IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOTHERN DIVISION

IN RE:	§	CASE NO: 00-CV-00005-DT
	§	(Settlement Facility Matters)
DOW CORNING CORPORATION	§	
	§	
Reorganized Debtor	§	
	§	
	§	Hon. Judge Denise Page Hood

REPLY TORESPONSE OF DOW CORNING CORPORATION, THE DEBTOR'S REPRESENTATIVES, THE FINANCE COMMITTEE AND THE CLAIMANTS' ADVISORY COMMITTEE TO KOREAN CLAIMANTS' MOTION TO SET ASIDE CLOSING ORDER 5

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Dow Corning Corporation, the Debtor's Representatives, the Finance Committee and the Claimants' Advisory Committee (hereinafter referred to as "Dow Corning Corporation" collectively) have filed the Response. The Korean Claimants file this Reply to the Response.

To simplify the arguments, the Korean Claimants assert point-to-point in accordance with titles in the Response.

I. Reply to Introduction and Background

Dow Corning Corporation asserts in the Introduction of the Response that movants have not satisfied any of the requirements for relief under Rule 60(b), an alleged lack of notice does not constitute excusable neglect and Closing Order 5 was properly entered as a stipulated order under the Court's authority consistent with the Plan, and the Motion to Set Aside is a thinly disguised effort to circumvent the requirements of Fed.R.App.P.4(a)(5) and should be denied. To the contrary, the 1,400 Korean Claimants affected by Closing Order 5 satisfied the requirements of relief. The Motion to Set Aside is different from the Motion to Reopen Time to File Appeal pending this Court. The basis for the two Motions is different and the requests to this Court are different. Dow Corning Corporation assumed that because the Korean Claimants filed the Motion to Set Aside two days after the Sixth Circuit explained in the Motion for Stay Closing Order 5 that the Korean Claimants could no longer move the district court to extend or reopen the time for appeal and the Korean Claimants filed Motion to Set Aside one day after the Korean Claimants filed the Motion to Reopen Time to File Appeal, this Motion to Set Aside must be a disguise to circumvent R.App.P.4(a)(5) and (6). This kind of assumption has no founding except Dow Corning Corporation's agitating intention that the Korean Claimants must comply with Closing Order 5 to close the Settlement Facility as its schedule.

Dow Corning Corporation asserts in the Background (*See* the Response pages 6-7),

““From the inception, 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 (“Claimants and attorneys are required to keep their address and contact information current with the SF-DCT.”) …. (Claimant Information Guides, 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).””

This part of Dow Corning Corporation’s assertions is a dispute between the Korean Claimants and Dow Corning Corporation but Dow Corning Corporation interprets as it wishes. First of all, the above assertion of Dow Corning Corporation contradicts its own admission, “The Settlement Facility’s experience demonstrated the **wisdom** of obtaining valid claimant addresses in advance of issuing payments---particularly in the context of a settlement program in operation for almost 20 years.” If from the inception the settlement program guidelines have consistently confirmed the obligation of claimants and attorneys to maintain updated and current address information, Dow Corning Corporation should not have called it “wisdom.”[1]The reason that Dow Corning Corporation asserts that the Settlement Facility experience demonstrated the wisdom regarding address update/confirmation is because it was not prescribed in the Plan but was invented by the Settlement Facility during its operation after the effective date of the Plan so that Dow Corning Corporation used the requirement and saved money since the 12,600 claimants applied by Closing Order 5 have gone away from the list of prospective Claimants who should be paid. A question arises from this point as to why this Court issued Closing Order 5 as well as Closing Order 2 regarding address update/confirmation. This question must be resolved so that the Korean Claimants have a justifiable founding to request and file this Motion to Set Aside. Second, contrary to

[1]Indeed, it is the wisdom of Dow Corning Corporation because the requirement of address update/confirmation enabled the Settlement Facility not to send checks to the attorneys for claimants including counsel for the Korean Claimants.

the Dow Corning Corporation's assertion there was no guideline as to address update/confirmation applied to claimants and attorneys from the inception of the settlement program. Dow Corning Corporation points out Claimant Information Guides before the Effective Date of the Plan. However, Claimant Information Guides just urged the claimants who filed a claim form in 1997-2003 to notify if they changed address after filing the claim form. It was not just as Dow Corning Corporation asserts, "the obligation of claimants and attorneys to maintain updated and current address information."[2]

Dow Corning Corporation further asserts, "This process alerts the represented claimant to check with their counsel to obtain their payment. If the verification mailing to the claimant is returned as undeliverable or does not generate a response then the Settlement Facility may not issue the payment." Because the Settlement Facility *may* not issue the payment, the Settlement Facility has discretion to issue the payment even if the Korean Claimants did not update their current address.[3] Dow Corning Corporation now admits that the Settlement Facility has a policing power on the relationship of claimants and attorneys regarding the payment. Policing the attorneys was not authorized by the Plan. It is also against the practice of each country. Counsel for the Korean Claimants can put the fund of claimants on local court's bond after deducting the attorney fees from check of payment. The Claimant can claim her fund to the court which will release the fund with interest statutorily incurred. In the name of the Korean Claimants' address update/confirmation, Dow Corning Corporation should not hold the payments for the Korean Claimants.

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[2]In addition, the way for updating and confirming claimants' address by Dow Corning Corporation, so to speak, was not the US Postal Service that the Settlement Facility exclusively used against the request of counsel for the Korean Claimants but a variety of ways of mail delivery service including domestic mailing system of foreign countries.

[3]Because the Settlement Facility may not issue the payment, the Settlement Facility has discretion to issue the payment even to the Korean Claimants who did not update their current address. But the Settlement Facility did not issue the payment to counsel for the Korean Claimants. Dow Corning Corporation did not act in good faith regarding counsel let alone a denial of the settlement agreement of mediation offered by the Finance Committee.

Dow Corning Corporation asserts, "Unfortunately, the record reflects a long history of unreliable or even false information submitted by counsel for Movants 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 Movants, the Sixth Circuit noted the unreliability of the Korean Claimants' submissions." Dow Corning Corporation further asserts, "In a similar vein, the Claims Administrator's data shows that address information provided by counsel for Movants has been unreliable. … More recently, decisions of the Appeals Judge found significant issues regarding the reliability of substantive claim submissions made by counsel for Movants." (*See* the Response pages 8-10) Dow Corning Corporation's assertions have not a founding. First of all, the late Claims Administrator, David Austern, repeated counsel for the Korean Claimants that the Korean claim files were neatly prepared and organized so that in comparison with the files of other countries the Korean Claimants contributed a cost-saving to the Settlement Facility. When counsel visited the Settlement Facility with Affirmative Statement forms twice before the effective date of the Plan, Allen Bearicks sitting with the Claims Administrator in the conference room viewed the forms of Affirmative Statement of the Korean implanting physicians negatively, different from friendly view of the Claims Administrator, (who suddenly quit later), and counsel for the Korean Claimants had a suspicion that she might be unethically motivated. And then, the Settlement Facility held the Korean Claimants' filings for about four years and then started sending checks for payment to counsel. After being "on hold" for about three years, the Finance Committee offered mediation for settlement with the Korean Claimants as a group to counsel but walked away by saying, "Oops! Mediation for settlement was not authorized by Dow Corning Corporation." In doing these, the Claimants' Advisory Committee did not object and Deborah Greenspan, counsel for Dow Corning Corporation, only played and took control over the matters regarding the Korean Claimants. The late David Austern told counsel for the Korean Claimants before a mediation conference in Washington D.C. that the management of Dow Corning Corporation who have known the process of Dow Corning reorganization and the

role of the Korean Claimants how much the Korean Claimants had contributed to the Proposed Plan confirmation left the company resulting that there was nobody to be able to listen the Korean Claimants' appeals so that he was sorry for the Korean Claimants. The Sixth Circuit as well as this Court did not recognize or even know the roles of the Korean Claimants in the process of confirmation of the Proposed Reorganization Plan. On the other hand, the Settlement Facility and Dow Corning Corporation has dug up the counsel's back[4] as an example that the Finance Committee filed the Motion to Show Cause for sanctions on counsel and is still plotting.

