Case No. 22-1750

In the United States Court of Appeals For the Sixth Circuit

IN RE: SETTLEMENT FACILITY DOW CORNING TRUST

KOREAN CLAIMANTS
Interested Party – Appellant
v.
DOW SILICONES CORPORATION; DEBTOR'S REPRESENTATIVES;
CLAIMANTS' ADVISORY COMMITTEE
Interested Parties – Appellees

FINANCE COMMITTEE
Movant – Appellee

On Appeal from the United States District Court for the Eastern District of Michigan

BRIEF OF APPELLEES DOW SILICONES CORPORATION, THE DEBTOR'S REPRESENTATIVES, THE CLAIMANTS' ADVISORY COMMITTEE, AND THE FINANCE COMMITTEE

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-1750 Case Name: In re Settlement Facility Dow Corning Trust

Name of counsel: Deborah E. Greenspan

Pursuant to 6th Cir. R. 26.1, The Debtor's Representatives
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.
The Debtor's Representatives consist of one counsel for Corning Incorporated, one in house counsel for The Dow Chemical Company and Deborah E. Greenspan.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes.

See separate Disclosure of Corporate Affiliations and Financial Interest filed by Dow Silicones Corporation.

CERTIFICATE OF SERVICE

I certify that on August 31, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Deborah E. Greenspan
Blank Rome LLP, 1825 Eye St. N.W.
Washington DC 20006

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-1750 Case Name: In re Settlement Facility Dow Corning Trust

Name of counsel: Deborah E. Greenspan

Pursuant to 6th Cir. R. 26.1, Dow Silicones Corporation
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes.

See answer to No. 2.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes.

Dow Silicones Corporation is owned by The Dow Chemical Company, a wholly-owned subsidiary of Dow, Inc.

CERTIFICATE OF SERVICE

I certify that on August 31, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Deborah E. Greenspan
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Washington DC 20006

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-1750 Case Name: Korean Cl. v. Dow Silicones Corp., et al.

Name of counsel: Karima G. Maloney and Eugene Zilberman

Pursuant to 6th Cir. R. 26.1, Finance Committee
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on October 6, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Karima G. Maloney
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-1750 Case Name: In re Settlement Facility Dow Corning

Name of counsel: Jeffrey S. Trachtman, Esq.

Pursuant to 6th Cir. R. 26.1, Claimants' Advisory Committee
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on August 29, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Jeffrey S. Trachtman
1177 Avenue of the Americas
New York, NY 10036

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is requested. This matter involves interpretation of a complex plan of reorganization that provided a mechanism for submission of claims and distribution of payments over a multi-year period that has now concluded. Oral argument will allow the attorneys for the parties to assist the Court by providing additional explanation.

INTRODUCTION AND BACKGROUND

In this appeal, the Appellants seek to change the terms of a confirmed and consummated plan of reorganization that became effective nearly 20 years ago. Appellants are individuals who elected to settle their claims under the terms of the Amended Joint Plan of Reorganization of Dow Corning Corporation (the "Plan").[1] All individuals who seek to settle their claims under the Plan's settlement program (Settling Personal Injury Claimants) are required to submit certain forms and documents to establish their eligibility for payment. The Plan Documents set forth detailed eligibility criteria, deadlines for submission, and terms for evaluation and qualification of claims. The Plan Documents establish claims submission deadlines for each of the four types of benefit claims that could be asserted. For purposes of

[1] Unless otherwise defined, capitalized terms used herein shall have the meaning provided in the Plan. *See* Plan, RE 1592-2. On February 1, 2018, Dow Corning Corporation changed its name to Dow Silicones Corporation. For the Court's and parties' convenience, Appellees will refer to Dow Silicones as Dow Corning herein.

this appeal, the relevant deadline is the final deadline – the last date for submitting settlement claims for disease or expedited payments. That deadline is set forth in the Plan Documents and is defined as the date that is the 15-year anniversary of the Effective Date of the Plan. *See infra* at 8. The Effective Date was June 1, 2004 and the 15-year anniversary of the Effective Date was June 3, 2019 (adjusted to the next business day).

Appellants failed to file their claims by the June 3, 2019 deadline. Instead, on February 3, 2021 – twenty months after the June 3, 2019 deadline – the Korean Claimants filed the Motion for Extension of Deadline for Filing Claims, RE 1586 ("Motion for Extension"). The Motion for Extension asserted that the June 3, 2019 deadline could be extended because it was not required by the Plan but was instead adopted as part of a July 25, 2018 order issued by the district court, Closing Order 1 for Final June 3, 2019 Claim Deadline (Establishing Final Cure Deadlines, Revised Claim Review Procedures, and Appeal Deadlines), RE 1447 ("Closing Order 1"). The Motion for Extension requested that the Court extend the June 3, 2019 deadline – so that approximately 400 Korean Claimants who had missed the deadline could submit their claims. In a separate pleading – a reply filed in connection with a motion to expedite the decision on the Motion for Extension – Appellants raised a new argument, asserting that they should be allowed to file their benefit claims late because their failure to file should be deemed excusable neglect. On December 29,

2021 (ten months after the Motion for Extension was filed and almost two and a half years after the deadline), the 405 Korean Claimants submitted their claims – which have been denied because they were filed after the deadline.

The district court properly denied the Motion for Extension, holding that the deadline was determined by the Plan and any alteration of the deadline would be an unlawful and unauthorized Plan modification.

On appeal, the Korean Claimants apparently have abandoned their primary contention that the deadline is not specified in the Plan and therefore may be extended, and instead rely on the "excusable neglect" argument that was not raised in the original motion. They assert that the deadline for filing claims "should be extended because the Korean Claimants had excusable neglect under Fed. R. Bankr. P. 3003(a) and Fed. R. Bankr. P. 9006(b)(1)." Korean Claimants Br. at 10.[2] This argument has no basis in law or fact. The deadline to file claims was established over twenty years ago in the Plan and cannot be modified to provide an extension to the Korean Claimants. The excusable neglect standard does not apply and, even if it did, Appellants do not and cannot satisfy any of the factors required to establish excusable neglect.

[2] The Korean Claimants continue to reference Closing Order 1 in framing the issue – *see id.* at 6 ("The issue is whether the 405 Korean Claimants' filing which passed June 3, 2019, the date of deadline for claim-filing set by Closing Order 1, was made by the excusable neglect.") – but make no argument on appeal that the Plan Documents themselves do not mandate the deadline.

STATEMENT OF JURISDICTION

The district court exercised jurisdiction pursuant to 28 U.S.C. § 1334(b) ("the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11"). This Court has jurisdiction to review the district court's August 12, 2022 order pursuant to 28 U.S.C. § 1291. *See* RE 1652. The Korean Claimants filed a timely notice of appeal on August 15, 2022 (*see* Notice of Appeal, RE 1654).

COUNTER STATEMENT OF ISSUES FOR REVIEW

1. Whether "excusable neglect" can be used to modify the confirmed and substantially consummated Plan and extend the Plan-mandated deadline for filing benefit claims.

2. Whether Appellants have demonstrated "excusable neglect" where they were aware of the deadline but argue that they made the strategic and tactical decision to litigate an alternative theory for resolution of their claims; where they intentionally waited to submit claims until two and a half years after the deadline for filing benefits claims; and where allowing these late claims would be prejudicial to the debtor and to other claimants.

3. Whether Appellants have properly raised the issue of whether "excusable neglect" can apply to excuse the filing of their claims for benefits two and a half years after the Plan deadline in this appeal, where they did not raise the

issue in their original motion but only asserted the argument in a reply brief on a subsequent motion for expedited hearing and relief?

