**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

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| **In re:**<br><br>**SETTLEMENT FACILITY DOW CORNING TRUST** | § | **Case No. 00-CV-00005**<br>**(Settlement Facility Matters)**<br><br>**Hon. Denise Page Hood** |

**RESPONSE OF DOW SILICONES CORPORATION, THE DEBTOR'S REPRESENTATIVES, AND THE CLAIMANTS' ADVISORY COMMITTEE TO MOTION FOR EXPEDITED HEARING AND RELIEF**

Dow Silicones Corporation ("Dow Silicones"),[1] the Debtor's Representatives (the "DRs") and the Claimants' Advisory Committee ("CAC") hereby respond to Korean Claimants' Motion for Expedited Hearing and Relief, ECF No. 1644 ("Motion to Expedite"). The Motion to Expedite requests an expedited process for a determination on a previously filed Motion for Extension of Deadline for Filing Claims, ECF No. 1586 ("Motion for Extension"). Dow Silicones, the DRs and the CAC do not oppose the request to schedule a hearing as appropriate and to expedite the determination on the Motion for Extension. The Motion to Expedite, however, asserts new arguments in support of the Motion for Extension. Dow Silicones, the DRs and the CAC now respond to the Motion to Expedite and respectfully submit

[1] As Dow Silicones Corporation previously advised the Court, Dow Corning Corporation changed its name to Dow Silicones Corporation on February 1, 2018.

that the Motion for Extension should be denied for the reasons set forth in the prior response to that Motion and for the reasons set forth in the attached Memorandum.

Dated: July 18, 2022

Respectfully submitted,

*/s/ Dianna L. Pendleton-Dominguez*
Dianna L. Pendleton-Dominguez
LAW OFFICE OF
DIANNA PENDLETON
401 N. Main Street
St. Marys, OH 45885
Telephone: (419) 394-0717
DPend440@aol.com
*Claimants' Advisory Committee*

*/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*

*/s/ Ernest H. Hornsby*
Ernest H. Hornsby
FARMER PRICE LLP
100 Adris Place
Dothan, AL 36303
Telephone: (334) 793-2424
Ernie@farmerprice.com

*Claimants' Advisory Committee*

**UNITED STATES DISTRICT COURT**
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| **In re:**<br><br>**SETTLEMENT FACILITY DOW CORNING TRUST,** | § | **Case No. 00-CV-00005**<br>**(Settlement Facility Matters)**<br><br>**Hon. Denise Page Hood** |

**PROPOSED ORDER OF DOW SILICONES CORPORATION, THE DEBTOR'S REPRESENTATIVES AND THE CLAIMANTS' ADVISORY COMMITTEE DENYING THE MOTION FOR EXTENSION**

The Court has considered the responses of Dow Silicones Corporation, the Debtor's Representatives, and the Claimants' Advisory Committee to Korean Claimants' Motion for Extension of Deadline for Filing Claim, ECF No. 1586 ("Motion for Extension") and to Korean Claimants' Motion for Expedited Hearing and Relief, ECF No. 1644 ("Motion to Expedite"), and the Court finds that the Motion to Expedite seeks to amend and augment the arguments set forth in the Motion for Extension and that the Motion for Extension should be denied with prejudice.

ACCORDINGLY, it is hereby ORDERED that the Motion for Extension is DENIED with prejudice and the Motion to Expedite is DENIED with prejudice with respect to all matters except the request to expedite the resolution of the Motion for Extension.

DATED: _____

_____
DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

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| **In re:** | § | **Case No. 00-CV-00005** |
| | § | **(Settlement Facility Matters)** |
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| | § | **Hon. Denise Page Hood** |

# MEMORANDUM IN SUPPORT OF THE RESPONSE OF DOW SILICONES CORPORATION, THE DEBTOR'S REPRESENTATIVES AND THE CLAIMANTS' ADVISORY COMMITTEE TO THE MOTION FOR EXPEDITED HEARING AND RELIEF

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## CONCISE STATEMENT OF ISSUES PRESENTED

1. Should the Court seek to order a modification to the confirmed and consummated Amended Joint Plan of Reorganization of Dow Corning Corporation ("Plan") – contrary to the terms of the Plan and to applicable Bankruptcy Law – and where the Court has no authority to modify the Plan – in order to permit the filing, review, and evaluation of claims submitted more than two and a half years after the final deadline for the submission of settlement claims?

   Respondents Answer: No.

2. Should the Court expedite the determination of all Motions pertinent to question number 1?

   Respondents Answer: Yes.

## CONTROLLING OR MOST APPROPRIATE AUTHORITY

- 11 U.S.C. § 1127(b)
- Dow Corning Amended Joint Plan of Reorganization
- The Settlement Facility and Fund Distribution Agreement
- Dow Corning Settlement Program and Claims Resolution Procedures, Annex A
- *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993)

Dow Silicones Corporation ("Dow Silicones"), the Debtor's Representatives (the "DRs") and the Claimants' Advisory Committee (the "CAC") respectfully request that the Court grant the request for an expedited hearing but deny the substantive relief sought in Korean Claimants' Motion for Expedited Hearing and Relief, ECF No. No. 1644 ("Motion to Expedite") and in the Motion for Extension of Deadline for Filing Claim, ECF No. 1586 ("Motion for Extension").