Since this Court was supervising the Claims Administrator and the Finance Committee and held conferences with the Parties including Dow Corning Corporation's counsel many times, this Court should have known that the records of Dow Corning Corporation on the basis of the Declaration of the Claims Administrator (Exhibits H,I of the Response), Allen Bearicks (Exhibit G of the Response), and Deborah Greenspan (Exhibit J of the Response) could not describe the whole picture of counsel and the Korean Claimants. Unfortunately, this Court denied all of the motions filed by the Korean Claimants, based upon the Declarations.

With respect to the assertion of Dow Corning Corporation that the Appeals Judge found evidence that the affirmative statements of the Korean physicians submitted to establish Proof of Manufacturer were, "unequivocally false evidencing intentional abuse and fraud." However, the evidence of the Appeals Judge in fact has nothing to do with the current issue of address update/confirmation and whether the Motion to Set Aside Closing Order 5 is granted or denied. The decisions of the Appeals Judge were regarding Affirmative Statements for proof of manufacturer before the Settlement Facility's decisions on acceptability of filed-

[4]When counsel for the Korean Claimants published an autobiography partly describing the experiences of counsel regarding the Dow Corning class action, Dow Corning Korea Inc., Dow Corning Corporation's regional office, in accordance with an order of Dow Corning Corporation interpreted the counsel' book in a whole and sent to the headquarter of Dow Group in Michigan, US..

claims of the Korean Claimants. This current issue as to Closing Order 5 is regarding the payments after the Settlement Facility's decisions on acceptability of filed-claims were made. The Korean Claimants do not understand why Dow Corning Corporation produced the decisions of the Appeals Judge as evidence. Affirmative Statements were submitted in 2007-2008, about fourteen years ago. As admitted by Dow Corning Corporation, the decisions of the Appeals Judge were made only to 98 Claimants out of 2,600 Claimants that counsel represented for filing the proof of manufacturer claim. Dow Corning Corporation, always acting in bad faith regarding the filings of the Korean Claimants with this Court,[5] cancelled proof of manufacturer of the 98 Claimants. Their appeal to this Court and the Sixth Court were denied. With respect to over six hundred (600) appeals to the Appeals Judge filed on June 1, 2019, the Appeals Judge did not grant even a single appeal[6] including the appeals regarding affirmative statement for the proof of manufacturer claim. The appeals of the Korean Claimants to the Appeals Judge included a variety of Claims denied by the Settlement

[5]Counsel, Deborah Greenspan, for Dow Corning Corporation corresponded with the Court without consent of the Korean Claimants' counsel to get a court's favor, even if the Korean Claimants' counsel has constantly worried about the impartiality of court because this Court was supervising the Claims Administrator and the Finance Committee. Exhibit F (email of July 28, 2022 of counsel) shows that as soon as the Korean Claimants filed the Motion for Expedited Hearing (ECF No.1644) concerning the Motion for Extension of Filing Claim (ECF No.1586), the counsel sent the clerk, Ann Daley, an email stating, "We thought it might be appropriate to consider setting a hearing to address both." While the clerk did not reply, just like coincidence, this Court issued the Order of August 12, 2022 denying both the Motion for Extension and the Motion for Expedited Hearing. The counsel was given a bigger present for this emailing. Even after the Korean Claimants' counsel warned, "inappropriate", the counsel continued an unnecessary and an inappropriate contact with an email of September 14, 2022 to the Court without consent of the Korean Claimants' counsel. (*See* Exhibit G)

[6]In addition, the Appeals Judge held the Korean Claimants' cases for a long time, presumably for discussing for conclusion, maybe with the Claims Administrator who has refused the counsel for the Korean Claimants to visit the Settlement Facility for meeting over the years. The Appeals Judge issued Decisions for all of the Korean Claimants' cases in one day, January 25, 2021. (*See* Exhibit I of the Response) The Korean Claimants submitted appeal letters to the Appeals Judge on June 1, 2019. It took over one and half years for the Appeals Judge for one simple conclusion, "Dismiss." The reasoning of the Appeals Judge's Decisions was exactly same as the reasoning of the Settlement Facility although the counsel for the Korean Claimants submitted several explanatory letters to protect Affirmative Statement of the Korean implanting physicians.

Facility. The Korean Claimants realized afterward that the Appeals Judge just stamped boilerplate so that an appeal to the Appeals Judge was not worthwhile. Furthermore, the basis for denials, collected by the Quality Control Department of the Settlement Facility, were so absurd that a Korean implanting physician was nineteen years old when he issued the Affirmative Statement to several Korean Claimants. It was found by the Settlement Facility through web search to a Korean web site. The Korean Claimants' counsel submitted contradictory evidence to the Settlement Facility that the implanting physician was a resident of the prominent Hospital at the time of the issuance of Affirmative Statement and is working as the chief doctor. It was one example of stereotype of the Settlement Facility's decisions which have been biased against the Korean Claimants. In other cases, several implanting physicians who were in active medical practice became non-existent according to the Settlement Facility's findings while the explanations and materials that the Korean Claimants' counsel submitted did not comply with their stereotyped view with the results of web search. Live doctors became dead or non-existent doctors by the Settlement Facility. It was suspicious that the Appeals Judge has been influenced.

II. Reply to Argument

A. The Korean Claimants Satisfied Basis for Relief under Rule 55(c) and Rule 60(b)(1)

Dow Corning Corporation asserts, "The Korean Claimants seek relief from their own failure to initiate a timely appeal. … This Motion to Set Aside could be denied simply on the ground that it is a disguised untimely motion for extension of time to appeal." However, the Motion to Set Aside is different from the Motion to Reopen Time to File Appeal pending this Court. The basis for the two Motions is different and the requests to this Court are different. Dow Corning Corporation assumed that because the Korean Claimants filed the Motion to Set Aside two days after the Sixth Circuit explained that the Korean Claimants could no longer move the district court to extend or reopen the time for appeal and the Korean

Claimants filed Motion to Set Aside one day after the Korean Claimants filed the Motion to Reopen Time to File Appeal, this Motion to Set Aside must be a disguise to circumvent R.App.P.4(a)(5) and (6). This kind of assumption has no founding except Dow Corning Corporation's agitating move that the Korean Claimants must disappear in order for Dow Corning Corporation to close the Settlement Facility as its schedule.

Dow Corning Corporation asserts, "Even if the Motion to Set Aside is considered as an excusable neglect motion under Rule 60, there is no basis to find that the neglect was excusable under any standard."

Rather this Motion to Set Aside is requested under Federal Rules of Civil Procedure Rule 55(c). Rule 55(c) prescribes;

> (c) Setting Aside a Default or a Default Judgment. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

The first question should be whether Closing Order 5 is close to a default judgment or a summary judgment because the former requires satisfaction of three factors of *United Coin Meter Co. v. Seaboard C. Railroad*, 705 F.2d 839 (Sixth Cir. 1983) and the latter requires five factors of *In re Pioneer Inv. Servs. Co.*, 943 F.2d 673 (Sixth Cir. 1991) The Korean Claimants agree to three factors because Closing Order 5 looks like a default judgment in that the Korean Claimants were not served nor noticed before the entry of the Order.

The three factors are:

1. Whether the respondent will be prejudiced;
2. Whether the movant has meritorious defense; and
3. Whether culpable conduct of the movant led to the default.
   (*See United Coin*, at 846)

""In considering a motion to set aside entry of a judgment of default a district court must apply Rule 60(b) "equitably and liberally … to achieve substantial justice."*Bios v. Friday*, 612 F.2d 938 (Fifth Cir. 1980)(per curiam). Judgment by default is a drastic step which

should be resorted to only in the most extreme cases. Where default results from an honest mistake "rather than willful misconduct, carelessness or negligence" there is special need to apply Rule 60(b) liberally. *Ellingsworth v. Chrysler*, 665 F.2d 180, 185 (Seventh Cir. 1981)""*See United Coin* at 846

United Coin explained that court should apply Rule 60(b) liberally if a default judgment was a result of an honest mistake rather than willful misconduct, carelessness or negligence.

