UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

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

For the reasons set forth in the attached memorandum, Dow Silicones Corporation ("Dow Silicones"),[1] the Debtor's Representatives (the "DRs"), the Finance Committee ("FC"), and the Claimants' Advisory Committee ("CAC") oppose Korean Claimants' Motion to Set Aside Closing Order 5 Regarding Korean Claimants, ECF No. 1668 ("Motion to Set Aside") and respectfully submit that the Motion to Set Aside should be denied.

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

Dated: October 3, 2022

Respectfully submitted,

/s/ Karima Maloney
Karima Maloney
SMYSER KAPLAN & VESELKA
717 Texas Avenue
Suite 2800
Houston, TX 77002
Telephone: (713) 221-2382
KMaloney@skv.com

Counsel for the Finance Committee

/s/ Deborah E Greenspan
Deborah E. Greenspan
BLANK ROME LLP
Michigan Bar # P33632
1825 Eye Street, N.W.
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
Deborah.Greenspan@blankrome.com

Debtor's Representative and Attorney for Dow Silicones Corporation

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

Claimants' Advisory Committee

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

Claimants' Advisory Committee

/s/ Jeffrey S. Trachman
Jeffrey S. Trachman
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036
Telephone: (212) 715-9175
jtrachtman@kramerlevin.com

Counsel for Claimants' Advisory Committee

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

PROPOSED ORDER OF DOW SILICONES CORPORATION, THE DEBTOR'S REPRESENTATIVES, THE FINANCE COMMITTEE, AND THE CLAIMANTS' ADVISORY COMMITTEE DENYING KOREAN CLAIMANTS' MOTION TO SET ASIDE CLOSING ORDER 5

The Court has considered the responses of Dow Silicones Corporation, the Debtor's Representatives, the Finance Committee, and the Claimants' Advisory Committee to Korean Claimants' Motion to Set Aside Closing Order 5 Regarding Korean Claimants, ECF No. 1668 ("Motion to Set Aside") and the Court finds that the Motion to Set Aside should be denied with prejudice.

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

DATED: _____

_____
DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

MEMORANDUM IN SUPPORT OF THE RESPONSE OF DOW SILICONES CORPORATION, THE DEBTOR'S REPRESENTATIVES, THE FINANCE COMMITTEE, AND THE CLAIMANTS' ADVISORY COMMITTEE TO KOREAN CLAIMANTS' MOTION TO SET ASIDE CLOSING ORDER 5

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

CONCISE STATEMENT OF ISSUES PRESENTED

1. Should the Court set aside Closing Order 5 under Rule 60(b)(1) where Korean Claimants provide no basis for a finding of excusable neglect (as required) or under Rule 60(b)(4) where there is no basis to find that the Closing Order is void?

   Respondents Answer: No.

2. Should the Court set aside Closing Order 5 under Rule 60(b) as to Korean Claimants only thereby allowing Korean Claimants to avoid the requirements of Federal Rule of Appellate Procedure 4(a)(6) where Korean Claimants failed to file a timely appeal or a timely motion to reopen the time for appeal?

   Respondents Answer: No

CONTROLLING OR MOST APPROPRIATE AUTHORITY

- Dow Corning Amended Joint Plan of Reorganization
- The Settlement Facility and Fund Distribution Agreement
- Dow Corning Settlement Program and Claims Resolution Procedures, Annex A
- Order, *In re Settlement Facility Dow Corning Trust*, 22-1752, Doc. No. 32-1 (6th Cir. Sept. 14, 2022)
- Fed. R. Civ. P. 60
- Fed. R. App. P. 4(a)(6)
- *Yeschick v. Mineta*, 675 F.3d 622 (6th Cir. 2012)

Dow Silicones Corporation ("Dow Silicones"), the Debtor's Representatives (the "DRs"), the Finance Committee (the "FC"), and the Claimants' Advisory Committee (the "CAC") (collectively, "Respondents") respectfully request that the Court deny the Motion Set Aside Closing Order 5 Regarding Korean Claimants, ECF No. 1668 ("Motion to Set Aside") filed by the Korean Claimants ("Movants").

INTRODUCTION

The Motion to Set Aside is the latest in a series of baseless filings in which the Korean Claimants seek relief from the Court for failing timely to appeal or seek leave to extend the time to appeal a properly entered order of this Court—Closing Order 5.[2] The Korean Claimants have mounted belated challenges to several of this Court's orders that facilitate the orderly wind down and closure of the Settlement Facility as contemplated by the Plan. The Korean Claimants challenged Closing Order 2[3] two years after its entry seeking at that time to vacate decisions of the Settlement Facility based on the requirements of Closing Order 2.[4] The appeal of

[2] *See* Closing Order 5, Notice that Certain Claims Without a Confirmed Current Address Shall be Closed and Establishing Protocols for Addressing Payments for Claimants in Bankruptcy, ECF No. 1642 ("Closing Order 5").

