Case No: *22-1753*

United States Court of Appeals for the Sixth Circuit

In re: SETTLEMENT DOW CORNING TRUST

Debtor

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KOREAN CLAIMANTS

Interested Parties - Appellant

v.

DOW SILICONES CORPORATION; DEBTOR'S REPRESENTATIVES;

CLAIMANTS' ADVISORY COMMITTEE

Interested Parties - Appellees

FINANCE COMMITTEE

Movant - Appellee

# Reply of Appellant Korean Claimants

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## I. REPLY TO INTRODUCTION AND BACKGROUND

In the Response, the Appellees ("Dow Corning Corporation") did not maintain their assertions made in the Response for the Motion to Reopen Time to Appeal (RE1670) and the Motion to Set Aside Closing Order 5 (RE1672) filed with the District Court to impair the images of the Korean Claimants and counsel. However, the Appellants ("the Korean Claimants") maintain because it could be helpful for this Court to understand what was happening between the Korean Claimants and Dow Corning Corporation.

Dow Corning Corporation depicts that counsel and the Korean Claimants committed fraud to cheat the Settlement Facility. But rather Dow Corning Corporation committed fraud to the Korean Claimants from 1997.

Counsel for Dow Corning Corporation[1] solicited the Korean Claimants' counsel to vote for Dow Corning Corporation's Proposed Reorganization Plan. She invited Korean counsel to her law firm in Houston. Right before the flight to Houston, however, Korean counsel had to cancel the flight for his personal reason. To return his apology not to be able to show up as promised, Korean counsel let the Korean Claimants vote for the Proposed Plan.

[1]Barbara Houser

When Korean counsel participated in the hearing for confirmation in 1999, counsel realized the contents of the Proposed Plan were extremely prejudicial to the Class 6.2 Claimants so that counsel wanted to revoke the vote from “accept” to “object.” Surprised by Korean counsel’s move, Dow Corning Corporation proposed some changes in the Proposed Plan. First of all, Dow Corning Corporation denied the offer of the Korean Claimants that the Settlement Facility set up a regional office in South Korea to process the Korean Claims. Second, Dow Corning Corporation offered that Korean counsel would be included as a member of the Claimants’ Advisory Committee which was accordingly reflected in the Proposed Plan that at least one member of the Claimants’ Advisory Committee must be a foreign attorney. Third, Dow Corning Corporation offered to mitigate the proof of manufacturer by including an affirmative statement of implanting physician. Finally, Dow Corning Corporation accepted that the rupture payment of the Class 6.2 Claimants could be upgraded to the rupture payments of the Claims 6.1 Claimants if the Claimants give up the Premium Payments applied to the rupture payments.

However, the commitments made as above were not implemented in the final Plan because while the Korean Claimants did not file a notice of appeal Dow Corning Corporation betrayed their commitments and changed the Proposed Plan’s clauses relevant to the commitments. In accordance with the final

confirmed Plan in 2004, the Settlement Facility has applied severe criteria to the Affirmative Statements of Korean implanting physicians although counsel for Dow Corning Corporation had promised Korean counsel that there would be no problem in the samples of Affirmative Statement provided, later shown to the Claims Administrator and relevant employees of the Settlement Facility. It turned out that the Korean Claimants and their counsel were cheated by Dow Corning Corporation.

Dow Corning Corporation asserts (RE1672 Pg ID:#31192-31193), ““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, RE 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).””[2]

[2]Interestingly enough, Dow Corning Corporation does not present Claimant Information Guides as evidence to prove the requirement of address and contact information in this Court. Instead, Dow Corning Corporation presents Order Approving Claim Form Packages as evidence, indicating a site address, https://www.sfdct.com/_sfdct/index.cfm/pom-forms. (*See* the Response, page 9) However, these Packages do not require the Claimants to inform the Settlement Facility of any change of address. The Packages simply made an address box including an email address for newsletter of the Claimants Advisory Committee

This part of address update/confirmation requirements is the 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."(RE1672 Pg ID:#31194) 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."[3] The reason that Dow Corning Corporation asserts that the Settlement Facility's experience demonstrated wisdom regarding address update/confirmation is because it is not prescribed in the Plan but was invented by the Settlement Facility. Second, there was no guideline as to address update/confirmation by claimant and attorney from the inception of the settlement program. Dow Corning Corporation points out Claimant Information Guide. (RE1672-8 Pg ID:#31171-31599) However, Claimant Information Guide just urged claimants who filed claim form to notify if they changed address. It was not what Dow Corning Corporation asserts, "the obligation of claimants and attorneys to

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in the Form.

