UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	§	**Case No. 00-CV-00005**
	§	**(Settlement Facility Matters)**
SETTLEMENT FACILITY DOW CORNING TRUST	§	
	§	**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 STAY THE COURT'S MEMORANDUM OPINION REGARDING TWO ORDERS TO SHOW CAUSE AGAINST ATTORNEY YEON-HO KIM AND VARIOUS MOTIONS FILED BY THE KOREAN CLAIMANTS

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 to Stay the Court's Memorandum Opinion Regarding Two Orders To Show Cause Against Attorney Yeon-Ho Kim and Various Motions Filed By The Korean Claimants, ECF No. 1660 ("Motion to Stay Order Denying Motion for Extension") and respectfully submit that the Motion to Stay Order Denying Motion for Extensions 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 13 2022

Respectfully submitted,

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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**

PROPOSED ORDER OF DOW SILICONES CORPORATION, THE DEBTOR'S REPRESENTATIVES, THE FINANCE COMMITEE AND THE CLAIMANTS' ADVISORY COMMITTEE DENYING KOREAN CLAIMANTS' MOTION TO STAY THE COURT'S MEMORANDUM OPINION REGARDING TWO ORDERS TO SHOW CAUSE AGAINST ATTORNEY YEON-HO KIM AND VARIOUS MOTIONS FILED BY THE KOREAN CLAIMANTS

The Court has considered the responses of Dow Silicones Corporation, the Debtor's Representatives, the Finance Committee, and the Claimants' Advisory Committee to Korean Claimants' Motion to Stay the Court's Memorandum Opinion Regarding Two Orders to Show Cause Against Attorney Yeon-Ho Kim and Various Motions Filed By The Korean Claimants, ECF No. 1660 ("Motion to Stay") and the Court finds that the Motion to Stay should be denied with prejudice.

ACCORDINGLY, it is hereby ORDERED that the Motion for Stay is DENIED with prejudice.

DATED: _____

_____
DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	§	**Case No. 00-CV-00005**
	§	**(Settlement Facility Matters)**
SETTLEMENT FACILITY DOW CORNING TRUST	§	
	§	**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 STAY THE COURT'S MEMORANDUM OPINION REGARDING TWO ORDERS TO SHOW CAUSE AGAINST ATTORNEY YEON-HO KIM AND VARIOUS MOTIONS FILED BY THE KOREAN CLAIMANTS

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Should the Court stay its August 12 *Memorandum Opinion and Order Regarding Two Orders To Show Causes Against Attorney Yeon-Ho Kim and Various Motions Filed By The Korean Claimants* with respect to the Court's Order denying the Korean Claimants' Motion for Extension of Deadline for Filing, where Movants have no likelihood of success on their appeal; Movants will suffer no irreparable harm absent a stay; issuance of a stay would cause harm to the Settlement Facility, other claimants and Dow Silicones; and a stay would not serve the public interest in implementing the Plan.

   Respondents Answer: No.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

- *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)
- *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 395 (1993)
- Fed. R. App. P. 8
- Dow Corning Amended Joint Plan of Reorganization
- The Settlement Facility and Fund Distribution Agreement
- Dow Corning Settlement Program and Claims Resolution Procedures, Annex A

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 Stay the Court's Memorandum Opinion Regarding Two Orders To Show Cause Against Attorney Yeon-Ho Km and Various Motions Filed By The Korean Claimants, ECF No. 1660 ("Motion to Stay") filed by the Korean Claimants ("Movants").

INTRODUCTION

The Motion to Stay asks this Court to stay its August 12 , 2022 Memorandum Opinion and Order Regarding Two Orders to Show Causes against Attorney Yeon-Ho Kim and Various Motions Filed by the Korean Claimants, ECF No. 1652 ("August 12 Order") pending appeal to the United States Court of Appeals for the Sixth Circuit. The Motion to Stay applies "only with respect to the Court's Order regarding the Korean Claimants' Motion for Extension of Deadline for Filing Claim (ECF No.1586)." Motion to Stay at n.1, PageID.29451.

Korean Claimants' Motion for Extension of Deadline For Filing Claim ("Motion for Extension") 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).[1] The Motion for Extension asserted that some 400 Korean claimants were unable to file their claims because of that deadline. 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. The Korean Claimants filed a reply and, subsequently, a Motion for Expedited Hearing and Relief, ECF No. 1644 ("Motion to Expedite"). Dow Silicones, the DRs, and the CAC filed a joint response to the Motion to Expedite and the Finance Committee filed a joinder to that response.

On August 12, this Court denied the Motion for Extension. The Korean Claimants filed a timely appeal of that order and then filed the Motion to Stay.