1. Whether lack of notice constitutes excusable neglect

While Dow Corning Corporation asserts that the Korean Claimants' counsel would be deemed to have received notice (either because the email address was operative or because the local rules would deem the notice valid), the Korean Claimants were not able to receive the notice of the June 13, 2022's entry of Closing Order5 because yhkimlaw@unitel.co.kr ceased to operate from June 1, 2022.(See Exhibit A) In this regard, Dow Corning Corporation asserts, "t[T]here can be no excusable neglect because counsel clearly failed to provide the requisite email contact in violation of the rules. By his own admission, counsel for Movants updated the email address only as of June 30.[7]Not only did counsel fail timely to update his email registration, but he also apparently provided an inaccurate notice to the Court." Dow Corning Corporation presented the rules to prove violation of counsel for the Korean Claimants. The rules that Dow Corning Corporation pointed out are, "Electronic service upon an obsolete e-mail address will constitute valid service if the user has not updated the account profile with the new e-mail address.", "Each filing user is responsible for maintaining valid

[7]To the contrary, the Korean Claimants updated the email address on June 24, 2022. *See* Exhibits 3,4 of Exhibit A .

and current contact information in his or her PACER account.", and "When a user's contact information changes, the user must promptly update his or her PACER account." *See* R3(d) of Electronic Filing Policies and Procedures, Eastern District of Michigan, Updated September 2022. (footnote 10 of the Response) However, counsel for the Korean Claimants updated his PACER account on June 24, 2022. Whether the update is prompt can be a question but relative to the fact that Closing Order 5 was entered suddenly without a service or a prior notice to counsel, the update of the counsel's PACER account on June 24, 2022 should be deemed 'prompt'. Under R3(d) of Electronic Filing Policies and Procedures, Eastern District of Michigan, electronic service upon an obsolete e-mail address, just like electronic service upon the operation-ceased yhkimlaw@unitel.co.kr, constitutes valid service if counsel has not updated the account profile for the new e-mail address. However, counsel for the Korean Claimants updated his account profile with the new e-mail address, yhkimlaw@naver.com , on June 24, 2022. Therefore, there was no violation. Even if counsel violated the rules of Electronic Filing Policies and Procedures, Eastern District of Michigan, and E.D.Mich.LR 11.2((Failure to Provide Notification of Change of Address), "Every attorney and every party not represented by an attorney must include his or her contact information of his or her e-mail address, and telephone number on the first paper that person files in a case. If there is a change in the contact information, that person promptly must file and serve a notice with the new contact information. The failure to file promptly current contact information may subject that person or party to appropriate sanctions, which may include dismissal, default judgment, and costs.")), those violations do not preclude counsel for the Korean Claimants from being in excusable neglect. In this respect, the Korean Claimants argue the ruling *in United Coin* that an honest mistake "rather than willful misconduct, carelessness or negligence" constitutes an excusable neglect and there is special

need to apply Rule 60(b) liberally.

Dow Corning Corporation further asserts, "i[I]t is apparent that counsel failed to fulfill his obligation to monitor the docket." First of all, however, counsel monitored docket activity. Because counsel monitored the docket, counsel was able to update his PACER account on June 24, 2022. Although Dow Corning Corporation presented several cases to prove an obligation to monitor the court's docket, (*See* pages 16-17 of the Response), the Korean Claimants agree a duty of counsel to monitor the court's docket. In part, counsel for the Korean Claimants carried out a duty to monitor the court's docket so that when the Claimants' Advisory Committee sent the Newsletter of August 16, 2022 to counsel, counsel immediately checked and found that this Court issued Closing Order 5 on June 13, 2022.

Had counsel not monitored the court's docket diligently, counsel could not have updated the PACER account and notified to this Court and the Sixth Circuit on June 24, 2022. (*See* Exhibits 3,4 of Exhibit A) The reason that counsel did not update earlier than June 13, 2022, the date of entry of Closing Order 5, was because counsel did not receive a prior notice of filing of Closing Order 5or was not served by Dow Corning Corporation prior to issuance. Since counsel had no idea as to Closing Order 5 which was to delisting 12,600 claimants including 1400 Korean Claimants from the claimant list pending the Settlement Facility, which is extraordinary, counsel failed to update his PACER account on June 1, 2022 the next day of May 31, 2022 that yhkimlaw@unitel.co.kr ceased to operate.

Dow Corning Corporation asserts, ""The case law is clear: counsel's inattention and failure to update his contact address or failure to apprise himself of docket activity cannot be the

basis for relief under Rule 60(b)(1). *See Yeschick*, 675 F.3d at 631 (no claim of excusable neglect where counsel"(1) knew that his email address changed from altel.net to windstream.net; (2) was aware that he was not receiving notice of electronic filings in other cases and that motions were expected in *Yeschick*'s case; (3) failed to diligently update his e-mail address; and (4) failed to monitor the docket in *Yeschick*'s case for filings between May 2009 and January 2010."). Counsel's ability to access the electronic docketing system directly" is "within [the attorney's] control."*Id*."" Contrary to the assertion of Dow Corning Corporation that counsel's failure to update his contact address or failure to apprise himself of docket activity cannot be the basis for relief under Rule 6(b)(1), however, counsel updated the PACER account on June 24, 2022 after *24 days* of the closure of operation of the email address, while counsel in *Yeschick* updated his email address on October 30, 2009 after *four and a half months* from May 15, 2009 of change of the email address. Different from counsel in *Yeschick* where notice of electronic filings in other cases and the motions were expected in *Yeschick*'s case, counsel for the Korean Claimants did not have any other case except this case as to Dow Corning Settlement Program and no motion was expected against the Korean Claimants or counsel accordingly. In addition, counsel updated his e-mail address on June 24, 2022 and monitored the court's docket activity resulting that counsel found from the Newsletter of August 16, 2022 of the Claimants' Advisory Committee that Closing Order 5 was issued by this Court. Even if counsel updated his PACER account after 24 days later from the closure of his email address, the court in *Union Coin* explained that court should apply Rule 60(b) *liberally* if a default judgment was a result of *an honest mistake* rather than willful misconduct, carelessness or negligence. *See United Coin* at 846

2. Setting Aside Closing Order 5 would not Prejudice the Parties and Affect Judicial Proceedings.

Dow Corning Corporation asserts, ""Movants do not articulate any basis for their unsubstantiated assertion that "there would be no prejudice to the Respondents even if this Court sets aside Closing Order 5 regarding the Korean Claimants."… Setting aside Closing Order 5 would result in uncertainty and would halt ongoing closure activities, disrupt trust operations, cause delay, and increase costs."" However, the Korean Claimants filed the Notice of Appeal Closing Order 5 for which Dow Corning Corporation was obliged to file their brief by October 22, 2022. The Korean Claimants has already filed the appellant brief. (*See* Exhibit B) The Settlement Facility will continue operating whether or not the Motion to Set Aside Closing Order 5 is granted. Contrary to the Dow Corning Corporation's assertion, there would be no result in uncertainty and would halt ongoing closure activities, disrupt trust operations, cause delay, and increase costs because there would be no possibility for such things to take place due to Closing Order 5 which requires address update/confirmation to the 1400 Korean Claimants. In addition, the Korean Claimants has filed the Notice of Appeal Closing Order 2 which was the founding of Closing Order 5. Closing Order 2 pending appeal has been fully briefed by both the Korean Claimants and Dow Corning Corporation and the parties just wait for a ruling of the Sixth Circuit.(*See* Exhibit C) Therefore there is no serious prejudice applied to Dow Corning Corporation and other Claimants whose claims-processing was finished and paid in full.