[3]Indeed, it is 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 the Korean Claimants. Dow Corning Corporation, additionally interesting enough, does not argue in this Court that the Settlement Facility 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.

maintain updated and current address information."[4]

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." (RE1672 Pg ID:#31193) 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.[5] Dow Corning Corporation now admits that it has a policing power on the relationship of claimant and attorney regarding check of payment. It was not authorized under the Plan. It is also against the practice of each country. Counsel for the Korean Claimants can put the fund of claimant on local court's bond after deducting the attorney fees from check of payment.

Dow Corning Corporation asserts, "Unfortunately, the record reflects *a long history of unreliable or even false information submitted by counsel* for the

[4]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 for mail delivery including domestic mailing system of foreign countries.

[5]But the Settlement Facility did not use discretion in favor of the Korean Claimants. The Settlement Facility did not send the payments to counsel for the Korean Claimants based upon address update/confirmation. Dow Corning Corporation did not act in good faith regarding counsel let alone denial of the settlement agreement of mediation offered by the Finance Committee.

Korean Claimants demonstrating that the Settlement Facility would not be fulfilling its required role and function if it were to exempt the Korean Claimants from requirements set forth in the Court's Closing Orders. Indeed in denying one of many appeals filed by the Korean Claimants, the Sixth Circuit noted the unreliability 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." (RE1672 Pg ID:#31194-31196) 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 before the effective date of the Plan, Allen Bearicks viewed the forms 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. The Settlement Facility held the Korean Claimants' filings for about three years and then started sending checks for payment to counsel. After being held for about two years, the Finance Committee offered mediation for settlement for the Korean Claimants as a group to counsel but walked away by saying, "*Oops*, the mediation was not authorized by Dow Corning Corporation." In doing these, the Claimants' Advisory Committee did not object and Deborah Greenspan only

played and took control over the matters regarding the Korean Claimants. The former Claims Administrator, the late David Austern, told counsel for the Korean Claimants right before mediation that the management of Dow Corning Corporation who knew the process of reorganization and the role of the Korean Claimants how much the Korean Claimants had contributed to the Proposed Plan's confirmation left the company resulting that there was nobody listening the Korean Claimants so that he was sorry for the Korean Claimants. The Settlement Facility has been digging the back of counsel[6] and the Korean Claimants as an example that the Finance Committee filed the Motion to Show Cause for sanctions on counsel. Since the District Court held chamber conferences with the Parties (the Claims Administrator, the Finance Committee, the Claimants' Advisory Committee) including Dow Corning Corporation's counsel many times,[7] the District Court should have known that the records of Dow Corning Corporation could not describe the whole picture of counsel and the Korean Claimants.

The decisions of the Appeals Judge regarding Affirmative Statements for proof of manufacturer have nothing to do with Closing Order 5. The Korean Claimants do not understand why Dow Corning Corporation produced the

[6]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, U.S..

[7]Counsel for the Korean Claimants has been constantly worrying about the neutrality and impartiality of court because this Court was supervising the Claims Administrator, the Finance Committee and the Settlement Facility.

decisions of the Appeals Judge as evidence. (RE1676, *See* the Response Page 15, footnote 4) Affirmative Statements were submitted in 2007-2008, about fourteen years ago. The decisions of the Appeals Judge were made only to 98 Claimants out of 2,600 Claimants for whom counsel represented for filing proof of manufacturer claim. In addition, the decisions of the Appeals Judge were regarding affirmative statements with no relation to address update/confirmation of Closing Order 5. Dow Corning Corporation, always acting in bad faith regarding the filings of the Korean Claimants with the District Court,[8] cancelled proof of manufacturer of 98 Claimants. Their appeals to this Court were denied. With respect to over six hundred appeals to the Appeals Judge filed on June 1, 2019, the Appeals Judge did not grant even a single case[9]including the cases regarding Affirmative Statement for proof of

[8]Counsel for Dow Corning Corporation, Deborah Greenspan, corresponded with the District 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 the District Court was supervising the Claims Administrator and the Finance Committee. The email of July 28, 2022 of Dow Corning Corporation's counsel (RE1675-7 Pg ID:#32166-32168) shows that as soon as the Korean Claimants filed the Motion for Expedited Hearing concerning the Motion for Extension of Filing Claim with the District Court, 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, the District Court issued the Order of August 12, 2022 denying both the Motion for Extension and the Motion for Expedited Hearing of the Korean Claimants. Dow Corning Corporation's counsel was given a bigger present for this emailing. Even after the Korean Claimants' counsel warned, "inappropriate", she continued an unnecessary and an inappropriate contact with an email of September 14, 2022 (RE1675-8 Pg ID:#32169-32170) to the Court without the Korean counsel's consent.