[3] *See* Closing Order 2 (Regarding Additional Procedures for Incomplete and Late Claims; Protocols for Issuing Payments; Audits of Attorney Distributions of Payments; Protocols for Return of Undistributed Claimant Payment Funds; Guidelines for Uncashed Checks and for Reissuance of Checks; Restrictions on Attorney Withdrawals), ECF No. 1482 ("Closing Order 2") (Exhibit A)

[4] *See* January 15, 2021 Motion for Vacating Decision of Settlement Facility Regarding Address Update/Confirmation, ECF No. 1569 ("Motion for Vacating"); Korean Claimants' Reply to Response of Dow Corning Corporation the Debtor's

this Court's order denying the Motion for Vacating (ECF No. 1607) remains pending.[5]

On February 3, 2021, the Korean Claimants filed a Motion for Extension of Deadline for Filing Claim (ECF No. 1586), which challenged the Court's July 25, 2018 Closing Order 1 as "ineffective." The Korean Claimants again sought relief claiming that "excusable neglect" should provide a basis for the untimely submission of claims.[6] This Court's denial of that motion is currently on appeal.[7]

In the instant Motion to Set Aside, the Korean Claimants again seek to challenge an order long after its entry. Closing Order 5 was entered on June 13, 2022. Movants filed an untimely notice of appeal 73 days later, claiming they were not served with Closing Order 5. After the Sixth Circuit denied their related motion to stay—finding the appeal was untimely[8]—the Korean Claimants filed two more

---

Representatives, Claimants' Advisory Committee and Finance Committee to Motion for Vacating Decision of Settlement Facility Regarding Address Update/Confirmation, ECF No. 1599, at PageID.28315.

[5] *See Korean Claimants v. Claimants' Advisory Committee, et al.*, No. 21-2665 ("Korean Claimants 2021 Appeal").

[6] *See* Korean Claimants' Reply to Response of Dow Corning Corporation, the Debtor's Representatives, Claimants' Advisory Committee and Finance Committee to Motion for Extension of Deadline for Filing Claims, ECF No. 1594, at PageID.27813-15; Reply to the Response of Dow Silicones Corporation, the Debtor's Representatives, and the Claimants' Advisory Committee to Motion for Expedited Hearing and Relief, ECF No. 1647, at PageID.29328.

[7] *See In re Settlement Facility Dow Corning Trust*, No. 22-1750 (6th Cir.).

[8] *See* Order, *In re Settlement Facility Dow Corning Trust*, 22-1752, Doc. No. 32-1, at 2 (6th Cir. Sept. 14, 2022) (Exhibit B) ("September 14 Order").

motions seeking, apparently, to rectify their untimely appeal. They filed the Motion to Reopen the Time to Appeal Regarding Closing Order 5, ECF No. 1667 ("Motion to Reopen") on September 15 and two days later filed this Motion to Set Aside. The Motion to Set Aside seeks unwarranted relief under Fed. R. Civ. P. 60(b).

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. The Motion to Set Aside is a thinly disguised effort to circumvent the requirements of Fed. R. App. P. 4(a)(5) and (6) and should be denied.[9]

---

[9] We note the unusual procedural context here: the Motion to Set Aside (like the Motion to Reopen) was filed after the notice of appeal of Closing Order 5 was filed. That appeal is currently in the briefing stage: the appellant's brief has been filed and the appellee brief is due on October 21, 2022. The Sixth Circuit stated in its order denying a stay of Closing Order 5 that the appeal is untimely and that the Korean Claimants could "no longer move the district court to extend or reopen the time for appeal." This procedural status raises a jurisdictional question. "'As a general rule, the district court loses jurisdiction over an action once a party files a notice of appeal, and jurisdiction transfers to the appellate court.'" *Hobbs v. County of Summit*, 552 F. App'x 517, 519 (6th Cir. 2014) (*quoting Lewis v. Alexander*, 987 F.2d 392, 394 (6th Cir.1993)). But, generally, the district court retains jurisdiction if the appeal is untimely, or the order appealed is a non-appealable order. *Lewis*, 987 F.2d at 394–95 (notwithstanding appeal, district court "retains jurisdiction to proceed with matters that are in aid of the appeal" and "'retains jurisdiction over an action when an 'appeal is untimely'") (citations omitted). Here, Respondents contend, and the Court of Appeals has noted, that the appeal is untimely. Arguably therefore, the district court retains jurisdiction to address the Motion to Set Aside. Further, this Court would retain jurisdiction under Fed. R. Civ. P. 62.1 to *deny* the Motion (although in such circumstances it could not *grant* the motion unless the Court of Appeals first remanded the case).