The Motion for Stay should be denied because Korean Claimants have not established any of the factors necessary to justify a stay and a stay in fact would be detrimental to the Settlement Facility, the Debtor, and to other claimants. Most importantly, there is no basis to conclude that the Korean Claimants are likely to succeed on the merits of their appeal. The issue on appeal challenges the final deadline for submission of claims for compensation under the Plan's settlement program – a deadline that has been embedded in the Plan since it was submitted to

[1] Unless otherwise defined, capitalized terms used herein shall have the meaning provided in the Plan, 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).

the Bankruptcy Court for confirmation over 20 years ago. Since the Korean Claimants failed to file their claims by that deadline, and those claims have been denied as "late", it is unclear what a stay would even accomplish. A stay to preserve the status quo would simply mean that nothing would happen and the claims would maintain their status as denied. If the Korean Claimants seek to obtain some sort of affirmative injunctive relief – such as an order to process the claims at issue pending appeal – such an order would be detrimental to the Settlement Facility and the settlement program. It would delay the closure of the Settlement Facility by well over a year and would generate significant costs at the expense of Dow Silicones. In either event, the Motion for Stay should be denied.

BACKGROUND

The Plan specifies the terms of the treatment of all classes of creditors and the means for implementing the Plan. The Settlement Facility Agreement along with Annex A to the Settlement Facility Agreement, which together contain the criteria and procedures for the submission and evaluation of Settling Personal Injury Claims, specify deadlines for the submission of claims. The deadline for submitting settlement claims for disease or expedited payments is 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* 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 "July 18 Smith-Mair Dec.") (Exhibit F), at ¶ 7.

Nearly two years *after* the Plan-mandated June 3, 2019 deadline, the Korean Claimants filed the Motion for Extension. The Motion for Extension erroneously asserted that the deadline was not mandated by the Plan and 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* Motion for Extension at 7-8, PageID.27071-72; Motion to Expedite at 1, PageID.28858. 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 prescribes

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, which directs the Settlement Facility to deny claims filed after June 3, 2019, is invalid;[2] (iii) the 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,[3] and (iv) the Korean Claimants wrongly

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[2] The 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.

[3] Closing Order 1 was stipulated and agreed to by the two parties—the CAC and the DRs—with express authority under 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. 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, the Korean Claimants could have sought reconsideration of the Order 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, PageID.27398-99 ("Closing Order 1 is not

assert that they lost the opportunity to file claims. *See* Joint Response at 8-14, PageID.27398-27404. The Finance Committee filed a joinder to the Joint Response on February 17, 2021 (ECF No. 1593).

The 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 ("Reply"). In that Reply, the 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, the Korean Claimants contend, the deadline may be modified. The Korean Claimants further argued 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 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

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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.").

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[4] (more than two and a half years after the June 3, 2019 deadline) and that on March 10, 2022, the Settlement Facility denied the claims because they were submitted late. Motion to Expedite at 1-2, PageID.28817-18. The Korean Claimants also asserted 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 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 H). 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.

[4] The claims were actually sent to the SF-DCT on December 29, 2021, but they were dated December 20, 2021. *See* Exhibit F, July 18 Smith-Mair Dec. at ¶17.

On July 18, 2022, Dow Silicones, the DRs, and the CAC filed the Response of Dow Silicones Corporation, the Debtor's Representatives, and the Claimants' Advisory Committee to Motion for Expedited Hearing and Relief, ECF No. 1645 ("Joint Response to Motion to Expedite") (Exhibit I). The Joint Response to Motion to Expedite did not oppose the request to expedite the determination of the Motion for Extension but reiterated the reasons the Motion for Extension must be denied, including, in response to the new argument related to the Order on Late Claimants, because 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. Joint Response to Motion to Expedite at 8-24, PageID.28874-28890. The Finance Committee filed a joinder. ECF No. 1646. On July 20, 2022, the Korean Claimants filed a Reply to the Response of Dow Silicones Corporation, the Debtor's Representatives, and the Claimants' Advisory Committee to motion for Expedited Hearing and Relief, ECF No. 1647.

On August 12, 2022, this Court issued its August 12 Order, which, *inter alia*, denied the Motion for Extension. The August 12 Order found that "[g]enerally, the provisions of a confirmed plan bind the debtor and any creditor. 11 U.S.C. § 1141(a). Section 1127(b) of the Bankruptcy Code is the sole means for modification of a confirmed plan…" " *Id.* at 15, PageID.29363. The Court held:

> The Court has no authority to extend any deadlines set forth under the Plan and agreed to by Dow Corning and the CAC. As noted above, Dow Corning and the CAC may jointly amend or modify the Plan, upon order of the Court. (Plan, § 11.4) There is no provision under the Plan or the SFA which allows the Court to extend the deadlines without the agreement of Dow Corning and the CAC. The final deadline to submit disease claims was established when the Plan was agreed to by the parties, which became effective on June 1, 2004. Closing Order 1, entered in 2018, did not change the final disease claim deadline. The Korean Claimants' Motion for Extension of Deadline for Filing Claim must be denied.

