Case No: *22-1750*

United States Court of Appeals for the Sixth Circuit

In re: SETTLEMENT DOW CORNING TRUST

Debtor

KOREAN CLAIMANTS

Interested Parties - Appellant

v.

DOW SILICONES CORPORATION; DEBTOR'S REPRESENTATIVES;

CLAIMANTS' ADVISORY COMMITTEE

Interested Parties - Appellees

FINANCE COMMITTEE

Movant - Appellee

Reply of Appellant Korean Claimants

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I. 405 KOREAN CLAIMANTS ARE NOT PUTATIVE CLAIMANTS BUT REAL CLAIMANTS MANAGED BY THE DEBTOR FROM THE FILING OF BANKRUPTCY

The 405 Korean Claimants at issue are the Claimants who filed their proof of claim in 1994. They received the MDL-926 identification number in 1994. When Dow Corning Corporation filed bankruptcy with assets more than liabilities from class action, Dow Corning Corporation took the files of the Korean Claimants over and asked the Korean Claimants to file proof of claim for processing bankruptcy proceedings. The Korean Claimants filed proof of claim with the Debtor in 1997.

Before the Dow Corning Reorganization Plan was confirmed in 2004, the estimated number of the Claimants with SID (a unique ID number from the Debtor) reached to 330,000. When the Settlement Facility finished the processing of claims filed from 2004 to 2019, the number of the Claimants who have actually filed their Claim was no more than 65,000. The 405 Korean Claimants are among the 65,000 Claimants.

The 405 Korean Claimants have both the MDL-926 ID and the SF-DCT ID. Dow Corning Corporation managed the 405 Korean Claimants through the Settlement Facility so that they were not putative Claimants but real Claimants

that Dow Corning Corporation was expecting their filings of Claims for respective payments such as rupture payment, explant payment, disease payment or alternatively expedited payment until the Debtor paid within the cap of the Funds that Dow Corning Corporation was required to fill under the Plan. The Funds was supposed to be used for payments to the Claimants including the 405 Korean Claimants at issue. After the Settlement Facility, an organ for processing claim-filings of the Claimants, finished processing of all claims and payments in 2022, 1.67 billion dollars remain, generating interest of 7% per year. Currently, no other Claimants except the 405 Korean Claimants have filed late-claim for disease payment. Even if the 176 Claimants that Declaration of the Claims Administrator attested are added, only the 681 Claimants have filed claim for disease payment after June 3, 2019.

The Settlement Facility has already finished processing of claim-files for the 405 Korean Claimants. It made a table of the Claimants and sent to counsel.

Whether the 405 Korean Claimants can receive payment for disease because they have filed late-claims for disease only hinges on a decision of this Court. Payment for disease claims of the 405 Korean Claimants would not impair an ability of the Funds to be kept until the close of the Settlement Facility nor to require Dow Corning Corporation to fill an additional funding. Dow Corning

Corporation exaggerates in the Response that if the 405 Korean Claimants were paid a disease claim, Dow Corning Corporation and the Settlement Facility will be affected seriously. However, a payment to the 405 Korean Claimants at issue was anticipated from 1997 when the bankruptcy-filed Dow Corning Corporation received proof of claim, and was managed during the period of the last 20 years operating the Settlement Facility, and was calculated as expenditure in sum when the Finance Committee filed for motions for premium payments.

If Dow Corning Corporation evades its responsibility for a disease payment of the 405 Korean Claimants which have been processed through a success in this Court, it is the same as fattening Dow Corning Corporation which was prosperous through a piecemeal payment to the Claimants for last 20 years.

II. REPLY TO ARGUMENT

A. Whether the Deadline to File Disease Claims is an Unambiguous Term of the Plan and cannot be Modified

The term regarding the deadlines is ambiguous and modified. First of all, the Plan itself does not specify any clause regarding the deadlines. Clauses regarding the deadlines are specified in the subsequent documents, which are

the Settlement Facility and Fund Distribution Agreement and its Annex, the Dow Corning Settlement Program and Claims Resolution Procedures. By way of branching out several subsidiary documents, the Plan was structured that a Claimant was not able to find clauses regarding the deadlines in the Documents.

