Case No. 22-1753

In the United States Court of Appeals For the Sixth Circuit

IN RE: SETTLEMENT DOW CORNING TRUST

KOREAN CLAIMANTS
Interested Party – Appellant
v.
CLAIMANTS' ADVISORY COMMITTEE; DOW SILICONES CORPORATION; DEBTOR'S REPRESENTATIVES
Interested Parties – Appellees

FINANCE COMMITTEE
Movant – Appellee

On Appeal from the United States District Court for the Eastern District of Michigan

BRIEF OF APPELLEES DOW SILICONES CORPORATION, THE DEBTOR'S REPRESENTATIVES, THE CLAIMANTS' ADVISORY COMMITTEE, AND THE FINANCE COMMITTEE

Deborah E. Greenspan
Blank Rome LLP
1825 Eye Street, N.W.
Washington, D.C. 20006
(202) 420-2200
Counsel for Dow Silicones Corporation and Debtor's Representatives

Jeffrey S. Trachtman
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9175
Counsel for Claimants' Advisory Committee

Karima Maloney
Eugene Zilberman
Smyser Kaplan & Veselka
717 Texas Avenue
Suite 2800
Houston, TX 77002
(713) 221-2382
Counsel for the Finance Committee

Dianna Pendleton-Dominguez
Law Office
401 N. Main Street
St. Marys, OH 45885
(419) 394-0717
Claimants' Advisory Committee

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-1753 Case Name: In re Settlement Facility Dow Corning

Name of counsel: Jeffrey S. Trachtman, Esq.

Pursuant to 6th Cir. R. 26.1, Claimants' Advisory Committee
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on August 29, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Jeffrey S. Trachtman
1177 Avenue of the Americas
New York, NY 10036

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-1753 Case Name: In re Settlement Facility Dow Corning Trust

Name of counsel: Deborah E. Greenspan

Pursuant to 6th Cir. R. 26.1, The Debtor's Representatives
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.
The Debtor's Representatives consist of one counsel for Corning Incorporated, one in house counsel for The Dow Chemical Company and Deborah E. Greenspan.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes.

See separate Disclosure of Corporate Affiliations and Financial Interest filed by Dow Silicones Corporation.

CERTIFICATE OF SERVICE

I certify that on August 31, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Deborah E. Greenspan
Blank Rome LLP, 1825 Eye St. N.W.
Washington DC 20006

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-1753 Case Name: In re Settlement Facility Dow Corning Trust

Name of counsel: Deborah E. Greenspan

Pursuant to 6th Cir. R. 26.1, Dow Silicones Corporation
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes.

See answer to No. 2.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes.

Dow Silicones Corporation is owned by The Dow Chemical Company, a wholly-owned subsidiary of Dow, Inc.

CERTIFICATE OF SERVICE

I certify that on August 31, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Deborah E. Greenspan
Blank Rome LLP, 1825 Eye St. N.W.
Washington DC 20006

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-1753 Case Name: Korean Cl. v. Dow Silicones Corp., et al.

Name of counsel: Karima G. Maloney and Eugene Zilberman

Pursuant to 6th Cir. R. 26.1, Finance Committee
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on October 6, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Karima G. Maloney
717 Texas Avenue, Suite 2800
Houston, Texas 77002-2761

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is requested. This matter involves interpretation of a complex plan of reorganization and the orders and provisions for implementing that plan over nearly two decades. Oral argument will allow the attorneys for the parties to assist the Court by providing additional explanation.

INTRODUCTION AND BACKGROUND

This appeal comes at the tail end of a two decade long process of implementing and distributing funds for settlement claims under the terms of the Dow Corning Amended Joint Plan of Reorganization (the "Plan").[1] The Appellants, belatedly, challenge an administrative order of the district court that sets forth a procedure and timeline for finalizing and closing settlement claims that cannot be completed or paid because the claimants' status or location cannot be determined and because the claimants have not complied with court orders and claims processing rules for obtaining compensation under the Plan. The distribution of assets for settlement claims under the terms of the Plan commenced in 2004, and the final deadline for the submission of settlement claims was June 3, 2019. The

[1] Unless otherwise defined, capitalized terms used herein shall have the meaning provided in the Plan defined in Article 1 thereof. *See* Plan, RE 1595-2, Page ID # 27873-27984. On February 1, 2018, Dow Corning Corporation changed its name to Dow Silicones Corporation. For the Court's and parties' convenience, Appellees will still refer to Dow Silicones as Dow Corning herein.

Settlement Facility (which is responsible for reviewing, processing, and paying settlement claims) has completed the review of all timely claims and is now in the process of issuing final payments, evaluating documents submitted to cure certain issues such as missing probate documents, addressing any final administrative appeals, and sending final determination letters to claimants.

Closing Order 5, at issue here, directed the Settlement Facility to publish on its website a list of claimants whose contact information could not be verified (as required by the processing procedures and court orders) after several years of inquiries and mailings. The list was to remain on the website for 90 days, after which the Settlement Facility was directed to close those claims for which a current address had not been provided. The Korean Claimants did not comply with Closing Order 5 and did not submit their current contact information as required but instead brought this appeal, asserting that the Order is void, that its entry violated due process, and that it violates the Plan and the Bankruptcy Code. After they filed this appeal, the Korean Claimants filed a motion to stay the Order (in this Court), which was denied on September 14, 2022. They then filed two motions in the district court that are pertinent to the procedural status of this appeal. On September 15, 2022, the Korean Claimants filed an untimely motion seeking to reopen the time to appeal under Fed. R. App. P. 4(a)(6), and on September 17, 2022, they filed a motion to set aside

Closing Order 5, based, apparently, on Fed. R. Civ. P. 55(c) and 60(b). Both of these motions remain pending.

These circumstances create a procedural question: on one hand, if the district court were to indicate that it would rule favorably on the motion to set aside, this Court could theoretically consider (but need not grant) a limited remand under Fed. R. App. P. 12.1 and Fed. R. Civ. P. 62.1. But in this case a panel of this Court, in denying the motion to stay, has already stated that the appeal was untimely and that no equitable exceptions to the filing deadline would apply. In this appeal, and in the motions pending in the district court, Appellants make the same argument that they made in their motion to stay seeking relief from the deadline—that they should be excused from the filing deadline because counsel's email was not working and, therefore, he did not receive the docket notice. In subsequent motions, the Korean Claimants have embellished and changed their description of the email issue, but there is no material difference in the argument: they continue to assert that counsel's failure to update his email for purposes of receiving service should relieve them of the need to file timely.

This appeal should be dismissed and denied. First, the appeal should be dismissed for the simple reason that it is late. The notice of appeal was filed 73 days after the entry of Closing Order 5 and is therefore untimely under Fed. R. App. P. 4. Appellees submit that this Court's September 14 Order denying the motion to stay

correctly found that the appeal was untimely and further that Appellants' failure to discover the Order is not a basis to provide relief from the deadline. Second, even if this appeal were timely, it should be denied on the merits. Closing Order 5 was properly entered as a stipulation between the parties authorized in the Plan to address Plan interpretation and implementation issues. The district court has clear authority under the Plan to address issues of interpretation, and to enter orders implementing the Plan. The entry of this Order is a proper and necessary exercise of the district court's supervisory authority over the implementation, management, and finalization of the distribution of assets pursuant to the settlement established under the Plan. There is no basis to find that the Order is improper or in violation of the Bankruptcy Code, due process, or other rights of Appellants.

STATEMENT OF JURISDICTION

The district court exercised jurisdiction pursuant to 28 U.S.C. § 1334(b) ("the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11"). This Court has jurisdiction to review the district court's June 13, 2022 order pursuant to 28 U.S.C. § 1291. *See* RE 1642. The Korean Claimants filed an untimely notice of appeal on August 25, 2022—43 days after the deadline for filing a notice of appeal under Fed. R. App. P. 4 (*see* Notice of Appeal, RE 1656). A panel of this Court determined that Appellants' notice was untimely under the rules, but that the

jurisdictional statute 28 U.S.C. § 2107 does not apply here because the matter arises under a plan resulting from a bankruptcy case. As explained below, Appellees submit that the failure to file timely under the rules is dispositive and that as a result this appeal should be dismissed. Appellees note that this Court has previously found that untimely appeals from decisions of the district court related to the Plan were barred under 28 U.S.C. § 2107. *See Hawkins v. Claimants' Advisory Comm.*, No. 22-1037, 2022 U.S. App. LEXIS 3802, at *1-2 (6th Cir. Feb. 10, 2022).

COUNTER STATEMENT OF ISSUES FOR REVIEW

1. Whether this Court should dismiss this appeal as untimely where the Appellants filed the notice of appeal 43 days after the deadline for filing notices of appeal under Fed. R. App. P. 4.

2. Whether this Court should grant Appellants relief from the deadline for filing a notice of appeal where the basis asserted for the late filing is that counsel did not timely provide an updated email address as required by the rules of the Eastern District of Michigan and where counsel failed to monitor the docket and other informational materials that included information about the Order at issue.

3. Whether this Court should find that a stipulated administrative order issued by the district court with the authority and obligation to issue orders as necessary to implement the Dow Corning Amended Joint Plan of Reorganization is void because the district court did not hold a hearing before entry of the Order.