[9]In addition, the Appeals Judge held the Korean Claimants' cases for a long time. The Appeals Judge issued Decisions for all of the Korean Claimants' cases in

manufacturer. The appeals of the Korean Claimants included a variety of Claims denied by the Settlement Facility. The Korean Claimants realized that the Appeals Judge just stamped boilerplate so that an appeal to the Appeals Judge was not worthwhile. The basis for denial collected and aided by the Quality Control Department were not changed even counsel submitted the explanations and materials that did not comply with the Quality Control Manager's stereotyped view using Korean websites search. Live doctors became dead or non-existent doctors by the Settlement Facility. By ignoring the new submissions and favoring the explanations of the Settlement Facility, the Appeals Judge has been influenced.

## II. REPLY TO ARGUMENT

### A. Whether the Appeal Should Be Dismissed as Untimely.

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. 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

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one day, January 25, 2021.(RE1676) The Korean Claimants submitted several hundred of 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 explanations to protect the Affirmative Statements of Korean implanting physicians.

emailed this Court stating "My email address is changed from yhkimlaw@unitel.co.kr to yhkimlaw@naver.com as of June 30, 2022." However, www.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. Although counsel emailed the District 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, 2022 of Closing Order 5 because the announcement of www.unitel.co.kr stated accordingly, "Closing Date of Receiving/Sending Mails : May 31, 2022." (RE1675-2 Pg ID:$31948-31957) The fact is supported by another email of counsel. (RE1675-2 Pg ID:#31965-31966) It was sent to Secretary General of the Asia-Pacific Chapter of International Academy of Family Law on June 9, 2022 because 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." The Korean Claimants' counsel updated his PACER account and notified to this Court and the District Court on June 24, 2022. (RE1675-2 Pg ID:#31958-31962[10]) The Court or clerk's office "learned" that the email notification was not received and counsel for the Korean Claimants did not receive the notice of Closing Order 5 of June 13, 2022.

[10] 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." (RE1675-2 Pg ID:#31964)

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 Order 5. 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 the Korean Claimants updated the email address only as of June 30. 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 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. 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,[11] 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

[11] The Claims Administrator was aware of yhkimlaw@naver.com. She used it for her emailing to counsel.

respect, the Korean Claimants argue the ruling *in United Coin Meter Co. v. Seaboard C. Railroad*, 705 F.2d 839 (Sixth Cir. 1983) at 846 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. 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.

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 5 and was not served by Dow Corning Corporation prior to issuance. Counsel had no idea as to Closing Order 5 without a prior notice. Furthermore, the Claims Administrator used to send counsel a mailing regarding an important development for the Korean Claimants but she did not

as to Closing Order 5 so that counsel had no way to learn except email from the ECF system.

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), 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-filing 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. 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

"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 "*Lewis* thus remains good law in this circuit, and the district court in this 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 acted in good faith. Rather, the Claims Administrator used to send counsel a mailing regarding an important development for the Korean Claimants but she did not do so as to Closing Order 5. The Korean Claimants appealed to Closing Order 2 which is pending the Sixth Circuit. Closing Order 5 was derived from Closing Order 2 so that there would be no prejudice to Dow Corning Corporation.

### B. Whether Closing Order 5 is Valid Order Consistent with the Plan and Bankruptcy Code.

Closing Order 5 is to eliminate the 1,400 Korean Claimants from the list of the eligible Claimants so that they are no longer the claimants before the Settlement Facility because September 17, 2022 for updating and confirming address has passed.