In addition, clauses regarding deadlines themselves are written ambiguously. Claims for explant payment must be submitted on or before the tenth anniversary of the Effective Date, Claims for rupture payment must be submitted on or before the secondary anniversary of the Effective Date, Claims for disease payment must be submitted before the fifteenth anniversary of the Effective Date, and claims for expedited release payment (Expedited payment is only applied to disease payment) must be submitted before the third anniversary of the Effective Date. (Annex A Section 7.09)

The Effective Date is an uncertain and un-fixed term to find the exact date regarding the deadlines. When the Plan was finally confirmed by this Court, Dow Corning Corporation should have distributed notices regarding the Effective Date to all Claimants. Dow Corning Corporation did not. Dow Corning Corporation asserts that because the Effective Date was June 1, 2004, the fifteenth anniversary for disease claims was June 3, 2019. Neither received the Korean Claimants a notice regarding the Effective Date nor were able to

read the several thousand pages of the Plan and the Documents that Dow Corning Corporation contends the integral parts of the Plan. Dow Corning Corporation failed to send a notice regarding the deadlines which were ambiguous. Dow Corning Corporation applied the deadline for claims for rupture payment without a notice of the deadline ("the secondary anniversary of the Effective Date") so that many Claimants, whether or not their origin of country, passed it inadvertently resulting in Dow Corning Corporation's gain.

In addition, Dow Corning Corporation changed the deadline for expedited payment without a notice. It was the third anniversary of the Effective Date originally. Dow Corning Corporation let the Claims Administrator change to the fifteenth anniversary of the Effective Date. The reason for change was to entice the Claimants to give up their rights of disease payment and walk away with a small amount of expedited payment. Dow Corning Corporation manipulated the clauses regarding the deadlines to enhance its financial interests. It is ludicrous that the clauses regarding the deadlines were fixed in the Plan.

The deadline to file disease claims was not only an ambiguous term of the Plan but was modified Dow Corning Corporation's own way.

Dow Corning Corporation asserts that on December 27, 2017, the District

Court authorized and directed the Settlement Facility to distribute to all claimants and attorneys a notice reminding them of the Plan-mandated June 3, 2019 final deadline for filing new disease or expedited claims. The District Court has not done this kind of direction regarding the deadlines for filing rupture and explant claims. This step of Dow Corning Corporation was to solidify the basis of the close of the Settlement Facility. Notices regarding Stipulation and Order Approving Notice of Closing and Final Deadline for Claims were not disseminated to the Claimants as broad as other notices. The handful of the Korean Claimants received the notice. In this regard, Dow Corning Corporation asserts that the notice of final deadline was mailed to each attorney of record including counsel for the Korean Claimants. At this point, counsel for the Korean Claimants has lost authority to update his clients' address by the Claims Administrator's order and was deemed unreliable and to have committed intentional frauds in representing the Claimants by Dow Corning Corporation. The notice of final deadline based on Stipulation and Order by the District Court to counsel shall not be the notice to *all* of the Korean Claimants. Dow Corning Corporation took advantages of attorney of record of the Settlement Facility but took the powers empowered by the Claimants off regarding address updates and other filings.

Since the Plan was ambiguous regarding the deadlines for filing claims and the

Dow Corning Corporation modified the deadline for filing expedited payment claims its own way, Dow Corning Corporation needed to get Stipulation and Order Approving Notice of Closing and Final Deadline of Claims of December 27, 2017. To finalize the Stipulation and Order and implement it, the District Court issued Closing Order 1. Dow Corning Corporation asserts that the deadline for filing disease payment claims was not established by Closing Order 1 and it is to implement the deadlines for filing claims under the Plan. The Claims Administrator ruled as a capacity of the court-designated position supervising the Settlement Facility that the filings for disease payment claims by the 405 Korean Claimants were denied on the ground of Closing Order 1 in a letter to counsel. Dow Corning Corporation cannot flip the ruling of the Claims Administrator over and then argue that the reason for denial should not be Closing Order 1 but rather should be the Plan. In addition, the Plan itself does not have a clause regarding the deadline. The Annex A to the SFA has clauses of the deadline but even the clauses have an ambiguous term regarding the deadlines for filing claims.