4. Whether this Court should find that a stipulated administrative order issued by the district court with the authority and obligation to issue orders as necessary to implement the Dow Corning Amended Joint Plan of Reorganization was entered for an improper purpose or is void when it was authorized under, and consistent with, the Plan and did not modify the Plan or treat the Korean Claimants any differently than all other claimants.

5. Whether the Korean Claimants should be exempted from Closing Order 5 and should not have to confirm their current address or satisfy the requirements all other claimants must meet on the basis of confidentiality, attorney-client privilege, or Korean law when the Korean Claimants voluntarily submitted claims for settlement under the Plan, the address information is sought from the claimants, not counsel, and does not involve privileged information, and where exempting the Korean Claimants would create disparate treatment of claims in violation of the Bankruptcy Code. Appellees note that these arguments—which pertain to the substantive requirements that were enforced in Closing Order 5—are the subject of a separate appeal pending in this Court.

STATEMENT OF THE CASE

A. Background—the Plan and Settlement Program

This Court has addressed the history of Dow Corning's bankruptcy proceedings and Plan on multiple occasions.[2] In 1999, Dow Corning and the representatives of the tort claimants—the Tort Claimants' Committee—filed the consensual Plan, which provides a comprehensive settlement program for breast implant claimants as well as individuals with certain other implanted medical devices. Following appeals, the Plan became effective on June 1, 2004. *See In re Settlement Facility Dow Corning Trust*, 628 F.3d 769, 771 (6th Cir. 2010); *see also* Plan, RE 1595-2, Page ID # 27873-27984.

Appellants elected to resolve their claims through the settlement option in the Plan and are thus Settling Personal Injury Claimants under the Plan. Plan, RE 1595-2, Page ID # 27912. The claims of Settling Personal Injury Claimants are reviewed, evaluated, and paid by the Settlement Facility-Dow Corning Trust (the "Settlement Facility" or "Settlement Trust"). The Settlement Facility and Fund Distribution Agreement ("SFA") and the Dow Corning Settlement Program and Claims

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[2] *See, e.g.*, *Korean Claimants v Claimants' Advisory Committee*, 813 F. App'x. 211 (6th Cir. 2020); *In re Settlement Facility Dow Corning Trust*, No. 18-1040, 2019 WL 181508 (6th Cir. Jan. 14, 2019)*; In re Settlement Facility Dow Corning Trust*, 592 F. App'x. 473 (6th Cir. 2015); *Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, 628 F.3d 769 (6th Cir. 2010); *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002); *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996).

Resolution Procedures, Annex A to SFA ("Annex A") prescribe the rules under which these settling claims are individually evaluated and, if eligible, paid.

The Claims Administrator appointed by the district court under the terms of the SFA oversees the processing and payment of claims by the Settlement Facility in accordance with the terms of the SFA. *See* Plan § 1.29, RE 1595-2, Page ID # 27890; SFA §§ 4.02, 5.01, 5.04, RE 1595-3, Page ID # 27995-27998, 28006, 28008-28010. The SFA provides for the appointment of the Finance Committee—which is responsible for oversight of financial matters of the Settlement Fund and has specific responsibilities regarding the verification and Allowance of claim payments. *See* SFA § 4.08, RE 1595-3, Page ID # 28001-28004. The Settlement Facility, the Finance Committee, the Claims Administrator, as well as the procedures for the distribution of funds, are supervised by the district court. The district court performs "all functions relating to the distribution of funds and all determinations regarding the prioritization or availability of payments, specifically including all functions related to Articles III [Transfer of Assets], VII [Payment Distribution Procedures], and VIII [Financial Management] herein." SFA § 4.01, RE 1595-3, Page ID #27995. The district court retains jurisdiction over the Plan to, *inter alia*, "resolve controversies and disputes regarding interpretation and implementation of this Plan and the Plan Documents." Plan, § 8.7.3, RE 1595-2, Page ID # 27957.

Claims of Settling Personal Injury Claimants are paid from the Settlement Fund, which is a limited fund of up to $1.95 billion (Net Present Value). *See* Plan § 5.3, RE 1595-2, Page ID # 27920-27921; SFA § 3.02(a), RE 1595-3, Page ID # 27993-27994. The Settlement Fund may be used only to pay Allowed claims of Settling Personal Injury Claimants along with related administrative expenses. SFA § 3.02(a)(ii), RE 1595-3, Page ID # 27994. The claim form—approved by the district court in 2001, and which all claimants must submit—requires claimants to submit certain information in order to be eligible for payment. *See* Order Approving Claim Form Packages, RE 9, Page ID # 33-35; https://www.sfdct.com/_sfdct/index.cfm/disease-claim-forms/ (last accessed on October 19, 2022); https://www.sfdct.com/_sfdct/index.cfm/pom-forms/ (last accessed on October 19, 2022). That required information includes the claimant's address and contact information along with the contact information for the attorney representing the claimant. *See id.*

The assets of the Settlement Fund remain under the supervision and control of the court until the claimant actually receives the funds. *See* SFA § 10.09, RE 1595-3, Page ID # 28024 ("All funds in the Settlement Facility are deemed *in custodia legis* until such times as the funds have actually been paid to and received by a Claimant, …."). The court thus has the plenary authority (and the obligation) to manage the distribution of funds and to institute procedures to assure that qualified

claimants actually receive the funds and that the limited assets of the Settlement Funds are not "lost" or otherwise diverted. These requirements protect the limited Settlement Fund assets, assure the equitable treatment of claimants, and prevent incorrect or invalid distributions.

The Plan established the Claimants' Advisory Committee ("CAC") and the Debtor's Representatives ("DRs") to assist in the implementation of the Plan's settlement program. *See* Plan § 1.28, RE 1595-2, Page ID # 27889 (defining the CAC to mean "those persons selected pursuant to the terms of the [SFA] to represent the interests of Personal Injury Claimants after the Effective Date"); SFA § 4.09(b), RE 1595-3, Page ID # 28004. The CAC and the DRs have the authority to take action to enforce the terms of the Plan, participate in meetings of the Finance Committee, and provide advice and assistance on all matters being considered by the Finance Committee, the Settlement Facility, the Claims Administrator, and other court-appointed persons. SFA § 4.09(c), RE 1595-3, Page ID # 28004-28005. The CAC and the DRs have the authority and the obligation to provide interpretations of the Plan when requested by the Claims Administrator. *Id.* at § 5.05, RE 1595-3, Page ID # 28010. Only the CAC and the DRs may decide or litigate any issue of Plan interpretation. *In re Settlement Facility Dow Corning Tr.*, No. 07-CV-12378, 2008 WL 905865, at *3 (E.D. Mich. Mar. 31, 2008) ("The SFA and the Procedures authorize only the Debtor's Representatives and the CAC to file a motion to interpret

a matter under the SFA. There is no provision under the SFA or the Procedures which allows a claimant to submit an issue to be interpreted before the Court.").

The final deadline for submission of settlement claims was June 3, 2019. At this point, the Settlement Facility has completed the review and processing of the claims submitted by that deadline and is now issuing deficiency notices; distributing final payments for Allowed claims, including supplemental payments (termed second priority payments); and preparing to terminate its operations as specified in the Plan. The Settlement Facility will terminate once all timely claims have been liquidated and paid or otherwise finally resolved.

The district court, which has the obligation to "enter orders in aid of this Plan and the Plan Documents" (Plan at § 8.7.5, RE 1595-2, Page ID # 27957) has issued a series of "closing orders"—setting forth administrative guidelines to enable the closure of the Settlement Facility operations once the requirements for termination are met.[3] These closing orders established deadlines for finalizing claims that had

[3] *See* Closing Order 1 for Final June 3, 2019 Claim Deadline (Establishing Final Cure Deadlines, Revised Claim Review Procedures, and Appeal Deadlines) ("Closing Order 1"), RE 1447, Page ID # 23937-23950; Closing Order 2 (Regarding Additional Procedures for Incomplete and Late Claims; Protocols for Issuing Payments; Audits of Attorney Distributions of Payments; Protocols for Return of Undistributed Claimant Payment Funds; Guidelines for Uncashed Checks and Reissuance of Checks; Restrictions of Attorney Withdrawals) ("Closing Order 2"), RE 1482, Page ID # 24084-24097; Closing Order 3 (Notice that Certain Claims will be Permanently Barred and Denied Payment Unless a "Confirmed Current Address" is Provided to the SF-DCT on or before June 30, 2021) ("Closing Order 3"), RE 1598, Page ID # 28287-28298; Closing Order 4 (Requiring Completion of Court-

been pending for years and generally established procedures to enable the Settlement Facility to finalize and resolve claims.

