UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

RESPONSE OF DOW SILICONES CORPORATION, THE DEBTOR'S REPRESENTATIVES, THE FINANCE COMMITTEE AND THE CLAIMANTS' ADVISORY COMMITTEE TO KOREAN CLAIMANTS' MOTION TO REOPEN TIME TO APPEAL CLOSING ORDER 5

For the reasons set forth in the attached memorandum, Dow Silicones Corporation ("Dow Silicones"),[1] the Debtor's Representatives (the "DRs"), the Finance Committee ("FC"), and the Claimants' Advisory Committee ("CAC") oppose Korean Claimants' Motion for Reopening the Time to File Appeal Regarding Closing Order 5, ECF No. 1667 ("Motion to Reopen") and respectfully submit that the Motion to Reopen should be denied.

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

Dated: September 29, 2022

Respectfully submitted,

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

PROPOSED ORDER OF DOW SILICONES CORPORATION, THE DEBTOR'S REPRESENTATIVES, THE FINANCE COMMITEE AND THE CLAIMANTS' ADVISORY COMMITTEE DENYING KOREAN CLAIMANTS' MOTION TO REOPEN THE TIME TO FILE APPEAL REGARDING CLOSING ORDER 5

The Court has considered the 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, ECF No. 1667 ("Motion to Reopen") and the Court finds that the Motion to Reopen should be denied with prejudice.

ACCORDINGLY, it is hereby ORDERED that the Motion to Reopen is DENIED with prejudice.

DATED: _____

_____
DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

MEMORANDUM IN SUPPORT OF THE RESPONSE OF DOW SILICONES CORPORATION, THE DEBTOR'S REPRESENTATIVES, THE FINANCE COMMITEE AND THE CLAIMANTS' ADVISORY COMMITTEE TO KOREAN CLAIMANTS' MOTION TO REOPEN THE TIME TO FILE APPEAL REGARDING CLOSING ORDER 5

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

CONCISE STATEMENT OF ISSUES PRESENTED

Have the Korean Claimants demonstrated satisfaction of the conditions required for reopening the time to appeal Closing Order 5 under Fed. R. App. P. 4(a)(6)?

Respondents Answer: No.

Even if the Korean Claimants could demonstrate satisfaction of the conditions required for reopening the time to appeal Closing Order 5 under Fed. R. App. P. 4(a)(6), should the Court exercise its discretion to reopen the time to appeal in the circumstances presented?

Respondents Answer: No.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

- Dow Corning Amended Joint Plan of Reorganization
- The Settlement Facility and Fund Distribution Agreement
- Dow Corning Settlement Program and Claims Resolution Procedures, Annex A
- Order, *In re Settlement Facility Dow Corning Trust*, 22-1752, Doc. No. 32-1 (6th Cir. Sept. 14, 2022)
- Fed. R. App. P. 4(a)(6)
- *Kuhn v. Sulzer Orthopedics, Inc.*, 498 F.3d 365, 369 (6th Cir. 2007)

Dow Silicones Corporation ("Dow Silicones"), the Debtor's Representatives (the "DRs"), the Finance Committee (the "FC"), and the Claimants' Advisory Committee (the "CAC") (collectively, "Respondents") respectfully request that the Court deny the Motion to Reopen the Time to Appeal Regarding Closing Order 5, ECF No. 1667 ("Motion to Reopen") filed by the Korean Claimants ("Movants").

INTRODUCTION

The Motion to Reopen is an untimely effort to rectify the untimely filing of Movants' appeal of this Court's June 13, 2022 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*, ECF No. 1642 ("Closing Order 5"). A district court has discretion to grant or deny a motion to reopen, in defined, limited circumstances, none of which apply here. In fact, the United States Court of Appeals for the Sixth Circuit has already determined that the Korean Claimants can "no longer move to the district court to extend or reopen the time for appeal." Order, *In re Settlement Facility Dow Corning Trust*, 22-1752, Doc. No. 32-1, at 2 (6th Cir. Sept. 14, 2022) (Exhibit A) ("September 14 Order").