Dow Corning Corporation asserts that the Korean Claimants apparently have abandoned the various arguments raised with the District Court on the Motion for Extension of Filing Claims. When counsel filed the Motion for Expedited Hearing for the Motion for Extension, the Korean Claimants reiterated the basis

for the Motion regarding the argument of the lack of the deadlines in the Plan and the ambiguity of the deadlines in the Documents as well as the argument of an excusable neglect. Right after receiving an "inappropriate"emailing from counsel for Dow Corning Corporation, "*We thought it might be appropriate to consider setting a hearing to address both*.", the District Court issued the Order denying the Motion for Extension and the Motion for Expedited Hearing together. Counsel for the Korean Claimants who has been constantly worrying about the neutrality and the impartiality of the Court was not persuaded by the process itself and further found out that the District Court without a hearing held failed to address the arguments of the Korean Claimants raised in the Motions. Dow Corning Corporation now contends that the Korean Claimants abandoned the various arguments raised with the District Court by adding its argument in the Response that the deadline to file disease claims is unambiguous term of the Plan and cannot be modified. The contention of Dow Corning Corporation is inconsistent because Dow Corning Corporation asked to consider and address both the Motion for Extension and the Motion For Expedited Hearing in the District Court and then to ask that the Korean Claimants abandoned the arguments in the Motion for Expedited Hearing in this Court by rephrasing and countering the argument of the Korean Claimants, "The Plan is ambiguous", on its behalf.

B. Whether the Excusable Neglect Standard is Neither Applicable Nor Satisfied Here

Dow Corning Corporation asserts that despite having raised multiple arguments at the district court level, Appellants base their appeal on solely "excusable neglect"– an argument they raised only belatedly in the district court, in their Reply on Motion to Expedite. Counsel for Dow Corning Corporation requested the district court by an emailing of "*We thought it might be appropriate to consider setting a hearing to address both*" that the argument of the Korean Claimants raised in the Motion for Expedited Hearing be considered with the argument of the Korean Claimants raised in the Motion for Extension. Now by reversing its request, Dow Corning Corporation cannot contend that an argument the Korean Claimants *belatedly* raised in their Reply on Motion to Expedite should be grounds for dismissal in this Court.

a. Whether the Plan-Mandated Deadline Cannot be Modified by Resort to Considerations of Excusable Neglect

First of all, the Plan did not mandate the deadlines for filing disease payment claims at issue. Annex A to the Settlement Facility Agreement, one of numerous subsidiary agreements which have never been looked at by all Claimants, has ambiguous terms regarding the deadlines. In addition, Dow Corning Corporation modified the clause of the deadlines by extending the deadline for

filing expedited payment claims to change from the third anniversary of the Effective Date to the fifteenth anniversary of the Effective Date without a notice to all Claimants.

Dow Corning Corporation asserts that Bankr. R. 9006(b) applies to acts "required or allowed to be done at or within a specified period *by these rules or be a notice given thereunder or by order of court*" so that the Motion for Extension does not involve a proof of claim process, nor does it involve the application of a deadline set by the rules or court order, so neither rule provides a basis for relief here. First of all, the Korean Claimants take the assertion of Dow Corning Corporation that the Motion for Extension to File Claims does not involve a proof of claim process as a the Korean Claimants' advantage since the 405 Korean Claimants filed their proof of claim with the Debtor in 1997 for the purpose of the Dow Corning Corporation's bankruptcy filing. Second, the Plan does not specify the deadline for filing disease payment claims. Annex A to the SFA, which is not the Plan itself, specifies the deadline for filing disease payment claims with the ambiguous term which was required to implement later in Stipulation and Order Approving Notice of Closing and Final Deadline for Claims of December 27, 2017 and Closing Order I of March 1, 2018. These are the rules or the court order regarding the deadline for filing disease payment claims so that the Motion for Extension to File Claims automatically involves

the application of a deadline set by the rules or court order resulting in the application of Bankr. R. 9006(b).