Closing Order 5, at issue in this appeal, is one such order. Closing Order 5 was entered by stipulation between the CAC and the DRs, the entities with express authority in the Plan to assist in its implementation, and to interpret and enforce its terms. Closing Order 5, RE 1642, Page ID # 28805. Closing Order 5 directed the Settlement Facility to publish a list of claimants who, as of the date of Closing Order 5, had not provided a verified address. *Id.*, at ¶6, RE 1642, Page ID # 28803-28804. The claims procedures require claimants to maintain current contact information, and the district court has ordered the Settlement Facility to confirm each claimant's contact information before issuing payments. *See* Closing Order 2, RE 1482, Page ID # 24088-24089. The claimants on the "Closing Order 5 list" are claimants whose address information could not be verified after the Settlement Facility made extensive efforts—for months or years—to reach these claimants so that they can be paid or notified of any additional information needed. *See* Closing Order 5 at ¶6, RE 1642, Page ID # 28803-28804. The Order required the Settlement Facility to maintain this list on its website for 90 days so that claimants (and attorneys) would

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Directed Audit Survey and Return of Funds Pursuant to Closing Order 2, RE 1640, Page ID # 28794-28796 ("Closing Order 4"); Closing Order 5, Notice that Certain Claims Without a Confirmed Current Address Shall be Closed and Establishing Protocols for Addressing Payments for Claimants in Bankruptcy ("Closing Order 5"), RE 1642, Page ID # 28800-28805.

have an additional opportunity to contact the Settlement Facility and provide their current address information. *Id.*, RE 1642, Page ID # 28803-28804. If, at the end of that 90-day period, the claimant had not contacted the Settlement Facility, the Settlement Facility was directed to close the claim. *Id.*, RE 1642, Page ID # 28804.

Confirming the claimants' current contact information is a necessary component of assuring that the Settlement Fund is properly distributed. The district court entered Closing Order 5 "to maximize Settlement Fund assets for distribution to claimants and to minimize the time and cost associated with addressing payments that cannot be distributed." Closing Order 5, RE 1642, Page ID # 28801. When claims are prepared for payment, the Settlement Facility confirms the accuracy of the evaluation and assures that the claimant (or heirs) can be located and their address confirmed by issuing address verification letters to the claimants. *See* February 26, 2021 Declaration of Ellen Bearicks ("Bearicks Dec") at ¶¶26-27, RE 1595-6, Page ID # 28168-28169. The Settlement Facility then issues "award" letters to claimants when a claim is approved for payment. The award letter provides notice to the claimant that a check will soon be sent to them directly (if they are not represented) or to their counsel. This process alerts the represented claimant to check with their counsel to obtain their payment. If the verification mailing to the claimant is returned as undeliverable, or does not generate a response, then the

Settlement Facility may not issue the payment. *See* July 20, 2020 Declaration of Ann Phillips ("Phillips Dec."), at ¶¶11-18, RE 1595-7, Page ID # 28196-28197.

The Settlement Facility's experience demonstrates the importance of obtaining valid claimant addresses immediately in advance of issuing payments—particularly in the context of a settlement program in operation for almost 20 years. The Settlement Facility has expended thousands of hours and hundreds of thousands of dollars tracking claimants and following up on over 4,100 payment checks that have not been cashed primarily because the claimants could not be located where address verification was not performed immediately before issuing payment. *See* September 28, 2022 Declaration of Kimberly Smith-Mair ("Smith-Mair Dec."), at ¶9, RE 1672-10, Page ID # 31626.

Appellants' objection to Closing Order 5 and this appeal arises because counsel for Korean Claimants has for several years disputed the requirement that claimants provide current addresses. While the Settlement Facility is permitted to accept address information provided by counsel, it may do so only so long as the information provided by counsel has not proven to be unreliable or inconsistent with the information provided by claimants. *See* Closing Order 2, ¶11, RE 1482, Page ID # 24089 ("The SF-DCT may accept confirmation of a claimant's current address provided by the claimant's attorney of record; however, the SF-DCT may seek additional confirmation as appropriate including, for example, in instances where

prior mailings were returned as undeliverable or where prior address confirmations were not accurate."). In the case of the Korean Claimants, the Settlement Facility has reported that both address information and claim information submitted by counsel has been in significant part invalid or unreliable, and as a result the Settlement Facility has followed the district court's orders and reasonably required confirmation directly from the individual Korean Claimants.[4]

B. The Korean Claimants' Untimely Appeal And Related Motions.

The Korean Claimants filed an untimely notice of appeal of Closing Order 5—73 days after it was entered. RE 1656, Page ID # 29376-29378. The Korean Claimants moved to stay implementation of Closing Order 5 in the district court on August 29, 2022 (RE 1658, Page ID # 29380-29384) and then filed a motion to stay in this Court on September 1, 2022 (Doc. No. 12). Appellees filed a response in this

[4] Mail sent to the Korean Claimants based on the addresses provided by counsel has been returned as undeliverable at a very high rate and a review of address information provided by counsel has revealed that it is not accurate. *See* Phillips Dec. at ¶¶38-39, RE 1595-7, Page ID # 26200-26201; Bearicks Dec. at ¶34, RE 1595-6, Page ID #28169. Decisions of the Appeals Judge designated under the Plan to hear administrative appeals have found significant issues regarding the reliability of substantive claim submissions made by counsel for the Korean Claimants. *See* Smith-Mair Dec., Exhs 2-11 (filed under seal), RE 1676 (Appeals Judge determinations concluding that 98 claims were appropriately denied because they were based on altered or patently false documentation—in the majority of cases, finding evidence that affirmative statements of physicians submitted to establish Proof of Manufacturer required under the settlement were "unequivocally false evidencing intentional abuse and fraud.").

Court arguing that the Korean Claimants did not satisfy the requirements for a stay because, *inter alia*, the appeal of Closing Order 5 was untimely. Doc No. 22-1.

By Order dated September 14, 2022, this Court denied the motion to stay, concluding:

> The Korean Claimants are unlikely to succeed on the merits because their appeal is not timely. A notice of appeal in a civil case must be filed within thirty days after the entry of the judgment or order appealed from. Fed. R. App. P. 4(a)(1)(A). The Korean Claimants, however, filed their notice of appeal seventy-three days after the district court entered Closing Order 5. And they can no longer move the district court to extend or reopen the time to appeal. Fed. R. App. P. 4(a)(5). As a result, their appeal is untimely and faces dismissal.

Doc. No. 32-2, at 2 ("September 14 Order"). This Court then concluded that Korean Claimants' argument that their untimely filing should be excused because counsel allegedly did not receive the emailed notice was not a basis to grant an exception to the deadline even if such an exception were permitted. The Court found:

> even if Rule 4 were amenable to equitable exceptions in principle, no such exception would apply in this case. The Korean Claimants say that they did not discover Closing Order 5 until well after it was posted on the district court's electronic docket. That oversight, however, is not the kind of unavoidable delay that could justify tolling an otherwise mandatory deadline.

Id., at 3 (*citing Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560–61 (6th Cir. 2000) ("Typically, equitable tolling applies only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control.").

The day after this Court's decision denying the stay, the Korean Claimants filed (in the district court) a Motion to Reopen the Time to Appeal Regarding Closing Order 5, RE 1667, Page ID # 30481-30571 ("Motion to Reopen") and two days later filed, in the district court, a Motion to Set Aside Closing Order 5 Regarding Korean Claimants, RE 1668, Page ID # 30572-30579 ("Motion to Set Aside").[5] Appellees have opposed both these motions in the district court, which remain pending. RE 1670, Page ID # 30581-30616 and RE 1672, Page ID # 31177-31212.

The Korean Claimants have filed another appeal that remains pending and is related to the instant appeal. *See Korean Claimants v. Claimants' Advisory Committee, et al.*, No. 21-2665 (the "2021 Appeal"). That appeal involves a challenge to Closing Order 2—which, as noted, mandates the application of certain address verification procedures before the Settlement Facility may issue payments to claimants.[6] Claimants who have failed to comply with Closing Order 2 are among those included in Closing Order 5.

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[5] The Korean Claimants have been active litigants throughout the implementation of the Plan and have filed over a dozen motions in the district court, challenging the operation of the Settlement Facility or disputing terms of the Plan or orders of the district court. Counsel for Korean Claimants is knowledgeable about the Plan and motion practice and is very familiar with the docket and rules.

[6] The Korean Claimants' 2021 Appeal involves two separate motions filed in the district court by Korean Claimants that—belatedly—challenge the address verification requirements set forth in Closing Order 2. Closing Order 2 specifies the

SUMMARY OF ARGUMENT

This appeal arises because Appellants—a group of claimants who submitted claims for settlement under the Dow Corning Plan of Reorganization—have failed to provide information that the district court and the Settlement Facility have deemed necessary to assure proper resolution and payment of the claims. The Appellants have received requests and notices—including court mandated notices for nearly seven years seeking this information. The district court, confronted with numerous claims that lacked this necessary information (including the claims of Appellants) entered a stipulated order directing the Settlement Facility to provide one final opportunity for the claimants to comply. Closing Order 5 established a final 90-day deadline during which the claimants could provide the information—consisting of their current address information where they could receive notices and if appropriate, payment. Appellants did not comply and instead filed this appeal during that 90-day period.

This appeal is untimely. It was filed 43 days after the 30-day deadline for appeal. Appellants now ask this Court to excuse their delay on the grounds that counsel's failure to maintain a current email address with the district court should be considered excusable neglect and should relieve them of any responsibility to file

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administrative procedures that the district court deemed necessary to implement certain Plan requirements and to assure that qualified claimants receive compensation as appropriate and are notified of the actions of the Settlement Facility.

timely. The case law is clear: the failure of counsel to monitor the docket and to maintain current contact information and an email address with the district court does not constitute excusable neglect and is not a basis to provide relief from the 30-day deadline. In fact, in denying the Korean Claimants' motion to stay Closing Order 5, this Court already concluded that the appeal would be dismissed as untimely and that counsel's failure to discover the Order "is not the kind of unavoidable delay that could justify tolling an otherwise mandatory deadline." September 14 Order, Doc. No. 32-2, at 2.