The Motion to Reopen—filed 94 days after Closing Order 5 was entered and served through the ECF system, 30 days after the Korean Claimants claim they received notice of Closing Order 5, 21 days after they filed an untimely notice of appeal, and one day after the Sixth Circuit found it was already too late to move to

reopen the time to file an appeal—is untimely, and further is barred by the Sixth Circuit's determination and should be denied.[1]

BACKGROUND

This Court is, of course, familiar with the relevant facts: The Dow Corning Amended Joint Plan of Reorganization ("Plan") (Exhibit B) 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

[1] We note the unusual procedural context here: the Motion to Reopen was filed after the notice of appeal of Closing Order 5 was filed. That appeal is currently in the briefing stage: the appellant's brief has been filed and the appellee brief is due on October 21, 2022. The Sixth Circuit stated in its order denying a stay of Closing Order 5 that the appeal is untimely and that the Korean Claimants could "no longer move to the district court to extend or reopen the time for appeal." The Sixth Circuit has not, however, dismissed the appeal. This procedural status raises a jurisdictional question. "'As a general rule, the district court loses jurisdiction over an action once a party files a notice of appeal, and jurisdiction transfers to the appellate court.'" *Hobbs v. County of Summit*, 552 F. App'x 517, 519 (6th Cir. 2014) (*quoting Lewis v. Alexander*, 987 F.2d 392, 394 (6th Cir.1993)). But, generally, the district court retains jurisdiction if the appeal is untimely, or the order appealed is a non-appealable order. *Lewis*, 987 F.2d at 394–95 (notwithstanding an appeal, the district court "retains jurisdiction to proceed with matters that are in aid of the appeal" and "'retains jurisdiction over an action when an 'appeal is untimely'") (citations omitted). Here, Respondents contend, and the Court of Appeals has noted, that the appeal is untimely. Arguably therefore, the district court retains jurisdiction to address the Motion to Reopen.

If this Motion to Reopen were *timely*, (and Respondents contend that it is not) this Court would retain jurisdiction under Fed. R. Civ. P. 62.1 to *deny* the Motion (although in such circumstances it could not *grant* the motion unless the Court of Appeals first remanded the case.) It follows that this Court should have jurisdiction to deny this untimely motion filed after an appeal was docketed.

Plan Documents governing operation and implementation of the Plan 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 C), the Dow Corning Settlement Program and Claims Resolution Procedures ("Annex A" to the SFA) (Exhibit D), 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 E).[2] 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 SFA (or the Litigation Facility Agreement, as applicable). The SFA 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.

The Settlement Facility is responsible for evaluating and processing claims for settlement compensation and must assure that claims meet the necessary criteria, that the supporting documentation is reliable, and that funds are distributed only to eligible claimants. SFA § 5.04(b). From the inception of the settlement program,

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

the settlement program guidelines and this Court have consistently confirmed the obligation of claimants and attorneys to maintain updated and current address information. *See* Closing Order 2, ECF No. 1482, PageID.24089 ("Claimants and attorneys are required to keep their address and contact information current with the SF-DCT."); Exhibit F, February 26, 2021 *Declaration of Ellen Bearicks Regarding the Motion for Vacating Decision of Settlement Facility Regarding Address Update/Verification* ("Bearicks Dec.") at ¶7 and at Exhs. 1-3 (CIG 9-14, 9-15, 10-8, 10-9); https://www.sfdct.com/_sfdct/index.cfm/how-to-file-a-claim-for-enefits/claimant-information-guide-cig-by-class (last accessed September 28, 2022) (Claimant Information Guides, which were published and made available before the Effective Date of the Plan stating that each claimant has an affirmative obligation to inform the Settlement Facility of any change of address).