Dow Corning Corporation asserts, to contend against the argument of the Korean Claimants that in other proceedings regarding the Settlement Facility the district court has previously addressed "excusable neglect", that in three of the four cases cited, the district court was applying the 2007 Agreed Order to determine if excusable neglect had been demonstrated with regard to individuals who had not filed timely proof of claim in the bankruptcy. Now here, Dow Corning Corporation admits that the excusable neglect standard was not used for late-filings but a way for the Settlement Facility to accept a late-filed claim that Dow Corning Corporation *had agreed*. Dow Corning Corporation asserts that the Plan-mandated deadline cannot be modified by resort to considerations of excusable neglect. If so, the district court should not have issued the 2007 *Agreed* Order because the Plan was confirmed in 2004.

b. Whether the 405 Korean Claimants Do Not Satisfy the Excusable Neglect Standard

1. Special Circumstances of the 405 Korean Claimants

The 405 Korean Claimants filed their proof of claim with the Debtor in 1997.

Dow Corning Corporation processed bankruptcy filings on the basis of proof of claim filed by the 300,000 Claimants including the 405 Korean Claimants. The 405 Korean Claimants filed their disease payment claims with the Settlement Facility after June 3, 2019. From 1997, the 405 Korean Claimants have been managed by Dow Corning Corporation and the Settlement Facility. The 405 Korean Claimants' filing of disease payment claim, which came up at the later stage of the Settlement Facility's operation, was anticipated by Dow Corning Corporation at any time. Plus, the 405 Korean Claimants' estimated claims amount was calculated as expenditure of the Settlement Facility when the Finance Committee filed the Motion for payment of the Second Priority Payments twice with the District Court and the District Court deliberated the Funds and the expenditures of the Settlement Facility and ruled favorably for the Motion for Second Priority Payments of the Finance Committee and approved the Funds and the expenditures. Dow Corning Corporation deemed the unfiled-Korean Claimants as a liability on the book which should be paid at any time from the Funds of the Settlement Facility.

The 405 Korean Claimants are individual claimants so that they can determine their filings for claim. Counsel cannot push them to file. They were informed that mediation with the Finance Committee took place and counsel filed the Motion for Recognition and Enforcement of Settlement Agreement including

the Motion for Reversal of the Settlement Decisions regarding Affirmative Statements of implanting physicians with the District Court and the appeals to this Court.

This Court issued the Opinion on the Motions of the Korean Claimants in 2019 and 2020 respectively. This Court issued the Opinion for the Motion for Recognition and Enforcement in June 1, 2020. The ruling of this Court passed June 3, 2019. The 405 Korean Claimants waited expecting a positive result.

The 405 Korean Claimants did not receive Notice of the Deadline for filing disease payment claim from the Settlement Facility. The Notice of the June 3 2019 Deadline arrived around three or seven months late to counsel only. Even if the Settlement Facility's mailings to them had been delivered, they could not have been delivered before the deadline for filing disease payment claim.

Dow Corning Corporation revoked the power of counsel empowered by the 405 Korean Claimants to update their address including other filings for them. If Dow Corning Corporation had deemed the notice of the deadline to counsel as a notice to individual Claimants, the Claims Administrator of the Settlement Facility should have reinstituted the power of counsel but Dow Corning Corporation did not let it happen while the Settlement Facility was sending the

notice of deadline of June 3, 2019 to counsel. Since Dow Corning Corporation declared in several pleadings that counsel for the Korean Claimants was not reliable and committed intentional frauds, the notice of the deadline to counsel will not suffice as the notice of the deadline to individual Claimants who did not receive Notice of the Deadline before June 3, 2019.

While the 405 Korean Claimants were preparing their filing for disease payment claim after they received the ruling of this Court regarding the Motion for Recognition and Enforcement of Settlement Agreement thorough mediation with the Finance Committee, they encountered the situations of the Covid-19 pandemic where most of clinics and physicians' office which were responsible for issuing the Affirmative Statement for proof of manufacturer of Dow Corning and a disease diagnosis were closed while the preparation for documents of disease payment claim to be submitted to the Settlement Facility required a significant timing including communications between individual Claimants and implanting physician and diagnosing doctors in nature.