Dow Corning Corporation further asserts, ""t[T]he Motion to Set Aside is filed only "regarding the Korean Claimants" and seeks an order "that the SF-DCT shall not close the processing of the Korean Claimants from September 17, 2022. … Granting such relief only to Movants would result in disparate treatment in violation of the Bankruptcy Code 11 U.S.C. Section 1123(a)(4) and would be unfair to other claimants who relied on the deadline to their

detriment."" However, other Claimants have been conducted their claims-processing finally and paid in full so that it is not unfair to them even if the Korean Claimants were granted for relief. In addition, Dow Corning Corporation can lift disparate treatments to other claimants if granting the Motion to Set Aside Closing Order 5 regarding the Korean Claimants is unfair to other claimants. Furthermore, "m[M]ere delay in satisfying the Respondent's claim, if it should succeed at trial, is not sufficient prejudice to require denial of a motion to set aside a default judgment."*See Union Coins* at 846. The court explained that delay in satisfying claim is not a basis for prejudice to the respondent. Dow Corning Corporation asserts that setting aside Closing Order 5 would result in uncertainty and would halt ongoing closure activities, disrupt trust operations, cause delay, and increase costs. These delay-caused results are not a basis for the second factor of prejudice to the parties and judicial proceedings.

3. The Korean Claimants articulated Meritorious Underlying Claim under Rule 60(b)(1).

Dow Corning Corporation asserts, ""Rather, the Korean Claimants simply state, "The Respondents do not have any meritorious defense to the Korean Claimants."… Movant's vague and unsupported assertions about privacy concerns (asserted in other pleadings submitted to this Court) do not state a meritorious claim within the meaning of Rule 60(b)(1) particularly in light of this Court's obligation and paramount interest in assuring the proper distribution of Settlement Fund assets."" However, this assertion of Dow Corning Corporation overlooked the filings of the Korean Claimants. The Korean Claimants have already filed brief with the Sixth Court.(*See* Exhibits B and C) In this brief, the Korean Claimants articulated meritorious underlying claims as follows:

(1) Closing Order 5 is void.

On March 29, 2019, this Court issued Closing Order 2 to prohibit the Settlement Facility from issuing payments to the Claimants who cannot be located or who do not have a confirmed current address. To implement Closing Order 2, this Court issued Closing Order 5 on June 13, 2022.The Korean Claimants were not notified or heard before any of these Orders was entered. Notice of filing a motion must be preceded before hearing. Hearing was not held because there was no notice. The lack of notice and hearing before the Order was entered has a grave defect. Closing Order 5 is a result of due process violation. Closing Order 5 has not been noticed to the Korean Claimants before issuance nor noticed after issuance.

““The Supreme Court addressed the relationship between notice and the Fourteenth Amendment *inMullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 70 S.Ct.652, 94 L. Ed. 865 (1950)… The Court went on to hold: An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance…Accordingly, the Court must conclude that the total absence of notice to the *Hahns* concerning the Hearing on Confirmation, and the various deadlines, renders the “Order Confirming Plan” violative of the Fifth Amendment.”” (*See In re Rideout*, 86 B.R. 523 (N.D. Ohio. 1988))

““A creditor that a reorganization of the debtor is taking place does not substitute for mailing notice of a bar date.”. *In re Yoder Co*, 758 F.2d 1114 (sixth Cir. 1985)””(*Id.* at 10)

The various deadlines must be noticed to creditors in bankruptcy procedure and the absence

of notice is a violation of the Fifteenth Amendment. The deadline under Closing Order 5, which is September 17, 2022 to respond regarding address verification of the Settlement Facility, is a deadline that the Settlement Facility should afford creditors (the Korean Claimants) an opportunity to present their objections. Closing Order 5 was issued without it.

Furthermore the Korean Claimants did not receive the notice of Closing Order 5 after it was issued. The Korean Claimants could not file a notice of appeal timely because Closing Order 5 was not served. The Korean Claimants did not receive notice for entry of Closing Order 5 within 21 days after entry. When Closing Order 5 was entered on June 13, 2022, the email address of counsel (yhkimlaw@unitel.co.kr) reported to the Court did not operate. The Server (www.unitel.co.kr) stopped working on May 31, 2022. (*See* Exhibits 1,2 of Exhibit A)

Counsel, AOR of the Settlement Facility, subscribed the Newsletter of the Claimants' Advisory Committee. Counsel found through the Newsletter of August 16, 2022 that the District Court issued Closing Order 5 and then went to the website of the Settlement Facility and downloaded Closing Order 5 including the list of the Claimants affected. Counsel did not receive the notice of Closing Order 5 sent by the ECF system to the email address (yhkimlaw@naver.com) so far.(See Exhibit 6 of Exhibit A) Closing Order 5 is void because it has not been noticed to the Korean Claimants before issuance nor noticed after issuance.

""Under Rule(b)(4), if a judgment is void, it must be vacated. Lack of notice and sufficient service of process leading ultimately to lack of due process properly renders a judgment void. The constitutional standard regarding notice requires that it "be such as is reasonably calculated to reach interested parties."" (*See In re Chess*, 268 B.R. 150 (W. D. Tenn. 2001))

Closing Order 5 must be set aside regarding the Korean Claimants due to violation of due process.

(2) Closing Order 5 along with Closing Order 2 was to approve wrongdoings of the Settlement Facility.

Even if Closing Order 5 is not void and therefore applicable to the Korean claimants, Closing Order 5 was to approve wrongdoings of the Settlement Facility so that it should be ineffective to the extent that it was applied to deny payments to the Korean Claimants.

Closing Order 5 was to implement Closing Order 2. Closing Order 5 was derived from Closing Order 2. Section C of Closing Order 2, that claimants and attorneys must notify the Settlement Facility of changes in address and the Settlement Facility may not issue without a confirmed current address, is nearly identical to the paragraph in the letters of the Settlement Facility, received by counsel from May 2015. (*See* Exhibit H) In other words, the Settlement Facility has begun sending letters titled as "Missing or Invalid Address" massively to counsel and the Korean Claimants from May 2015. The letters of Missing or Invalid Address included a phrase, "After the Address Update/Correcting Form is received and verified, the Settlement Facility will reactivate the processing and review of your claim."

It means that the Settlement Facility not only has set up the requirement of a valid, confirmed current address inside the Settlement Facility (because it said, "reactivate") but has also applied the requirement to the Korean Claimants from May 2015 secretly. The Settlement Facility has applied the requirement of a valid, confirmed current address to the Korean Claimants four years earlier than Closing Order 2 which was issued in March 2019. Closing Order 2 is retroactive authorization of the Settlement Facility's secret and unauthorized practice. It is a principle that laws shall not be applied retroactively. Closing Order 5 along with Closing Order 2 is the product of an overdue attempt to justify the practice of the Settlement Facility unauthorized under the Plan.

Dow Corning Corporation asserted in other pleadings to deem the Claimant Information Guides of 2004 (*See* Exhibit G of the Response) as evidence to prove the address verification

requirement to the Korean Claimants. (ECF No.1599,Pg ID:#28323-28531)

However, the Claimant Information Guides cannot be the basis to impose an obligation to maintain a valid, confirmed current address on the Korean Claimants. It is merely a guide just as found in a shopping mall. In addition, the relevant Clauses (§9 Q9-14, 9-15, §10 Q10-8, 10-9) of the Claimant Information Guide that Dow Corning Corporation attempted to prove the address verification requirement to the Korean Claimants have nothing to do with the requirement of a valid, confirmed current address for the payments when a Claim became acceptable after claims review by the Settlement Facility. Specifically, (a) Q9-14 is about the deadlines to apply for settlement benefits so that it has nothing to do with the payment after the Claim became acceptable ("*If I move and forget to notify the Settlement Facility in writing, my Notification of Status letter might take days or weeks to be forwarded to my new address. Will any of the time periods and deadlines be extended because of this?*"), (b) Q9-15 is about the Participation Form to elect to withdraw or litigate so that it has nothing to do with the payment after the Claim became acceptable ("*I moved and did not notify the Bankruptcy Court or Settlement Facility of my new address and I missed the deadline to file the Participation Form to elect to withdraw or litigate. Can I file it now?*"), (c) Q10-8 is about proof of claim so that it has nothing to do with the payment after the Claim became acceptable ("*I moved since I sent my proof of claim to the Bankruptcy Court. Can I e-mail my new address to you or give it to you over the telephone?*"), and (d) Q10-9 is about proof of claim so that it has nothing to do with the payment after the Claim became acceptable ("*I sent my Proof of Claim form to the Bankruptcy Court in 1997. I have since married and changed my name. How can I update my file with my new married name?*").