BACKGROUND

This Court is, of course, familiar with the relevant facts: In 1999, Dow Corning and the representatives of the tort claimants—the Tort Claimants' Committee—filed the Dow Corning Amended Joint Plan of Reorganization ("Plan") (Exhibit C), which became effective on June 1, 2004. The Plan specifies the terms of the treatment of all classes of creditors and the means for implementing the Plan. The Plan Documents governing operation and implementation of the Plan include the Settlement Facility and Fund Distribution Agreement ("Settlement Facility Agreement" or "SFA") (Exhibit D), the Dow Corning Settlement Program and Claims Resolution Procedures ("Annex A" to the SFA) (Exhibit E), and the Funding Payment Agreement (Exhibit F).[10] Section 5.3 of the Plan provides that the Settling Personal Injury Claims, including the Breast Implant claims, shall be resolved under the terms of the SFA (or the Litigation Facility Agreement, as applicable). The SFA along with Annex A establish the detailed rules and guidelines for determining the eligibility of claims for the settlement program and for the submission, evaluation, and payment of Breast Implant claims eligible for a settlement under the Plan.

The Settlement Facility is responsible for evaluating and processing claims for settlement compensation and must assure that claims meet the necessary criteria,

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

that the supporting documentation is reliable, and that funds are distributed only to eligible claimants. SFA § 5.04(b). The Court retains jurisdiction over the Plan to, *inter alia*, "resolve controversies and disputes regarding interpretation and implementation of this Plan and the Plan Documents." Plan, § 8.7.3. The assets of the Settlement Fund are maintained under the supervision and control of the Court until the claimant *actually receives* the funds. *See* SFA § 10.09 ("All funds in the Settlement Facility are deemed *in custodia legis* until such times as the funds have actually been paid to and received by a Claimant, ….). The Court thus has control over funds while they are in the possession of counsel and retains the plenary authority (and the obligation) to manage the distribution of funds and to institute procedures to assure that qualified claimants actually receive the funds and that the limited assets of the Settlement Funds are not "lost" or otherwise diverted.

To assure that only qualified claimants are paid and that the Settlement Fund assets are not distributed inappropriately, the Settlement Facility has the affirmative obligation to institute procedures to deter and identify fraud or any abuse of the claims process. SFA §5.04(a). The Plan established the CAC and the DRs to assist in the implementation of the Plan's settlement program. *See* Plan § 1.28 (defining CAC as "those persons selected pursuant to the terms of the [SFA] to represent the interests of Personal Injury Claimants after the Effective Date"). The CAC and the DRs have the authority to take action to enforce the terms of the Plan, participate in

meetings of the Finance Committee, and provide advice and assistance on all matters being considered by the Finance Committee, the Settlement Facility, the Claims Administrator, and other court-appointed persons. SFA §4.09(c). They also have the authority and the obligation to provide interpretations of the Plan. SFA §5.05. Only the CAC and the DRs may decide or litigate any issue of Plan interpretation. *In re Settlement Facility Dow Corning Tr.*, No. 07-CV-12378, 2008 WL 905865, at *3 (E.D. Mich. Mar. 31, 2008) ("The SFA and the Procedures authorize only the Debtor's Representatives and the CAC to file a motion to interpret a matter under the SFA. There is no provision under the SFA or the Procedures which allows a claimant to submit an issue to be interpreted before the Court.").

This Court has express authority under the Plan to "enter orders in aid of this Plan and the Plan Documents" (Plan at §8.7.5) and supervises and manages the operations of the Settlement Facility through authorizing orders. This Court has issued a series of "Closing Orders"—setting forth administrative guidelines to enable the closure of the Settlement Facility operations once the requirements for termination are met.[11] 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.

[11] *See* Closing Order 1 for Final June 3, 2019 Claim Deadline (Establishing Final Cure Deadlines, Revised Claim Review Procedures, and Appeal Deadlines) (ECF No. 1447); Closing Order 2; Closing Order 3 (ECF No. 1598).

1482, PageID.24089 ("Claimants and attorneys are required to keep their address and contact information current with the SF-DCT."); Exhibit G, February 26, 2021 Declaration of Ellen Bearicks ("Bearicks Dec.") at ¶7 and at Exhs. 1-3 (CIG 9-14, 9-15, 10-8, 10-9); https://www.sfdct.com/_sfdct/index.cfm/how-to-file-a-claim-for-benefits/claimant-information-guide-cig-by-class (last accessed October 3, 2022) (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).