## INTRODUCTION

On February 3, 2021, the Korean Claimants filed the Motion for Extension in which they sought an extension of the June 3, 2019 final deadline for filing disease or expedited claims under the settlement program established in the Amended Joint Plan of Reorganization of Dow Corning Corporation (the "Plan") (Exhibit A). They asserted in that Motion for Extension that some 400 Korean claimants were unable to file their claims because of that deadline. On February 17, 2021, Dow Silicones, the DRs, and the CAC filed a Response to the Motion for Extension and the Finance Committee filed a joinder to that Response. On February 23, 2021, Korean Claimants submitted a Reply to that Response. The Court has not held argument on the Motion for Extension and the matter remains pending.

Now the Korean Claimants have filed a Motion to Expedite, in which they request that the Court expedite the decision on the Motion for Extension, and, in addition, assert additional arguments in support of their Motion for Extension. Dow

Silicones, the DRs and the CAC ("Respondents") submit this Response to the Motion to Expedite addressing the additional arguments in support of the Motion for Extension raised by Korean Claimants in the Motion to Expedite as well as the assertions in their Reply about actions taken by the Settlement Facility-Dow Corning Trust ("SF-DCT"). For the reasons set forth herein and in the Response to the Motion for Extension, the Motion for Extension should be denied. The Respondents do not object to an expedited consideration of the Motion for Extension.

**BACKGROUND**

As the Court knows, after nine years of litigation, including a multi-week confirmation hearing and multiple appeals to this Court and to the United States Court of Appeals for the 6th Circuit, the Plan became Effective on June 1, 2004 pursuant to an Order of this Court. The Plan specifies the terms of the treatment of all classes of creditors and the means for implementing the Plan. The Plan includes numerous Plan Documents that govern the operation and implementation of the Plan. The Plan Documents are defined at Section 1.131 of the Plan to include, *inter alia*, the Settlement Facility and Fund Distribution Agreement ("Settlement Facility Agreement" or "SFA") (Exhibit B), the Dow Corning Settlement Program and Claims Resolution Procedures ("Annex A" to the SFA) (Exhibit C), and the Funding Payment Agreement (Classes 5 through 19) between Dow Corning Corporation, the Dow Chemical Company, Corning Incorporated, and the Claimants' Advisory

Committee ("Funding Payment Agreement") (Exhibit D).[1] Section 5.3 of the Plan provides that the Settling Personal Injury Claims, including the Breast Implant claims, shall be resolved under the terms of the Settlement Facility Agreement (or the Litigation Facility Agreement, as applicable). The Settlement Facility Agreement along with Annex A to the Settlement Facility Agreement establish the detailed rules and guidelines for determining the eligibility of claims for the settlement program and for the submission, evaluation, and payment of Breast Implant claims eligible for a settlement under the Plan. Those rules and guidelines include deadlines for submission of claims. Those rules define the deadline for submitting settlement claims for disease or expedited payments as the date that is the 15-year anniversary of the Effective Date of the Plan. Annex A at § 7.09(b)(i); *see also id.* at § 6.02(a)(ii)(a). The 15-year anniversary of the Effective Date was June 3, 2019.

Although not required by the Plan, in December 2017, the Court authorized the distribution of a reminder notice of the June 3, 2019 deadline (the "Notice of Final Deadline"). That Notice of Final Deadline was distributed to all claimants and all counsel of record 16 months before the June 3, 2019 deadline, thus providing ample time for claimants and attorneys to prepare claims for timely submission. *See*

[1] Unless otherwise defined, capitalized terms used herein shall have the meaning provided in the Plan, the SFA or Annex A.

Stipulation and Order Approving Notice of Closing and Final Deadline for Claims, ECF No. 1342 (Dec. 27, 2017) ("Order Approving Notice of Final Deadline") (Exhibit E); July 18, 2022 Declaration of Kimberly Smith-Mair (the "Smith-Mair Dec.") (Exhibit F), at ¶ 7.

On February 3, 2021, 20 months after the June 3, 2019 deadline, Korean Claimants filed a Motion for Extension of Deadline for Filing Claims, ECF No. 1568 ("Motion for Extension"). The Motion for Extension asserted that the June 3, 2019 deadline could be extended because it was not required by the Plan but was instead adopted as part of a Closing Order.[2] The Motion for Extension requested that the Court extend the June 3, 2019 deadline – so that approximately 400 Korean Claimants who had missed the deadline could submit their claims. *See id.* at 7-8; Motion to Expedite at 1. On February 17, 2021, Dow Silicones, the DRs and the CAC filed the Response of Dow Silicones Corporation, the Debtor's Representatives, and the Claimants' Advisory Committee to the Motion for Extension of Deadline for Filing a Claim, ECF No. 1592 ("Joint Response") (Exhibit G). The Respondents opposed the Motion for Extension and argued the Motion for Extension should be denied because: (i) the Plan, not Closing Order 1, prescribes