In other words, the Settlement Facility has used the above Clauses of the Claimant Information Guides to deny payments to the acceptable Korean Claimants from 2015.

The Settlement Facility has been biased against the Korean Claimants. The Settlement

Facility was quick to pay to the Class 5 Claimants. Counsel knew it since a dozen of the Class 5 Claimants, through counsel, filed their claims with medical records identical to the Korean Claimants. The Class 5 Claimants were accepted easily and furthermore have never been asked by the Settlement Facility to submit a valid, confirmed current address before payment. But the Korean Claimants, whether Class 6.2 Claimants or Class 6.1 Claimants, were different. The Settlement Facility ordered counsel to submit a valid, confirmed current address before sending premium payment's checks for the 924 Claimants who had been eligible for payment. (ECF No.1569 Pg ID:#26408-26455)

(3) Closing Order 5 along with Closing Order 2 has no founding under the Plan and violates §1129(b)

The procedures of claims processing of the Settlement Facility shall be in accordance with the Plan. Not only shall the Settlement Facility uphold the provisions of the Plan documents, but the Settlement Facility shall not create a procedure to affect the rights of the Claimants or decrease the possibility of claim payment. The requirement of a valid, confirmed current address was adopted by the Settlement Facility to save money of the funds[8] on the pretense that the funds shall be received by the eligible Claimants who can be located only by the Settlement Facility, which believes that it does not matter whether the Claimants are represented by attorney.

""Under the Bankruptcy Code, a plan may not be confirmed by a court over the objection of a class of creditors unless, among other things, the following requirements are met: (1) under the plan, the class would receive an amount that is equal to or greater than the amount they would receive if the debtor's assets were liquidated s*ee* 11 U.S.C. §1129(a)(7); and (2) the plan is found to be fair and equitable *see* 11 U.S.C. §1129(b)(1). By incorporating the fair and equitable standard in §1129(b) of the Code, Congress codified the "absolute priority rule,"

[8]The Korean Claim's value was estimated twelve (12) million dollars before the Bankruptcy Court in 1999 but the Korean Claimants have been paid about seven (7) million dollars so far.

which provides that absent full satisfaction of a creditor's allowed claims, no member of a class junior in priority to that creditor may receive anything at all on account of their claim or equity interest. *Case v. L.A. Lumber Prods. Co*. 308 U.S.106, 115, 60 S.Ct.184 L.Ed.110(1939)""*In re. Settlement Facility Dow Corning Trust*, 656 F.3d. 668 at 3 (Sixth Cir. 2006)

The Sixth Circuit explained that the District Court shall not violate §1129(b)'s fair and equitable requirement in interpreting the Plan. ("Although the bankruptcy court did not abuse its discretion by interpreting the plan as requiring the payment of pendency interest at a non-default, fixed rate, the bankruptcy court still may have done so if it construed the plan such a way as to cause it to violate §1129(b)'s fair and equitable requirement." *Id*. at 6)

The requirement of a valid, confirmed current address affected substantive rights of the Korean Claimants because it actually prohibited the eligible Claimants from receiving payments including premium payments. There are many eligible Korean Claimants not paid although they were found "acceptable" after claims review. The requirement of a valid, confirmed current address is not merely a procedure of the Payments. The Settlement Facility adopted such procedures as a valid, confirmed current address to deny premium payments as well as basic payments of the Korean Claimants. Closing Order 5 along with Closing Order 2 authorized the practice of the Settlement and even expanded the requirement of a valid, confirmed current address to all payments to the Korean Claimants.

The Settlement Facility stopped processing of the Korean Claims without a valid, confirmed current address without a foundation under the Plan. Closing Order 5 authorizes the Settlement Facility to close around 1,400 Korean Claimants' claim permanently. Closing Order 5 along with Closing Order 2 must be set aside to the extent that it requires the Korean Claimants to submit a valid, confirmed current address to the Settlement Facility.

(4) List of Claimants under Closing Order 5 was Arbitrary

Closing Order 5 directs to the Settlement Facility the claimants who were categorized 'bad address' and who did not respond to the address verification to maintain the list on its website for 90 days and to close their claim permanently.

The Claims Administrator stated in the Declaration(*See* Exhibit H of the Response) that of the 924 letters sent to the Korean Claimants, 436 have returned as undeliverable to date and that the Settlement Facility conducted an audit of mailings to the Korean Claimants in early 2020, and the audit revealed that of 1,382 Claimants represented by counsel who are eligible for future payments, 600 had correspondence sent to directly to the Claimants that has been returned as undeliverable, and that the audit also revealed that 39.2% of mailings to 2,476 Claimants with eligible Class 5 and 6 claims were returned as undeliverable, and that the audit also revealed that 50% of the mailings to updated addresses provided by the attorney in January 2018 were returned as undeliverable.

Pursuant to the Claims Administrator's Declaration, it is obvious that neither were all of the mailings of the Settlement Facility returned as undeliverable nor prior address confirmations by counsel were inaccurate in one hundred (100) percent(%).

The mailings returned as undeliverable must be assessed individually, not on the basis of a rate. The Settlement Facility's practice that the rate of the mailings returned as undeliverable to the Korean Claimants far exceeds the rate of undeliverable mail that the Settlement Facility has experienced with other counsel must be disclosed to counsel. The Settlement Facility must present a chart of comparison of different counsels including the origin of country. The conclusion of the Settlement Facility that the percentage of returned mail from mailings to the Korean Claimants represented by counsel is much higher than the general rate of returned mail that the Settlement facility has experienced and several mailings have resulted in a 40 to

50 percent return rate must be completely disclosed. The Settlement Facility must present a chart of comparison of the general rate and the rate of the Korean Claimants including the origin of country. The Korean Claimants did not agree to the audit and counsel was not informed of the audit of the Settlement Facility. The Korean Claimants request this Court to order the Settlement Facility to provide the audit documents of the early 2020 in full to counsel.

(5) Korean Claimants should be exempted from Closing Order 5

The Korean Claimants have a reasonable basis for exemption from address verification requirement under Closing Order 5.

The Settlement Facility asked counsel to submit Social Security Number ("SSN") to prove that the Korean Claimants were not bogus claimants but real claimants when the claims were first filed in 2005 and 2006. Counsel replied that there was no such SSN type (000-00-0000) thing existing in Korea. The Settlement Facility asked counsel what was comparable to SSN of the United States in Korea. Counsel answered that there was Resident Registration Number ("RRN", 000000-0000000, RE1569 Pg ID:#26284). Then, the Settlement Facility asked counsel to submit RRN instead of SSN. Counsel filed RRN and attached Government-issued Resident Registry to prove RRN of the Claimants.

However, the Government-issued Resident Registry happened to include the Claimants' current address and previous address. It is a formality of Government-issued Resident Registry. The Korean Claimants did not want to submit address information to the Settlement Facility when they hired counsel for filing their claim.

Furthermore, the Class 5 Claimants that counsel was representing did not submit address information to the Settlement Facility when they filed the claims in 2005 and 2006. Counsel

submitted driver's license, permanent resident card or a US passport for Class 5 Claimants, which does not include address information. The Class 5 claimants were not required to submit address information to the Settlement Facility. Likewise, the Korean Claimants were not required to submit their address to the Settlement Facility when they filed their claim in 2005 and 2006.

But the Settlement Facility used the Government-issued Resident Registry to keep the Korean Claimants' address at its files. The Settlement Facility has exploited the address information in it to ask counsel to update their address from May 2015. Counsel tried to explain the Claims Administrator through a meeting in the context of address information on several occasions but proposal for meeting was turned down.