2. Whether the 405 Korean Claimants Knowingly and Intentionally Failed to File Claims by the Plan-Mandated Deadline and the Delay Was Thus Entirely Within their Reasonable Control

Dow Corning Corporation asserts that (1) the failure of the Korean Claimants

– or their counsel – to read or comprehend the applicability of the claim deadline does not constitute excusable neglect, (2) if the late claimants' reason for delay is insufficient, excusable neglect will not be found even if the other factors favor the claimant, (3) the undisputed facts documenting multiple notices and their varying explanations confirm that they *were* aware of the deadline but *chose* to delay based upon strategic considerations –and thus the reason for the delay was entirely "within the reasonable control of the movant", (4) the fact that an appeal was pending when the deadline passed is irrelevant because no one can know the outcome of a pending appeal and no one could reasonably rely on a potential favorable outcome as a reason to forgo filing, (5) the failure to file thus was not the result of an outside factor that made it impossible to file and rather the Korean Claimants voluntarily and intentionally chose not to comply with the Plan deadline, (6) Closing Order 1 is irrelevant – it did not establish the filing deadline but rather provided guidelines for assuring proper and prompt review of claims filed by that deadline and even if Closing Order 1 was procedurally flawed, that would have no bearing on the deadline and further the Korean Claimants raised their complaints about Closing Order 1 only in their February 2021 Motion for Extension – long after the claim filing deadline have already expired, (7) whether or not the mailings to them were delivered promptly is irrelevant because the Korean Claimants indisputably knew the deadline well in advance of June 2019 by way of the Settlement

Facility's distribution of the reminder Notice of Final Deadline of the Plan-mandated June 3, 2019 final deadline in early 2018 and the ECF system for the district court's December 27, 2017 Order Approving Notice of Final Deadline served on counsel of the Korean Claimants and posting of the Notice of Final Deadline on the Settlement Facility website and the CAC's newsletters subscribed by counsel for the Korean Claimants and the March 13, 2019 mailing and April 30, 2019 mailing of the Settlement Facility to counsel, (8) counsel for the Korean Claimants has admitted that he was aware of the June 3, 2019 deadline in appeals filings to the Appeals Judge of the Settlement Facility, (9) the June 3, 2019 deadline was obviously well before the onset of the Covid-19 pandemic although the Korean Claimants assert that the delay in filing was not within their control because of the Covid-19 pandemic.

The 405 Korean Claimants at issue did not receive the Notice of Deadline for filing disease payment claim from the Settlement Facility. Dow Corning Corporation admitted through the Declaration of the Claims Administrator that *all or most* of the Korean Claimants, with allegedly 50% of the Settlement Facility's mailings returned or undeliverable, did not have current address of the Korean Claimants. Because the Settlement Facility does not have current address of the Korean Claimants, the 405 Korean Claimants were not able to receive Notice of the Deadline for filing claim.

The 405 Korean Claimants were unaware of the deadline. Because they were not aware of the deadline for filing claim, they could not choose to delay the filing of claim based upon strategic considerations. The reason for the delay was out of the reasonable control of the 405 Korean Claimants. The only thing that they did was to wait a positive result of the Motion for Recognition and Enforcement of Mediation Results of Settlement Agreement with the Finance Committee pending this Court until June 1, 2020.

Dow Corning Corporation asserts that counsel was served Stipulation and Order Approving Notice of Closing and Final Deadline of Claims of December 27, 2017 and Closing Order 1 of March 1, 2018 and received Notice of the Deadline from the Settlement by letters of the Claims Administrator and the Quality Control Manager and received the CAC newsletters including notice of the deadline. However, Dow Corning Corporation through the Claims Administrator's Order took the power of counsel empowered by the Korean Claimants off in 2016. The Claims Administrator precluded counsel from submitting address update form for the Claimants as well as other filings including the power of receiving checks for the Claimants through sanctions on counsel. While the Claims Administrator, a court-appointed agency, did not institute the power of counsel before the Settlement Facility, the Settlement

Facility mailed Notice of Deadline and letters explaining Closing Order 1.

Notice of Deadline for filing claim delivered to counsel is not as effective as Notice of Deadline to individual Claimants. To be deemed that Notice of Deadline to counsel is as effective as Notice of Deadline to the Claimants, the Settlement Facility should have reinstituted the power of counsel before Notice of Deadline.

Even if Notice of Deadline to counsel should be deemed as effective as Notice of Deadline to the 405 Korean Claimants, Notices of Deadline of June 3, 2019 was delivered to counsel well after June 3, 2019. So it was not an effective notice. With respect to the 2017 Stipulation and Order regarding the deadline of June 3, 2019 and the 2018 Closing Order 1, the same is applied to counsel whose power was stripped off by the Claims Administrator in 2006. In addition, Closing Order 1 was not served before the issuance of the district court resulting in serious flaws based upon due process in making an order.