[2] Specifically, the Korean Claimants contend that the June 3, 2019 deadline was established by Closing Order 1 for Final June 3, 2019 Claim Deadline (Establishing Final Cure Deadlines, Revised Claim Review Procedures, and Appeal Deadlines), ECF No. 1447 (Exhibit H) ("Closing Order 1").

the final deadline for submitting claims for payment and therefore the relief requested by Korean Claimants would result in a Plan modification prohibited by the Bankruptcy Code and the Plan; (ii) the Korean Claimants' Motion for Extension improperly argues that Closing Order 1 is invalid by incorrectly conflating the provision for termination of the Settlement Facility with Closing Order 1,[3] (iii) Korean Claimants' assertion that Closing Order 1 is invalid because they had no notice of or opportunity for a hearing before Closing Order 1 was entered does not affect the validity of the Order and is irrelevant because the deadline was set in the Plan and further any challenge to Closing Order 1 should have been brought (but was not brought) at the time through a motion for reconsideration or other relief ;[4]

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[3] Korean Claimants argued that Closing Order 1 was a "termination" of the Settlement Facility and that the Order was invalid because the termination provision in the SFA requires notice and hearing before termination. Motion for Extension at 6, PageID.27070. Closing Order 1, of course, is not the "termination" of the Settlement Facility. *See* Joint Response at 13, PageID.27403.

[4] Closing Order 1 was stipulated and agreed to by the two parties—the CAC and the DRs—with express authority granted by the Plan to interpret the Plan's terms and whose consent is required for purposes of establishing guidelines for distribution of Settlement Fund assets. *See* Plan § 1.28, SFA §4.09; SFA §5.05; *In re Settlement Facility Dow Corning Tr.*, No. 07-CV-12378, 2008 WL 905865, at *3 (E.D. Mich. Mar. 31, 2008). Given the agreement of the parties, no motion or hearing was required or necessary. *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 legal basis to find that Closing Order 1, or other orders entered by the Court addressing various administrative matters over the long course of these proceedings, are void simply because the Court did not hold a hearing before entering a stipulated order. Of course, Korean Claimants could have sought reconsideration of the Order

and (iv) Korean Claimants wrongly assert that they lost the opportunity to file claims. *See* Joint Response at 8-14. The Finance Committee filed a joinder to the Joint Response on February 17, 2021 (ECF No. 1593).

Korean Claimants filed a Reply to Response of Dow Corning Corporation, the Debtor's Representatives, Claimants' Advisory Committee and Finance Committee to Motion for Extension of Deadline for Filing Claims, ECF No 1594 on February 23, 2021 (the "Reply"). In that Reply, Korean Claimants argued that the 15-year deadline did not exist in the Plan itself because it is set forth in a Plan Document. Accordingly, Korean Claimants contend, the deadline may be modified. In addition, Korean Claimants reiterated their argument that the imposition of the deadline and other terms in Closing Order 1 was improper because Closing Order 1 was entered without a prior hearing. Korean Claimants further argue in the Reply that they never received notice of the June 3, 2019 final submission date and that as a result it was a practical impossibility for the remaining 400 claims to be filed by that date. Reply at 10, PageID.27817. They further offer another, seemingly inconsistent excuse for their failure to file timely claims: they contend that the Korean Claimants did not file because they believed that they had reached a

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consistent with the local rules within 14 days of its entry. *See* E.D. Mich. L.R. 7.1(h)(2) (motions for reconsideration of non-Final Orders); *see also* Joint Response at 8-9 ("Closing Order 1 is not a "judgment" but even were Federal Rule of Civil Procedure 60 applicable, a request for relief under that Rule must be raised within a reasonable time—in most cases within one year.").

resolution of their claims through a mediation process that has been invalidated by this Court. *See id.* at 11, PageID.27818 ("over 400 hundred Claimants who filed this Motion did not file claim by the deadline on their own, thinking that the motion for enforcement of mediation was optimistic.").

On July 3, 2022, Korean Claimants filed the Motion to Expedite. In the Motion to Expedite, the Korean Claimants state that they filed their claims on December 20, 2021[5] (more than two and a half years after the June 3, 2019 deadline) and that those claims have not been processed. Motion to Expedite at 1-2. They state that they received a letter from the Settlement Facility on March 10, 2022, denying the claims because they were submitted late. *Id.* Korean Claimants appear to assert that since the Motion for Extension is still pending, the Settlement Facility should not have denied the claims. *See id.* The Korean Claimants raise an additional argument: they contend that the Korean Claimants who submitted claims after the June 3 deadline are being treated unfairly compared to the individuals who will receive payment under the terms of the recent Order and Joint Stipulation of the Claimants' Advisory Committee and Debtor's Representatives for Approval to Pay Full Payment Long-Term Option Late Claimants Based on Recommendation of Claims Administrator, ECF No. 1643 ("Order on Late Claimants") (Exhibit I).

[5] The claims were actually sent to the SF-DCT on December 29, 2021, but they were dated December 20, 2021. Smith-Mair Dec. at ¶17.

Korean Claimants believe that it is unfair for such "Late Claimants," who did not even file a Proof of Claim, to be authorized to receive payment while Korean Claimants are being denied payment because they failed to file their benefit claims by the June 3, 2019 deadline.