STATEMENT OF THE CASE

A. Background And The Controlling Plan Documents.

This Court has addressed the history of Dow Corning's bankruptcy proceedings and Plan on multiple occasions.[3] Dow Corning filed its petition for reorganization under Chapter 11 of the Bankruptcy Code on May 15, 1995. In 1999, Dow Corning and the representatives of the tort claimants – the Tort Claimants' Committee – filed the consensual Plan, which provides a comprehensive settlement program for breast implant claimants as well as individuals with certain other implanted medical devices. Following appeals, the Plan became effective on June 1, 2004. *See In re Settlement Facility Dow Corning Trust*, 628 F.3d 769, 771 (6th Cir. 2010); *see also* Plan, RE 1592-2. The Plan incorporates Plan Documents that provide the means for the implementation of its terms. *See generally* Plan, § 1.131, RE 1592-2, Page ID # 27442-27443; Plan § 5.3, RE 1592-2, Page ID # 27456-27457; Plan 5.4. RE 1592-2, Page ID # 27457. *See generally*, *In re Settlement Facility Dow Corning Trust*, 2017 WL 7660597, at *3 (E.D. Mich. Dec. 28, 2017), *aff'd* 760 Fed. App'x. 406, 411-412 (6th Cir. 2019) (discussing provisions of Annex A in

[3] *See, e.g.*, *Korean Claimants v Claimants' Advisory Committee*, 813 F. App'x 211 (6th Cir. 2020); *In re Settlement Facility Dow Corning Trust*, No. 18-1040, 2019 WL 181508 (6th Cir. Jan. 14, 2019); *In re Settlement Facility Dow Corning Trust*, 592 F. App'x 473 (6th Cir. 2015); *Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, 628 F.3d 769 (6th Cir. 2010); *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002); *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996).

concluding that "[t]he Plan provides that the decision of the Appeals Judge is final and binding…").

Tort creditors – such as the Korean Claimants – were provided a settlement option and a litigation option for the resolution of their claims against Dow Corning. The Korean Claimants elected to resolve their claims through the settlement option and are thus Settling Personal Injury Claimants. Plan at § 1.159, RE 1592-2, Page ID # 27448. The claims of Settling Personal Injury Claimants are reviewed, evaluated, and paid by the Settlement Facility-Dow Corning Trust (the "Settlement Facility" or "Settlement Trust"). The Settlement Facility and Fund Distribution Agreement ("SFA"), RE 1592-4, and the Dow Corning Settlement Program and Claims Resolution Procedures, Annex A to SFA ("Annex A"), RE 1592-5, prescribe the rules under which these settling claims are submitted, individually evaluated, and, if eligible and in compliance with the rules, paid.

The Plan was designed to accept claims over a period of years and provided time periods for filing each of the four basic types of claims. Specifically, Annex A Section 7.09 provides that:

(1) Claims for explant benefits "must be submitted on or before the 10th anniversary of the Effective Date." Annex A at § 7.09(a)(i), RE 1592-5 at Page ID # 27636. The 10th anniversary of the Effective Date (adjusted to the next business day) was June 2, 2014.

(2) Claimants must submit claims for rupture benefits on or before the second anniversary of the Effective Date. *Id.* at § 7.09(c)(i), RE 1592-5 at Page ID # 27637. The second anniversary of the Effective Date was June 1, 2006.

(3) Claimants were allowed to apply for disease benefits at any time up to the fifteenth anniversary of the Effective Date. *Id*. at § 7.09(b)(i), RE 1592-5 at Page ID # 27636. The fifteenth anniversary of the Effective Date (adjusted to the next business day) was June 3, 2019.

(4) Claimants could apply for an Expedited Release payment until the third anniversary of the Effective Date, unless that deadline was extended by the Claims Administrator. *Id*. at § 6.02(f)(1), Page ID # 27604. The Claims Administrator, in fact, did extend that deadline until the fifteenth anniversary of the Effective Date – the same deadline that applies to disease claims. *See* RE 1592-7, Page ID # 27709.

Thus, the final deadline for filing claims applies to disease and expedited release claims – and that deadline was June 3, 2019. There is no ambiguity; the 15-year deadline is stated more than once: "Eligible Breast Implant Claimants may elect compensation for Disease Payment Option benefits . . . *any time on or before the fifteenth anniversary of the Effective Date*." Annex A at § 6.02(a)(ii)(a), RE 1592-5, Page ID # 27591 (emphasis added); *id.* at § 7.09(b)(i), RE 1592-5 at Page ID # 27636 ("Eligible Breast Implant Claimants will receive benefits under the Disease

Payment Option upon proof, *on or before the fifteenth anniversary of the Effective Date*, of . . . ") (emphasis added).[4]

The Claims Administrator appointed by the district court under the terms of the SFA oversees the processing and payment of claims by the Settlement Facility in accordance with the terms of the SFA. *See* Plan § 1.29, RE 1592-2, Page ID # 27426; SFA §§ 4.02, 5.01, 5.04, RE 1592-4, Page ID # 27539, 27550, 27552-27554. The Finance Committee appointed by the district court is responsible for financial management and oversight. *See* Plan § 1.67, RE 1592-2, Page ID # 27432; SFA § 4.08, RE 1592-4, Page ID # 27545-27548. The Settlement Facility operates under the supervision of the district court. The district court retains jurisdiction over the Plan and is expressly charged with supervising the resolution of claims by the Settlement Facility, entering or enforcing any order requiring the filing of any Claim before a particular date, and resolving "controversies and disputes regarding interpretation and implementation of this Plan and the Plan Documents." Plan, §§ 8.7.3, 8.7.8, RE 1592-2, Page ID # 27493; SFA § 4.01, RE 1592-4, Page ID # 27539.

The Plan established the Claimants' Advisory Committee ("CAC") and the Debtor's Representatives ("DRs") to assist in the implementation of the settlement

[4] All of the terms and criteria for benefits claims for breast implant claimants apply to claimants in classes 5, 6.1, and 6.2. *See id.* at § 6.05.

program. *See* Plan § 1.28, RE 1592-2, Page ID # 27425 (defining CAC to mean "those persons selected pursuant to the terms of the [SFA] to represent the interests of Personal Injury Claimants after the Effective Date"); SFA § 4.09(b), RE 1592-4, Page ID # 27548. 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), RE 1592-4, Page ID # 27548-27549. The CAC and the DRs have the authority and the obligation to provide interpretations of the Plan when requested by the Claims Administrator. *Id.* at § 5.05, RE 1592-4, Page ID # 27544. 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.").

B. Notice Of The June 3, 2019 Final Deadline.

On December 27, 2017, the district court authorized and directed the Settlement Facility to distribute to all claimants and attorneys a notice reminding them of the Plan-mandated June 3, 2019 final deadline for filing new Disease or Expedited Release claims. *See* Stipulation and Order Approving Notice of Closing

and Final Deadline for Claims, RE 1342 (Dec. 27, 2017) ("Notice of Final Deadline").[5]

The Notice of Final Deadline was posted on the Settlement Facility website and mailed to each attorney of record, including counsel for the Korean Claimants. *See* February 16, 2021 Declaration of Ellen Bearicks (the "Bearicks Dec.") at ¶¶ 8-9, RE 1592-9, Page ID # 27722; July 18, 2022 Declaration of Kimberly Smith-Mair (Smith-Mair Dec.") at ¶¶ 7-8, RE 1645-7, Page ID # 29239. An additional reminder notice was sent to counsel for the Korean Claimants on March 13, 2019. *See* Bearicks Dec. at ¶ 9 and Exh. 2, RE 1592-9 Page ID # 27722 and 27727-27729. In addition, starting in 2004, counsel for the Korean Claimants subscribed to the CAC's newsletters. *See* February 16, 2021 Declaration of Dianna Pendleton-Dominguez, at ¶ 4, RE 1592-10, Page ID # 27731.[6] The newsletters repeatedly advised subscribers that the final deadline to submit claims for benefits from the Settlement Facility was June 3, 2019 and that no claims submitted after that date would be accepted. *Id.* at ¶ 5.