Even if the appeal were timely, it should be denied on the merits. Appellants seek to have Closing Order 5 declared void. There is no basis in law or fact to find this Order to be void. Closing Order 5 sets forth a timeline giving claimants a final opportunity to perfect their claims and provide the necessary information. It is an appropriate and necessary exercise of the district court's obligation to oversee and manage the settlement program and the distribution of assets. The final deadline for filing claims occurred more than three years ago and all timely claims have been processed. The claims that have not complied with the requirements and have missed the deadlines must be closed in accordance with the Plan. Closing Order 5 is one component of the process of achieving an efficient and timely termination of the settlement program after 20 years—and it is well within the authority of the district court under the Plan.

Appellants' objections to the procedure by which Closing Order 5 was entered do not provide any basis to invalidate the Order. Closing Order 5 was properly entered by the district court as a stipulated order of the parties with express authority to address Plan implementation issues. The Plan expressly contemplates and indeed requires the district court to enter orders in aid of the Plan—which necessarily includes orders that develop the detailed procedures that are necessary to operate a long-term settlement program distributing over a billion dollars in assets to tens of thousands of claimants. There is no basis to find that the district court's entry of the stipulation without a hearing in advance was procedurally improper or in any way a due process violation.

The Order at issue in this appeal is intended to implement necessary procedures to carry out the mandates of the Plan. It in no way modifies any provision of the Plan; nor does it violate any provision of the Bankruptcy Code. It affords all claimants who have failed to complete the necessary components of their claim submissions an equal final opportunity to comply before their claims are closed.

Korean Claimants offer no cogent bases for their challenge to the terms of the order and their refusal to comply with its simple terms, and the appeal should be denied.

STANDARD OF REVIEW

This appeal involves the process by which the district court entered a stipulated order, issues of notice of the order under the applicable rules and case law, and, by extension, issues of interpretation of the requirements of the Plan and the orders implementing the Plan.

Issues involving the interpretation of the plain language of the Plan and Plan Documents are reviewed *de novo*. *Korean Claimants v. CAC*, 813 F. App'x. 211, 216 (2020) ("The district court's decision involved the interpretation and application of the plain language of the reorganization plan. Where, as here, the district court's interpretation is confined to the Plan documents without reference to extrinsic evidence, we review *de novo*.") (internal citation omitted); *In re Settlement Facility Dow Corning Trust*, 592 F. App'x. 473, 477 (2015) ("When reviewing a district court's interpretation of a bankruptcy plan where the district judge did not confirm the plan but has extensive knowledge of the case, we grant the district court significant deference with respect to its assessment of extrinsic evidence…However, we evaluate *de novo* a district court's interpretation that does not rely on extrinsic evidence."); *In re Settlement Facility Dow Corning Tr.*, 670 F. App'x. 887, 888 (6th Cir. 2016) ("We review de novo whether the district court had jurisdiction to enter the Consent Order.") (citation omitted).

Appeals regarding the interpretation of the district court's own orders are reviewed under the abuse of discretion standard. *See Hankins v. City of Inkster, Michigan*, 832 F. App'x. 373, 378 (6th Cir. 2020) ("We review a district court's interpretation and enforcement of its own orders under an abuse-of-discretion standard") (citation omitted). To find an abuse of discretion, the Court "must be left with a 'definite and firm conviction' that the district court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Denhof v. City of Grand Rapids, Michigan*, 797 F. App'x. 944, 947 (6th Cir. 2019) (citation omitted).

Appellees submit that the Appellants' contention that the Order was improperly entered should also be reviewed under an abuse of discretion standard. This argument is based on the district court's determination to accept a stipulation of the parties named in the Plan and its application of the local rules. *See S.S. v. Eastern Kentucky University*, 532 F.3d 445, 451 (6th Cir. 2008) ("The interpretation and application of local rules 'are matters within the district court's discretion, [and] the district court's decision is reviewed for abuse of discretion.'") *(quoting Wright v. Murray Guard, Inc.*, 455 F.3d 702, 714 (6th Cir. 2006)).

ARGUMENT

I. The Appeal Should Be Dismissed As Untimely.

It is undisputed that Appellants filed their appeal late—73 days after the entry of Closing Order 5—and that fact is dispositive. *See, e.g.*, *Hamer v. Neighborhood Hous. Servs. of Chi.,* 138 S. Ct. 13, 17 (2017) ("[i]f properly invoked, mandatory claim-processing rules must be enforced."); *United States v. Maddux,* 37 F.4th 1170, 1176 (6th Cir. 2022) ("mandatory claim-processing rules bind courts and may not be equitably tolled."); *see also Hawkins v. Claimants' Advisory Comm.*, No. 22-1037, 2022 U.S. App. LEXIS 3802, at *1-2 (6th Cir. Feb. 10, 2022) (dismissing untimely appeal of district court order dismissing civil action filed by claimant "arising out of the resolution of a claim that she filed in connection with the Dow Corning Corporation bankruptcy case," holding that plaintiff's "failure to file a timely notice of appeal deprives this court of jurisdiction. Compliance with the statutory deadline in § 2107(a) is a jurisdictional prerequisite that this court may not waive"). A panel of this Court has already concluded that this appeal is untimely under Rule 4. *See* September 14 Order, Doc. No. 32-2, at 2 ("Korean Claimants are unlikely to succeed on the merits because their appeal is not timely"). The panel also stated that even if Rule 4 were amenable to equitable exceptions in principle, the Korean Claimants' assertions that they "did not discover Closing Order 5 until well after it was posted on the district court's electronic docket…is not the kind of

unavoidable delay that could justify tolling an otherwise mandatory deadline." *Id.* (citation omitted).

Notwithstanding this Court's clear statements, Appellants have now filed in the district court two motions in an effort to avoid the timeliness bar. In the three-day period after the panel denied the Korean Claimants' motion to stay, the Appellants filed the Motion to Reopen under Fed. R. App. P. 4(a)(6) and the Motion to Set Aside, apparently under Fed. R. Civ. P. 60(b) and 55(c). RE 1667, Page ID # 30481-30571 and RE 1668, Page ID # 30572-30579. Appellees have filed responses, asserting that the Motion to Reopen is untimely under Fed. R. App. P. 4(a)(6) and that there is no basis under Fed. R. Civ. P. 60(b) to provide relief from the Order. RE 1670, Page ID # 30581-31108 and RE 1672, Page ID # 31177-31651. Those motions are still pending in the district court.

In this appeal, and in the Motion to Set Aside in the district court, the Korean Claimants assert that they should be excused from compliance with the filing rules under the excusable neglect standard in Fed. R. Civ. P. 60(b)(1).[7] They base this

[7] The Korean Claimants cite both Fed. R. Civ. P. 60(b)(1) and Fed. R. Civ. P. 55(c) in their argument. Fed. R. Civ. P. 55 has no relevance here. Closing Order 5 is neither an entry of default nor a default judgment and, even if the Order could be equated with a final default judgment, Fed. R. Civ. P. 55 requires application of Fed. R. Civ. P. 60(b). Even were a more lax standard for setting aside entry of a default to apply the result would be the same. *See MMCPM Logistics, LLC v. Clarity Retail, LLC*, No. 2:21CV15 (WOB), 2021 WL 3711173, at *4 (E.D. Ky. Aug. 20, 2021) (finding failure to carry burden under Rule 55(c) for setting aside a default where movants made bare assertion that they were not properly served).

argument on the assertion that counsel's email address allegedly was not working at the time Closing Order 5 was entered, and as a result he allegedly did not receive notice of the entry of the Order. Therefore, Appellants contend, counsel did not receive appropriate notice as required and Appellants cannot be held to the 30-day deadline for appeal that would run from the date of entry of the Order. *See* Korean Claimants' Br. at 20.

Appellants cannot satisfy the requirements of excusable neglect and any attempt to resurrect their untimely appeal based on that argument, whether in this Court or the district court, should be denied. The Korean Claimants "bear[] the burden of establishing the existence of mistake, inadvertence, surprise, or excusable neglect under Rule 60(b)(1)." *Kensu v. Corizon*, No. 19-10944, 2022 WL 1831307, at *2 (E.D. Mich. June 3, 2022) (citing *Jinks v. Alliedsignal, Inc.*, 250 F.3d 381, 385 (6th Cir. 2001)). "Rule 60(b)(1) 'is intended to provide relief in only two situations: (1) when a party has made an excusable mistake or an attorney has acted without authority, or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order.'" *Fetherolf v. Shoop*, Case No. 21-3985, 2022 WL 7283927, at *3 (6th Cir. May 6, 2022) (internal quotation omitted). In determining whether relief is appropriate based on a Rule 60(b)(1) claim of excusable neglect, courts consider three factors: "(1) culpability—that is, whether the neglect was excusable;

(2) any prejudice to the opposing party; and (3) whether the party holds a meritorious underlying claim or defense." *Yeschick v. Mineta*, 675 F.3d 622, 628 (6th Cir. 2012).[8]

"Excusable neglect … is met only in extraordinary cases." *Nicholson v. City of Warren*, 467 F.3d 525, 526 (6th Cir. 2006). "Just because neglect is accidental does not make it excusable. It is well-established that mere forgetfulness or carelessness on the part of counsel does not entitle a movant to Rule 60(b)(1) relief." *Kensu*, 2022 WL 1831307, at *3 (citing *FHC Equities, L.L.C. v. MBL Life Assur. Corp.*, 188 F.3d 678, 685 (6th Cir. 1999) ("[A] court would abuse its discretion if it were to reopen a case under Rule 60(b)(1) when the reason asserted as justifying relief is one attributable solely to counsel's carelessness....").[9]

Although the Korean Claimants assert that "the reason for delay was out of control of the Korean Claimants" (Korean Claimants' Br. at 24-25), the record

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[8] To determine whether neglect is excusable with respect to "out-of-time" filings, the Sixth Circuit has, in some cases, looked to the factors in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993). To evaluate a claim of excusable neglect under *Pioneer*, the court must consider "the danger of prejudice to [the non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Yeschick*, 675 F.3d at 629 (citing *Pioneer*).