The Korean Claimants, plainly and simply, are asking this Court to modify the confirmed and consummated Plan. These new arguments do not alter that fact. The Motion for Extension should be denied for all the reasons stated herein and set forth in the Joint Response, all of which is incorporated into this Response by reference, and which is attached hereto as Exhibit G.

## ARGUMENT

### A. THE CLAIM FILING DEADLINE WAS IMPOSED BY THE PLAN, NOT BY THE CLOSING ORDER, AND CANNOT BE MODIFIED

The Plan Documents clearly and unequivocally establish the final deadline for the submission of settlement claims: Annex A directs that Eligible Settling Breast Implant Claimants must submit claims for disease benefits by the fifteenth anniversary of the Effective Date of the Plan:[6]

[6] As the Court knows, the Plan established earlier deadlines for the submission of rupture claims and explant claims. *See* Annex A at § 7.09(a)(i) ("Explantation Payment Option Claims must be submitted on or before the 10th anniversary of the Effective Date"); *id.* at § 7.09(c)(i) (Breast Implant Claimants must submit the Rupture Payment Option Form and supporting documentation before the second anniversary of the Effective Date).

> ***Deadline for Submission of Disease Payment Option Claims.*** Eligible Settling Breast Implant Claimants who do not otherwise release their Disease Payment Option may apply for Disease Payment Option benefits at any time on or before the fifteenth anniversary of the Effective Date.

Annex A at § 7.09(b)(i); *see also id.* at § 6.02(a)(ii)(a) ("Eligible Breast Implant Claimants may elect compensation for Disease Payment Option benefits … any time on or before the fifteenth anniversary of the Effective Date."). The Plan Documents established the deadline for the "Expedited Release Payment Option as the third anniversary of the Effective Date" unless extended by the Claims Administrator. *Id.* at § 6.02(f)(i). The Claims Administrator, in fact, did extend that deadline until June 3, 2019, consistent with the disease claim deadline. *See* https://www.sfdct.com/_sfdct/index.cfm/deadlines (last accessed July 16, 2022) (Exhibit J).

In their Reply, Korean Claimants seek to avoid that clear and unequivocal deadline by arguing that the Plan Documents, the very documents that implement the reorganization – both by specifying the assets to be paid by the Debtor for distribution to claimants[7] and by specifying terms of distribution of assets – are somehow not part of the Plan. *See* Reply at 2-3, PageID.27809-10 (arguing that "the Plan itself did not establish the final filing deadline" but, rather, the deadline was set forth in the Annex A to the SFA). This argument is contrary to the structure of the

[7] *See* Funding Payment Agreement at Article 2.

Plan and the case law. Both Annex A and the SFA are Plan Documents, and the Plan Documents govern the implementation of the Plan of Reorganization with respect to the resolution of Settling Personal Injury Claims. *See* Plan Section 1.131. Their terms bind the Debtor and all creditors. *See In re Settlement Facility-Dow Corning Trust*, 2012 WL 4476647, at *2 (E.D. Mich. Sept. 28, 2012) (interpreting language of the SFA and Annex A in holding that "[t]he Plan provides no right of appeal to the Court."); *In re Settlement Facility-Dow Corning Trust* 760 Fed.Appx. 406, 411-412 (6th Cir. 2019) (finding that the Plan (based on language in the Plan Documents) prohibits challenges and reviews sought by the Korean Claimants and stating: "To the extent the Korean Claimants seek to challenge any substantive decisions of the Claims Administrator with respect to any particular claims, such review is beyond the scope of the plan…To the extent the Korean Claimants seek review of substantive decisions regarding particular claims, their request is denied as it is contrary to the terms of the plan."); *In re Settlement Facility Dow Corning Trust*, 2017 WL 7660597, at *3 (E.D. Mich. Dec. 28, 2017), *aff'd* 760 Fed. App'x. 406, 411-412 (6th Cir. 2019). (interpreting language in the Plan Documents as "the Plan" and discussing provisions of Annex A in concluding that "[t]he Plan provides that the decision of the Appeals Judge is final and binding and there is no provision allowing a claimant to appeal to or request reversal of any decision by the Appeals Judge.").

Every dispute about the procedures and terms for the resolution of the Settling Personal Injury claims has been governed by the SFA and Annex A. As this Court has explained:

> The SFA and Annex A to the SFA establish the exclusive criteria by which such [Breast Implant] claims are evaluated, liquidated, allowed and paid. (SFA, § 5.01) The process for resolution of claims is set forth under the SFA and corresponding claims resolution procedures in Annex A. (SFA, § 4.01).

*In re Settlement Facility Dow Corning Trust*, 2017 WL 7660597, at *1 (addressing various motions by Korean Claimants and dismissing and/or finding motions moot).