[5] The Plan does not require that any such notice be provided. The notice was distributed to provide additional assistance to claimants.

[6] In another pleading, counsel for the Korean Claimants has confirmed that he has received CAC newsletters. *See* Response of Korean Claimants to Finance Committee's Recommendation and Motion for Authorization to make Second Priority Payments, at Exh. 10, RE 1584-2, Page ID # 26648 (attaching a 2020 CAC newsletter as Exhibit 10), RE 1592-11.

C. Conclusion Of Settlement Facility Operations And Distributions.

The Settlement Facility has completed the review and processing of timely claims and is now distributing final payments for Allowed claims, including supplemental payments (termed Second Priority Payments), confirming necessary documentation to enable final payments, and preparing to terminate its operations as specified in the Plan. The Settlement Facility will terminate once all timely claims have been liquidated and paid or otherwise finally resolved. *See* Funding Payment Agreement (Classes 5 through 19) Between Dow Corning Corporation, the Dow Chemical Company, Corning Incorporated, and the Claimants' Advisory Committee (the "FPA"), § 2.01(c), RE 1592-12, Page ID # 27757-27758.

The district court, which has the obligation to "enter orders in aid of this Plan and the Plan Documents" (Plan at § 8.7.5, RE 1592-2, Page ID # 27493) has issued a series of "closing orders" – setting forth administrative guidelines to facilitate the closure of the Settlement Facility operations once the requirements for termination are met. These closing orders generally established procedures for finalizing claims and for assuring that eligible claimants will receive their payments.

D. The Korean Claimants' Motion For Extension.

On February 3, 2021 – 20 months after the expiration of the June 3, 2019 claim filing deadline – the Korean Claimants filed the Motion for Extension seeking an indefinite extension of the deadline for filing settlement claims. RE 1586. The

Motion for Extension sought an extension of the final June 3, 2019 deadline arguing, erroneously, that the district court established the deadline in Closing Order 1 and therefore it could be extended. The Motion for Extension sought to invalidate Closing Order 1 based on alleged procedural flaws – but failed to acknowledge or recognize that the deadline complained of was established by the Plan and not Closing Order 1. The Korean Claimants did not argue that they were unaware of the deadline. Instead, they asserted that they should not be bound by the deadline because they anticipated an alternative resolution of their claims based on an alleged mediation agreement that the district court and this Court have rejected. *Id.* at Page ID # 27071.

On February 17, 2021, Dow Silicones, the DRs, and the CAC filed the Response of Dow Silicones Corporation, the Debtor's Representatives, and the Claimants' Advisory Committee to the Motion for Extension of Deadline for Filing Claim, RE 1592 ("Joint Response to Motion for Extension"). The Joint Response to Motion for Extension argued that the Motion for Extension should be denied because, *inter alia*, (i) the Plan, not Closing Order 1, prescribes the final deadline for submitting claims for payment and therefore the relief requested by the Korean Claimants would result in a Plan modification prohibited by the Bankruptcy Code and the Plan; and (ii) contrary to the Korean Claimants' assertion, Closing Order 1 is a valid order within the authority of the district court and properly entered. The

Response further noted that had the Korean Claimants wished to challenge Closing Order 1, they should have filed a motion for reconsideration or other relief in 2018 when it was entered.[7] The Finance Committed filed a joinder. RE 1593.

The Korean Claimants filed a Reply to Response of Dow Corning Corporation, the Debtor's Representatives, Claimants' Advisory Committee and Finance Committee to Motion for Extension of Deadline for Filing Claims, RE 1594, on February 23, 2021 ("Korean Claimants Reply on Motion for Extension"). The Korean Claimants Reply on Motion for Extension sought relief from Closing Order 1 under Rule 60(b) on the ground that Closing Order 1 is void because it was entered as a stipulation without prior notice to the Korean Claimants. They contended further that the deadline was not in fact stated in the Plan but rather in the Plan Documents and that such Plan Documents could be modified by the district court.[8]

On July 3, 2022, the Korean Claimants filed a Motion for Expedited Hearing and Relief, RE 1644 ("Motion to Expedite"), requesting a hearing and decision on

[7] Closing Order 1 was stipulated and agreed to by the two parties – the CAC and the DRs – with express authority under the Plan to interpret the Plan's terms and whose consent is required for purposes of establishing guidelines for distribution of Settlement Fund assets. *See* Plan § 1.28, Page ID # 27425, SFA § 4.09, Page ID # 27548-27549; SFA § 5.05, Page ID # 27554; *In re Settlement Facility Dow Corning Tr.,* No. 07-CV-12378, 2008 WL 905865, at *3 (E.D. Mich. Mar. 31, 2008). Given the agreement of the parties, no motion or hearing was required or necessary.

[8] The Plan defines the Plan Documents to include, *inter alia,* the SFA, Annex A, and the FPA. Plan § 1.131, RE 1592-2, Page ID # 27442-43.

the Motion for Extension. The Korean Claimants raised an entirely new argument in the Motion to Expedite – asserting a fairness argument based on the fact that individuals who had been allowed in 2007 to file late proofs of claims would be paid while the Korean Claimants who submitted claims after the June 3 deadline would not receive payment. *Id.* at Page ID # 28818.

On July 18, 2022, Dow Silicones, the DRs, and the CAC filed the Response of Dow Silicones Corporation, the Debtor's Representatives, and the Claimants' Advisory Committee to Motion for Expedited Hearing and Relief, RE 1645 ("Joint Response to Motion to Expedite"). The Joint Response to Motion to Expedite did not oppose the request to expedite the determination of the Motion for Extension but reiterated the reasons the Motion for Extension must be denied, and explained that the Order on Late Claimants cited by the Korean Claimants merely implements the final component of a 2007 Agreed Order Allowing Certain Late Claimants Limited Rights to Participate in the Plan's Settlement Facility, RE 606 (the "2007 Agreed Order"), which was the result of a settlement agreement approved by the district court in 2007. That settlement was the result of extensive litigation and negotiation regarding the treatment of individuals who sought to file *late proofs of claim*. The Joint Response to Motion to Expedite notes that the 2007 Agreed Order involved the proper application of the "excusable neglect" standard and is irrelevant to the Korean

Claimants' attempt to modify a Plan-mandated deadline. RE 1645, Page ID # 28879. The Finance Committee filed a joinder. RE 1646.

On July 20, 2022, the Korean Claimants filed a Reply to the Response of Dow Silicones Corporation, the Debtor's Representatives, and the Claimants' Advisory Committee to Motion for Expedited Hearing and Relief, RE 1647 (Korean Claimants' Reply on Motion to Expedite"). In the Korean Claimants' Reply on Motion to Expedite, they raised yet another new argument and contended, for the first time, that excusable neglect should be applied as a basis to extend the deadline established in the Plan to file disease claims. *Id.* at Page ID # 29328.

On August 12, 2022, the district court entered its Memorandum Opinion and Order Regarding Two Orders to Show Cause Against Attorney Yeon-Ho Kim and Various Motions Filed by the Korean Claimants, RE 1652 (the "August 12 Order"). The district court denied the Motion for Extension, recognizing that the final filing deadline was established in the Plan Documents. *Id.* at Page ID # 29362-29363 (citing SFA § 7.09(b)(I)).