While the 405 Korean Claimants were unaware of the June 3, 2019 deadline, the Korean Claimants waited the ruling on the Motion for Recognition and Enforcement of Mediation Result of Settlement Agreement, its appeal pending this Court, until June 1, 2020. When they were preparing disease payment claim

after they have known that this Court denied the Motion (affirmed the District Court's denial), they encountered the Covid-19 pandemic which was actually impacting from the last part of the year of 2019. Although Dow Corning Corporation asserts that the June 3, 2019 deadline was obviously well before the onset of the Covid-19 pandemic, the impact on the Korean Claimants began from the last part of 2019 overlapping with the June 3, 2109 deadline. If Dow Corning Corporation had thought so, it should have explained why the U.S. Postal Service used by the Settlement Facility was so late that the U. S. Postal Service did not deliver the Settlement Facility's mailings of 2019 and 2020 to counsel on time and delivered at least three to seven months late.

Notice of Deadline should be delivered in accordance with the Claimants Guide that Dow Corning Corporation promulgated in 2004. Notice of Deadline was mailed only by the U.S. Postal Service although the Claimants Guide adopted other mailing services as well. In particular, the foreign Claimants were expected to receive the mailings of the Settlement Facility by way of the mailing service of each country. Dow Corning Corporation did not use the Korean Mailing Service for Notice of Deadline by breaching the commitment of mailing under the Claimants Guide.

While Dow Corning Corporation asserts that counsel admitted in the pleadings

that he was aware of the deadline of filing claims, the 405 Korean Claimants waited the ruling of this Court regarding the Motion for Recognition and Enforcement of Mediation Results until June 1, 2020. They were not aware of the June 3, 2019 deadline because they did not receive Notice of Deadline. They could not voluntarily and intentionally chose not to comply with the deadline based upon strategic considerations. They did not voluntarily and intentionally chose not to comply with the deadline. Counsel did not make a decision strategically not to file their disease payment claims because the 405 Korean Claimants were individual Claimants so that the decision to file their disease payment claims had to be made by them individually.

The reason for delay was not within their control. The 405 Korean Claimants were not aware of the June 3, 2019 deadline for filing disease payment claim. The Settlement Facility failed to carry out the responsibility to deliver Notice of Deadline ordered by the District Court as it admitted that it did not keep the Claimants' current address with *all or more than 50%* of mailings returned as undeliverable in Declaration of the Claims Administrator of the Settlement Facility. Counsel's power before the Settlement Facility was taken off by the Claims Administrator in 2016 so that Notice of Deadline to counsel was no longer as effective as Notice of Deadline to the 405 Korean Claimants individually. Therefore the reason for delay in filing their disease payment claim

was out of their control.

3. Whether the Length of Delay and the Impact on Judicial Proceedings Counsel Strongly Against a Finding Excusable Neglect

Dow Corning Corporation asserts that the 405 Korean Claimants waited more than two and a half years after the deadline to file and to reopen the Settlement Facility operations to address these extremely late filings would clearly impede judicial proceedings and have a detrimental effect on the closure of Settlement Operations and the final distribution of funds and accounting.

Dow Corning Corporation is implementing the 2007 Agreed Order Allowing Certain Late Claimants Limited Rights to participate in the Plan's Settlement Facility based upon the August 2022's Order on Late Claimants. In doing so, the Settlement Facility does not have to reopen its operations to address the 405 Korean Claimants' late filings. The Settlement Facility can address the 405 Korean Claimants' late filings along with implementing the August 2022's Order on Late Claimants. Since Dow Corning Corporation admitted that the Settlement Facility would operate by 2023 or the first 2024, late filings of the 405 Korean Claimants would not clearly impede judicial proceedings and have no detrimental effect on the closure of Settlement Operations and the final distribution of funds and accounting. Like the late Claimants under August

2022's Order, the Settlement Facility finished the review over the 405 Korean Claimants' filings for disease payment claim and notified counsel the table of Claimants including address.