Id. at 15-16, PageID.29363-64.

On August 15, 2022, the Korean Claimants filed a Notice of Appeal to Memorandum and Order Regarding Two Orders to Show Causes Against Attorney Yeon-Ho Kim and Various Motions filed by the Korean Claimants, ECF No. 1654. On August 30, 2022, the Korean Claimants filed the Motion to Stay, ECF No. 1660.

ARGUMENT

The Korean Claimants Have Not Established Any Of The Factors That Would Warrant A Stay.

In determining whether a stay should be granted, the court considers "the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). These four factors are: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public

interest in granting the stay." *DV Diamond Club of Flint, LLC v. Small Business Admin.*, 960 F.3d 743, 746 (6th Cir. 2020) (quoting *Griepentrog*, 945 F.2d at 153); *see also Order Denying the Korean Claimants' Motion to Stay the Court's Ruling Regarding the Finance Committee's Motion for Authorization to Make Second Priority Payments, the Korean Claimants' Motion for Premium Payments, and the Korean Claimants' Motion for Order Vacating Decision of the Settlement Facility Regarding Address Update/Confirmation*, ECF No. 1651 (Aug. 12, 2022) ("Order Denying Korean Claimants' Motion to Stay Rulings on Second Priority Payments and Motion for Vacating") (same). The party seeking the stay must demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted. *Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002) (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)).

The Korean Claimants must articulate the specific reasons why the Order at issue is likely to be reversed. *See Detroit Free Press, Inc v. Ashcroft,* No. 02-1437, 2002 WL 1332836, at *1 (6th Cir. Apr. 18, 2002) ("a party seeking a stay must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal") (citing *Griepentrog*, 945 F.2d at 153). The Korean Claimants have not done so.

A. Korean Claimants Are Not Likely To Succeed On Appeal Because The Plan Bars Their Request.

The Korean Claimants are not likely to succeed on their appeal of the August 12 Order for the simple and dispositive reason that the Plan established the claims filing deadline and any modification of the deadline would violate the terms of the Plan and the Bankruptcy Code. Korean Claimants ignore this dispositive reason in their Motion to Stay, instead arguing that they can demonstrate "excusable neglect" for failing to timely file. These arguments are entirely devoid of merit and cannot provide a basis to extend the deadline.

1. The Korean Claimants Are Not Likely To Succeed On The Merits Because The Court Cannot Modify The Plan-Mandated Claim Filing Deadline.

As the August 12 Order correctly made clear, the final deadline to file claims was established by the Plan, and the Court has no authority to extend the deadline under the Plan or Bankruptcy Code. *See* August 12 Order at 15-16, PageID 29363-29364. 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:

> ***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 September 12, 2022) (Exhibit J). The Korean Claimants do not – and cannot – dispute this controlling point and they thus cannot demonstrate a likelihood of success on appeal.

2. The Order On Late Claims And The "Excusable Neglect" Standard Asserted By Korean Claimants Do Not Apply and Cannot Be Used To Modify The Plan.

In the Motion to Expedite, Korean Claimants contended that the 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, PageID.28818 ("[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"). The 2007 Agreed Order 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"); *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)).

The Korean Claimants assert that they are likely to prevail in their appeal because the excusable neglect standard would permit their late filings. *See* Motion to Stay at 2, PageID.29451 ("The issue is whether the Korean Claimants can prove the 'excusable neglect' standard."). This argument is unavailing. First, the excusable neglect standard does not even apply here, where Korean Claimants seek to avoid a clear requirement of the Plan. Second, the plain facts make clear that even if excusable neglect were applicable here, Korean Claimants cannot satisfy any of the four "*Pioneer*" requirements for a finding of excusable neglect.

1. Danger of Prejudice to Debtor. There clearly is prejudice to both the Debtor and to other 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 increase funding required to pay claims and administrative costs and thus would increase the funding obligations of Dow Silicones. To allow these 400 late claims 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* Exhibit F, July 18 Smith-Mair Dec. at ¶18).

2. Length of Delay. The length of the delay is extreme. The Korean Claimants knew of the deadline more than 15 years before it occurred and received multiple reminder notices. Yet they did not file their claims until two and a half years after that deadline – after the Settlement Facility had completed their review of timely filed claims. The addition of 400 new claims for processing would extend the operations of the Settlement Facility by more than a year – likely two years.

3. Delay was not outside the control of the Korean Claimants. 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. Movants' various excuses cannot alter the fact that they could have filed but chose not to file their claims on time.