Korean Claimants' further contention that somehow modification of a Plan Document is different than modification of the Plan and therefore the deadline can easily be extended is unsupportable.[8] The Plan Documents are an integral part of

[8] Korean Claimants also try and circumvent the clear language of the SFA by asserting that the SFA can be modified without the consent of Dow Silicones and the CAC because the extension of the filing deadline would not increase the value of the claims or increase the payments required to be made by Dow Silicones. *See* Reply at 4. The Plan cannot be amended to extend the deadline, but in any event, of course the addition of late filed claims would increase the value of any such claims that might be approved, increase administrative costs, and increase the funding needs and payments to be made by Dow Silicones. As such, such a modification would also plainly be prohibited by the Section 10.06 of the SFA, which provides that the SFA cannot be modified without the consent of Dow Silicones and the CAC if such modification would directly or indirectly, *inter alia*:

> (i) increase the liquidation value or settlement value of any Claim, or the amount or value of any payment, award or other form of consideration payable to or for the benefit of a Claimant, including, without limitation, any cash payment or

the Plan and any modification of their terms would violate both the terms of the Plan and Section 1127(b) of the Bankruptcy Code. [9]

Korean Claimants' continued argument that the claim filing deadline can and should be extended is unsupportable: it is contrary to the plain and unambiguous terms of the Plan, would affect detrimentally the terms agreed to by the Plan Proponents and relied upon by claimants, and would constitute an impermissible Plan modification. *See* 11 U.S.C. § 1127(b); Joint Response at 10-11.

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> other benefits provided to a Claimant, … [or ] (iii) increase the amount or change the due date of any payment to be made by the Debtor to the Settlement Facility pursuant to the Plan or the Funding Payment Agreement …

SFA §10.06.

[9] Section 1127(b) provides:

> The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

11 U.S.C. § 1127(b).

### B. THE ORDER AUTHORIZING THE FINAL PAYMENT TO LATE CLAIMANTS IN CONNECTION WITH THE 2007 ORDER APPROVING A LATE CLAIM SETTLEMENT HAS NO BEARING ON THE APPLICABILITY OF THE FINAL CLAIM FILING DEADLINE TO KOREAN CLAIMANTS

In the Motion to Expedite, Korean Claimants contend that the recently entered Order on Late Claimants somehow provides a basis to permit an extension of the claim filing deadline imposed by the Plan. *See* Motion to Expedite at 2 ("[i]n comparison, the certain Korean Claimants who filed their Claim later than June 3, 2019 should be more favorably considered than the Late Claimants under the Order."). Korean Claimants misapprehend the Order on Late Claimants. The Order on Late Claimants does not itself determine the propriety or legal basis for permitting payment for those specific late claim submissions. The Order on Late Claimants merely implements the final component of the 2007 Agreed Order Allowing Certain Late Claimants Limited Rights to Participate in the Plan's Settlement Facility, ECF No. 606 (the "2007 Agreed Order"), which was the result of a settlement agreement approved by the Court in 2007. That settlement was the result of extensive litigation and negotiation regarding the treatment of individuals who sought to file late proofs of claim and the application of the "excusable neglect" standard to such late claims. In evaluating the 2007 Agreed Order, this Court articulated the standard to be applied in determining whether an individual who failed to file a timely proof of claim in the bankruptcy case could nevertheless be permitted to file a late claim:

> The Supreme Court in addressing a late claim filed beyond the deadline set forth in Bankr. R. 3003 used the "excusable neglect" standard under Fed. R. Civ. P. Rule 60(b)(1) to determine whether the Bankruptcy Court had the authority to enlarge time limitations under Bankr. R. 9006(b), which is patterned after Fed. R. Civ. P. 6(b). The Supreme Court approved the following factors that a court may consider in finding excusable neglect: 1) the danger of prejudice to the debtor; 2) the length of the delay and its potential impact on judicial proceedings; 3) the reason for the delay, including whether it was within the reasonable control of the movant; and, 4) whether the movant acted in good faith. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993).

*In re Settlement-Facility Dow Corning Trust, Debra Spies Vardakis*, No. 15-10852, ECF No. 6, at PageID.104 (E.D. Mich. Mar. 27, 2018). The standards set forth in the *Pioneer* case by the Supreme Court are limited and exacting and ignorance of the rules or a mistaken interpretation of the rules do not satisfy the "excusable neglect" standard. As this Court stated:

> The Supreme Court noted that "clients must be held accountable for the acts and omissions of their attorneys." *Id.* at 396. A client, having chosen a particular attorney to represent him in a proceeding, cannot "avoid the consequences of the acts or omissions of this freely selected agent," and that "[a]ny other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." *Id*. at 397. In assessing a claim of excusable neglect, "the proper focus is upon whether the neglect of [the parties] and their counsel was excusable." *Id.* (emphasis in original). An attorney or pro se litigant's failure to timely meet a deadline because of "[i]nadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable neglect.'" *Id.* at 392; *Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir. 1991).