In the August 12 Order, the district court held that 11 U.S.C. 1127(b) is the sole means for modification of a confirmed plan, stating:

> The Court has no authority to extend any deadlines set forth under the Plan and agreed to by Dow Corning and the CAC. As noted above, Dow Corning and the CAC may jointly amend or modify the Plan, upon order of the Court. (Plan, § 11.4) There is no provision under the Plan or the SFA which allows the Court to extend the deadlines without the agreement of Dow Corning and the CAC. The final deadline to submit disease claims was established when

> the Plan was agreed to by the parties, which became effective on June 1, 2004. Closing Order 1, entered in 2018, did not change the final disease claim deadline. The Korean Claimants' Motion for Extension of Deadline for Filing Claim must be denied.

Id. at Page ID # 29363-29364.

On August 15, 2022, the Korean Claimants filed a Notice of Appeal to Memorandum and Order Regarding Two Orders to Show Causes Against Attorney Yeon-Ho Kim and Various Motions filed by the Korean Claimants, RE 1654.[9]

On August 30, 2022, the Korean Claimants filed a Motion to Stay the Court's Memorandum Opinion Regarding Two Orders To Show Cause Against Attorney Yeon-Ho Kim and Various Motions Filed By The Korean Claimants, RE 1660 ("Motion to Stay Order Denying Motion for Extension"). Appellees opposed the motion (RE 1664) and the Korean Claimants filed a reply (RE 1665). The Motion to Stay Order Denying Motion for Extension remains pending in the district court as of the date of this filing.

On September 26, 2022, the Korean Claimants filed their Brief of Appellant Korean Claimants, Doc 27. The Korean Claimants apparently have abandoned the various arguments raised with the district court on the Motion for Extension and base their appeal solely on the contention (raised for the first time in their Reply on

[9] The issues raised by the Korean Claimants in this appeal are limited to that portion of the August 12 Order that denied the Motion for Extension and denied as moot the Motion to Expedite.

Motion to Expedite) that the doctrine of excusable neglect should apply to permit their late filed claims.

SUMMARY OF ARGUMENT

The district court correctly denied the Motion for Extension because a modification of the claim filing deadline would violate both the Plan and the Bankruptcy Code. The deadline for submitting claims under the settlement program is clearly set forth in the operative Plan Documents that provide the means for implementation of the Plan. That deadline is an integral part of the Plan – it defines the universe of eligible personal injury claimants and that, in turn, defines the funding obligations of the reorganized debtor. It is not a mere administrative term – it is a fundamental component of the Plan that was integral to the feasibility finding during Plan confirmation. The parties to a bankruptcy proceeding are entitled and must be able to rely on the unambiguous terms of the Plan. The Korean Claimants' request to change the Plan's terms by extending the duration of the settlement program would violate that principle and upset the expectations of the Debtor and the claimants alike.

The Korean Claimants cannot rely on the "excusable neglect" standard to extend the deadline because they did not properly invoke it below and it is neither applicable nor satisfied under the facts of this case. The Korean Claimants cite two inapplicable Bankruptcy Rules – Rules 3003(a) and 9006(b) – as the basis for their

argument on appeal. Neither of these Rules is applicable here and the concept of "excusable neglect" cannot be used to modify the terms of a confirmed and substantially consummated plan of reorganization in violation of the Bankruptcy Code and the Plan itself.

Even if the excusable neglect standard was properly raised by the Korean Claimants and theoretically available here, the Korean Claimants do not satisfy the standard under the well-established factors established by the Supreme Court. The Korean Claimants do not assert (nor could they assert) that they were unaware of the deadline. Instead, they contend that they should be excused because they made a strategic decision to wait to file claims. They assert that they did not file their claims because they had pursued an alternative litigation route – attempting to resolve their claims through an unsanctioned mediation that has been rejected by the district court and this Court alike. This argument alone is fatal to the excusable neglect claim. The law is clear that such deliberate, tactical conduct, which is entirely with the reasonable control of the movants, cannot support a claim for excusable neglect. The Korean Claimants' other arguments, regarding flaws in a "closing order" that did not itself establish the deadline and the supposed impact of the COVID-19 pandemic – also fail to establish that their neglect was excusable.

The Korean Claimants fail to establish the other factors governing excusable neglect. An extension of the deadline would prejudice the reorganized debtor and

other parties. It would impose additional funding obligations on the debtor and would substantially delay the closure of the Settlement Facility (the entity that is responsible for the review and payment of claims). The Settlement Facility has already concluded the review of all timely filed claims and is in the process of finalizing its operations. The district court is preparing for the termination of the Settlement Facility operations and has entered a number of orders guiding the process for closure of the Settlement Facility. Moreover, allowing these Korean Claimants to file their untimely claims would raise an issue of disparate treatment. The Settlement Facility has reported additional late claims filed by others and of course there are individuals who did not attempt to file late, recognizing that the deadline had passed.

Finally, the Korean Claimants cannot show that their failure to file was in "good faith." They deliberately waited over two years past the deadline to file their claims. In each submission to the district court and now to this Court they have shifted their argument and reasons for their assertion that the deadline should be extended. Their failure to file timely claims cannot be sanctioned under the rubric of "excusable neglect."

STANDARD OF REVIEW

Issues involving the interpretation of the plain language of the Plan and Plan Documents are reviewed *de novo*. *Korean Claimants v. Claimants' Advisory*

Committee, 813 F. App'x 211, 216 (6th Cir. 2020) ("The district court's decision involved the interpretation and application of the plain language of the reorganization plan. Where, as here, the district court's interpretation is confined to the Plan documents without reference to extrinsic evidence, we review *de novo*.") (internal citation omitted); *In re Settlement Facility Dow Corning Trust*, 592 F. App'x 473, 477 (6th Cir. 2015) ("When reviewing a district court's interpretation of a bankruptcy plan where the district judge did not confirm the plan but has extensive knowledge of the case, we grant the district court significant deference with respect to its assessment of extrinsic evidence. . .However, we evaluate *de novo* a district court's interpretation that does not rely on extrinsic evidence."); *In re Settlement Facility Dow Corning Tr.*, 670 F. App'x 887, 888 (6th Cir. 2016) ("We review de novo whether the district court had jurisdiction to enter the Consent Order.") (citation omitted).

A district court's determination with respect to excusable neglect should be reviewed under the abuse of discretion standard. *See United States v. Elenniss*, 729 F. App'x 422, 424 (6th Cir. 2018) ("We also review a district court's finding of an absence of excusable neglect for an abuse of discretion.") (internal citation omitted); *United States v. One 2011 Porsche Panamera*, 684 F. App'x 501, 506 (6th Cir. 2017) ("This Court also reviews a district court's decision to accept a late filing after the

relevant deadline, based on excusable neglect or lack thereof, for an abuse of discretion.") (internal citations omitted).

ARGUMENT

I. The Deadline To File Disease Claims Is An Unambiguous Term Of The Plan And Cannot Be Modified.

As the district court properly found, "[t]he final deadline to submit disease claims was established when the Plan was agreed to by the parties, which became effective on June 1, 2004," and the court thus has "no authority" to extend that deadline. August 12 Order, RE 1652, Page ID # 29363-29364. *See also In Re Clark-James v. Settlement Facility Dow Corning Trust,* No. 08-1633, 2009 WL 9532581, *2 (6th Cir. 2009) ("the district court had no authority to modify the Plan, equitable or otherwise").