Closing Order 5 was stipulated and agreed to by the CAC and the DRs and entered on the ECF docket on June 13, 2022. ECF No. 1642, PageID.28800. Closing Order 5 directed the Settlement Facility to close those claims submitted by individuals for whom the Settlement Facility could not verify a valid current address. While the Plan does not require the Settlement Facility to undertake efforts to locate claimants, Closing Order 5 directed the Settlement Facility to refrain from closing those claims for a period of 90 days following the posting of a list of such claimants, to give them a further opportunity to provide a valid address. *Id.*; *see also* Exhibit

G, September 28 2022 Declaration of Kimberly Smith-Mair ("September 28 Smith-Mair Declaration"), at ¶ 7 and Exh. 1 (Settlement Facility website homepage providing notice). Closing Order 5 provides that "[i]f a claimant responds on or before the end of that 90-day period, … the Settlement Facility will proceed to finalize processing or payment of the claim as appropriate. If the claimant does not respond on or before the end of the 90-day period, the claim shall be permanently closed." Closing Order 5 at PageID.28804.

As this Court determined in entering Closing Order 5, as well as earlier Closing Orders, confirming the claimants' current contact information is a necessary component of assuring that the Settlement Fund is properly distributed. 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 verified by issuing address verification letters to the claimants. *See* Bearicks Dec. at ¶¶26-27. The Settlement Facility then issues "award" letters to claimants when a claim is approved for payment. The award letter advises 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 withholds payment until the claimant is located. *See* Exhibit H, July 20, 2020

Declaration of Ann Phillips Regarding the Motion for Premium Payments to Korean Claimants ("Phillips Declaration"), at ¶¶11-18.

The Settlement Facility's experience demonstrates the wisdom of obtaining valid claimant addresses in advance of issuing payments. The Settlement Facility has reported that over 4,100 payment checks have not been cashed, primarily because the claimant could not be located. *See* September 28 Smith-Mair Declaration, at ¶9. The Settlement Facility has expended thousands of hours tracking these checks to determine their ultimate disposition and then incurred over $195,000 in banking costs to stop payment and record the status of such checks. *Id.* at ¶10.

The Korean Claimants, like all other claimants, must comply with the guidelines in the Plan and the procedures established by the District Court when submitting their claims. They are required, like all other claimants, to provide the necessary supporting information that will permit review, evaluation, and payment of the claims. Unfortunately, the record reflects a long history of information that is unreliable or has been determined to be false submitted by counsel Korean Claimants, demonstrating that the Settlement Facility would not be fulfilling its required role and function if it were to exempt the Korean Claimants from requirements set forth in the Court's Closing Orders. Indeed, in denying one of

many appeals filed by the Korean Claimants, the Sixth Circuit noted the unreliability Korean Claimants' submissions observing:

> Through Mr. Kim, the Korean Claimants submitted hundreds of claims that used the same type of evidence to prove that Dow was the manufacturer of their breast implants: an "affirmative statement" from their physicians… Under the plan documents, affirmative statements in general are disfavored, and are only permitted as proof of manufacturer if there are no medical records. But the number of Korean Claimants' claims relying on an affirmative statement was very high: over 94% of Mr. Kim's clients submitted affirmative statements as proof of manufacturer, higher than every other law firm that had submitted more than 100 claims. In other words, almost every Korean Claimant appeared to be unable to locate her medical or hospital records. There were other oddities as well. On some claims the date and facility listed for the procedure would be different on the affirmative statement than the date on registration forms. Correction fluid was used on many forms. Perhaps most troublingly, when questioned regarding these, and similar, documentation problems, Mr. Kim apparently sent the Settlement Facility medical documentation as proof, despite his representation that there were no medical records for these operations.

In re Settlement Facility Dow Corning Trust, 760 F. App'x. 406, 408 (6th Cir. 2019).

In a similar vein, the Claims Administrator's data shows that address information provided by counsel for Korean Claimants has been unreliable. The Claims Administrator has reported that the percentage of mail returned as undeliverable (meaning that the address is incorrect) to Korean Claimants far exceeds the percentage of mail that has been found "undeliverable" among other claimants. Phillips Dec. at ¶¶ 38-39. The Settlement Facility has also found that the

address information provided by counsel for the Korean Claimants is often not accurate. Bearicks Dec. at ¶34.