As this Court has determined, confirming the claimants' current contact information is a necessary component of assuring that the Settlement Fund is properly distributed. When claims are prepared for payment, the Settlement Facility confirms the accuracy of the evaluation and assures that the claimant (or heirs) can be located and their address verified by issuing address verification letters to the claimants. *See* Bearicks Dec. at ¶¶26-27. The Settlement Facility then issues "award" letters to claimants when a claim is approved for payment. The award letter provides notice to the claimant that a check will soon be sent to them directly (if they are not represented) or to their counsel. This process alerts the represented claimant to check with their counsel to obtain their payment. If the verification mailing to the claimant is returned as undeliverable, or does not generate a response, then the

Settlement Facility may not issue the payment. *See* Exhibit H, July 20, 2020 Declaration of Ann Phillips ("Phillips Declaration"), at ¶¶11-18.

The Settlement Facility's experience demonstrates 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. The Settlement Facility has reported that over 4,100 payment checks have not been cashed, primarily because the claimant could not be located. *See* Exhibit I, September 28 2022 Declaration of Kimberly Smith-Mair ("Smith-Mair Dec."), at ¶9. The Settlement Facility has expended thousands of hours tracking these claims and checks to determine their ultimate disposition and then incurred over $195,000 in banking costs to stop payment and record the status of such checks. *Id.* at ¶10.

Movants, like all other claimants, must comply with the guidelines in the Plan and the procedures established by this Court when submitting their claims. They are required, like all other claimants, to provide the necessary supporting information that will permit review, evaluation, and payment of the claims. Unfortunately, the record reflects a long history of 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. *See In re Settlement Facility Dow Corning Trust*, 760 F. App'x. 406, 408 (6th Cir. 2019) (describing "oddities" found in "affirmative statements" submitted by the Korean Claimants in place of medical records to show proof of manufacturer and "most troublingly, when questioned regarding these, and similar, documentation problems, Mr. Kim apparently sent the Settlement Facility medical documentation as proof, despite his representation that there were no medical records for these operations.").

In a similar vein, the Claims Administrator's data shows that address information provided by counsel for Movants has been unreliable. The Claims Administrator has reported that the percentage of mail returned as undeliverable (meaning that the address is incorrect) to Movants based on addresses provided by counsel far exceeds the percentage of mail that has been found "undeliverable" among other claimants, and that the address information provided by counsel for Movants is often not accurate. Bearicks Dec. at ¶34; Phillips Dec. at ¶¶38-39.

More recently, decisions of the Appeals Judge (designated under the Plan to hear administrative appeals) found significant issues regarding the reliability of substantive claim submissions made by counsel for Movants. *See* exhibits 2-11 (to be filed under seal) to the September 28, 2022 Smith-Mair Declaration[12] (ECF No.

[12] *See* Declaration of September 28 2022 Declaration of Kimberly Smith-Mair, ECF No. 1670-8, and Exhibits 2-11 to be filed under seal (also Exhibit A to Respondents' Motion For Leave to File Certain Exhibits Under Seal, ECF No. 1671-1).

1671-1). As the decisions demonstrate, the Appeals Judge determined that 98 claims were appropriately denied because they were based on altered or patently false documentation. In the majority of cases, the Appeals Judge found evidence that affirmative statements of physicians submitted to establish Proof of Manufacturer were "unequivocally false evidencing intentional abuse and fraud."[13]

Closing Order 5 was stipulated and agreed to by the CAC and the DRs and entered on the ECF docket on June 13, 2022. ECF No. 1642. It directed the Settlement Facility to close those claims submitted by individuals for whom the Settlement Facility could not verify a valid current address. While the Plan does not require the Settlement Facility to undertake efforts to locate claimants, Closing Order 5 directed the Settlement Facility to refrain from closing those claims for a period of 90 days after posting of a list of such claimants, to give them a further opportunity to provide a valid address. *Id.*; *see also* Smith-Mair Dec., at ¶7 and Exh. 1 (Settlement Facility website homepage providing notice). Closing Order 5 provides that "[i]f a claimant responds on or before the end of that 90-day period, … the Settlement Facility will proceed to finalize processing or payment of the claim

[13] The Appeals Judge found that submitted records showed evidence of alteration (where names and locations of surgery were covered up with correction fluid and new names were inserted) and contradictory records (where a submission identified a Dow Corning implant but other records for the same implant surgery identified a different manufacturer or showed a different location of surgery). The Appeals Judge also identified claims where the forms were signed by a physician who was not a physician at the time of the implant surgery. *See id.* at Exhibits 2-11.

as appropriate. If the claimant does not respond on or before the end of the 90-day period, the claim shall be permanently closed." Closing Order 5 at PageID.28804.

The Korean Claimants filed an untimely notice of appeal of Closing Order 5 73 days after it was entered. ECF No. 1656. *See* September 14 Order at 2. The Korean Claimants have filed two separate motions seeking to resurrect their untimely appeal: the Motion to Reopen and this Motion to Set Aside. Counsel did not seek concurrence of the parties before filing the Motion to Set Aside.