Counsel is not allowed to submit a valid, confirmed current address of a Claimant without permission of the Claimants under Personal Information Protection Act of Korea. Counsel is not allowed to disclose client's personal information. Address of individual is personal information under Personal Information Protection Act of Korea. In addition, no court in Korea orders counsel to update address of client or submit a valid, confirmed current address of counsel's clients.

Besides, the Korean Claimants retained counsel. Without counsel, then the Settlement Facility would have a reason or a reasonable basis for asking address information from the Claimants. However, the Korean Claimants were represented by counsel from 1994 when Global Breast Implant Settlement Program began. Under these circumstances, that the Settlement Facility denies payments to the eligible Claimants and even holds claims processing itself on the basis of address update/confirmation and now prohibits the Korean Claimants from receiving payments due to address verification is a violation of the rights of counsel. Attorney-client privilege should be applied. ("The federal forum is unanimously in accord with the general rule that the identity of a client is, with limited exceptions, not within

protective ambit of the attorney-client privilege…Another exception to the general rule that the identity of a client is not privileged arises where disclosure of the identity would be tantamount to disclosing an otherwise protected confidential information." *In re Grand Jury Investigation 83-2-35*, 723 F.2d 447 at 5, 8 (Sixth Cir. 1983))

Under the New York laws which apply for interpretation of the Plan, address of the Korean Claimants is an attorney-client privilege. ("An a general matter, communication between a lawyer and client, including disclosure of the client's address, is privileged because it serves the policy of frank revelation by the client to the attorney." *Elliott Associates, L.P. v. Republic of Peru*, 176.F.R.D.93 (S.D.N.Y. 1997) at 5) When the Korean Claimants hired counsel, they asked counsel not to disclose their address for filing purposes of claims to the Settlement Facility and thus keeping the asking of the Korean Claimants served frank revelation to counsel.

The Korean Claimants do not want to receive a mailing of the Settlement Facility at their home address nor want to update/confirm their address. They marked on "CONFIDENTIAL" when they retained counsel. They asked counsel not to send any mailings to their home. Under these circumstances, if counsel submits their updated or current address without permission to follow the request of the Settlement Facility, counsel might be charged for a violation of Personal Information Protection Act.

There is no provision in the laws of Korea that counsel must keep updated and current address of clients. If a client does not give her updated address to counsel or does not want her address to be updated, it is fine. Besides, there is a plenty of ways for counsel to communicate with clients. The Korean Claimants have no problem to communicate with counsel over the phone. The counsel's law office is open all the times.

In addition, whether counsel provided updated address to the Settlement Facility and how

many address updates provided by counsel were returned as undelivered, and, more importantly, why such differences took place should be a question as to facts. The Settlement Facility did not provide the records to counsel. Counsel asked the Settlement Facility to provide the whole documents of the audit of the early 2020 and the list of mailings of address update/confirmation of the Settlement Facility sent to the Korean Claimants from 2015. The Settlement Facility denied.

The Settlement Facility modified the rules and requirement under the SFA and the Annex A to the Dow Corning Settlement Facility and fund Distribution Agreement by arbitrarily including the requirement of a valid, confirmed current address in claims processing. (11 U.S. Code section 1127, "The proponent of a plan may modify such plan at any time before confirmation 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") The requirement of a valid, confirmed current address violates equal treatment.(Section 1123(a)(4), "Notwithstanding any otherwise applicable non-bankruptcy law, a plan shall provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest.")

The procedures of verification of a valid, confirmed current address violate equal treatment too. Since the postal system is different country to country, the Settlement Facility must use the postal system of each country. However, the Settlement Facility adopted the US Postal Service only for verification of address of the Korean Claimants. The Settlement Facility contemplated the other additional delivery services in Claimant Information Guide. (ECF No.1599 Pg ID:#28321-28532)

Q 9-4 What are the acceptable methods to mail or deliver my Participation Form to the Settlement Facility?

Mail or deliver the Participation Form to the Settlement Facility using one (1) of the

following three (3) delivery methods:

1. Use a delivery service (e.g., Federal Express, Airborne Express, U.P.S. etc.) and make sure that the airbill or invoice clearly lists the date of mailing as on or before [T.B.D.] if you are withdrawing your claim or on or before [T.B.D.] if you are rejecting settlement and intend to file a lawsuit against DCC Litigation Facility, Inc.: OR
2. Mail the Participation Form by United States certified or registered mail as long as the certified or registered mail is postmarked on or before [T.B.D.] if you are withdrawing your claim or on or before [T.B.D.] if you are rejecting settlement and intend to file a lawsuit against Litigation Facility Inc. Please check with the U.S. Post Office on how to send a certified or registered letter so that it has the correct postmark (for claimants who reside outside of the U.S., the Settlement Facility will rely on the postmark date used by your country's version of "certified" or "registered" mail): OR
3. If you mail the Participation Form by regular U.S. mail or by using a national mail service in the country in which you reside, then the Participation Form must be received by the Settlement Facility by 5:00 p.m. Central Time on or before [T.B.D.] if your withdrawing your claim and on or before [T.B.D.] if you are rejecting settlement and intend to file a lawsuit against DCC Litigation Facility Inc. It is important to mail you Participation Form early enough so that the Settlement Facility receives it on or before the applicable deadline. The postmark date on the envelope will **NOT** be used by the Settlement Facility if you use regular U.S. mail or a national mail service in a country other than the U.S.

Q 9-11 What are the acceptable methods to mail or deliver my Claim Forms to the Settlement Facility?

Mail or deliver the Claim Forms to the Settlement Facility using one (1) of the following three (3) delivery methods:

1. Use a delivery service (e.g., Federal Express, Airborne Express, U.P.S. etc.) and make sure that the airbill or invoice clearly lists the date of mailing as on or before the deadline: OR
2. Mail the Claim Forms by U.S. certified or registered mail as long as the certified or registered mail is postmarked on or before the deadline. Please check with the U.S. Post Office on how to send a certified or registered letter so that it has the correct postmark (for claimants who reside outside of the U.S., the Settlement Facility will rely on the postmark date used by your country's version of "certified" or "registered" mail): OR
3. If you mail the Claim Forms by regular U.S. mail or by using a national mail service in the country in which you reside, then the Claim Forms must be received by the Settlement Facility by 5:00 p.m. Central Time on or before the deadline. It is important to mail you Claim Forms early enough so that the Settlement Facility receives them on or before the deadline for the settlement benefit. The postmark date on the envelope will **NOT** be used by the Settlement Facility if you use regular U.S. mail or a national mail service in a country other than the U.S.

The Settlement Facility contemplated other delivery services such as Federal Express, Airborne Express. The Settlement Facility also contemplated a national mail service in the country other than the U.S., in which a claimant resides.

However, the Settlement Facility adopted the US Postal Service only for verification of address of the Korean Claimants. The practice of the Settlement Facility contradicted its own admission in the Claimant Information Guide.

The US Postal Service for verification of address for payments is not an equal treatment to the Korean Claimants. In fact, the US Postal Service is not accurate in delivering mailings to the Korean Claimants. Even worse, it is clear that the US Postal Service delivered to counsel's law office several (three to seven) months late under the circumstances that the deadlines to submit a document for cure of a deficiency of claims were critical to protect the rights of the Claimants.

(6) The Settlement Facility eliminated the requirement of a valid, confirmed current address on its own.