*Id.* at PageID.104-105. *See also In re Edwards*, 748 F. App'x. 695, 698 (6th Cir. 2019) ("Since the Court decided *Pioneer*, we have considered excusable neglect in different contexts and repeatedly underscored that it is a difficult standard to satisfy"); *Yeschick v. Mineta*, 675 F.3d 622, 631 (6th Cir. 2012) (finding "lack of the diligence required to make out a successful claim of excusable neglect" where counsel, *inter alia,* was aware that he was not receiving notice of electronic filings in other cases and that motions were expected and failed to monitor the docket); *Tri-Corner Investments LLC v. First Defense Intern. Group, Inc*., 361 F. App'x 629, 632 (6th Cir. 2010) (affirming finding that a party had not demonstrated excusable neglect where, *inter alia*, that party "failed to present a compelling explanation for why it neglected to ensure that mail accepted at [its] business address was read in a timely manner"); *Dilloway v. Comm'r of Soc. Sec.*, No. 18-13424, 2020 WL 3440578, at *1 (E.D. Mich. May 11, 2020) (holding that "counsel's purported unawareness" that a report and recommendation had been issued does not constitute excusable neglect where nothing in the court docket indicated counsel failed to receive the usual notice sent electronically to the e-mail address on file and, "[m]ore importantly, the courts have held that it does not matter where the fault lies for an attorney's failure to receive notice that a court order has been issued") (*citing Harness v. Taft*, 801 F. App'x 374 (6th Cir. Jan. 23, 2020)).

Korean Claimants, of course, do not and cannot challenge the 2007 Agreed Order. They appear to contend that it is unfair to deny their late filed claims when claims encompassed within the 2007 Agreed Order were allowed to submit benefits claims under the settlement program. But these two situations are not equivalent or comparable. The individuals affected by the 2007 Agreed Order were authorized to submit claims 12 years before the final claim deadline based on an analysis of the universe of claims and a determination that the excusable neglect standard (defined by the Supreme Court in *Pioneer*) was reasonably satisfied. To assure that the allowance of those claims would not affect detrimentally the treatment and payment of timely claims, the 2007 Agreed Order specified limited payment options and restricted distributions so that the final payments could not be made until there was assurance that they would not affect payment to timely claimants.[10] Korean

[10] The 2007 Agreed Order allowed the submission of certain identified "late claims" on detailed terms and conditions. The 2007 Agreed Order provides that "[a]ll late claimants bear the burden of proving that their failure to timely file a POC or an NOI was the result of excusable neglect." 2007 Agreed Order at 2, PageID.8504. The 2007 Agreed Order stated it would avoid "the costs, time and resources involved in the oversight and litigation of late claim requests" that would "consume Settlement Fund assets and create uncertainty and potentially prejudice the rights of timely filed claimants." *Id.*

The 2007 Agreed Order further provides that "late claim requests dated after June 1, 2007 or received by the Court after June 5, 2007 are presumptively without merit and that such late claims would unfairly prejudice the interests of timely filed claimants, increase the administrative burdens and costs of the SF-DCT, undermine the SF-DCT's need for certainty in formulating accurate projections and administering the Settlement Fund, and threaten the important rule of finality

Claimants, in contrast, ask this Court to *reopen* the claim filing deadline years after the final filing deadline and, in fact, long after the completion of the claims review process. To grant this request would be manifestly unfair to those claimants who abided by the rules.

We do not believe that the excusable neglect standard even applies here, and in fact Korean Claimants have not made this express argument. But Korean Claimants do not and cannot meet that standard even if it were somehow deemed to apply. Korean Claimants assert no facts that would meet the four factors necessary to find excusable neglect. First, there clearly is prejudice to both the Debtor and to timely claimants if these claims were to be accepted more than two and a half years after the final claim deadline. The addition of 400 new claims would certainly affect the funding obligations of the Debtor and the timing of payments to eligible claimants. Further, it would be unfair to other claimants who missed the deadline or who decided not to submit a late claim because they understood that the deadline had passed. (The Claims Administrator reports that 176 other claimants missed the June 3, 2019 deadline – most by a matter of days or weeks and not years – and that all of those claims have been denied. *See* Smith-Mair Dec. at ¶18). Second, the length of the delay is extreme. The Korean Claimants had notice from the outset –

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inherent in the confirmation of the Plan under the Bankruptcy Code." *Id.* at 13, PageID.8515.

15 years before the deadline – and additional notices more than a year before the deadline. To accept their claims more than two and a half years after the deadline would clearly impede judicial proceedings and could have a detrimental effect on the closure of Settlement Facility operations and the final distribution of funds and accounting. The Korean Claimants had the ability to file claims and there is no basis to conclude that circumstances outside their control affected the claim filing. Finally, and unfortunately, the circumstances here do not support a conclusion that the Korean Claimants acted in good faith. There is no indication, for example, that the 405 Korean Claimants all suffered from catastrophic illness that prevented filing or that devastating weather delayed the transmittal of claims by the postal system.

For all these reasons, any argument that the Korean Claimants' late claims should be allowed based in any way on the 2007 Late Claim order or the standards that apply to the submission of late claims is without merit.