[9] In assessing a claim of excusable neglect, "the proper focus is upon whether the neglect of [the parties] *and their counsel* was excusable." *Pioneer*, 507 U.S at 397 (emphasis in original).

clearly supports a contrary conclusion: the delay was entirely within the control of the Korean Claimants' counsel and resulted solely from counsel's carelessness, failure to abide by the court rules, and lack of due diligence. The declaration submitted by counsel for the Korean Claimants in the district court shows that counsel notified other entities of the change in email address before Closing Order 5 was docketed yet failed timely to notify the district court as required by the local rules. Declaration of Yeon-Ho Kim at ¶7, RE 1674-2, Page ID # 31672-31673. In fact, counsel delayed notification to the district court until two weeks after the entry of Closing Order 5 and, even then, erroneously advised the district court that the email was still operative. *Compare* Declaration of Yeon-Ho Kim at ¶3 and Exh. 2, RE 1674-2, Page ID # 31678 (translation of Notice of Service Termination for Unitel provider, stating closing date of receiving/sending mails would be May 31, 2022); *and id*. at ¶7 and Exh. 5, RE 1674-2, Page ID # 31689 (email from Yeon-Ho Kim to the Secretary General of the Asia Pacific Chapter of International Academy of Family Law dated June 9, 2022—4 days before Closing Order 5—advising that "[t]he paid email service is no longer in business from June 1, 2022"); *with id*. at ¶5 and Exh. 3, RE 1674-2, Page ID # 31682 (email from Yeon-Ho Kim to the district court dated June 24, 2022—11 days after Closing Order 5 was entered and 24 days after claimed cessation of email service—and even then, advising that his email address is changed "*as of June 30,* 2022") (emphasis added).

The conflicting statements and notices of counsel for the Korean Claimants in and of themselves foreclose any argument of excusable neglect. If the Korean Claimants' counsel's statement in his email to the district court is correct, then counsel would be deemed to have received notice either because the email address was still operative or because the local rules would deem the notice valid. If the Korean Claimants' alternative inconsistent assertion is correct, there can be no excusable neglect because counsel clearly failed to provide the requisite email contact in violation of the local rules.[10]

Further, it is apparent that counsel failed to fulfill his obligation to monitor the docket: the Korean Claimants assert that counsel first became aware of Closing Order 5 through a newsletter issued by the Claimants' Advisory Committee on August 16, 2022. Korean Claimants' Br. at 20. Had counsel been monitoring the docket—particularly where he *knew* his email was no longer operative and that he had *not* advised the court—he would have learned of the Order well before that date. And counsel also should have received two prior CAC newsletters—dated June 15

[10] "Electronic service upon an obsolete e-mail address will constitute valid service if the user has not updated the account profile with the new e-mail address." Electronic Filing Policies and Procedures, Eastern District of Michigan, Updated September 2022, R3. *See also id.* ("Each filing user is responsible for maintaining valid and current contact information in his or her PACER account. When a user's contact information changes, the user must promptly update his or her PACER account."); E.D. Mich. LR 11.2 (requiring counsel to promptly file and serve updated contact information and providing that failure to do so may subject the person or party to sanctions).

and June 22, 2022—alerting claimants to Closing Order 5. *See* Korean Claimants' Br. at 20 (claiming not to have received the newsletters either). All of these newsletters were not just emailed but also posted on the CAC's website, and the Settlement Facility's own website posted notice of the Order, neither of which counsel apparently monitored either. *See* Doc. 31-1, at 4-5, n.2.

Counsel's inattention and failure to update his email address or to apprise himself of docket activity cannot be the basis for excusable neglect. *See Yeschick*, 675 F.3d at 631 (no excusable neglect where counsel "(1) knew that his email address changed from alltel.net to windstream.net; (2) was aware that he was not receiving notice of electronic filings in other cases and that motions were expected in Yeschick's case; (3) failed to diligently update his e-mail address; and (4) failed to monitor the docket in Yeschick's case for filings between May 2009 and January 2010"). Counsel's "ability to access the electronic docketing system directly" is "within [the attorney's] control." *Id.* The court in *Yeschick* emphasized, "regardless of whether email notifications are received, parties continue to have a duty to monitor the court's docket" and be "apprised of the entry of orders that they may wish to appeal." *Id.* at 639-30 (citing *Kuhn v. Sulzer Orthopedics, Inc.,* 498 F.3d 365, 370–71 (6th Cir.2007)).[11]

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[11] This Court recently reaffirmed that obligation. *See Harness v. Taft*, 801 F. App'x 374, 377 (6th Cir. 2020) ("Regardless of whether counsel received the orders in the mail, he was obligated to monitor the court's docket.…Parties have an independent

The Korean Claimants do not meet any of the other requirements for finding excusable neglect. The second factor considers prejudice to the opposing party. Contrary to their assertion, setting aside Closing Order 5 would result in prejudice. Closing Order 5 is one in a series of orders entered by the district court to ensure an orderly and timely termination of the Settlement Facility in accordance with the Plan. The parties, who stipulated to Closing Order 5, have a strong interest in assuring efficient termination of the Settlement Facility—and certainly relied on the finality of the various closing orders, including Closing Order 5. Setting aside Closing Order 5 would result in uncertainty and would halt ongoing closure activities, cause delay, increase costs, and, as this Court previously found, would disrupt trust operations. September 14 Order, Doc. No. 32-2, at 4. This disruption would affect not only the parties and other claimants but also the district court. Further, to the extent this appeal seeks to vacate or set aside Closing Order 5 "regarding the Korean Claimants" (Korean Claimants' Br. at 24), granting such relief only to the Korean Claimants would result in disparate treatment in violation of the Bankruptcy Code (11 U.S.C. § 1123(a)(4)) and would be unfair to other claimants who relied on the deadline to their detriment.

The third factor under Fed. R. Civ. P. 60(b)(1) is to determine whether the

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obligation to monitor all developments in an ongoing case and cannot rely on the clerk's office to fulfill this responsibility for them.").

party seeking relief has an underlying meritorious claim. The Korean Claimants do not even attempt to meet this standard. They fail to articulate any reason on the merits that Closing Order 5 should be "set aside." *See Kensu*, 2022 WL 1831307, at *5 ("[movant] has not shown that he has a meritorious underlying claim, and, accordingly, he is not entitled to Rule 60(b)(1) relief") (citing *Yeschick*, 675 F.3d at 628). Rather, they simply state, "Appellees do not have any meritorious defense to the Korean Claimants." Korean Claimants' Br. at 25. That statement does not satisfy the requirements of Fed. R. Civ. P. 60.

As demonstrated more fully below, there is no basis to upset Closing Order 5, which simply provided claimants with an additional period within which to fulfill their long-standing obligation to provide updated contact information to the Settlement Facility. Under the Order, claimants were permitted to revive their claims within 90 days simply by contacting the Settlement Facility—by mail, email, or telephone—to confirm their contact address. If claimants did not want to provide a home address, they could provide another address—that of a relative, or friend, or a post office box (or the equivalent). This is a simple obligation to fulfill. Counsel could simply have contacted all claimants by text message and asked them to provide the information. Appellants' vague and unsupported assertions about privacy concerns do not state a meritorious claim within the meaning of Fed. R. Civ. P. 60(b)(1), particularly in light of the district court's obligation and paramount interest

in assuring the proper distribution of Settlement Fund assets.[12]

Appellees submit that this Court's findings in the September 14 Order are correct and determinative here: Appellants' late discovery of the Order due to a failure to maintain a valid email address "is not the kind of unavoidable delay that could justify tolling an otherwise mandatory deadline." September 14 Order, Doc. No. 32-2, at 3. Moreover, Appellants' failure to comply with the Order after learning of its existence precludes any equitable tolling. *See Perez-Aguilar v. Garland*, No. 21-3757, 2022 WL 796109, at *3 n.2 (6th Cir. Mar. 16, 2022) ("Because [petitioner] could have acted" within the statutory filing window, "we do not believe an equitable exception would be appropriate in this case and decline to take up the issue now.") (citations omitted).

II. Closing Order 5 Is A Valid Order, Consistent With The Plan And Bankruptcy Code.

The Korean Claimants advance several arguments to attack the validity of Closing Order 5, none of which has any merit. We note that several of these arguments are directed at the underlying requirement of the settlement process that claimants provide verified address information to assure proper notification and

[12] Nor do the circumstances here support a conclusion that the Korean Claimants acted in good faith under *Pioneer*. The address process is intended to assure that notice is provided to claimants and that funds are disbursed to eligible claimants. It is difficult to understand a good faith basis for the Korean Claimants' refusal to provide this information for years.

distribution of payments. Many of these arguments are the subject of the 2021 Appeal, which is pending in this Court.