4. Whether Allowing Submission of Late Claims Would prejudice Dow Corning, Other Claimants, and the Settlement Facility

Dow Corning Corporation asserts that contrary to the assertion of the Korean Claimants, the Settlement Facility would have to review all the claims – a process that will take months and then will result in a further one-year period for claimants to cure any deficiencies in their claims, forcing the Settlement Facility to incur significant additional expenses. It is ludicrous that the Settlement Facility would have to review late filings of the 405 Korean Claimants and take one year and several months. Contrary to the Dow Corning Corporation's assertion, the Settlement Facility finished review of claim-filings for *all* of the Claimants as Dow Corning Corporation admitted in the Declaration of the Claims Administrator. The Settlement Facility finished review of filings of the 405 Korean Claimants as well. Even if the Settlement Facility would have to review the filings of the 405 Korean Claimants, it would not take one year and several months because the Settlement Facility can proceed with consolidated review for proof of manufacturer and disease proof and even the payment requirements altogether as authorized by the District

Court.

Dow Corning Corporation asserts that the Korean Claimants are incorrect in asserting that the funds for payments that were paid by the Debtor are fixed and there would be no additional obligation that the Debtor has to execute for the Funds even if the 405 Korean Claimants are allowed to be processed, and the Debtor has an obligation to provide funding up to a capped amount by only to the extent that timely eligible claims are allowed, and the addition of hundreds of untimely new claims after the final deadline would not only violate the Plan but would also obligate Dow Corning Corporation to expend additional funds to pay those claims. While the Finance Committee filed the Motion for the Second Priority Payments, the Special Assessor reported that there would be remaining funds of 1.67 billion dollars even after the Settlement Facility paid out *all* Claimants' claims including the 405 Korean Claimants. There would not obligate Dow Corning Corporation to pay the 405 Korean Claimants' late-claims because the Settlement Facility is sufficiently funded.

Dow Corning Corporation asserts that the influx of new claims that would need to be reviewed and wind their way through the claims review, appeal, and payment processes would substantially delay closure, add to the time and burden of the Settlement Facility, require maintenance of additional staff, and

extend the period of time in which the Settlement Facility must operate. The filings of the 405 Korean Claimants are not specific or unique so that they filed with Affirmative Statement in a similar form for proof of manufacturer and also with doctor's diagnosis in a similar form for proof of disease. The filings of the 405 Korean Claimants would not substantially delay closure, add to the time and burden of the Settlement Facility, require maintenance of additional staff, and extend the period of time in which the Settlement Facility must operate. Existing staffs of the Settlement Facility are familiar with the filings of the Korean Claimants so that they would be very quick in reviewing the filings. The filings of the 405 Korean Claimants would not require additional staff and extend the period of time in light that the Settlement Facility would have to review the late Claimants under the August 2022's Order for the 2007 Agreed Order.

Dow Corning Corporation asserts that extending the deadline only for the 405 Korean Claimants would result in disparate treatment in violation of the Bankruptcy Code (11 U.S.C. Section 1123(a)(4)) and be unfair to other claimants who missed the deadline or who decided not to submit a late claim because they understood and relied on the deadline to their detriment. There would be no disparate treatment under the Bankruptcy Code Section 1123(a)(4) because other Claimants can file late-claims. If they decide not to file late-

claims believing that the deadline should be applied to them, they would choose their rights as they want. If allowing the 405 Korean Claimants to file late-filings for disease payment precludes other claimants from filing late-claims, it would result in disparate treatment but it is not the case here.

Dow Corning Corporation asserts that the Korean Claimants themselves have acknowledged to the district court the broader implication of their Motion for Extension and Courts consistently find impermissible prejudice when the allowance of one late claim would "open the floodgates" to other similar late claims. First of all, other similar late claims are limited to the Claimants who filed a proof of claim in 1997 before Dow Corning Corporation filed bankruptcy, approximately 65,000 Claimants estimated by Dow Corning Corporation. All of them have been calculated as expenditure (which means a liability of the Settlement Facility) when the Finance Committee requested the district court to prove the Second Priority Payments. They have already been paid out by the Settlement Facility. Even if the remaining Claimants in the pool of the Claimants who filed a proof of claim in 1997 are not paid yet, they would not file late-claims because they have not filed by June 3, 2019, even knowing the deadline. There would not "open the floodgates" of other similar late claims even if the 405 Korean Claimants were allowed to file late-claims. It was supported as evidence from Declaration of the Claims Administrator that only

the 176 Claimants filed late-claims after June 3, 2019. There would be no more than the 405 Korean Claimants and the other 176 Claimants asking for filing late-claims. The assertion of Dow Corning Corporation, “open the floodgates”, is an exaggeration not to allow the 405 Korean Claimants to file their disease payment claims.