More recently, decisions of the Appeals Judge (designated under the Plan to hear administrative appeals) found significant issues regarding the reliability of substantive claim submissions made by counsel for Korean Claimants. These decisions are appended as exhibits (to be filed under seal) to the September 28, 2022 Smith-Mair Declaration. As the decisions contained in the exhibits demonstrate, the Appeals Judge determined that 98 claims were appropriately denied because they were based on altered or patently false documentation. In the majority of cases, the Appeals Judge found evidence of that affirmative statements of physicians submitted to establish Proof of Manufacturer ("POM") to be "unequivocally false evidencing intentional abuse and fraud." The Appeals Judge found that the submitted records showed evidence of alteration (where names and locations of surgery were covered up with correction fluid and new names were inserted) and contradictory records (where a submission identified a Dow Corning implant but other records for the same implant surgery identified a different manufacturer or showed a different location of surgery). The Appeals Judge also identified claims where the forms were signed by a physician who was not a physician at the time of the implant surgery. *See id.* at Exhibits 2-11.

The settlement program guidelines and this Court have required claimants and attorneys to maintain current address information since the beginning of the operations of the settlement program. *See* Bearicks Dec. at ¶7 and at Exhs. 1-3. The Settlement Facility has reported that *no other lawyers* have disputed the obligation of the Settlement Facility to assure correct address information for claimants. September 28, 2022 Smith-Mair Dec. at ¶8. Counsel for Korean Claimants is the only lawyer who disputes this necessary, and simple, requirement. Korean Claimants' objections to providing address information has resulted (to date) in five motions and two appeals.[3] Closing Order 5 (the subject of the most recent appeal) does not even *establish* any requirement—it simply implements the previous, long-standing and necessary policy of assuring valid claimant addresses and directs the Settlement Facility to close those claims that are not in compliance with this requirement.

The Korean Claimants filed the notice of appeal of Closing Order 5 73 days after it was entered. ECF No. 1656. That Appeal is clearly untimely. *See* September

[3] *See* Motion for Premium Payments to Korean Claimants (ECF No. 1545); Motion for Vacating Decision of Settlement Facility Regarding Address Update/ Confirmation (ECF No. 1569); Motion to Stay Court's Ruling Regarding Closing Order 5 (ECF No. 1658); Motion for Reopening the Time to File Appeal Regarding Closing Order 5 (ECF No. 1667); Motion to Set Aside Closing Order 5 Regarding Korean Claimants (ECF No. 1668); Exhibit I, *Korean Claimants v. Claimants' Advisory Committee, et al.,* No. 21-2665 (6th Cir.), Appellants' Brief, Dkt. 21-1, at 18-19 (challenging Closing Order 2 and address requirements); *In re Settlement Facility Dow Corning Trust,* No. 22-1752 (appeal of Closing Order 5).

14 Order at 2 (Korean Claimants are unlikely to succeed on merits because their appeal is not timely and "they can no longer move the district court to extend or reopen the time to appeal"). Notwithstanding the Sixth Circuit's statement, on September 15, 2022, 21 days after the notice of appeal and one day after the Sixth Circuit's order denying a stay, the Korean Claimants filed this Motion to Reopen. Counsel did not seek concurrence of the parties before filing the Motion to Reopen.

ARGUMENT

This Motion to Reopen is one in a series of motions through which the Korean Claimants seek to challenge this Court's Closing Order 5. Closing Order 5 was entered on June 13, 2022. On August 25, 2022, Korean Claimants filed a notice of appeal of Closing Order 5. On August 29, 2022, Korean Claimants filed a motion to stay Closing Order 5 in this Court. On September 1, 2022, Korean Claimants filed a motion to stay Closing Order 5 in the Sixth Circuit. On September 14, the Court of Appeals denied the stay concluding, *inter alia*, that the appeal is unlikely to succeed on the merits:

> 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.

September 14 Order at 2 (emphasis added). 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.[4]

Next, on September 15, 2022, the Korean Claimants filed this Motion to Reopen. And on September 17, 2022, the Korean Claimants filed a Motion to Set Aside Closing Order 5 Regarding Korean Claimants (ECF No. 1668).

The Motion to Reopen should be denied: the Korean Claimants have not satisfied any of the requirements necessary for this Court to exercise discretion to consider reopening the time for appeal under Fed. R. App. P. 4, and even were those requirements satisfied, this Court should exercise discretion to deny the Motion.