The relief that the Korean Claimants seek would result in a prohibited Plan modification. *See Korean Claimants v. Claimants' Advisory Committee*, 813 Fed. App'x 211, 218 (6th Cir. 2020) ("The Bankruptcy Code limits modification of a confirmed plan when the plan has been substantially consummated. . .The record indicates that the Plan – which became effective in 2004 – has been substantially consummated."). Section 11.4 of Plan prohibits amendment post consummation (consistent with the Bankruptcy Code). Plan § 11.4, RE 1592-2, Page ID # 27503. The SFA, the Plan Document that sets forth the claim submission deadlines (in its Annex A), prohibits modifications at any time absent the written consent of the Plan

Proponents that would directly or indirectly: "(i) increase the liquidation value or settlement value of any Claim, or the amount or value of any payment, award or other form of consideration payable to or for the benefit of a Claimant, including, without limitation, any cash payment or other benefits provided to a Claimant,… (iii) increase the amount or change the due date of any payment to be made by the Debtor to the Settlement Facility pursuant to the Plan or the Funding Payment Agreement …". SFA § 10.06, RE 1592-4, Page ID # 27567. Adding 400 additional claims (plus potentially other late claims) to the pool of claims eligible to receive payment would indisputably change the payment obligations of the Debtor and would increase the value of each of those individual claims – that have no current value because they are not eligible for payment.

There are compelling reasons not to modify the filing deadline – even if it were permissible. The fifteen-year deadline for the submission of disease claims under the settlement program is not an arbitrary date or a simple administrative mechanism. It is integral to the operation of the Plan and its funding provisions, was an important component of the negotiation of the Plan and the analysis underlying its confirmation, and has been relied upon for nearly two decades. The deadline is a condition of eligibility, not an administrative rule of convenience, and it defines the individuals who may assert a claim in the settlement program.

The parties to a bankruptcy proceeding are entitled and must be able to rely on the unambiguous terms of the Plan. A change in the duration of the settlement program would upset the expectations of the Debtor and the claimants alike. "The plan and order of confirmation fixes the rights of the parties." *In re Wrenn*, 178 B.R. 792, 796 (Bankr. W.D. Mo. 1995) (citations omitted). The Plan's settlement program and its deadlines provide appropriate finality and certainty and have been relied upon for nearly 20 years. If the Korean Claimants had any objection to this filing deadline, those objections should have been raised at the time of confirmation. *See In re Adkins*, 425 F.3d 296, 302 (6th Cir. 2005) (describing confirmation of plan as "res judicata of all issues that could or should have been litigated at the confirmation hearing") (quoting *In re Cameron*, 274 B.R. 457, 460 (Bankr. N.D. Tex. 2002)).

The Plan is clear and unambiguous – there can be no modification of the June 3, 2019 deadline.

II. The Excusable Neglect Standard Is Neither Applicable Nor Satisfied Here.

Despite having raised multiple arguments at the district court level, Appellants base this appeal on solely "excusable neglect" – an argument they raised only belatedly in the district court, in their Reply on Motion to Expedite. *See infra* at 34. Appellants assert that the deadline should be extended because "the Korean Claimants had excusable neglect under Fed. R. Bankr. P. 3003(a) and Fed. R. Bankr.

P. 9006(b)(1)." Korean Claimants Br. at 10. Excusable neglect has no application here, and the failure of Appellants to raise this argument in the initial Motion for Extension can be grounds for dismissal here. *See Sheet Metal Workers' Health & Welfare Fund of N. Carolina v. L. Off. of Michael A. DeMayo, LLP*, 21 F.4th 350, 355 (6th Cir. 2021) (holding that appellant had not properly preserved an argument for appeal by raising it for the first time in its reply brief in the district court – "[b]efore a party may present an issue for the appellate court's review, parties are required to raise the issue in the district court….Omission of an issue in the district court typically will amount to a forfeiture of the issue, meaning we will not consider it on appeal.")[10]; *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 553 (6th Cir. 2008) (refusing to consider a new argument raised in plaintiff's district court reply brief even though the district court addressed the new argument in its final order). Despite the Appellants' failure to timely assert the argument, Appellees have addressed the issues in full in this brief for this Court's consideration.

A. The Plan-Mandated Deadline Cannot Be Modified By Resort To Considerations Of Excusable Neglect.

The Korean Claimants seek to use the inapplicable excusable neglect standard (citing Bankruptcy Rules 3003(a) and 9006(b)) to achieve a prohibited Plan modification. *See* Korean Claimants' Br. at 11-14. Neither of these rules applies to

[10] The Sixth Circuit noted that "issue" as used here also referred to "claim" or "argument". *Id.*

the situation here nor can they be used to circumvent the terms of the Plan. Bankruptcy Rule 3003 (Filing Proof of Claim or Equity Interest) provides that the court "shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed." Bankr. R. 9006(b) applies to acts "required or allowed to be done at or within a specified period *by these rules or by a notice given thereunder or by order of court*" and provides that "the court for cause shown may at any time in its discretion. . .on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect." *Id*. (emphasis added.) The Motion for Extension does not involve a proof of claim process, nor does it involve the application of a deadline set by the rules or court order, so neither rule provides a basis for relief here.

The Korean Claimants argue that "the District Court failed to address whether the Korean Claimants had excusable neglect." Korean Claimants' Br. at 10-11. To the extent this Court believes Appellants' argument based on excusable neglect is properly presented and should be considered on appeal, this contention has no bearing on this Court's review of the district court's order. In denying the Motion for Extension and denying the Motion to Expedite as moot, the district court was not required to address every argument raised below. *See, e.g.*, *Ericksen v. Doe #1*, No. 15-CV-10088, 2015 WL 13035520, at *1 (E.D. Mich. July 23, 2015) ("[t]he court is not required to delineate every reason for the decisions that it makes."); Decker Mfg.

Corp. v. Travelers Indem. Co., No. 1:13-CV-820, 2015 WL 3902012, at *1 (W.D. Mich. June 25, 2015) ("The Court is not required to expressly address every argument raised by a party."). This Court may affirm a lower court judgment on any ground showing it to be correct, even if the lower court did not specifically address the argument now chosen by the Korean Claimants to pursue on appeal. *See Golf Vill. N., LLC v. City of Powell, Ohio*, 14 F.4th 611, 617 (6th Cir. 2021) (holding, in context of reviewing lower court's dismissal for failure to state a claim, "[w]e may affirm on any ground supported by the record, even if not relied upon by the district court.") (internal citation omitted).

The Korean Claimants argue that in other proceedings regarding the Settlement Facility, the district court has previously addressed "excusable neglect." Korean Claimants' Br. at 11 (citing four cases). But in three of the four cases cited, the district court was applying the 2007 Agreed Order (discussed *supra* at 15) to determine if excusable neglect had been demonstrated with regard to individuals who had not filed timely proofs of claim in the bankruptcy. *See In re Settlement Facility Dow Corning Trust*, Case No. 08-CV-12019, 2009 U.S. Dist. Lexis 110233 (E.D. Mich. Nov. 242009); *In re Settlement Facility Dow Corning Trust*, Case No. 08-CV-11953, 2012 U.S. Dist. Lexis 45331 (E.D. Mich. Oct. 26, 2012); *In re Settlement Facility Dow Corning Trust*, Case No. 08-CV-11951, 2012 U.S. Dist. Lexis 45336 (E.D. Mich. Mar. 30, 2012). (In all three cases, the district court held

that the individual had not demonstrated excusable neglect.) In the one other cited case, a claimant challenged, on the basis of excusable neglect, a decision of the Settlement Facility's administrative appeals judge that her claim for rupture benefits was untimely under the Plan-mandated 2006 deadline. The district court found that the excusable neglect standard could not excuse the failure to timely submit the form. *In re Settlement Facility Dow Corning Trust*, Case No. 07-CV-14898, 2008 U.S. Dist. Lexis 79328 (E.D. Mich. Sept. 30, 2008) ("counsel has not shown excusable neglect in failing to timely submit the claim form…the failure of Ms. Reardon's counsel (former or current counsel) to verify the requirements of the Plan and the Plan Documents regarding the time to submit the rupture claim does not constitute excusable neglect.").