A. Closing Order 5 Was Entered Properly As A Stipulated Order Of The Parties.

The Korean Claimants argue that Closing Order 5 is "void" and a "due process violation" because "it has not been noticed to the Korean Claimants before issuance nor noticed after issuance." Korean Claimants' Br. at 19-21.

First, this assertion is factually and legally incorrect as to post-issuance notice. As set forth above, the Korean Claimants received notice when Closing Order 5 was entered in accordance with Fed. R. Civ. P. 77. Any failure of the Korean Claimants actually to learn of entry of the Order was entirely the result of counsel's *inexcusable* neglect. *See supra* at 28-30.

Second, due process does not require advance "notice and a preliminary hearing" for every order entered. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 632 (1962). And the circumstances here—where the Order was stipulated to and then filed on the docket consistent with the rules—are consistent with due process. Had counsel acted with due diligence, he could have sought reconsideration or timely appealed.

Third, the district court properly entered Closing Order 5 as a stipulated order of the CAC and the DRs consistent with their obligations and authority under the Plan. Given the agreement of the parties, no motion or hearing was required. *See*

E.D. Mich. L.R. 7.1 (a)(1) ("…If the movant obtains concurrence, the parties or other persons involved may make the subject matter of the contemplated motion or request a matter of record by stipulated order."). There is no basis to find that Closing Order 5 is "void" simply because the Court did not hold a hearing or provide advance notice to counsel for the Korean Claimants before entering a stipulated order. The Korean Claimants have not established any basis for requiring advance notice to them of the entry of Closing Order 5. The district court unquestionably had the power and authority under the Plan to issue the Order. *See,* Plan at § 8.7.5, RE 1595-2, Page ID # 27956-57) (the court "will retain exclusive jurisdiction … to enter orders in aid of this Plan and the Plan Documents"); *In re Settlement Facility Dow Corning Trust*, 670 F. App'x. 887 (6th Cir. 2016) (stating that "[under the Plan, the district court has jurisdiction to, among other things, 'resolve controversies and disputes regarding interpretation and implementation of this Plan and the Plan Documents'" and concluding that consent order "plainly falls within the district court's powers under the Plan.").

The cases cited by Korean Claimants—most involving entry of default or the requirement that creditors be notified of a confirmation hearing on a proposed plan of reorganization or bar date—are inapposite. Default judgments and confirmation proceedings under the bankruptcy code are significantly different from a stipulated administrative order that provides all claimants, including Korean Claimants, with

an additional opportunity to comply with the multiple previous requests and orders.[13] And, of course, the Korean Claimants received notice of the entry of Closing Order 5 as explained above—and to the extent that they did not actually become aware of the Order, it is solely a result of counsel's lack of diligence. As already stated, Appellants were not prejudiced in their ability to provide the requisite information. They had been notified of the insufficiency of their claim submissions and the need to submit the information in multiple letters, notices, and orders, and they continued to have the ability to confirm their address even after counsel alleges that he first learned of Closing Order 5. They simply have failed to comply.[14]

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[13] The Korean Claimants cite *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *In re Chess,* 268 B.R. 150 (W. D. Tenn. 2001), for the basic proposition that "[t]he constitutional standard regarding notice requires that it 'be such as is reasonably calculated to reach interested parties." Korean Claimants Br. at 18-19, 21. Those decisions have no relevance here, where the order provided the Korean Claimants with a final opportunity to comply with the claim submission requirements, and since notice of the order was provided in accordance with the applicable rules. Indeed, *In re Chess* rejected a due process claim where the party did not rebut the presumption of receipt of service of process by mail under Fed. R. Bankr. P. 7004(b). *In re Chess,* 268 B.R. at 157. The Korean Claimants' other citations are likewise not relevant here. *See In re Rideout*, 86 B.R. 523 (1988) (total absence of notice to creditors, as required under rules, concerning hearing on confirmation of plan of reorganization rendered order confirming plan violative of due process); *In re Yoder Co.*, 758 F.2d 1114, 1116 (6th Cir.1985) ("A creditor's knowledge that a reorganization of the debtor is taking place does not substitute for mailing notice of a bar date.") (citation omitted).

[14] Before the entry of Closing Order 5, the Korean Claimants received repeated notice of the requirement to provide updated address information and of various Plan mandated deadlines, further minimizing any potential need to receive *advance* notice of an order extending their time to comply with these requirements. They received

Indeed, the Korean Claimants' notice complaints are ironic considering the entire purpose of obtaining the address information that they have refused to provide is to *facilitate notice* to the claimants of the status of their claims and other important actions of the Settlement Facility. There is no basis to find that the district court's entry of Closing Order 5 without a hearing was procedurally improper in any way, much less a due process violation.

B. The Korean Claimants Fail To Establish That Closing Order 5 Was Entered For An Improper Purpose.

The Korean Claimants make a confusing argument that Closing Order 5 was intended to "approve" wrongful acts of the Settlement Facility and that it is a "retroactive authorization of the Settlement Facility's practice" that "should be ineffective" as to the Korean Claimants. Korean Claimants' Br. at 26-27. The Korean Claimants seem to be asserting that the Settlement Facility—an administrative entity supervised by the district court—acted improperly and then the district court improperly blessed those actions retroactively. There is not a shred of evidence in the record for this speculation. As demonstrated above, the requirement

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multiple individual letters advising of the need to provide address information and the consequences of the failure to do so. *See* Bearicks Dec., at ¶¶ 26-34, RE 1595-6, Page ID # 28168-28169; Phillips Dec. ¶¶13; 21-28, RE 1595-7, Page ID # 28197-28199. And they undeniably received notice of the entry of multiple closing orders issued by this Court making clear that claims would be closed absent timely submission of any missing information.

to provide contact information was specified from the beginning of the settlement program. The Settlement Facility—which reports to the district court—is required to implement the claims processing procedures that enable the court to verify that settlement dollars actually reach the claimants for whom they are intended. Appellants' assertion that the Settlement Facility invented the address verification process in an effort to avoid paying Korean Claimants and thereby save funds has no basis in reality and is flatly contradicted by the sworn statements of Settlement Facility personnel. *See* Bearicks Dec. at ¶¶11, 13, RE 1595-6, Page ID # 28167; Phillips Dec. at ¶12, RE 1595-7, Page ID # 28196-28197; Korean Claimants' Br. at 28-29.

The Korean Claimants do not and cannot offer any factual support for their allegations and this baseless and improper accusation should be dismissed summarily. Closing Order 5 was entered by the district court exercising its responsibility to implement the terms of the Plan and to assure the proper distribution of the Plan assets (as explicitly stated in the Order). The Korean Claimants' dissatisfaction with the Settlement Facility has no bearing on the issue on appeal regarding the validity of Closing Order 5.

C. Closing Order 5 Implements, Is Consistent With, And Does Not Modify The Plan Or Violate The Bankruptcy Code.

The Korean Claimants assert that "the Settlement Facility modified the rules and requirement under the SFA and the Annex A" by requiring a valid, confirmed

current address and that such requirement raises issues of equal treatment in violation of Bankruptcy Code Sections 1123 and 1127. Korean Claimants' Br. at 37-40. The Korean Claimants do not and cannot not cite any language in the Plan or Plan documents that is "modified" by the Closing Orders. They assert instead that the adoption of administrative and procedural terms not expressly stated in the Plan constitutes a modification. *See id.*

The Plan does not purport to, and indeed cannot, define the detailed administrative procedures that will be necessary to implement its terms. The Plan addresses this obvious fact by instructing the district court to "enter orders in aid of this Plan and the Plan Documents" (Plan at § 8.7.5, RE 1595-2, Page ID # 27957) and by instructing the Claims Administrator, under the supervision of the district court, to develop and define necessary detailed procedures. *See* SFA § 5.01(a), RE 1595-3, Page ID # 28006 ("The Claims Administrator shall have discretion to implement such additional procedures and routines as necessary to implement the Claims Resolution Procedures …."); SFA § 5.05(b), RE 1595-3, Page ID # 28006 ("The Claims Administrator shall institute procedures … and shall develop claims-tracking and payment systems as necessary to process the Settling Breast Implant Claims in accordance with the terms of this Settlement Facility Agreement …."); SFA § 5.04(b), RE 1595-3, Page ID # 28009 ("The Claims Administrator shall have the plenary authority and obligation to institute procedures to assure an acceptable

level of reliability and quality control of Claims and to assure that payment is distributed only for Claims that satisfy the Claims Resolution Procedures.”).

The Korean Claimants’ citation to 11 U.S.C. § 1127(b) to support the assertion that Closing Order 5 is an improper modification of the Plan is misplaced. Section 1127(b) outlines requirements for pre-confirmation modifications and generally prohibits modification after “substantial consummation” of a plan of reorganization. The Plan, of course, was consummated years ago. A violation of § 1127(b) post consummation would occur only where there is, in fact, a modification that effects a material change in the rights of creditors. “[T]he restrictions on modification imposed by § 1127(b) apply only when a proposed change to a confirmed plan would constitute a meaningful alteration.” Bankruptcy Code Manual, §1127:9 (5th ed. 2021) (citations omitted). *See also In re Terex Corp.*, 984 F.2d 170, 173 (6th Cir. 1993) (§1127(b) not implicated where court interprets plan to determine appropriateness of interest award); *In re Motors Liquidation Company*, 539 B.R. 676, 682 (Bankr. S.D. N.Y. 2015) (bankruptcy court’s decision to enter injunction pending appeal to delay trust distributions is not an impermissible modification of plan). Here, similarly, Closing Order 5 does not modify any provision of the Plan or materially change creditor treatment, and thus § 1127(b) does not apply.