A. The Motion To Reopen Should De Denied Because Fed. R. App. P. 4(a)(6) Does Not Apply.

In its September 14 Order, the Sixth Circuit specifically found that the Korean Claimants "can no longer move the district court to extend or reopen the time to appeal." September 14 Order at 2. Notwithstanding that clear statement, which

[4] The Court also found that "none of the other discretionary factors cut in favor of a stay." *Id.*

should be determinative, Korean Claimants filed the Motion to Reopen the very next day.[5] For the reasons set forth below, the Motion to Reopen should be denied.

Fed. R. App. P. 4(a)(6) provides the District Court with the discretion to reopen the time to file an appeal only in very limited circumstances:

> The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> > (A) The court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;
> >
> > (B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and
> >
> > (C) the court finds that no party would be prejudiced.

[5] *See Pennebaker v. Rewerts*, Case No. 21-1216, 2021 WL 7237920, *3 (6th Cir., Sept. 10, 2021) (concluding prior Sixth Circuit order was law of the case where "Pennebaker claimed that he received notice of the district court's judgment on September 8, 2020, more than twenty-one days after its entry on July 27, 2020. Nevertheless, he filed his motion to reopen on October 21, 2020, which was more than fourteen days after he received notice of the district court's judgment, and this court concluded that his motion to reopen and/or extend was therefore untimely. 'Under the doctrine of law of the case, findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation.' … Because this court had already decided the issue, the district court lacked authority to extend the time for filing an appeal.").

Fed. R. App. P. 4(a)(6). *See also Last Minute Cuts v. Biddle*, Case No. 21-5557, 2022 WL 2061977 (6th Cir., Apr.1, 2022). None of these conditions has been satisfied.

1. Fed. R. App. P. 4(a)(6) Does Not Apply Because Counsel Cannot Demonstrate Lack Of Notice.

There is no dispute that Closing Order 5 was entered and placed on the ECF system on June 13 and thereby sent to counsel of record, including counsel for the Korean Claimants. *See* Exhibit J, September 12, 2022 Declaration of Deborah E. Greenspan ("Greenspan Declaration") at Exh. 1 (June 13, 2022 email of ECF Notice of Electronic Filing of Closing Order 5). The record also reflects that on June 24, 2022—11 days *after* Closing Order 5 was entered and served—counsel for the Korean Claimants emailed the court stating "My email address is changed from yhkimlaw@unitel.co.kr to yhkimlaw@naver.com *as of June 30, 2022*. The paid service provider (www.unitel.co.kr) is closing business." Greenspan Dec. at Exh. 2 (emphasis added). The record also shows that as of June 30, ECF notices were then sent to counsel for Korean Claimants at this new email address. *See* Greenspan Dec. at Exh. 3.

The Korean Claimants nevertheless argue that they did not receive notice of Closing Order 5 on June 13. Korean Claimants assert that the reason they did not receive notice on June 13 is because the email address with which counsel registered for the ECF system (as required by the rules) stopped working on May 31, 2022.

Motion to Reopen at PageID.30482. Counsel's unsworn assertion under these circumstances does not demonstrate lack of notice. First, this unsupported assertion contradicts the notice provided to the Court and counsel on June 24, 2022 – in which counsel for Korean Claimants stated that the email system registered with ECF would cease to be operative as of June 30, 2022. Greenspan Dec. at Exh. 2. Second, even if this new assertion is correct, the rules of this Court clearly provide that "[e]lectronic 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." *See* Electronic Filing Policies and Procedures, Eastern District of Michigan, Updated September 2022, R3.[6] *See also* 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). By his own admission, the counsel for Korean Claimants did not update his email address until sending a notice on June 24 that was to be effective on June 30 – a month after counsel now alleges that the original email address ceased to work. *See* Motion to Reopen at 2, PageID.30482 ("When Closing Order 5 was entered on June 13, 2022, the email address of Yeon-

[6] Rule 3(d) further states that "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. If the filing user has a pending case before the Court, the user must also promptly notify all parties in all cases." *Id.*

Ho Kim (yhkimlaw@unitel.co.kr) reported to the court was not operated. The Sever (www.unitel.co.kr) stopped working on May 31, 2022").