4. The Korean Claimants did not act in good faith. The circumstances here do not support a conclusion that the Korean Claimants acted in good faith. The only justification the Korean Claimants assert in their Motion to Stay is that COVID-19 affected their ability to file. This assertion – contradictory to all of the earlier rationales provided by the Korean Claimants as to why they should be excused for filing two and half years

late – has no basis. The claims filing deadline mandated by the Plan was June 3, 2019 – well before the onset of the COVID-19 pandemic.

For all these reasons, any argument that the Korean Claimants' late claims should be allowed based on the excusable neglect standard is without merit.

B. There is No Irreparable Harm to Korean Claimants.

To support a stay pending appeal, the Movant must show irreparable harm. *See State of Ohio v. Becerra*, No. 21-4235, 2022 WL 413680, at *2 (6th Cir. Feb. 8, 2022) ("'[E]ven the strongest showing' on the other factors cannot justify a preliminary injunction if there is no 'imminent and irreparable injury.'") (quoting *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 391 (6th Cir. 2020), quoting *D.T. v. Sumner Cnty. Schools*, 942 F.3d 324, 326-27 (6th Cir. 2019)). That injury "'must be both certain and immediate,' not 'speculative or theoretical.'" *D.T.*, 942 F.3d at 927 (quoting *Griepentrog*, 945 F.2d at 154). Additionally, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Becerra,* 2022 WL 413680, at *2 (quoting *Griepentrog*, 945 F.2d at 154, quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)).

The Korean Claimants assert that the SF-DCT "will close in June 2023" and "[i]t is not certain that the Appellate Court would rule on the Korean Claimants' appeal (Case No. 22-1750) until then." Motion to Stay at 5, PageID.29454. This

assertion is simply wrong. There is no termination order and there is no basis for the statement that the Settlement Facility will close in June 2023. In fact, the Settlement Facility will continue operations until it completes the resolution of all pending claims (including claims subject to probate, claims on appeal, and claims that continue to cure deficiencies) and will at that point terminate as provided in the Plan. This point is not expected to be reached until late 2023 or early 2024. *See* Exhibit K, September 6, 2022 Declaration of Kimberly Smith-Mair Regarding Motion to Stay, filed in Case No. 22-1753 (6th Cir. Sept. 6, 2022), Doc 22-2 ("September 6 Smith-Mair Declaration"), at ¶ 10.

C. Issuance of a Stay Would Harm The Settlement Facility, Other Claimants, and Dow Silicones.

The Korean Claimants assert that "other Claimants will not be harmed" by the issuance of a stay because "the Claims for all of Claimants have been filed and counted in full" and other claimants "were paid almost in full." Motion to Stay at 6, PageID.29455. Issuance of a stay, however, would have profound effects on the Settlement Facility and other claimants. If a stay were to authorize the processing of the 400 late claims at issue here, the Settlement Facility (and in turn Dow Silicones) would incur significant costs that could not be recovered (unless, perhaps, the Korean Claimants were required to post a substantial bond in connection with a stay). Further, a stay could generate uncertainty among claimants, particularly others who missed the deadline. It would create further confusion among claimants

who, having recognized that they missed the deadline, did not file claims. In fact, any action that could be interpreted as signaling a potential deadline extension could well generate additional claim filings. A stay of the August 12 Order would leave lingering uncertainty as what claims could still be filed, what claims need to be reviewed, and what claims ultimately may need to be paid, which could then affect certain prior determinations regarding Second Priority Payments. In short, it would put the Settlement Facility in a state of indefinite limbo requiring it to maintain staff and incur excess costs for an unknown period.

D. A Stay Would Not Serve the Public Interest.

The Korean Claimants assert that the public interest will be served by a stay because they "met the Deadlines from 1997" and the "Plan should be implemented so that the creditors who had participated in the Dow Corning Reorganization plan and had followed every instruction requested by the Debtor for reorganization should be somehow paid from the SF-DCT." Motion to Stay at 6, PageID.29455. To the contrary, the public interest is served by implementing the Plan as written and confirmed – almost 20 years ago – and heeding the deadline that expired more than two and half years before Korean Claimants filed their claims. The Korean Claimants had ample time to submit their claims. Staying the completion of Settlement Facility activities pending the appeal – which has no meaningful chance of success – would not serve the public interest. This factor weighs strongly against

a stay. *See* Order Denying Korean Claimants' Motion to Stay Rulings on Second Priority Payments and Motion for Vacating, ECF No. 1651 ("The public has a strong interest in implementing a bankruptcy plan. This factor does not weigh in the Korean Claimants' favor").

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 for Stay.

Dated: September 13, 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 13, 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 13, 2022

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