5. Whether the 405 Korean Claimants Did Not Act in Good Faith in Knowingly Waiting to File Their Claims Until Over Two Years After the Deadline

Dow Corning Corporation asserts the Korean Claimants make the bald assertion that they “did pass the deadline of June 3, 2019 in bad faith,” but provide no explanation, and all of excuses provided by the Korean Claimants demonstrate a lack of good faith, and their claim that Covid-19 precluded filing is not credible – the deadline predated the pandemic, and the argument that they were waiting for a decision on the “Mediation” is not credible, and the argument that they did not receive timely mailings is not pertinent or credible, and the Korean Claimants do not and cannot provide a good faith basis for *refusing* to file claims until two and a half years after the deadline and seeking to impose on Dow Corning Corporation and the District Court and other Claimants the added time, burden, expense, and unfairness of reopening claims processing that has already concluded.

Even if all those assertions of Dow Corning Corporation were assumed true, one thing that has never changed is that Dow Corning Corporation did not pay the approved claims to the Korean Claimants based upon their makeshift theory which has never been authorized or prescribed in the Plan and that Dow Corning Corporation refused to use the excusable neglect standard although the 2007 *Agreed* Order and August 2022's Order for Late Claimants allowed other Claimants to file late-claims.

Dow Corning Corporation has tried to influence the District Court through inappropriate emailing of counsel to the Court, captured by counsel for the Korean Claimants. The Korean Claimants could guess that Dow Corning Corporation imposed numerous disadvantages on the Korean Claimants during last 20 years of the Settlement Facility's operations behind scene.

If any actions and explanations of the Korean Claimants regarding filings of the 405 Korean Claimants' late-claims were not credible, Dow Corning Corporation should have disclosed the information kept in the Settlement Facility regarding Korean filings to counsel first. And then, the Korean Claimants can acknowledge that Dow Corning Corporation was in good faith and the Korean Claimants was in bad faith.

With an influence over the District Court such as inappropriate emailing, Dow Corning Corporation has always succeeded in denying numerous requests for resolving grievances regarding filings of claim with the Settlement Facility.

The Korean Claimants and counsel tried to act in good faith regarding filings of claims as possible as they can because the venue and the place for filings of claim were in a foreign country.

In 1999, Dow Corning Corporation refused to accept the opening of a regional processing office in South Korea for processing the Korean claims and other Asian claims. Dow Corning Corporation opened a regional processing office in Europe, Canada and Australia in 2004 although their Claimants were less than the Korean Claimants. Dow Corning Corporation abandoned an opportunity in checking the credibility of filing of Korean claims. Dow Corning Corporation makes the bald assertion that the 405 Korean Claimants *refused* to file claims until two and a half years after the deadline and seeking to impose on Dow Corning Corporation and the District Court and other Claimants the added time, burden, expense, and unfairness of reopening claims processing that has already concluded.

The 405 Korean Claimants did not voluntarily and intentionally chose not to

comply with the June 3, 2019 deadline. They were not aware of the deadline. They did not choose to delay based upon strategic considerations.

Money says everything in this capitalism-oriented world. The 405 Korean Claimants could not have earned anything if they had chosen to delay based upon strategic considerations.

III. CONCLUSION

For the forgoing reason, the 405 Korean Claimants request this Court to Overturn the District Court's decision and Order the Settlement Facility to Accept the submissions of the 405 Korean Claimants' late-claims and to Process in accordance with the Plan and the Documents and to Pay.

Date: November 7, 2022

Respectfully submitted,

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For the 405 Korean Claimants

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2022, I have electronically filed the above document with the Clerk of Court by ECF system that will notify to all relevant parties in the record.

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   Dated: **November 7, 2022**