The first prong of the mandatory elements of Rule 4(a)(6) requires the Court to determine that the Movants did not receive the notice. The burden is on the Movant to demonstrate lack of receipt. *See generally Murray v. Stan's BBQ*, Case No. No. 2:06-cv-89, 2007 WL 2021936, at *3 (E.D. Tenn. July 10, 2007) (movant bears the burden of proving non-receipt of notice under Rule 4(a)(6)) (*citing Evans v. United States,* 165 F.3d 27, 1998 WL 598712, at *2 (6th Cir. 1998) (unpublished disposition)). The unequivocal record shows that notice was provided consistent with Fed. R. Civ. P. 77(d) and this Court's local rules. *See supra*. at 12-14. There is no evidence in the record indicating that the Court or clerk's office "learned" that the email notification was not received. *See* Federal Rule of Civil Procedure 5(b)(2)(E). The first notification of counsel's unsupported assertion that he did not receive the email notice was contained in Movants' notice of appeal filed on August 25, 2022. There is no record of any notification to the clerk's office. On this record, there is no basis for the Court to conclude that counsel did not receive notice pursuant to Fed. R. Civ. P. 77.

2. Fed. R. App. P. 4(a)(6) Does Not Apply Because The Motion To Reopen Was Filed More Than 14 Days After Counsel Admits Receiving Notice.

A motion to reopen the time to file an appeal can be granted only if filed "within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier." Fed. R. App. P. 4(a)(6)(B).[7] The Korean Claimants assert that their Motion to Reopen is timely because the 14-day period "is not applicable here because this Court did not serve a notice in accordance with Fed. R. Civ. P. 77(d))." This argument should be rejected.

First, the undisputed record shows that the Court served notice in compliance with Fed. R. Civ. P. 77 based on the registration information provided by counsel for Korean Claimants and under the local rules, that notice is valid and counsel therefore should be deemed to have received notice. The evidence does not support a contrary finding.

Even if the Court were to find that counsel did not receive formal notice on June 13, counsel cannot disavow having received notice as of the date counsel filed

[7] Fed. R. Civ. P. 77(d)(1) provides that the clerk is to serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear, and that any party also may serve notice of the entry as provided in Fed. R. Civ. P. 5(b). Fed. R. Civ. P. 77(d)(2) (Time to Appeal Not Affected by Lack of Notice) states: "Lack of notice of the entry does not affect the time for appeal or relieve--or authorize the court to relieve--a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure (4)(a)."

a notice of appeal. The Motion to Reopen was filed 21 days *after* counsel filed a late notice of appeal. Applying counsel's own admitted date of notice renders this Motion to Reopen untimely.

For these reasons, Movants do not and cannot meet the first two requirements of Rule 4(a)(6) and the motion must be denied. *See Fields v. Bergh,* Case No. 2:12-CV-12658, 2022 WL 1617625, *2 (E.D. Mich. May 23, 2022) (Hood, J.) (on limited remand, denying motion to extend time to appeal based on claim that petitioner did not personally receive notice of February 3 order where "Court records… indicate that a copy of the Court's order was electronically served on his attorney of record on that date" and further noting that "Petitioner admits that he learned of the Court's decision on March 23, 2022 upon researching his case in the prison law library, yet he did not submit his notice of appeal and his motion for extension of time to prison officials for mailing until 19 days later, on April 11, 2022, more than 14 days after he received notice of the Court's order"); *Price v. St. Louis Correctional Facility,* Case No. 21-cv-11260, 2021 WL 5085759 (E.D. Mich. Nov. 2, 2021) (plaintiff filed untimely notice of appeal on August 26, but court noted that "'merely filing a notice of appeal does not amount to a motion for more time to file an appeal'" and it was not until October 22 that plaintiff filed a request with the district court asking for an extension of time, and that "even if the Court generously construes the motion as one to reopen the time for filing a notice of appeal," it could still not be granted

because it was filed more than 14 days after filing of notice of appeal, at which time Plaintiff's own filings showed awareness of date of filing of opinion and judgment).