ARGUMENT

Movants base their Motion to Set Aside on F. R. Civ. P. 60(b), which provides, as applicable here: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; … (4) the judgment is void; …" The Korean Claimants cite two bases for F. R. Civ. P.60(b) relief. First, they assert that Rule 60(b)(1) applies on the ground of excusable neglect, focusing on their failure to file timely a notice of appeal. Second, they assert under Rule 60(b)(4) that Closing Order 5 is "void" claiming that an alleged lack of notice is a due process violation. Neither argument merits relief under Rule 60.

A. There Is No Basis For Relief Under Rule 60(b)(1).

Initially, it is not clear how excusable neglect under F. R. Civ. P. 60 applies. The Korean Claimants seek relief from their own failure to initiate a timely appeal.

This argument would more properly be brought as a motion for extension of time under Fed. R. App. P. 4(a)(5) but, as the Sixth Circuit has noted, such a motion would not be timely. 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.

But 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. The Korean Claimants "bear[] the burden of establishing the existence of mistake, inadvertence, surprise, or excusable neglect under Rule 60(b)(1)." *Kensu v. Corizon,* No. 19-10944, 2022 WL 1831307, at *2 (E.D. Mich. June 3, 2022) (quoting *Jinks v. Alliedsignal,* Inc., 250 F.3d 381, 385 (6th Cir. 2001)). "Rule 60(b)(1) 'is intended to provide relief in only two situations: (1) when a party has made an excusable mistake or an attorney has acted without authority, or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order.'" *Fetherolf v. Shoop,* Case No. 20-4323, 2021 WL 2658050, at *2 (6th Cir. June 15, 2021) (internal quotation omitted). In determining whether relief is appropriate based on a Rule 60(b)(1) claim of excusable neglect, courts consider three factors: "'(1) culpability—that is, whether the neglect was excusable; (2) any prejudice to the opposing party; and (3) whether the party holds a meritorious underlying claim or defense.'" *Kensu,* 2022 WL 1831307, at * 2 (quoting *Yeschick*

v. Mineta, 675 F.3d 622, 628 (6th Cir. 2012)).[14]

1. The Claimed Lack Of Notice Does Not Constitute Excusable Neglect.

"'Excusable neglect has been held to be a strict standard which is met only in extraordinary cases.'" *Bargo v. State Farm Fire and Casualty Co.*, No. 6:21-CV-203-REW-HAI, 2022 WL 2402665, at *2 (E.D. Ky. Jan. 12, 2022) (quoting *Nicholson v. City of Warren*, 467 F.3d 525, 526 (6th Cir. 2006). "'A party seeking relief [under the excusable neglect provision] must first demonstrate a lack of culpability before the court examines the remaining two factors'" applicable under F. R. Civ. P. 60(b)(1). *Kensu,* 2022 WL 1831307, at *2 (quoting *Yeschick*, 675 F.3d at 628-29). "'Just because neglect is accidental does not make it excusable. It is well-established that mere forgetfulness or carelessness on the part of counsel does not entitle a movant to Rule 60(b)(1) relief.'" *Kensu,* 2022 WL 1831307, at *3 (citing *FHC Equities, L.L.C. v. MBL Life Assur. Corp*., 188 F.3d 678, 685 (6th Cir. 1999) ("[A] court would abuse its discretion if it were to reopen a case under Rule 60(b)(1)

[14] To determine whether neglect was excusable with respect to "out-of-time" filings, the Sixth Circuit has, in some cases, looked to the factors in the seminal case of *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993). To evaluate a claim of excusable neglect under *Pioneer*, the court must consider "the danger of prejudice to [the non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Yeschick*, 675 F.3d at 629 (*citing Pioneer*).

when the reason asserted as justifying relief is one attributable solely to counsel's carelessness...."). As this Court stated in considering excusable neglect under the *Pioneer* standards:

> In assessing a claim of excusable neglect, "the proper focus is upon whether the neglect of [the parties] *and their counsel* was excusable." [507 U.S at 397] (emphasis in original). An attorney or *pro se* litigant's failure to timely meet a deadline because of "[i]nadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable neglect.'" *Id.* at 392; *Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir. 1991).

In re Settlement-Facility Dow Corning Trust, Debra Spies Vardakis, No. 15-10852, ECF No. 6, at PageID.104-105 (E.D. Mich. Mar. 27, 2018).[15]

Movants base their claim of excusable neglect on counsel's allegation that he did not receive the email notice of entry of Closing Order 5 from the ECF system. They assert that the email system registered with the Court was not working on June 13, 2022 when the Order was entered on the docket and served via the ECF system:

> The Korean Claimants were served by the ECF system to yhkimlaw@unitel.co.kr. However, yhkimlaw@unitel.co.kr could not be accessible by Yeon-Ho Kim because the server of www.unitel.co.kr was not in service on June 13, 2022 since the server was going to close its business on June 30, 2022. Yeon-Ho Kim notified the clerk and the Respondents that the Korean Claimants would like to receive notices or correspondences by yhkimlaw@naver.com.