B. Even If Excusable Neglect Could Be A Basis For Amending The Plan-Mandated Deadline, The Korean Claimants Do Not Satisfy the Standard.

Even assuming, *arguendo*, that the district court had authority to use the excusable neglect standard to modify the Plan and extend the deadline, the Korean Claimants have not demonstrated and cannot demonstrate excusable neglect. Even where applicable, excusable neglect is a difficult standard to satisfy. *See In re Edwards,* 748 F. App'x 695, 698 (6th Cir. 2019).

In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993), the Supreme Court set forth the factors governing excusable neglect: (i) the

danger of prejudice to the debtor, (ii) the length of delay and its potential impact on judicial proceedings, (iii) the reason for delay, including whether it was within the reasonable control of the movant, and (iv) whether the movant acted in good faith. *Id.* at 395. The Supreme Court also made clear that in assessing a claim of excusable neglect, "the proper focus is upon whether the neglect of [the parties] *and their counsel* was excusable." *Id.* at 397 (emphasis in original).

"The *Pioneer* factors 'do not carry equal weight; the excuse given for the late filing must have the greatest import. While [the others] might have more relevance in a closer case, the reason-for-delay factor will always be critical to the inquiry.'" *JBlanco Enterprises v. Soprema Roofing & Waterproofing, Inc.*, No. 17-3535, 2017 WL 5634299, at *2 (6th Cir. Nov. 20, 2017) (quoting *United States v. Munoz*, 605 F.3d 359, 372 (6th Cir. 2010)). Here, the Korean Claimants' actions in refusing to file their claims despite notice and opportunity is determinative and precludes application of the excusable neglect standard.

1. The Korean Claimants Knowingly And Intentionally Failed To File Claims By The Plan-Mandated Deadline, And The Delay Was Thus Entirely Within Their Reasonable Control.

The Korean Claimants provide a series of alternative and contradictory explanations as to why they waited to file claims until two and a half years after the final claim filing deadline. They do not claim that they were unaware of the deadline but even if they were the law is clear: the failure of the Korean Claimants – or their

counsel – to read or comprehend the applicability of the claim deadline does not constitute excusable neglect. *Pioneer*, 507 U.S. at 392 ("inadvertence, ignorance of rules, or mistakes construing the rules do not usually constitute 'excusable neglect'"); *Mirpuri v. ACT Mfg., Inc.*, 212 F. 3d 624, 631 (1st Cir. 2000) ("A misunderstanding that occurs because a party (or his counsel) elects to read the clear, unambiguous [rules]. . .through rose-colored glasses cannot constitute excusable neglect."); *Deym v. Von Fragstein*, Case No. 05-2052, 1997 WL 650933, at *2 (6th Cir. Oct. 16, 1997) ("The excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the plain language of the federal rules") (quoting *Prizevoits v. Ind. Bell Tel. Co.*, 76 F.3d 132, 133 (7th Cir. 1996)). And if the late claimant's reason for delay is insufficient, excusable neglect will not be found even if the other factors favor the claimant. *See, e.g.*, *United States v. Torres*, 372 F.3d 1159, 1162–63 (10th Cir. 2004) (no excusable neglect when reason for delay was confusion over deadline, even though all other *Pioneer* factors favored claimant). Excusable neglect may be based on an unavoidable and serious matter that precluded action. *See, e.g.*, *In re Whitaker*, 326 B.R. 901 (B.A.P. 6th Cir. 2005) ("Illness may excuse neglect under certain circumstances.").

But, as noted, the Korean Claimants do not actually argue confusion or unawareness of the deadline. To the contrary, the undisputed facts documenting multiple notices and their varying explanations confirm that they *were* aware of the

deadline but *chose* to delay based on strategic considerations – and thus the reason for the delay was entirely "within the reasonable control of the movant." As the Supreme Court explained in *Pioneer*, the requirement that neglect be excusable is to "deter creditors or other parties from freely ignoring court-ordered deadlines in the hopes of winning a permissive reprieve under Rule 9006(b)(1)." *Pioneer*, 507 U.S. at 395.

First, the Korean Claimants assert they were "optimistic" that their motion to enforce a "mediation" would be successful and that they therefore would not be required to file claims at all. *See* Motion for Extension, RE 1586, Page ID # 27071; *see also* Korean Claimants' Br. at 19. Korean Claimants' Motion For Recognition and Enforcement Of Mediation was filed on December 16, 2016 (RE 1271), more than two and a half years before the deadline. Instead of filing their claims they "waited for the results of the Motion before filing." Korean Claimants' Br. at 19.

On December 12, 2018 – six months before the deadline – the district court issued its Order Denying Motion for Recognition and Enforcement of Mediation Filed By Korean Claimants. RE 1461. Still, however, the Korean Claimants chose to wait. *See* Korean Claimants Br. at 20.

On June 3, 2019, the claim filing deadline came and went, and still the Korean Claimants chose to wait.

A year later, on June 1, 2020, this Court affirmed the district court's denial of the Motion For Recognition and Enforcement Of Mediation. *See Korean Claimants v. Claimants' Advisory Committee*, 813 Fed. App'x (6th Cir. 2020). Yet still, the Korean Claimants chose to wait to file their claims.

On February 3, 2021 – seven more months after this Court's June 1, 2020 decision – the Korean Claimants filed the Motion for Extension. Still, however, the Korean Claimants chose to wait to file their claims. Only in December 2021 did they finally file their claims with the Settlement Facility.

The fact that an appeal was pending when the deadline passed is irrelevant: no one can know the outcome of a pending appeal, and no one could reasonably rely on a potential favorable outcome as a reason to forgo filing. Indeed, the Korean Claimants were specifically warned that the outstanding appeal regarding the mediation issue did *not* obviate the June 3, 2019 deadline. *See* Smith-Mair Dec. at Exhibit 3 and at ¶ 13, RE 1645-7, Page ID # 29240, 29248-29249 (April 30, 2019 letter sent by Settlement Facility to counsel for Korean Claimants by email and regular mail stating that June 3, 2019 deadline "applies to domestic and foreign claims including claims of Korean Claimants" and emphasizing that Korean Claimants' pending appeal "does not change the final filing deadline").

The failure to file thus was not the result of an outside factor that made it impossible to file; rather, the Korean Claimants voluntarily and intentionally chose

not to comply with the Plan deadline. The decision to wait to file claims in hope of a positive outcome on appeal or argument is simply not excusable neglect. *See Federal's Inc. v. Edmonton Inv. Co.*, 555 F.2d 577, 583 (6th Cir. 1977) (affirming district court's rejection of excusable neglect, finding that "Rule 60 was not intended to relieve counsel of the consequences of decisions deliberately made, although subsequent events reveal that such decisions were unwise…Such a deliberate choice is not the type of mistake contemplated by Rule 60") (citing *United States v. Erdoss*, 440 F.2d 1221 (2d Cir. 1971)). "[T]he law since the *Pioneer* decision has been well established that 'where a party's actions are deliberate, the party's late filing cannot constitute 'excusable neglect.'" *In re Banco Latino Intern.*, 310 B.R. 780, 785 (2004) (citations omitted) ("In this case, the bankruptcy court found that the Creditors 'could have filed a claim … prior to the August 9 bar date. Instead, [... they] chose not to file their claims at that time.'…As such, the Creditors' actions were not the result of excusable neglect"). *See also In re Energy Future Holdings Corp.*, 619 B.R. 99, 119 (Bankr. D. Del. 2020) (holding no basis for excusable neglect where delay was tactical and done with knowledge of bar date); *In re Maxus Energy Corporation*, 639 B.R. 51 (Bankr. D. Del. 2022) (no excusable neglect where consultant chose not to file proof of claim even though it was provided with opportunity to do so over four-year period).