The Korean Claimants further assert that the supposed modification of the Plan for a “requirement of a valid, confirmed current address violates equal

treatment." Korean Claimants' Br. at 37 (citing § 1123(a)(4)). It appears that they are asserting, without any evidentiary support, that these address verification procedures are applied only to Korean Claimants. Korean Claimants' Br. at 28-29. But nothing in Closing Order 5 limits its application to Korean Claimants and, to the extent they assert that the Settlement Facility sought to treat the Korean Claimants differently than other claimants—specifically Class 5 claimants[15]—this assertion is belied by the uncontroverted record: the declarations of the Claims Administrator and the head of Quality Management at the Settlement Facility make clear that the procedures at issue are applied uniformly. *See* Phillips Dec. at ¶¶11-19, RE 1595-7, Page ID # 28196-28197; Bearicks Dec. at ¶¶12-31, RE 1595-6, Page ID # 28167-28169. There is absolutely no basis or evidentiary support for the Korean Claimants' assertion of discrimination or unequal treatment.

The Korean Claimants also contend that the fact that the Settlement Facility relies on the U.S. Postal Service to distribute mail to claimants, including Korean Claimants, constitutes unequal treatment. Korean Claimants' Br. at 37-40. They contend that the Settlement Facility should not use the U.S. Postal Service but instead should use the postal systems of each country. Korean Claimants' Br. at 37-38. The Korean Claimants' "postal service" assertion amounts to a complaint about

[15] Class 5 claimants are "domestic"—essentially United States claimants. Plan at § 3.2.7, RE 1595-2, Page ID # 27915.

the timeliness of the postal delivery system. They offer no evidence that there is a better system or that Korean Claimants receive different treatment from the U.S. Postal Service than other claimants. More significantly, Korean Claimants do not explain how or even assert that the use of the U.S. Postal Service somehow would mandate reversal of Closing Order 5.

Similarly, the Korean Claimants assert that Closing Order 5 violates the fair and equitable standard of 11 U.S.C. §1129(b) because the requirement of a valid, confirmed current address "prohibit[s] the eligible Claimants from receiving payments including premium payments." Korean Claimants' Br. at 30. This argument is baseless. First, the Plan was confirmed over 20 years ago in accordance with the Bankruptcy Code, and has been implemented from the beginning with the requirement that Claimants provide accurate contact information as part of the claims process. *See* Plan, RE 1592-2, Page ID # 27885-27913; *see supra* at 12-14. Second, Closing Order 5 applies to *all Claimants* and thus in no way imposes discriminatory or different treatment on the Korean Claimants.

D. The Korean Claimants Do Not And Cannot Provide Any Evidence To Support An Argument That There Is No Factual Basis To Support Closing Order 5.

The Korean Claimants assert that the Settlement Facility did not have a proper basis to invoke the address verification procedure embodied in Closing Order 5. They raise a series of complaints stating in essence that because they did not receive

a report of the audit conducted by the Settlement Facility, there is no valid data to support the requirements implemented in Closing Order 5. Korean Claimants' Br. at 14. It appears that the Korean Claimants are asserting that the Settlement Facility must demonstrate that all of the addresses provided by counsel for the Korean Claimants are invalid before applying Closing Order 5. This argument fundamentally misunderstands the basis of the Closing Order 2 address verification requirement (which again is the subject of a separate appeal). The address verification requirement protects the Settlement Fund assets and the claimants and provides the district court with assurance that claimants will receive their payments. No other party has objected to this requirement or questioned its appropriateness. Smith-Mair Dec. at ¶8, RE 1672-10, Page ID # 31626. Nor did the Settlement Facility need to establish that *all* of the addresses provided by counsel for the Korean Claimants were invalid before requiring that the claimants themselves confirm their addresses to the Settlement Facility. As demonstrated above, at 15, there was ample basis for questioning the reliability of information provided by counsel and requiring direct confirmation from claimants.

E. The Korean Claimants Cannot Be Exempted From Closing Order 5.

The Korean Claimants raise a series of arguments as to why they should be "exempted" from Closing Order 5. None have any merit. They assert that they could not and should not be required to comply with Closing Order 5 because of

privacy concerns. Korean Claimants' Br. at 7-8, 36. However, the Korean Claimants cite no authority permitting them to demand a settlement payment without complying with claim submission rules applicable to all claimants. If they wish to avail themselves of the opportunity to obtain a settlement payment, they must submit the required documents. Every single document necessary to demonstrate eligibility—including medical records, identification documents, and claim forms—involves the provision of personal information, which is used only to determine eligibility and assure delivery of the settlement to correct parties but is otherwise kept confidential. The Korean Claimants cannot demand a settlement without satisfying the same procedural requirements as any other claimant.

Moreover, the Korean Claimants' privacy argument is belied by their own submissions: they admit that they provided addresses (as required by the forms and for classification purposes) in 2005 and 2006 when the claims were first filed. Korean Claimants' Br. at 9. Appellants offer no cogent explanation as to why providing updated address information is problematic now when it was acceptable earlier.

Korean Claimants also argue that "[c]ounsel is not allowed to submit a valid, confirmed current address of a Claimant without permission of the Claimants under Personal Information Protection Act of Korea." Korean Claimants' Br. at 35. The Settlement Facility, however, is not requesting address information from counsel but

rather from the claimants themselves—precisely because the addresses provided by counsel have been demonstrated to be invalid in large part. Further, the Korean Claimants have availed themselves of the settlement program—knowing and, in fact, expecting that they ultimately would receive a determination from the Settlement Facility and a payment. They subjected themselves to the jurisdiction of the court in filing their claims and thereby subjected themselves to the rules and requirements for receiving compensation. *See Langenkamp v. Culp*, 498 U.S. 42, 45 (1990) ("Respondents filed claims against the bankruptcy estate, thereby bringing themselves within the equitable jurisdiction of the Bankruptcy Court."); *In re Dow Corning Corp.*, 287 B.R. 396, 412 (E.D. Mich. 2002) ("…Claimants have submitted themselves to this Court's jurisdiction by participating in this bankruptcy action. When a creditor submits to bankruptcy court jurisdiction by filing a proof of claim in order to collect its debt, the creditor is subject to the court's orders…."). The Korean Claimants cannot both take advantage of the settlement program and also avoid its requirements.

The Korean Claimants further assert that the address information is protected by the attorney-client privilege and therefore counsel cannot divulge the information absent express permission. Korean Claimants' Br. at 36. This argument, too, lacks merit for the simple reason stated above: the Settlement Facility seeks address

verification directly from the Korean Claimants.[16] In any event, the Korean Claimants are not in the midst of litigation: they are submitting claims to a claims processing entity in an effort to obtain compensation as permitted by the Plan. To obtain compensation, they have to submit complete claim forms—including their contact information—and follow the requirements of the Plan, the Settlement Facility and the district court. If a claimant declines to provide information because she believes it might waive the attorney client privilege, then she need not file a claim.

Even if the Settlement Facility were seeking address information from the lawyer, there is no privilege: the claimant's provision of a current address to the Settlement Facility does not implicate any privileged communication between a client and a lawyer.[17] The Sixth Circuit case cited by the Korean Claimants, *In re Grand Jury Investigation 83-2-35*, 723 F.2d 447 (6th Cir. 1983), addresses the

[16] Korean Claimants' own actions undermine the credibility of their confidentiality and privacy arguments. Counsel for Korean Claimants filed on the *public* docket a listing of certain Korean Claimants' names and addresses. This is hardly consistent with the asserted need for privacy. *See* Korean Claimants' Motion for Vacating Decision of Settlement Facility Regarding Address Update/Confirmation at Exh. 11, RE 1569-2, Page ID # 26348-26395.

[17] A client's address generally is not subject to attorney-client privilege. *See* Paul R. Rice, Attorney-Client Privilege in the United States, December 2020 Update, 1 § 6:20 ("a client's whereabouts—his address or telephone number—generally are not protected by the privilege. An attorney must disclose such information unless it can be demonstrated that the client consulted the attorney for the purpose of seeking advice about the legal implications of his whereabouts.") (citations omitted).

application of privilege to the identity—not the location—of the client and is not applicable. The other case cited, *Elliott Associates, L.P. v. Republic of Peru*, 176 F.R.D. 93 (S.D.N.Y. 1997), is not pertinent. Applying New York law, the court in *Elliott Associates* held that a lawyer could refuse to divulge the address of a *non-party* client in an unrelated action. The court's decision cites—and appears to rely on—a case in which the court held that a client's address was deemed privileged where the location of the client was communicated for the specific purpose of receiving legal advice concerning relocation. *Id.* at 98 (citing *Matter of Grand Jury Subpoenas Served Upon Field*, 408 F. Supp. 1169 (S.D.N.Y. 1976)).