3. Reopening The Time To Appeal Would Prejudice The Parties And Other Claimants.

In denying the motion to stay Closing Order 5, the Sixth Circuit found that a stay of Closing Order 5 would cause harm "by disrupting trust operations." September 14 Order at 4. Closing Order 5 is one in a series of orders that this Court has issued 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. Reopening the time to appeal Closing Order 5 would result in uncertainty and would halt ongoing closure activities, disrupt trust operations, cause delay, and increase costs.

A condition for exercising discretion to order relief under Fed. R. App. P. (4)(a)(6) is that the court "finds that no party would be prejudiced." In this case, not only would the parties and other claimants be prejudiced, but the Court would not be able to fulfil its obligations under the Plan. For this reason alone, the Motion to Reopen must be denied.

B. Even if Korean Claimants Could Satisfy the Three Requirements For Invoking of Fed. R. App. P. 4(a)(6), the Facts and Law Strongly Counsel Against the Court Exercising its Discretion to Condone the Conduct of Counsel for Korean Claimants.

Even assuming, *arguendo*, that the Korean Claimants could satisfy all three conditions required to invoke Fed. R. App. P. 4(a)(6), "[t]he Rule's permissive language, which states that a district court 'may reopen the time to file an appeal' if its conditions are satisfied, means that the district court retains discretion to deny a Fed. R. App. P. 4(a)(6) motion even where a movant has complied with all three express conditions." *Kuhn v. Sulzer Orthopedics, Inc.,* 498 F.3d 365, 369 (6th Cir. 2007). Under the facts herein, the caselaw makes clear that the Court should deny the motion even if it were to find the conditions of Fed. R. App. P. 4(a)(6) are satisfied.

First, counsel for the Korean Claimants had an obligation to keep apprised of the docket, particularly if, as claimed, he was not receiving emails. In *Kuhn*, the Sixth Circuit affirmed the denial of a motion to reopen the time to appeal where the district court concluded that counsel's failure to learn of the court's order was "largely of his own making." *Id.* at 368. In *Kuhn,* appellees did not dispute the satisfaction of the underlying requirements of Fed. R. App. P. 4(a)(6), but the Sixth Circuit held that the district court properly exercised its discretion in denying the motion where counsel failed to monitor the docket:

> An interpretation of Rule 4(a)(6) that allowed parties to ignore entirely the electronic information at their fingertips would severely undermine the benefits for both courts and litigants fostered by the CM/ECF system, including ease and speed of access to all the filings in a case. In addition, such an interpretation would defy common sense: It might be one thing not to penalize a party who did not learn about the issuance of an appealable order in the bygone days of hiring " 'runners' to physically go to the courthouse to check the docket," but here all Harris had to do was register his email address with the district court's CM/ECF system to receive the court's orders. Id. Failing that, Harris simply had to scan periodically the electronic docket for recent activity.

Id. at 371.[8] *See also Yeschick v. Mineta*, 675 F.3d 622, 630 (6th Cir.2012) ("parties continue to have a duty to monitor the court's docket.") (citing *Kuhn*). In *Yeschick*, the attorney failed to monitor the docket and the court found counsel could not establish 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 ...

Id. at 631.[9]

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[8] In *Kuhn*, counsel had not registered with the ECF system. In this case, Korean Claimants cannot ignore an obligation to monitor the docket—particularly where they now, belatedly, claim their email service ceased operations at the end of May.

[9] *See also Clark v. Hoffner*, Case No. 2:12–CV–13237, 2015 WL 1637303, at *2 (E.D. Mich. Apr. 13, 2015) ("even if this Court had the authority to reopen the time for Petitioner to appeal, it would decline to do so because Petitioner "'failed to fulfill