In this regard, Dow Corning Corporation asserts that Closing Order 5 was entered properly as a Stipulated Order. Closing Order 5 should be subject to advance notice and a preliminary hearing. Due process is an upper requirement whether or not the Stipulated Order was in accordance with the Plan and the rules of the District Court. Dow Corning Corporation asserts that the Korean Claimants could have sought reconsideration. If Dow Corning Corporation has thought so, Dow Corning Corporation is better off to drop its objection to the

Korean Claimants' appeal based upon the delay of filing a notice of appeal.

### C. Whether Closing Order 5 was Entered for Improper Purpose.

Dow Corning Corporation asserts that the Korean Claimants make a confusing argument that Closing Order 5 was intended to approve wrongful acts of the Settlement Facility and that it is a retroactive authorization of the Settlement Facility's practice. Not that the Korean Claimants make a confusing argument, Dow Corning Corporation feels hurt because of the Korean Claimants' revelation.

As the Korean Claimants pointed out in the Appellant's Brief and the Appellant's Brief of *Case No.21-2665*, Closing Order 5 as well as Closing Order 2 is to formalize the *secret* practice of the Settlement Facility's address update/confirmation. The Korean Claimants who received payments checks from 2008 to 2014 have never been asked by the Settlement Facility to update their address or to be confirmed by the Settlement Facility before mailing checks. However, the Settlement Facility began to ask counsel the Claimants' address update/confirmation from 2015. The Korean Claimants presented evidence in the Brief that the Settlement Facility sent a lot of address update/confirmation letters to counsel from 2015 and then counsel protested the

Claims Administrator and the Quality Control Manager regarding the address update/confirmation requirement.

In this regard, Dow Corning Corporation asserts that the Korean Claimants' notice complaints are ironic 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. The Dow Corning Corporation's purpose is to police the relationship between counsel and the Korean Claimants. The Korean Claimants are not interested in operation of the Settlement Facility and the status of their claims. The Korean Claimants who suffered from defected goods that Dow Corning Corporation manufactured just want to receive payment checks by empowering counsel to represent before the Settlement Facility. Not that the Korean Claimants refused to provide their address update/confirmation, Dow Corning Corporation exploited the process of address update/confirmation to deny sending payment checks to counsel.

In addition, Dow Corning Corporation assert that the Settlement Facility---which reports to the District Court---is required to implement the claims processing procedures that enable the Court to verify that settlement dollars actually reach the claimants for whom they are intended. Dow Corning

Corporation now admits that the purpose of address update/confirmation is to verity the settlement dollars actually to reach the claimants, which means that whether counsel embezzled the money of claimants should be verified by the Settlement Facility. Dow Corning Corporation filed the Motion to Show Cause against counsel for excessive attorney fees and non-distribution of checks sent to counsel on the basis of return of address confirmation letters in 2017. However, the District Court denied the Motion for Sanctions against counsel. In practice, counsel can put client's money from checks on the Korean court's bond after deducting his attorney fees with local courts and the claimants are able to claim from the courts with interests incurred.

### D. Whether Closing Order 5 Implements, is Consistent with, and does not Modify the Plan or Violate the Bankruptcy Code.

Dow Corning Corporation asserts that Closing Order 5 is to implement the Plan and does not modify it. Dow Corning Corporation further asserts that the Claims Administrator shall have the plenary authority and obligation to institute procedures to assure an acceptable level of reliability and quality control of Claims and to assure that payment is distributed only for Claims that satisfy the Claims Resolution Procedures. Closing Order 5 is not to implement the Plan but to eliminate the 1,400 claims-approved Korean Claimants from a possibility of receiving checks. Address update/confirmation before payments is not

prescribed in the Plan. The Settlement Facility invented it during process of claims for last 20 years and applied from 2015. If the requirement of address update/confirmation were included in the Proposed Plan, counsel for the Korean Claimants would not vote for the Plan. Through a Stipulated Order, Dow Corning Corporation formalized the unauthorized (secret) practice of the Settlement Facility regarding address update/confirmation, which is identical to putting a new clause into the Plan. It is a modification of the Plan. The Claims Administrator is not allowed to apply a claims-processing practice unauthorized by the Plan even if she has a plenary authority to assure an acceptable level of reliability not to mention that she has acted as an errand agency of Dow Corning Corporation.