On March 13, 2019, the Settlement Facility sent a letter via email and regular mail to counsel addressing that certain Claims would not be issued any payments for which they might be eligible, counsel must provide addresses in the format as recommended by the US Postal Service, all Claimants eligible for partial premium payment must confirm their current addresses, The partial premium payments could be issued only after the Settlement Facility received an address in the proper format described, the Korean Claimants with deficiencies as described would be adversely affected, and ***all deficiencies must be resolved by the June 3, 2019 deadline or the Claims will be denied***(ECF No.1569 Pg ID:#24833-24834), as written in the following;

The SF-DCT previously sent you letters requesting an updated address for claimants with

> an eligible payment, whose mail was returned to the SF-DCT by the Postal Service (a sample copy of the letter previously sent is attached). Without an updated address (***by June 3, 2019***) these claims will not be issued any payments for which they may be eligible. ,…, Although you have received the Notice of Final Filing Deadline June 3, 2019, this letter is specific notice to you that your claimants with deficiencies as described above will be adversely affected if you fail to take action as required by the Notice and Closing Orders. All deficiencies must be resolved by the June 3, 2019 deadline or the claims will be denied.

The Settlement Facility fixed the June 3, 2019 deadline as the final date for address updates of the Korean Claimants undoubtedly.

Nevertheless, after having received address update form of six hundred seventy six (676) Claimants from counsel on June 3, 2019, the Settlement Facility put the address update forms into audit and then asked the Korean Claimants to use email, telephone or written correspondence to provide a confirmed current address. Counsel is not allowed to update their address which has already been submitted to the Settlement Facility without their permission. The Settlement Facility must keep its word that address updates must be resolved by June 3, 2019.

Actually, there were many mailings of the Settlement Facility, which have never arrived in Korea. The records about how many mailings of the Settlement Facility were returned as undeliverable are kept only at the Settlement Facility (which was not shared with counsel) and nobody know why those mailings were returned as undeliverable. There were several Claimants who called counsel that they put their mailings of the United States in the box of return mail without opening envelope. There were many Claimants who complained counsel why counsel disclosed their address to the United States. The Settlement Facility assumed that if mailings to the Korean Claimant were returned as undeliverable, the address of the Claimants was not valid and should be updated within ninety (90) days[9]. This assumption is

[9]How address of the Korean Claimants can be updated within ninety (90) days with the US Postal Service whose mailings including a request of the Settlement Facility for address

nonsense. Furthermore there were many cases that the Settlement Facility mailed to wrong address where the Claimants did not live.

More importantly, the mailing system of US Postal Service for delivery in Korea is not reliable. It took at least three to seven months for the Settlement Facility's mailings to arrive at counsel's law office which is extremely open to the public and, in many occasions, the mailings of the Settlement Facility have never arrived to counsel's law office although the Claimants notified counsel that they had received them. Counsel asked the Settlement Facility to use the Federal Express or DHL for mailings to counsel but the Settlement Facility turned it down.

The Settlement Facility presented the Claimant Information Guide as the founding to ask counsel and the Korean Claimants to submit a valid, confirmed current address. The Claimant Information Guide contemplated the other mail services besides the US Postal Service. The Settlement Facility declined the counsel's request for using the Federal Express or DHL by saying that it would unduly jeopardize the corpus of the Trust and the Settlement Facility did not manipulate any mailing systems in its correspondence with counsel. (ECF No.1569 Pg ID:#26500-16502) To follow the Claimant Information Guide shall not be to jeopardize the corpus of the Trust. Whether the Settlement Facility manipulated any mailing systems in its correspondence with counsel is self-proving in that the Settlement Facility did not use other mailing services except the US Postal Service to obtain address verification of the Korean Claimants.

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update/confirmation arrive in Korea three or four months late? However, the Settlement Facility wrote back to counsel, "We do not agree that any mail delivery issue has deprived you of the opportunity to meet cure deadlines for your clients." (ECF No.1569 Pg ID:#26500-26502)

B. Closing Order 5 is Void under Rule 60(b)(4) and Rule 60(b) can be Used to Avoid Fed.R.App.P.4(a)(6)

Dow Corning Corporation asserts, "First, any failure of the Korean Claimants actually to learn of entry was entirely the result of counsel's inexcusable neglect." (*See* page 20 of the Response) This assertion was explained in Section A as above.

Dow Corning Corporation asserts, "t[T]he Court properly entered Closing Order 5 as a stipulated order of the CAC and the DRs consistent with their obligation and authority under the Plan. … The Korean Claimants have not established any basis for requiring advance notice to them of the entry of Closing Order 5." However, whether or not a stipulated order of the CAC and the DRs was consistent with the Plan and E.D.Mich.LR 7.1(a)(1), a violation of due process cannot be waived.

""The Supreme Court addressed the relationship between notice and the Fourteenth Amendment *inMullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 70 S.Ct.652, 94 L. Ed. 865 (1950)… The Court went on to hold: An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance…Accordingly, the Court must conclude that the total absence of notice to the *Hahns* concerning the Hearing on Confirmation, and the various deadlines, renders the "Order Confirming Plan" violative of the Fifth Amendment."" (*See In re Rideout*, 86 B.R. 523 (N.D. Ohio. 1988))

""A creditor that a reorganization of the debtor is taking place does not substitute for

mailing notice of a bar-date.". *In re Yoder Co*, 758 F.2d 1114 (sixth Cir. 1985)""(*Id.* at 10)

The deadline under Closing Order 5, which is September 17, 2022 to respond regarding address verification of the Settlement Facility, is a deadline that the Settlement Facility should afford the Korean Claimants an opportunity to present their objections. Closing Order 5 violated the due process.

Dow Corning Corporation further asserts, "Movants did in fact receive notice of entry of Closing Order 5 and to the extent that they did not actually become aware of the order, it is entirely a result of counsel's lack of diligence. Additionally, they clearly knew of Closing Order 5 at least a month before its deadline and therefore could have complied with its terms."However, the Korean Claimant did not receive notice under F.R. Civil P. 77(d) of the entry of Closing Order 5 within 21 days after entry. In this regard, Dow Corning Corporation asserted that the Korean Claimants' counsel cannot demonstrate lack of notice. Dow Corning Corporation contends that Closing Order 5 was placed on the ECF system on June 13, 2022 so that the counsel received it by yhkimlaw@unitel.co.kr because the counsel emailed this Court stating "My email address is changed from yhkimlaw@unitel.co.kr to yhkimlaw@naver.com as of June 30, 2022."But www.unitel.co.kr operating the email address of yhkimlaw@unitel.co.kr ceased to operate the service of emailing from June 1, 2022. It was in business until June 30, 2022 but available only for mail backup which meant downloading existing emails of users in the Server. The announcement of www.unitel.co.kr clearly stated that the email service would be closed on May 31, 2022 and it would provide the service of mail backupof the user's email until June 30, 2022. Although the counsel emailed this Court stating, "My email address would be changed as of June 30, 2022," it is

the fact that yhkimlaw@unitel.co.kr was not operated on June 13, 2022of Closing Order 5.[10]The Korean Claimants' counsel updated his PACER account and notified to this Court and the Sixth Circuit of Court of Appeals on June 24, 2022. (*See* Exhibits 3,4 of Exhibit A[11]) Contrary to Dow Corning Corporation's assertion that there is no evidence in the record indicating that the Court or clerk's office "leaned" that the email notification was not received, counsel for the Korean Claimants could not receive the notice of Closing Order 5 entered on June 13, 2022 becauseyhkimlaw@unitel.co.kr was not operated at that time. The assertion of Dow Corning Corporation that the failure of notice of Closing Order 5 was entirely a result of counsel's lack of diligence has no founding because counsel for the Korean Claimants updated his PACER account on June 24, 2022 promptly. Cases that Dow Corning Corporation presented as evidence that counsel for the Korean Claimants did not act diligently to update his email address and failed a duty to monitor the court's docket do not support the proof of negligence of counsel regarding change of email address. The assertion of Dow Corning Corporation that the Korean Claimants clearly knew of Closing Order 5 at least a month before its deadline and therefore could have complied with its terms is no use because September 17, 2022 passed now.

Dow Corning Corporation asserts, "Indeed, Movants' notice complaints are ironic

[10]Because the announcement of www.unitel.co.kr stated accordingly, "Closing Date of Receiving/Sending Mails : May 31, 2022." (*See* Exhibits 1,2 of Exhibit A)The fact is supported by another email of the counsel. (*See* Exhibit 5 of Exhibit A) It was sent to Secretary General of the Asia-Pacific Chapter of International Academy of Family Law on June 9, 2022 because the counsel was a member of IAFL. The email stated, "My email was changed from yhkimlaw@unitel.co.kr to yhkimlaw@naver.com. It is because the paid email service is no longer in business from June 1, 2022."