Motion to Set Aside at PageID.30577. That notice of the change of email address, was dated June 24, 2022—11 days *after* Closing Order 5 was entered and served—

[15] *See also Kensu*, 2022 WL 1831307, at *3 ("Attorney oversight cannot justify Rule 60(b)(1) relief").

and stated: "My email address is changed from yhkimlaw@unitel.co.kr to yhkimlaw@naver.com *as of June 30, 2022*. The paid service provider (www.unitel.co.kr) is closing business." *See* Exhibit J, Declaration of Deborah E. Greenspan, dated September 12, 2022 ("Greenspan Dec.") at Exh. 2 (emphasis added). In another motion filed with this Court—the Motion to Reopen—Movants make a different assertion. In the Motion to Reopen, they assert that the old email system stopped working on May 31, 2022—a full two weeks *before* Closing Order 5 was entered and served. Neither of these inconsistent factual assertions justifies a finding of excusable neglect. If Movants' first statement is correct, then 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). If Movants' second statement is correct, there can be no excusable neglect because counsel clearly failed to provide the requisite email contact in violation of the rules.[16] By his own admission, counsel for Movants updated the email address only as of June 30. Not only did counsel fail timely to update his email registration, but he also

[16] "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." Electronic Filing Policies and Procedures, Eastern District of Michigan, Updated September 2022, R3. *See also id.* ("Each filing user is responsible for maintaining valid and current contact information in his or her PACER account. When a user's contact information changes, the user must promptly update his or her PACER account."); E. D. Mich. LR 11.2 (requiring counsel to promptly file and serve updated contact information and providing that failure to do so may subject the person or party to sanctions).

apparently provided an inaccurate notice to the Court. Further, it is apparent that counsel failed to fulfill his obligation to monitor the docket: the Motion to Reopen states that counsel first became aware of Closing Order 5 through a newsletter issued by the Claimants' Advisory Committee on August 16, 2022. Motion to Reopen at PageID.30482. Had he been monitoring the docket, he would have learned of the Order well before that date.

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 alltel.net to windstream.net; (2) was aware that he was not receiving notice of electronic filings in other cases and that motions were expected in Yeschick's case; (3) failed to diligently update his e-mail address; and (4) failed to monitor the docket in Yeschick's case for filings between May 2009 and January 2010"). Counsel's "ability to access the electronic docketing system directly" is "within [the attorney's] control." *Id.* The Sixth Circuit emphasized, "regardless of whether email notifications are received, parties continue to have a duty to monitor the court's docket." *Id.* at 630 (citing *Kuhn*, 498 F.3d at 370-71).

This obligation has been repeatedly reaffirmed. *See, e.g.*, *Harness v. Taft*, 801 F. App'x 374, 377 (6th Cir. 2020) ("Regardless of whether counsel received the

orders in the mail, he was obligated to monitor the court's docket.…Parties have an independent obligation to monitor all developments in an ongoing case and cannot rely on the clerk's office to fulfill this responsibility for them."); *Henken v. IW Trust Funds*, 568 F.Supp.3d 870, 875-76 (S.D. Ohio 2021) (denying F. R. Civ. P. 60 motion "[b]ecause the burden to monitor the electronic docket fell on Plaintiff's counsel" and "his failure to do so does not constitute 'excusable neglect' … the fact that Plaintiff's counsel swears that he received no ECF notice does not usurp this duty or excuse counsel's passivity"); *Keybank Nat. Ass'n v. Lake Villa Oxford Associates,* No. 12–13611 2013 WL 466197, at *3 (E.D. Mich. 2013) (denying Rule 60 motion and stating "'parties have an affirmative duty to monitor the dockets' in order to keep themselves apprised of case developments—including 'the entry of orders they may wish to appeal.'"") (quoting *Kuhn*).[17]

2. Setting Aside Closing Order 5 Would Prejudice The Parties And Affect Judicial Proceedings.

The second factor under Rule 60(b)(1) that the Court must consider is whether granting relief from the order would prejudice any party. Movants do not articulate

[17] Further, the circumstances here do not support a conclusion that Movants acted in good faith under *Pioneer*. The address process is intended to assure that notice is provided to claimants and that funds are disbursed to eligible claimants. It is difficult to understand a reasonable basis for Movants' refusal to provide this information for years. And while Movants claim that they did not know of Closing Order 5 until after it was entered, they certainly knew of its existence while the 90-day time period for submission of current addresses was still open. They offer no reason for their failure to provide their current addresses before the deadline

any basis for their unsupported assertion that "there would be no prejudice to the Respondents even if this Court sets aside Closing Order 5 regarding the Korean Claimants." Motion to Set Aside at PageID.30578. To the contrary, setting aside Closing Order 5 would result in prejudice. Closing Order 5 is one in a series of orders that this Court has issued to ensure an orderly and timely termination of the Settlement Facility in accordance with the Plan. The parties, who stipulated to Closing Order 5, have a strong interest in assuring efficient termination of the Settlement Facility—and certainly relied on the finality of the various closing orders, including Closing Order 5. Setting aside Closing Order 5 would result in uncertainty and would halt ongoing closure activities, disrupt trust operations, cause delay, and increase costs.[18] In this event, not only would the parties and other claimants be prejudiced, but the Court would not be able to fulfil its obligations under the Plan.