The Korean Claimants also argue that excusable neglect should apply because they "believed through advice of the representing attorney" that since there was no hearing in advance of the district court's Closing Order 1, the Plan deadline "was to be somehow extended by the Motion." Korean Claimants' Br. at 20-21. The Korean Claimants here seek to reintroduce their argument that Closing Order 1 is invalid to support excusable neglect. But Closing Order 1 is irrelevant – it did not establish the filing deadline but rather provided guidelines for assuring proper and prompt review of claims filed by that deadline. Even if Closing Order 1 was procedurally flawed, as the Korean Claimants have baselessly asserted in the past, that would have no bearing on the deadline. And further, of course, the Korean Claimants raised their complaints about Closing Order 1 only in their February 2021 Motion for Extension – long *after* the claim filing deadline had already expired.

The Korean Claimants also assert that excusable neglect should apply because mailings to them (or to counsel) allegedly were not delivered on time. Whether or not these mailings were delivered promptly is irrelevant. The Korean Claimants indisputably knew the deadline well in advance of June 2019. The Settlement Facility distributed the reminder Notice of Final Deadline of the Plan-mandated June 3, 2019 final deadline to all claimants and attorneys in early 2018. *See* December 27, 2017 Order Approving Notice of Final Deadline, RE 1342; July 18 Smith-Mair Dec. at ¶¶ 7-8, RE 1645-7, Page ID # 29239; Bearicks Dec., at Exhibits 1 and 2 and

at ¶¶ 7-8, RE 1592-9, Page ID # 27722, 27724-27726, 27727-27729. The Notice of Final Deadline was also included as Exhibit A to the district court's December 27, 2017 Order Approving Notice of Final Deadline – which was posted on the ECF system – and was therefore served on counsel for the Korean Claimants.[11]

The Notice of Final Deadline was also posted on the Settlement Facility website, which was available to the general public. *See* Bearicks Dec., RE 1592-9, Page ID # 27722; Smith-Mair Dec. at ¶¶ 9, 15, RE 1645-7, Page ID # 29239-29240. The CAC's newsletters also repeatedly advised of the final deadline and contained links to the Notice of the Final Deadline. Pendleton-Dominguez Dec. at ¶5, RE 1592-10, Page ID # 27731-27732. Counsel for Korean Claimants subscribed to and received these newsletters. *See supra* at 11.

In addition to the 2018 mailing, the Settlement Facility also sent two additional specific notices to counsel for the Korean Claimants by email (in addition to regular mail) on March 13, 2019 and April 30, 2019 reminding him of the upcoming deadline. *See* Smith-Mair Dec. at ¶ 12 and at Exhs. 2 and 3, RE 1645-7,

[11] *See* Fed. R. Civ. P. 5(b)(2)(E) (a paper is served under this Rule by sending it to a registered user by filing it with the court's electronic-filing system); United States District Court for the Eastern District of Michigan's Electronic Filing Policies and Procedures (revised February 2020), R.9 (b), ("[w]henever a non-restricted paper is filed electronically in accordance with these procedures, ECF will generate a NEF [Notice of Electronic Filing] to all filing users associated with that case and to the judge to whom the case is assigned.").

Page ID # 29240, 29245-29247, 29248-29249; Bearicks Dec. at ¶ 9 and at Exhibit 2, RE 1592-9, Page ID # 27722, 27727-27729; *supra* at 11.

Counsel for the Korean Claimants has admitted that he was aware of the June 3, 2019 deadline. In appeals filed with the Settlement Facility before the June 3 deadline, counsel for the Korean Claimants made clear that he was aware of the deadline by expressly referenced the approaching "final deadline of June 3, 2019." Smith-Mair Dec. at ¶ 16 and at Exhibit 4, RE 1645-7, Page ID # 29240, 29250-29252.

Finally, the Korean Claimants assert that the delay in filing was not in their control because of the COVID-19 pandemic. Korean Claimants' Br. at 22. But the June 3, 2019 deadline was obviously well before the onset of the COVID-19 pandemic.

2. The Length Of Delay And The Impact On Judicial Proceedings Counsel Strongly Against A Finding Excusable Neglect.

The second factor under *Pioneer* also counsels strongly against finding excusable neglect because the length of the delay in this case is extreme. This is not a situation where the filings were a day or two late. The Korean Claimants had notice from the outset – 15 years before the deadline – and additional notices more than a year before the deadline, yet waited more than two and a half years *after* the deadline to file. To reopen the Settlement Facility operations to address these extremely late filings would clearly impede judicial proceedings and have a detrimental effect on the

closure of Settlement Facility operations and the final distribution of funds and accounting. *See, e.g.*, *In re CJ Holding Company*, 27 F.4th 1105 (5th Cir. 2022) (creditors did not file motion for relief until nearly three years after bar date and plan explicitly disallowed late claims); *In re City of Detroit, Michigan*, 576 B.R. 552, 559 (Bankr. E.D. Mich. 2017) ("Collins's Motion was filed December 30, 2016. That is a delay of almost three years—an extraordinarily long time under the circumstances. This factor weighs strongly against finding that Collins's neglect is excusable.").

3. Allowing Submission Of Late Claims Would Prejudice Dow Corning, Other Claimants, And The Settlement Facility.

There clearly is prejudice to multiple parties if these claims were to be accepted more than two and a half years after the final claim deadline.

First, contrary to the assertion of Appellants, the Settlement Facility would have to review all the claims – a process that will take months and then will result in a further one-year period for claimants to cure any deficiencies in their claims, forcing the Settlement Facility to incur significant additional expenses.

Second, the Korean Claimants are incorrect in asserting that the "funds for payments that were paid by the Debtor are fixed" and there would be "no additional obligation that the Debtor has to execute for the Funds even if the 405 Korean Claimants are allowed to be processed." Korean Claimants' Br. at 16. The Debtor has an obligation to provide funding up to a capped amount but only to the extent that timely eligible claims are Allowed. FPA, § 2.01(c), RE 1592-12, Page ID #

27757-17758. The addition of hundreds of untimely new claims after the final deadline would not only violate the Plan, but would also obligate Dow Corning to expend additional funds to pay those claims.

Third, the Korean Claimants are wrong when they claim that the allowance of the untimely claims "would not hinder" the closure of the settlement. While the Settlement Facility will remain operational as it completes the process of paying out the final remaining claims and closing, that process has been the subject of ongoing and detailed timelines overseen by the district court pursuant to its authority under the Plan and is nearing completion. There is no provision for the influx of hundreds of new claims that would need to be reviewed and wind their way through the claims review, appeal, and payment processes. This would substantially delay closure, add to the time and burden of the Settlement Facility, require maintenance of additional staff, and extend the period of time in which the Settlement Facility must operate. There is a strong interest in assuring efficient termination of the Settlement Facility. Extending the deadline at this late date would result in uncertainty and would halt ongoing closure activities, cause delay, increase costs, and disrupt trust operations. This disruption would affect not only the parties and other claimants but also the district court.

Finally, extending the deadline only for the 405 Korean Claimants (Korean Claimants' Br. at 15) would result in disparate treatment in violation of the

Bankruptcy Code (11 U.S.C. § 1123(a)(4)) and be unfair to other claimants who missed the deadline or who decided not to submit a late claim because they understood and relied on the deadline to their detriment. In fact, the Claims Administrator reports that 176 other claimants missed the June 3, 2019 deadline – most by a matter of days or weeks and not years – and that all of those claims have been denied. *See* Smith-Mair Dec. at ¶ 18, RE 1645-7, Page ID # 29241.