[11]Counsel for the Korean Claimants thanked in a returning email of June 24, 2022 by saying, "I conducted the process explained by you. Thank you for your instruction." (*See* Exhibit 4 of Exhibit A)

considering the entire purpose of obtaining the address information that they have refused to provide is to facilitate notice to the claimants of the status of their claims and other important actions of the Settlement Facility. Closing Order 5 did not and does not establish any rule or any new requirement. It merely defines a period of time before those claims that failed to abide by the rules would be closed." (*See* page 22 of the Response) However, the requirement of address update/confirmation invented and imposed by the Settlement Facility and Dow Corning Corporation demonstrated the **wisdom** of obtaining valid claimant addresses in advance of issuing payments as confessed by them.(*See* page 8 of the Response) The requirement actually contributed enormously to remaining the Fund of 1.67 billion dollars. Closing Order 5 as well as Closing Order 2 is to establish the new requirement of address update/confirmation to claimants so that the Dow Corning's assertion that Closing Order 5 is to facilitate notice to the claimants of the status of their claims and other important actions of the Settlement Facility is simply to manipulate the Plan and to betray the spirit of the Plan which is the result of negotiations by the creditors in way of voting for the Proposed Plan. In this regard, Dow Corning Corporation asserts, "In fact, the Korean Claimants have received, over the years, multiple notices of deadlines and of the complained policies and requirements of the Settlement Facility and the necessity of providing certain information in order to submit a claim for compensation and to receive payment." However, Dow Corning Corporation should have been aware that the Settlement Facility adopted the requirement of address update/confirmation from May 2015 without authority and then this Court issued Closing Order 2 on March 2019 that requires claimants to submit address update/confirmation to the Settlement Facility to receive payment. Prior to May 2015, the Korean Claimants who were paid had never been asked to submit address update/confirmation. After the Korean Claimants climbed the hurdle of Affirmative

Statement for proof of manufacturer over, the Settlement Facility invented the requirement of address update/confirmation before the payment in May 2015 and then applied it to the Korean Claimants as the basis for refusal to pay the premium payments as well as the basic payment to the Claimants who filed Claims after May 2015. Dow Corning Corporation asserts, "Closing Order 5 did not create those rules and guidelines or deprive Movants of anything." (*See* page 23 of the Response) If so, the Korean Claimants ask Dow Corning Corporation and the Settlement Facility to send checks for payment to counsel for the Korean Claimants promptly since Closing Order 5 as well as Closing Order 2 did not create the rules or deprive the Korean Claimants of anything just like the Korean Claimants who were paid the basic payments before May 2015, or at most before March 2019 when Closing Order 2 was issued and entered by this Court.

Dow Corning Corporation asserts, "Finally, and dispositively, Movants cannot use Rule 60(b) to avoid the time requirements mandated by Fed.R.App.P.4(a)(6) The Motion to Set Aside was filed only after the Korean Claimants filed a Motion to Reopen the time to appeal and after the Sixth Circuit found that their appeal was untimely and that they could "no longer move the district court to extend or reopen the time to appeal." Dow Corning Corporation further asserts, "The Korean Claimants cannot now seek to circumvent the specific requirement of Fed.R.App.P.4(a)(6) through the mechanism of a Rule 60 motion claiming lack of notice."However, the Motion to Set Aside is different from the Motion to Reopen Time to File Appeal pending this Court. The basis for the two Motions is different and the requests to this Court are different. Dow Corning Corporation assumed that because the Korean Claimants filed the Motion to Set Aside two days after the Sixth Circuit explained that the Korean Claimants could no longer move the district court to extend or reopen the

time for appeal and the Korean Claimants filed Motion to Set Aside one day after the Korean Claimants filed the Motion to Reopen Time to File Appeal, this Motion to Set Aside must be a disguise to circumvent Fed.R.App.P.4(a)(5) and (6). This kind of assumption has no founding except Dow Corning Corporation's agitating intention that the Korean Claimants must comply with Closing Order 5 in order for Dow Corning Corporation to close the Settlement Facility as its schedule.

The Sixth Circuit explained that Fed.R.App.P.4 is not jurisdictional in the context of bankruptcy filing, rather at most to a mandatory claims-processing rule, can be waived or forfeited, and may be subject to equitable exceptions. (*See In re Settlement Facility Dow Corning Trust*, 22-1752, Doc.No.32-1 (Sixth Cir. 2022) Therefore, this Court is able to exercise an equitable decision. Closing Order 5 was derived from Closing Order 2. Closing Order 2 is pending the Appellate Court (Case No. 21-2665) and was fully briefed by the Parties. (*See* Exhibit C) The Korean Claimants has already filed Notice of Appeal for Closing Order 5. (Case No. 22-1753) This appeal's briefing schedule was set by the Appellate Court and the Korean Claimants has already filed the Appellant's brief (*See* Exhibit B). Dow Corning Corporation is obliged to file the Appellee's brief by October 21, 2022.[12]

"If the untimely appeal is still pending in this court [appellate court], the district court should consider the merits of the Rule 60(b) motion and issue an opinion indicating whether it is inclined to grant the motion."*See Lewis v. Alexander*, 987 F.2d 392 (Sixth Cir. 1993) at 396 "A district court may therefore employ Rule 60(b) to permit an appeal outside the time constraints of Fed.R.App.P.4(a)(5)"*See Davenport v. Tribley*, 2011 U.S.Dist. Lexis 15800 (E.D.Mich. 2011) ""*Lewis* thus remains good law in this circuit, and the district court in this

[12]The Korean Claimants have the other two filings pending the Sixth Circuit for appeal to Motion for Extension and Motion for Stay regarding Premium Payments. Dow Corning Corporation has been ordered to file brief by November 4 and 9, 2022. (*See* Exhibits D,E)

case erred in concluding otherwise. …Although we concluded that "[t]he district court did not abuse its discretion in refusing to rule that the attorney's misinterpretation of the rules was a 'mistake' within Rule 60(b), "our analysis actually presumed the availability of Rule 60(b) as a basis on which to provide a party with relief from Rule 4(a) in some circumstances.""*See Tanner v. Yukins*, 776 F.3d 434 (Sixth Cir. 2015) at 442.

The Korean Claimants did not file the Motion to Set Aside Closing Order 5 to circumvent the specific requirement of Fed.R.App.P.4(a)(6). The Korean Claimants filed the Motion to Set Aside Closing Order 5 rather under Fed.R.Civ.P.55(c). Rule 55(c) prescribes;

> (c) Setting Aside a Default or a Default Judgment. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

Even if the Motion to Set Aside is a Rule 60 motion, the case law of the Sixth Circuit did not preclude the availability of Rule 60(b) as a basis for providing the Korean Claimants with relief from Fed.R.App.P.4(a) in some circumstances. In this regard, Dow Corning Corporation asserts, "Fed.R.App.P.4(a)(6) is the exclusive remedy for reopening the time for filing a notice of appeal after the statutory time period for filing such an appeal has expired." (*See* footnote 22 of the Response) However, the Korean Claimants filed the Motion to Set Aside under Fed.R.Civ.P.55(c) other than a Rule 60 motion. The Motion to Set Aside has nothing to do with the Motion to Reopen Time to File Appeal filed by the Korean Claimants.

III. Conclusion

For the foregoing reasons, the Korean Claimants request this Court to Grant this Motion to Set Aside Closing Order 5.

Date: October 11, 2022 Respectfully submitted,

(signed) Yeon-Ho Kim

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CERTIFICATE OF SERVICE

I hereby certify that on October 11,2022, this Reply to the Response has been electronically filed with the Clerk of Court using ECF system, and the same has been notified to all of the relevant parties of record.

Dated:October 11, 2022 Signed by YeonHo Kim