Further, the 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." Motion to Set Aside at PageID.30578 (emphasis added). Granting such relief only to Movants would result in disparate treatment in violation of the Bankruptcy Code (11 U.S.C. § 1123(a)(4)) and would be unfair to other claimants who relied on the deadline to their detriment.

[18] In denying the motion to stay Closing Order 5, the Sixth Circuit found that such a stay would cause harm "by disrupting trust operations." September 14 Order at 4.

3. The Korean Claimants Do Not And Cannot Articulate Any Meritorious Underlying Claim Under Rule 60(b)(1).

The third factor under Rule 60(b)(1) is to determine whether the party seeking relief has an underlying meritorious claim. Movants do not even attempt to meet this standard. They fail to articulate any reason on the merits that Closing Order 5 should be "set aside." *See Kensu*, 2022 WL 1831307, at *5 ("[movant] has not shown that he has a meritorious underlying claim, and, accordingly, he is not entitled to Rule 60(b)(1) relief") (citing *Yeschick,* 675 F.3d at 628. Rather, they simply state, "The Respondents do not have any meritorious defense to the Korean Claimants." Motion to Set Aside PageID.30578. That statement does not satisfy the requirements of F. R. Civ. P. 60.

Closing Order 5 provided claimants with an additional period within which to fulfill their long-standing obligation to provide updated contact information to the Settlement Facility. Under the Order, claimants were permitted to revive their claims within 90 days simply by contacting the Settlement Facility—by mail, email, or telephone—to confirm their contact address. If claimants did not want to provide a home address, they could provide another address—that of a relative, or friend, or a post office box (or the equivalent). This is a simple obligation to fulfill. Counsel could simply have contacted all claimants by text message and asked them to provide the information. Movants' vague and *unsupported* assertions about privacy concerns

(asserted in other pleadings submitted to this Court)[19] 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.

B. Closing Order 5 Is Not Void Under Rule 60(b)(4) And Rule 60(b) Cannot Be Used To Avoid Fed. R. App. P. 4(a)(6).

Movants assert that Closing Order 5 was entered without prior or post issuance notice to them and therefore violates due process. Motion to Set Aside at 2. This argument has no merit and is an improper attempt to avoid the clear limitations for reopening the time to appeal mandated by Fed. R. App. P. 4(a)(6).

First, this assertion is factually incorrect as to post-issuance notice. As set forth above, Movants received notice when Closing Order 5 was entered in accordance with F. R. Civ. P. 77. Any failure of the Korean Claimants actually to learn of entry of the order was entirely the result of counsel's *inexcusable* neglect.

Second, the Court properly entered Closing Order 5 as a stipulated order of the CAC and the DRs consistent with their obligations and authority under the Plan. Given the agreement of the parties, no motion or hearing was required. *See* E.D. Mich. L.R. 7.1 (a)(1) ("…If the movant obtains concurrence, the parties or other persons involved may make the subject matter of the contemplated motion or request

[19] *See* Motion for Vacating, ECF No. 1569, PageID.26262.

a matter of record by stipulated order."). Throughout the operation of the Settlement Facility, this Court has entered multiple stipulated orders—like Closing Order 5 and Closing Order 2—to implement the Plan and manage the operations of the Settlement Facility. *See supra.* at 1. There is no basis to find that Closing Order 5 is "void" simply because the Court did not hold a hearing or provide advance notice to counsel for the Korean Claimants before entering a stipulated order. The Korean Claimants have not established any basis for requiring advance notice to them of the entry of Closing Order 5. And had counsel acted with proper diligence, he would have been able to file a timely motion for reconsideration or appeal.

Movants cite a series of cases—most involving entry of default and not, as here, a stipulated order implementing terms regarding distribution of assets under a plan of reorganization—in support of their argument that the entry of Closing Order 5 without prior or post entry notice to them constitutes a violation of due process.[20] First, of course, Movants did in fact receive notice of the entry of Closing Order 5 as explained above—and to the extent that they did not actually become aware of the order, it is only 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. They were not prejudiced in their ability to provide

[20] It has long been recognized that due process does not require advance notice is for every order entered. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 632 (1962).

the requisite information.