Second, under the facts presented herein—where counsel *admits* to receiving notice more than 14 days before filing the motion to reopen[10]—the Court should deny the requested relief. In *In re WorldCom, Inc.,* 708 F.3d 327 (2d Cir. 2013), the Second Circuit held that the district court abused its discretion in reopening the time to appeal. In that case, counsel for CNI failed to update his email address in the ECF system as required by the local rules and as a result the order and judgment at issue were sent to counsel's old email address. Forty-six days after entry of the judgment and fifty-six days after entry of the decision and order, counsel filed a noticed of appeal. On appeal of the district court's grant of a motion to reopen the time to appeal, the Second Circuit held that the district court erred in exercising discretion to grant relief under the facts presented, concluding that counsel was at fault in failing to update the address for the ECF system and further found that counsel's

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his duty to diligently monitor'" this Court's docket") (citation omitted); *Keybank Nat. Ass'n v. Lake Villa Oxford Associates,* Case No. No. 12–13611, 2013 WL 466197, at *3 (E.D. Mich. 2013) (denying Rule 60 motion and stating "'parties have an affirmative duty to monitor the dockets' in order to keep themselves apprised of case developments—including 'the entry of orders they may wish to appeal.'"") (quoting *Kuhn*); *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 obligation to monitor all developments in an ongoing case and cannot rely on the clerk's office to fulfill this responsibility for them.").

[10] In the interim, rather than file a Motion to Reopen, the Korean Claimants filed an untimely notice of appeal, two motions to stay, a reply to the Sixth Circuit motion to stay, and a motion to dismiss the motion to stay filed in this Court.

failure to promptly file the motion to reopen—even after becoming aware of the judgment, but instead filing an untimely notice of appeal—warranted denial of the motion:

> We observe also that CNI's actions even once it became aware of the judgment—at the latest, on November 9, 2010—do not support its claim to relief. CNI's only action at that time was to file a clearly untimely notice of appeal … *A litigant who never receives Civil Rule 77(d) notice but becomes fully aware of the judgment a month after entry could not be entitled to a favorable exercise of discretion* if without justification he fails to move for Rule 4(a)(6) relief until just before the 180–day deadline.

Id. at 340 n.68 (emphasis added, citations omitted). *See also Two-Way Media LLC v. AT & T, Inc.*, 782 F.3d 1311, 1319-20 (Fed. Cir. 2015) ("putting aside the question of whether the prerequisites to application of Rule 4(a)(6) were satisfied, we find no abuse of discretion in the denial of AT & T's motion under that Rule" where district court "refused to trigger the relief contemplated in Rule 4(a)(6) in circumstances where a party actually has received a final judgment (regardless of whether the entry of that judgment is accurately described), but fails to monitor the electronic docket for a compliant entry of the judgment. … we find no abuse of discretion in a district court's decision to impose an obligation to monitor an electronic docket for entry of an order which a party and its counsel already have in their possession and know that the clerk at least attempted to enter.").

Third, counsel's contradictory assertions and failure to notify the Court timely strongly counsel against granting the Motion to Reopen. Counsel has provided no explanation for why—if counsel's email was not accessible after June 1 and he had not been receiving emails since that time—he did not advise the Court earlier or why counsel instead advised the Court that the change in email would be effective June 30. (Presumably counsel received notice from the email provider of the impending cessation of services. Respondents note an article found in an online search dated in March 2022, publicizing the impending cancellation of email service by the counsel's previous provider. *See* Exhibit K, https://www.tellerreport.com/business/2022-03-06--korea-s-only-pc-communication--unitel-ends-26-year-history-at-the-end-of-june.BydJDmFbZ5.html (last accessed September 28, 2022)). There is no excuse for this failure. Counsel has an ongoing obligation to maintain an active email PACER account and the failure to provide timely notice to the Court and parties is a violation of this Court's rules subject to sanctions. *See* Electronic Filing Policies and Procedures R.3(d); E. D. Mich. LR 11.2.

In these circumstances, even were the Court were to find the technical conditions required under Fed. R. App. P. 4(a)(6) were satisfied, there is no basis for the Court to exercise its discretion to grant the Motion to Reopen.

CONCLUSION

For the foregoing reasons, Dow Silicones Corporation, the Debtor's Representatives, the Finance Committee, and the Claimants' Advisory Committee respectfully request that the Court deny the Motion to Reopen.

Dated: September 29, 2022

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 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: September 29, 2022

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