Dow Corning Corporation asserts that nothing in Closing Order 5 limits its application to the Korean Claimants and there is absolutely no basis or evidentiary support for the Korean Claimants' assertion of discrimination or unequal treatment. The 16,000 Claimants affected by Closing Order 5 include the 1,400 Korean Claimants. The other Claimants, non-Korean Claimants of Closing Order 5, are mostly the Claimants who were not represented by an attorney. Dow Corning Corporation admitted that the only counsel unsatisfied with Closing Order 5 is Korean counsel. The reason that no other counsels objected Closing Order 5 is because Closing Order 5 does not apply to their

clients. Not that nothing in Closing Order 5 limits its application to the Korean Claimants, there is no one except counsel for the Korean Claimants to raise a complaint as to Closing Order 5. Whether there is evidentiary support of discrimination or unequal treatment is that Dow Corning Corporation would know exclusively because the Settlement Facility did not share information with counsel including the return rates of address verification letters regarding the Korean Claimants.

Dow Corning Corporation asserts that the fact that the Settlement Facility relies on the U.S. Postal Service to distribute mail to claimants does not constitute a different treatment. Dow Corning Corporation exclusively relies on the U.S. Postal Service to verify whether the Korean Claimants received the payments. The U.S. Postal Service is not reliable because it delivered mails several months late to the Korean Claimants and counsel. It is fairly assumed that there were a lot of mails inaccurately delivered or returned. One example is that when the employees of counsel's law office registered their home address with the Settlement Facility they did not receive any mailing from the Settlement Facility. There should be a lot of non-delivery or return without being delivered. Based upon the U.S. Postal Service's return of inaccurate mailings, the Settlement Facility included the 1,400 Korean Claimants in the list of Closing Order 5. If the Settlement Facility is required for accuracy, Dow

Corning Corporation must have used the Federal Express or the DHL. But the Settlement Facility denied a proposal of counsel to use the Federal Express even though address verification from the Korean Claimants is critical to protect their rights for payments. In addition, the Korean Claimants are foreign claimants so that the Settlement Facility must use the Korean Postal Service. The Settlement Facility violated an equal treatment clause and the fair and equitable standard under the Bankruptcy Code.

### E. Whether the Korean Claimants do not and cannot Provide any Evidence to Support the Argument that There is No Factual Basis to Support Closing Order 5.

Dow Corning Corporation asserts that the address verification requirement protects the Settlement Fund assets and the claimants and provides the District Court with assurance that the claimants will receive their payments, no other party has objected to this requirement or questioned its appropriateness, nor did the Settlement Facility need to establish that *all* of the addresses provided by counsel for the Korean Claimants were invalid before requiring that the claimants themselves confirm their address to the Settlement Facility. For the first part of 2019, the Claims Administrator sent letters to counsel to ask for filings for the Korean Claimants regarding address update/confirmation and the claims in deficiency by June 3, 2019. Counsel reluctantly filed the 660 address

update forms and over 600 appeals letters to the Appeals Judge in June 1, 2019. As mentioned above, *all* of 600 appeals to the Appeals Judge were denied on January 25, 2021. In addition, the Settlement Facility put the 660 address update forms in audit immediately. The Claims Administrator who solicited counsel to file anything by June 3, 2019 attested in her Declaration that more than 50% of address update verification letters were returned therefore the Korean Claimants' address updates were not reliable so that *all* of them must be included in the list of Closing Order 5. The Settlement Facility did not treat fairly and equitably in processing the Korean Claims regarding Affirmative Statement. Plus, the Settlement Facility did not share any information with counsel including the result of address verification audit and did not allow counsel to visit the Settlement Facility for meeting the Claims Administrator. When the Korean Claimants did not move, the Settlement Facility solicited counsel to file either claims or address update/confirmation forms. When counsel filed, the Settlement Facility exploited the filings to impose disadvantages on the Korean Claimants. The Korean Claimants filed Motions with the District Court. The grievances of the Korean Claimants have never been resolved by filing Motions. Dow Corning Corporation can do whatever on the basis of the Plan or Stipulated Orders because the Claimants' Advisory Committee is always cooperative but the Korean Claimants did not receive checks that they were supposed to even if their Claims were approved.