### C. THE KOREAN CLAIMANTS RECEIVED AMPLE AND APPROPRIATE NOTICE OF THE FINAL FILING DEADLINE.

Korean Claimants assert in their Reply that they did not have notice of the June 3, 2019 deadline and could not possibly have submitted all of the remaining claims by that deadline.[11] This contention is demonstrably false. First, as addressed

[11] Korean Claimants assert that it "is a lie" that the Settlement Facility mailed the notice to counsel to Korean Claimants. Reply at 9, PageID.27816.

in the Joint Response, this Court directed the SF-DCT to distribute a notice (the "Notice of Final Deadline" as defined herein) to all claimants[12] and attorneys reminding them of the Plan-mandated June 3, 2019 final deadline. *See* Joint Response at 5; December 27, 2017 Order Approving Notice of Final Deadline. This Notice of Final Deadline was mailed to all claimants at the address on file with the Settlement Facility, distributed to each attorney of record, including counsel for Korean Claimants, and posted on the Settlement Facility website. *See* Smith-Mair Dec. at ¶¶7-8; February 16, 2021 Declaration of Ellen Bearicks (the "Bearicks Dec.") (Exhibit K), at Exhibits 1 and 2 and at ¶¶7-8 (stating that "Notice was sent to Mr. Kim as counsel for the Korean Claimants in accordance with the Court's directive on or about January 31, 2018" and the Settlement Facility does "not have any record indicating that the Notice mailing was returned as undeliverable."). The Notice of Final Deadline was also included as Exhibit A to this Court's December 27, 2017 Order Approving Notice of Final Deadline – which was posted on the ECF system – and therefore counsel for Korean Claimants received the Notice of Final Deadline via the ECF system. *Cf.* Fed. R. Civ. P. 5(b)(2)(E) (a paper is served under this Rule by sending it to a registered user by filing it with the court's electronic-

[12] Specifically, the Order provided that the Notice of Final Deadline would be sent to "to all individuals classified in Plan Classes 5, 6.1, and 6.2 who filed a timely proof of claim or notice of intent and who are not otherwise barred from participation in the distribution of settlement payments under the Plan." Order Approving Notice of Final Deadline, at 1.

filing system); United States District Court for the Eastern District of Michigan's Electronic Filing Policies and Procedures (revised February 2020), R.9 (b), ("[w]henever a non-restricted paper is filed electronically in accordance with these procedures, ECF will generate a NEF [Notice of Electronic Filing] to all filing users associated with that case and to the judge to whom the case is assigned.").

The Notice of Final Deadline was distributed in English but had advised in six languages – including Korean – that translated copies of the Notice could be requested by sending an email to the SF-DCT. *See* Smith-Mair Dec. at ¶11 and at Exhibit 1. The SF-DCT received requests for translation from individual claimants, including individual Korean claimants. *Id.* In each case, when a request for translation was received, the SF-DCT provided a translated copy. *Id.* The Settlement Facility also mailed the Notice of Final Deadline to all 2,415 Korean Claimants. *Id.* at ¶10. Korean Claimants, surprisingly, seek to excuse their failure to file timely by contending that because they have violated this Court's orders by failing to provide valid addresses to the Settlement Facility, they could not have received the Notice of Final Deadline. Reply at 9, PageID.27816. Of course, even if some of the individual Korean Claimants did not receive the Notice of Final Deadline, counsel for the Korean Claimants was provided with notice (*see supra.* at 19-20; Bearicks Dec. at ¶¶ 7-8 and Exh. 2) and would be obligated to act accordingly and to provide it to his clients.

The SF-DCT also posted the Notice of Final Deadline on its website. Bearicks Dec. at ¶7; Smith-Mair Dec. at ¶9. Counsel for Korean Claimants makes the irrelevant and unsupported assertion that he has "been prohibited from access to the Claimants' file through the SF-DCT website from around 2011" and that the "Settlement Facility revoked the Password of counsel for Korean Claimants to log in" so such posting was "meaningless." Reply at 9, PageID.27816. The only way access to the SF-DCT's online website claims portal (MyClaims) would be interrupted is if (i) the user does not remember the correct password and is locked out after multiple attempts, or (ii) the user changes their email address used to access MyClaims – and in either case, the user can, any time, request a new temporary password from the SF-DCT. Smith-Mair Dec. at ¶14. Of course, the relevant point is that the section of the website in which the Notice of Final Deadline was posted is accessible to the public – there is no need for any password. *See id*. at ¶¶9, 15.

In addition to the 2018 mailing, the Settlement Facility also sent two additional notices to counsel for Korean Claimants. On March 13, 2019, the Settlement Facility sent a detailed letter to counsel for Korean Claimants by email and regular mail reminding him of the upcoming deadline. Smith-Mair Dec. at ¶12 and at Exhibit 2; Bearicks Dec. at ¶9 and at Exhibit 2. On April 30, 2019, the Settlement Facility sent yet another notice to counsel for Korean Claimants – by email and regular mail – to remind him again, on behalf of the Finance Committee,

of the upcoming final June 3, 2019 deadline that "applies to domestic and foreign claims including claims of Korean Claimants." Smith-Mair Dec. at Exhibit 3 and at ¶13. The April 30 letter also stated that Korean Claimants pending appeal "does not change the final deadline." *Id.*

Further, counsel for Korean Claimants admits that he subscribed to the CAC's newsletters, which advised of the final June 3, 2019 deadline, but apparently did not bother to read those newsletters: he states that "unfortunately," he "directed the emails for the CAC's newsletters to the garbage can." Reply at 10, PageID.27817.