Indeed, Movants' 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. Closing Order 5 did not and does not establish any rule or implement any new requirement. It merely defines a period of time before those claims that failed to abide by the rules would be closed. In fact, the Korean Claimants have received, over the years, *multiple* notices of deadlines and of the complained of 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, if eligible.

- The Korean Claimants received notice of the Plan and all Plan Documents, which contain the basic requirement for claim submissions.
- They received the Claimant Information Guides, which make clear the obligation to provide updated contact information.
- They received the notice of the final claim submission deadline (in 2018), which informed them of the need to finalize claim submissions by June 3, 2019.
- They received multiple individual letters advising of the need to provide address information and the consequences of the failure to do so.[21]
- They undeniably received notice of the entry of multiple closing orders issued by this Court making clear that claims would be closed and finalized absent timely submission of any missing information.

[21] *See* Bearicks Dec., at ¶¶ 26-34; Phillips Dec. ¶¶13; 21-28.

Closing Order 5 did not create those rules and guidelines or deprive Movants of anything. It merely provided a limited period of *relief* to claimants—delaying the closure of their claims while offering a further opportunity to comply with the long-announced rules by submitting the necessary missing information. And even when Movants belatedly filed a notice of appeal, they still could easily have complied with the September 17 deadline in Closing Order 5.

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." Korean Claimants cannot now seek to circumvent the specific requirements of Fed. R. App. P. 4(a)(6) through the mechanism of a Rule 60 motion claiming lack of notice. *See Pennebaker v. Rewerts*, No. 17-12196, 2021 WL 267782, *4 (E.D. Mich. Jan. 27, 2021) ("Rule 60(b) cannot be used to circumvent Rule 4(a)(6)'s requirements.") (*quoting Hall v. Scutt*, 482 F. App'x 990, 991 (6th Cir. 2012)), *aff'd* 2021 WL 7237920 (6th Cir. Sep. 10, 2021); *Washington v. Warden, North Central Correctional Inst.*, No. 1:18-cv-709, 2022 WL 740927, at *4 (S.D. Ohio Mar. 11, 2022) ("the Sixth Circuit has found that 'Rule 60(b) is an appropriate means of considering equitable interests when a notice of appeal is filed late *for reasons other*

than lack of notice.'") (quoting *Tanner v. Yukins,* 776 F.3d 434, 441 (6th Cir. 2015); *United States v. Smith,* No. 10-cr-20388, 2019 WL 1450352, *2 (E.D. Mich. Apr. 2, 2019) ("a party cannot use Rule 60(b) to circumvent the requirement of a timely filing of a notice of appeal." (citations omitted).[22]

[22] Movants can point to no extraordinary circumstances that would justify equitable relief from Rule 60(b). "Rule 60(b) is an appropriate means of considering equitable interests when a notice of appeal is filed late for reasons other than lack of notice." *Tanner*, 776 F.3d at 440-41. In *Tanner,* the extraordinary circumstances that warranted granting relief under Rule 60(b)(6) consisted of unconstitutional conduct by prison officials that prevented petitioner from timely filing her appeal. *Id. Compare Berg v. Metrish*, No. 07-14565, 2015 WL 9582742, *5 (E.D. Mich. Oct. 5, 2015) (report and recommendation), *adopted* 2015 WL 9489600 (E.D. Mich. Dec. 30, 2015) (*Tanner* "is of little comfort to this Petitioner, since the untimeliness of his appeal stems from lack of notice, not an actionable constitutional violation by a state actor. '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'") (citation omitted).

CONCLUSION

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

Dated: October 3, 2022

Respectfully submitted,

/s/ Karima Maloney
Karima Maloney
SMYSER KAPLAN & VESELKA
717 Texas Avenue
Suite 2800
Houston, TX 77002
Telephone: (713) 221-2382
KMaloney@skv.com

Counsel for the Finance Committee

/s/ Deborah E. Greenspan
Deborah E. Greenspan
BLANK ROME LLP
Michigan Bar # P33632
1825 Eye Street, N.W.
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
Deborah.Greenspan@blankrome.com
Debtor's Representative and Attorney for Dow Silicones Corporation

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

Claimants' Advisory Committee

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

/s/Jeffrey S. Trachman
Jeffrey S. Trachman
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036
Telephone: (212) 715-9175
jtrachtman@kramerlevin.com
Counsel for Claimants' Advisory Committee

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2022, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notification of such filing to all registered counsel in this case.

Dated: October 3, 2022

/s/ Deborah E. Greenspan

Deborah E. Greenspan
BLANK ROME LLP
Michigan Bar # P33632
1825 Eye Street, N.W.
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
Deborah.Greenspan@blankrome.com
Debtor's Representative and Attorney for Dow Silicones Corporation