If the Korean Claimants believed that the address requirement was problematic, they should have raised this issue when claim forms were initially distributed—nearly 20 years ago. They have always been under an obligation to disclose their address and residence information to file their claims. *See* Plan §§ 3.2.7, 3.2.8 and 3.2.9, RE 1595-2, Page ID # 27915; Annex A, § 6.05(h)(i), RE 1595-4, Page ID # 28079; *supra* at 12-13.

The Korean Claimants assert that Korean law does not require their counsel to keep updated and current addresses of clients, and that Korean law prohibits their counsel from disclosing their addresses without their permission. Korean Claimants' Br. at 35-36. This is irrelevant. The address information requirement is not based on the law of Korea or the United States. It is based on the requirements of the Plan.

None of these arguments has any bearing on the district court's entry of Closing Order 5.

F. The Korean Claimants' Additional Arguments Relate To Their Complaints About The Settlement Facility And Not To The District Court's Entry Of Closing Order 5.

In a rather convoluted argument, Korean Claimants assert that the Settlement Facility somehow eliminated the requirement for address verification by sending a letter to the counsel for Korean Claimants that stated that address updates had to be provided by June 3, 2019. Korean Claimants' Br. at 40-42. Of course, a letter from the Settlement Facility cannot and does not abrogate or amend an order of the district court—particularly an order that was entered after the date of the letter.

The Korean Claimants also recite a litany of complaints about the mail delivery system, the accuracy of the mailing procedures of the Settlement Facility, the refusal of the Settlement Facility to send all mailings by express mail service, the interpretation of the reasons for undeliverable mail, and the citation to the claimant information guides in the declarations, and further accuse the Settlement Facility of manipulating the mailing procedures. Korean Claimants' Br. at 11, 13, 14-15, 39-40, 42-43. None of these complaints has any bearing on the validity of Closing Order 5.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that the Court dismiss and deny the appeal of Closing Order 5.

Dated: October 21, 2022

/s/ Karima Maloney
Karima Maloney
Eugene Zilberman
Smyser, Kaplan & Veselka
717 Texas Avenue
Suite 2800
Houston, TX 77002
(713) 221-2382
kmaloney@skv.com
ezilberman@skv.com
Counsel for the Finance Committee

/s/ Deborah E. Greenspan
Deborah E. Greenspan
BLANK ROME LLP
1825 Eye Street, N.W.
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
Deborah.Greenspan@blankrome.com
Debtor's Representatives and Attorneys for Dow Corning Corporation

/s/ Dianna Pendleton-Dominguez
Dianna Pendleton-Dominguez
Law Office
401 N. Main Street
St. Marys, OH 45885
(419) 394-071
dpend440@aol.com
Claimants' Advisory Committee

/s/ Jeffrey S. Trachtman
Jeffrey S. Trachtman
Kramer, Levin, Naftalis & Frankel
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9175
JTrachtman@kramerlevin.com
Counsel for Claimants' Advisory Committee

STATEMENT OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). According to the word processing program used to prepare this brief (Microsoft Word), and excluding the parts of this brief exempted by Fed. R. App. P. 32(f), this brief contains 11,971 words.

Dated: October 21, 2022

/s/ Deborah E. Greenspan

Deborah E. Greenspan

BLANK ROME LLP
Michigan Bar # P33632
1825 Eye Street, N.W.
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
Deborah.Greenspan@blankrome.com

Debtor's Representative and
Attorney for Dow Silicones Corporation

CERTIFICATE OF SERVICE

I certify that on October 21, 2022, I electronically filed a copy of the foregoing Brief of Appellees, the Debtor's Representatives and Dow Silicones Corporation, through the Court's electronic filing system, which will send notice and a copy of this brief to all registered counsel in this case, as follows:

Karima Maloney
Eugene Zilberman
Smyser, Kaplan & Veselka
717 Texas Avenue, Suite 2800
Houston, TX 77002
Counsel for the Finance Committee

Jeffrey S. Trachtman
Kramer, Levin, Naftalis & Frankel
1177 Avenue of the Americas
New York, NY 10036

Ernest H. Hornsby
FarmerPrice
100 Adris Place
Dothan, AL 36302

Dianna Pendleton-Dominguez
401 N. Main Street
St. Marys, OH 45885
Counsel for the Claimants' Advisory Committee

Yeon-Ho Kim
Yeon-Ho Kim Int'l Law Office
Suite 4105, Trade Tower,
511 Yeongdong-daero, Kangnam-ku
Seoul 06164, South Korea
Counsel for the Korean Claimants

Dated: October 21, 2022

/s/ Deborah E. Greenspan

Deborah E. Greenspan

BLANK ROME LLP
Michigan Bar # P33632
1825 Eye Street, N.W.
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
Deborah.Greenspan@blankrome.com

Debtor's Representative and
Attorney for Dow Silicones Corporation

ADDENDUM DESIGNATING RELEVANT DOCUMENTS IN THE DISTRICT COURT DOCKET (E.D. MICH. NO. 00-00005)

RE #	Filing Date	Document Description	Page ID
9	12/11/2001	Order Approving Claim Form Packages	33-35
1447	07/25/2018	Closing Order 1 for Final June 3, 2019 Claim Deadline (Establishing Final Cure Deadlines, Revised Claim Review Procedures, and Appeal Deadlines)	23937-23950
1482	03/19/2019	Closing Order 2 (Regarding Additional Procedures for Incomplete and Late Claims; Protocols for Issuing Payments; Audits of Attorney Distributions of Payments; Protocols for Return of Undistributed Claimant Payment Funds; Guidelines for Uncashed Checks and Reissuance of Checks; Restrictions of Attorney Withdrawals) ("Closing Order 2")	24084-24097
1569	01/15/2021	Korean Claimants' Motion for Vacating Decision of Settlement Facility Regarding Address Update/Confirmation	26261-26505
1569-2	01/15/2021	Exhibits to Korean Claimants Motion for Vacating Decision of Settlement facility Regarding Address Update/Confirmation	26276-26505
1595	02/26/2021	Response of Dow Silicones Corporation, the Debtors Representatives and the Claimants' Advisory Committee to Korean Claimants Motion for Vacating Decision of Settlement Facility Regarding Address Update/Confirmation, Index and Exhibits A-F	27839-27871
1595-2	02/26/2021	Amended Joint Plan of Reorganization	27873-27984
1595-3	02/26/2021	Settlement Facility and Fund Distribution Agreement	27985-28030

1595-4	02/26/2021	Annex A to the Settlement Facility and Fund Distribution Agreement	28031-28148
1595-6	02/26/2021	Declaration of Ellen Bearicks Regarding The Motion For Vacating Decision of Settlement Facility Regarding Address Update/Confirmation	28164-28193
1595-7	02/26/2021	Declaration of Ann M. Phillips, dated July 20, 2020	28194-28217
1598	03/25/2021	Closing Order 3 (Notice that Certain Claims will be Permanently Barred and Denied Payment Unless a "Confirmed Current Address" is Provided to the SF-DCT on or before June 30, 2021)	28284-28298
1640	04/1/2022	Closing Order 4 (Requiring Completion of Court-Directed Audit Survey and Return of Funds Pursuant to Closing Order 2)	28794-28796
1642	06/13/2022	Closing Order 5	28800-28805
1656	08/25/2022	Notice of Appeal	29376-29378
1658	08/29/2022	Korean Claimants' Motion to Stay The Court's Ruling Regarding Closing Order 5	29380-29384
1667	09/15/2022	Korean Claimants' Motion to Reopen the Time to Appeal Regarding Closing Order 5	30481-30571
1668	09/17/2022	Korean Claimants' Motion Set Aside Closing Order 5 Regarding Korean Claimants	30572-30579
1670, 1670-1 – 1670-12	09/29/2022	Response of Dow Silicones Corp., The Debtor's Representatives, The Finance Committee and The Claimants' Advisory Committee to Korean Claimants' Motion to Reopen Time to Appeal Closing Order 5, Index and Exhibits A-K	30581-31108
1672, 1672-1 – 1672-11	10/3/2022	Response of Dow Silicones Corporation, The Debtor's Representatives, The Finance	31177-31651

		Committee, and The Claimants' Advisory Committee to Korean Claimants' Motion to Set Aside Closing Order 5, Index and Exhibits A-J	
1672-10	10/3/2022	September 28, 2022 Declaration of Kimberly Smith-Mair and Exhibit 1 (Exhibits 2-11 filed under seal)	31020-31081
1674	10/5/2022	Korean Claimants' Reply to Response of Dow Silicones Corp., The Debtor's Representatives, The Finance Committee and The Claimants' Advisory Committee to Korean Claimants' Motion to Reopen Time to Appeal Closing Order 5, Index and Exhibits E-K	31654-31906
1674-2	10/5/2022	Declaration of Yeon-Ho Kim (Exhibit E to Korean Claimants' Reply to Response of Dow Silicones Corp., The Debtor's Representatives, The Finance Committee and The Claimants' Advisory Committee to Korean Claimants' Motion to Reopen Time to Appeal Closing Order 5)	31671-31723
1675	10/10/2022	Korean Claimants' Reply to Response of Dow Silicones Corporation, The Debtor's Representatives, The Finance Committee, and The Claimants' Advisory Committee to Korean Claimants' Motion to Set Aside Closing Order 5, Index and Exhibits A-H	31907-32177
1676	10/20/2022	Exhibits 2-11 to September 28, 2022 Declaration of Kimberly Smith-Mair	SEALED ENTRY