Finally, and significantly, counsel for Korean Claimants admitted that he was aware of the June 3, 2019 deadline: in appeals filed with the SF-DCT before the June 3 deadline, counsel for Korean Claimants made clear that he was aware of the deadline by expressly referenced the approaching "final deadline of June 3, 2019." Smith-Mair Dec. at ¶16 and at Exhibit 4.

There is no credible basis for an argument that Korean Claimants, and counsel for Korean Claimants, did not have notice of the deadline.

It is also worth noting that counsel for Korean Claimants has been an active participant throughout the bankruptcy case and the implementation of the Plan. He has participated in numerous hearings and conferences. He has communicated

regularly with the SF-DCT. He has filed nine motions in this Court[13] and four appeals in the Court of Appeals. He is knowledgeable and active – there is no basis for any claim that he was simply unaware of the activities of the SF-DCT, the documents on the ECF system, or the procedures and timeline for filing claims.[14]

[13] To date, Korean Claimants have filed nine motions in this Court challenging the operation of the Settlement Facility or disputing terms of the Plan or orders of the district court. *See*: (i) Motion to Expedite; (ii) Motion for Extension; (iii) Motion for Vacating Decision of Settlement Facility Regarding Address Update Confirmation, ECF No. 1569 (Jan. 15, 2021); (iv) Motion for Premium Payments to Korean Claimants, ECF No. 1545 (July 6, 2020) ("Motion for Premium Payments"); (v) Motion for Cross-Motion for Entry of Order to Show Cause with Respect to the Finance Committee, ECF No. 1357 (Jan. 17, 2018) (challenging the Finance Committee's determination that the Plan does not permit them to agree to payment of a lump sum to Korean Claimants); (vi) Motion For Recognition and Enforcement of Mediation, ECF No. 1271 (Dec. 14, 2016) (asserting that the Finance Committee was obligated to issue payments for claims that had not been evaluated under the Plan mandated criteria) (vii) Motion for Re-Categorization of Korea, ECF No. 965 (Apr. 7, 2014) (disputing the time period selected by the Claims Administrator for recategorization of the Korean Claims to a Plan Class that will result in higher payments); (viii) Motion for Extension of Deadline of Class 7 Claimants, ECF No. 958 (Mar. 7, 2014) (disputing the deadline set in the Plan that defined eligible Class 7 claims); (ix) Motion for Reversal of Decision of SF-DCT Regarding Korean Claimants, ECF No. 810 (Sept. 26, 2011) (challenging the decision of the Settlement Facility regarding the reliability of certain settlement submissions of Korean Claimants).

[14] Mr. Kim had recognized the earlier deadline for submitting Explant claims, and did not dispute the fact that it was set forth in a Plan Document. *See* Smith-Mair Dec. at ¶19 and at Exhibit 5.

### D. THE SETTLEMENT FACILITY PROPERLY DENIED CLAIMS IN ACCORDANCE WITH THE PLAN AND CLOSING ORDER.

In the Motion to Expedite, the Korean Claimants assert that the Settlement Facility should not have denied their late claims while the Motion for Extension was pending. The Korean Claimants state that they filed 405 disease or expedited release claims on December 20, 2021 – more than 30 months after the final deadline of June 3, 2019. *See* Motion to Expedite at 1, PageID.28817. The Settlement Facility followed the requirements of the Plan and this Court's directives in Closing Order 1 to issue a denial decision to any claim that was either incomplete as of June 3, 2019 or was filed with a postmark after June 3, 2019. Closing Order 1, at ¶¶27, 29. The Settlement Facility was bound to abide by the Plan and the Order and issued denial letters for all claims filed with a postmark after June 3, 2019. *See* Smith-Mair Dec. at ¶17. But even if this Court were to find that the Settlement Facility should not have issued those denial letters, there is no harm to Korean Claimants. Were the Court to grant the Motion for Extension and allow the filing of claims more than two and a half years after the deadline, then the Settlement Facility would at that time address the review and disposition of those claims. The fact that the Settlement Facility issued denial decisions has no bearing whatsoever on the merits of the Motion for Extension or the Motion to Expedite.

## CONCLUSION

For the foregoing reasons, Dow Silicones Corporation, the Debtor's Representatives and the Claimants' Advisory Committee respectfully request that the Court deny the Motion for Extension and grant only that portion of the Motion to Expedite that seeks an expedited hearing and determination.

Dated: July 18, 2022

Respectfully submitted,

*/s/ Dianna L. Pendleton-Dominguez*
Dianna L. Pendleton-Dominguez
LAW OFFICE OF
DIANNA PENDLETON
401 N. Main Street
St. Marys, OH 45885
Telephone: (419) 394-0717
DPend440@aol.com
*Claimants' Advisory Committee*

*/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*

*/s/ Ernest H. Hornsby*
Ernest H. Hornsby
FARMER PRICE LLP
100 Adris Place
Dothan, AL 36303
Telephone: (334) 793-2424
Ernie@farmerprice.com

*Claimants' Advisory Committee*

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

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|---|---|---|
| **In re:** | § | **Case No. 00-CV-00005** |
| **SETTLEMENT FACILITY DOW CORNING TRUST** | § | **Hon. Denise Page Hood** |

## CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2022, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notification of such filing to all registered counsel in this case.

Dated: July 18, 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*