### F. Whether the Korean Claimants Cannot be Exempted from Closing Order 5.

Dow Corning Corporation asserts that the Korean Claimants cannot demand a settlement without satisfying the same procedural requirements as any other claimant, the Korean Claimants' privacy argument is belied by their own submissions, the Settlement Facility is not requesting address information from counsel but rather from the claimants themselves, the Korean Claimants have availed themselves of the settlement program and thereby subjected themselves the rules and requirements for receiving compensation, the address information is not protected by the attorney-client privilege because the Settlement Facility seeks address verification directly from the Korean Claimants and even if seeking from the lawyer the claimant's provision of a current address to the Settlement Facility does not implicate any privileged communication between an client and a lawyer, and if the Korean Claimants believed that the address requirement was problematic they should have raised this issue when claim forms were initially distributed—nearly 20 years ago. Address information of an individual is strictly protected by the Personal Information Protection Act of Korea. Nobody can divulge the individual's address information without consent. The Korean Claimants contracted with counsel not to disclose anybody including the parties in the U.S. their information including address. When the Korean Claimants filed their Claims, they were not required to submit their

address. The Claim Forms Packages did not require the Korean Claimants to submit their address. The Korean Claimants did not subject themselves of address requirements when they filed their Claims in 2005-2006 because there was no address requirement at that time. The address update/confirmation requirement was used from 2015 by the Settlement Facility and then authorized by the District Court by Closing Order 2 in March 2019. Address information under the Korean laws is protected under the attorney-client privilege. No court asks an attorney to disclose address information of client. Counsel is subject to the Korean laws so that the Settlement Facility is not irrelevant to the Korean laws. Even if Dow Corning Corporation mocks counsel that the Korean Claimants should have raised this issue when claim forms were initially distributed--nearly 20 years ago, there was no such issue of address update/confirmation at that time. There were only the Claims Forms where address box of the Claimants was included along with other claims information.

### G. Whether the Korean Claimants' Additional Arguments Relate to Their Complaints about the Settlement Facility and Not to the District Court's Entry of Closing Order 5.

Dow Corning Corporation asserts that the fact that the Settlement Facility ordered counsel that the Korean Claimants' address update had to be provided by June 3, 2019 does not abrogate or amend an order of the District Court. Dow

Corning Corporation and further asserts that the Korean Claimants' other complaints about mail delivery system, the accuracy of the mailing procedures of the Settlement Facility, the refusal of the Settlement Facility to send all mailings by express mail service, the interpretation of the reasons for undeliverable mail, and the citation to the Claimant Information Guides in the Declarations, and the accusation to the Settlement Facility of manipulating the mailing procedures do not have any bearing on the validity of Closing Order 5. Dow Corning Corporation ignores the mistake of the Settlement Facility and rather blames the Korean Claimants for following the requests of the Settlement Facility. The Orders of the District Court regarding the Settlement Facility were based upon consent of Dow Corning Corporation and the Claimants' Advisory Committee. The requirements and the rules of the Settlement Facility are actually those of Dow Corning Corporation imposed on the claims processing. If the Settlement Facility ordered counsel to provide the Korean Claimants' address update by June 3, 2019, it is identical to the order of the District Court. Therefore if the Settlement Facility ordered counsel likewise, the Settlement Facility must abide by. It cannot run from responsibility of mistake. Dow Corning Corporation argued in the District Court that the Claimant Information Guide was the basis for address update/confirmation requirement. But now, Dow Corning Corporation changed the basis for address update/confirmation to the Claim Form Packages which was confirmed in 2002 by the District Court. It

is the result of the Korean Claimants' counsel's strong argument. Likewise, Dow Corning Corporation should have accepted the complaints validly raised by the Korean Claimants regarding address update/confirmation because the Korean Claimants' Claims were approved by the Settlement Facility. If Dow Corning Corporation evades its responsibility for payments to the Korean Claimants by way of the success in the cases pending this Court, it must be a shame since a large corporation is greedy enough not to pay a dime to foreign consumers.

## III. CONCLUSION

For the forgoing reasons, the Korean Claimants request that this Court approve the appeal of the Korean Claimants as timely and accept the complaints of the Korean Claimants regarding Closing Order 5.

Date: October 25, 2022

Respectfully submitted,

(signed by) Yeon-Ho Kim
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For the Korean Claimants

# APPENDIX

**CERTIFICATE OF SERVICE**

I hereby certify that on October 25, 2022, I have electronically filed the above document with the Clerk of Court by ECF system that will notify to all relevant parties in the record.

Date: October 25, 2022 Signed by Yeon-Ho Kim

**Form 6. Certificate of Compliance With Type-Volume Limit**

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   /s/ **Yeon Ho Kim**

   Attorney for **Korean Claimants**

   Dated: **Oct.25, 2022**