The Korean Claimants themselves have acknowledged to the district court the broader implications of their Motion for Extension. *See* Korean Claimants' Reply on Motion for Extension, RE 1594, Page ID # 27808 ("If the Korean Claimants are successful in this Motion, there should be a lot of the Claimants, whether Korean or not, who can be benefitted from the Order Granting the Motion because many Claimants failed to submit their Claim by June 3, 2019."). Courts consistently find impermissible prejudice when the allowance of one late claim would "open the floodgates" to other similar late claims. *In re Am. Classic Voyages Co.*, 405 F.3d 127, 133-34 (3d Cir. 2005) (due to large volume of late claim requests filed and continuing inquiries from other late claimants, allowing one late claim could render bar date meaningless); *In re KMart Corp.*, 381 F.3d 709, 713-14 (7th Cir. 2004) (allowing relatively small late claim could induce other late claimants to seek admission based on a "simple 'innocent mistake'" and open door to "a mountain of such claims with a corresponding price tag in the millions of dollars"); *In re*

Spiegel, Inc., 337 B.R. 816, 820 (Bankr. S.D.N.Y. 2006) (holding that allowing late proofs of claim "could also adversely affect the estate by opening the floodgates to similar claims in a case where over 4,300 claims have been filed.").

4. The Korean Claimants Did Not Act In Good Faith In Knowingly Waiting To File Their Claims Until Over Two Years After The Deadline.

The Korean Claimants make the bald assertion that they "did not pass the deadline of June 3, 2019 in bad faith," but provide no explanation. Their silence speaks volumes and the facts speak for themselves. All of the excuses provided by the Korean Claimants demonstrate a lack of good faith. Their claim that COVID-19 precluded filing is not credible – the deadline predated the pandemic. The argument that they were waiting for a decision on the "Mediation" is not credible for the reasons stated above. *See also Korean Claimants v. Claimants' Advisory Committee*, 813 Fed. App'x 211, 219 (6th Cir. 2020) (finding that counsel for Korean Claimants should have known that "mediation" was not authorized in the Plan: "[T]he district court correctly found that due to Kim's many years of involvement in the Dow breast implant litigation, he 'knew or should have known that although the actions by the Claims Administrator and Special Master were well-intentioned in order to resolve ongoing claims by the Korean Claimants, such actions exceeded the scope of their authority.'"). The argument that they did not receive timely mailings is not pertinent or credible for the reasons explained above.

The Korean Claimants do not and cannot provide a good faith basis for refusing to file claims until two and a half years after the deadline and seeking to impose on Dow Corning, the Settlement Facility, the district court, and other claimants the added time, burden, expense, and unfairness of reopening claims processing that has already concluded.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that the Court affirm the district court's August 12 Order.

Dated: November 4, 2022

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STATEMENT OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). According to the word processing program used to prepare this brief (Microsoft Word), and excluding the parts of this brief exempted by Fed. R. App. P. 32(f), this brief contains 9,883 words.

Dated: November 4, 2022

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CERTIFICATE OF SERVICE

I certify that on November 4, 2022, I electronically filed a copy of the foregoing Brief of Appellees, the Debtor's Representatives and Dow Silicones Corporation, through the Court's electronic filing system, which will send notice and a copy of this brief to all registered counsel in this case, as follows:

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ADDENDUM DESIGNATING RELEVANT DOCUMENTS IN THE DISTRICT COURT DOCKET (E.D. MICH. NO. 00-00005)

RE #	Filing Date	Document Description	Page ID
606	12/12/2007	Agreed Order Allowing Certain Late Claimants Limited Rights to Participate in the Plan's Settlement Facility	8503-8530
1271	12/14/2016	Motion for Recognition and Enforcement of Mediation	19277-19285
1342	12/27/2017	Stipulation and Order Approving Notice of Closing and Final Deadline for Claims	21544-21551
1447	07/25/2018	Closing Order 1 for Final June 3, 2019 Claim Deadline (Establishing Final Cure Deadlines, Revised Claim Review Procedures, and Appeal Deadlines)	23937-23950
1461	12/12/2018	Order Denying Motion for Recognition and Enforcement of Mediation	24002-24017
1584-2	01/27/2021	Exhibit 10 to Response of Korean Claimants to Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments	27053-27056
1586	02/02/2021	Motion for Extension of Deadline for Filing Claims and Exhibits	27065-27348
1592	02/17/2021	Response of Dow Silicones, Corporation, the Debtors Representatives and the Claimants' Advisory Committee to Motion for Extension of Deadline for Filing Claims	27382-27407
1592-2	02/17/2021	Amended Joint Plan of Reorganization	27409-27520
1592-3	02/17/2021	Order Confirming Amended Joint Plan of Reorganization as Modified	27521-27528
1592-4	02/17/2021	Settlement Facility and Fund Distribution Agreement	27529-27574
1592-5	02/17/2021	Annex A to the Settlement Facility and Fund Distribution Agreement	27576-27692
1592-6	02/17/2021	Closing Order 1 for Final June 3, 2019 Claim Deadline (Establishing Final Cure Deadlines, Revised Claim Review Procedures, and Appeal Deadlines)	27693-27707

1592-7	02/17/2021	SF-DCT Deadlines	27708-27710
1592-8	02/17/2021	Stipulation and Order Approving Notice of Closing and Final Deadline for Claims, ECF No. 1342 (Dec. 27, 2017)	27711-27719
1592-9	02/17/2021	Declaration of Ellen Bearicks Regarding the Motion for Extension of Deadline for Filing Claim	27720-27729
1592-10	02/17/2021	Declaration of Dianna Pendleton-Dominguez Regarding the Motion for Extension of Deadline for Filing Claim	27730-27732
1592-11	02/17/2021	Response of Korean Claimants' to Finance Committee Recommendation and Motion for Authorization to Make Second Priority Payments	27733-27747
1592-12	02/17/2021	Funding Payment Agreement (Classes 5 through 19) Between Dow Corning Corporation, the Dow Chemical Company, Corning Incorporated, and the Claimants' Advisory Committee	27748-27805
1593	02/17/2021	Finance Committee Joinder in Response of Dow Silicones, Corporation, the Debtors Representatives and the Claimants' Advisory Committee to Motion for Extension of Deadline for Filing Claim	27806-27807
1594	02/23/2021	Korean Claimants' Reply to Response of Dow Silicones, Corporation, the Debtors Representatives and the Claimants' Advisory Committee to Motion for Extension of Deadline for Filing Claim and Exhibits	27808-27838
1644	07/03/2022	Korean Claimants' Motion to Expedite Hearing and Relief and Exhibits	28817-28857
1645	07/18/2022	Response of Dow Silicones Corp., The Debtors' Representatives, and The Claimants' Advisory Committee to Motion to Expedite Hearing and Relief and Exhibits	28858-29322
1645-7	07/18/2022	Declaration of Kimberly Smith-Mair dated July 18, 2022	29237-29255
1645-10	07/18/2022	Order and Joint Stipulation of the Claimants' Joint Advisory Committee and Debtors' Representatives for Approval to Pay Full Payment	29298-29309

		Long Term Option Late Claimants Based on Recommendation of Claims Administrator	
1645-11	07/18/2022	Settlement Facility Deadlines, https://www.sfdct.com/_sfdct/index.cfm/deadlines (last accessed July 16, 2022)	29310-29312
1646	7/19/2022	Finance Committee Joinder In Response of Dow Silicones Corp., The Debtors' Representatives, and The Claimants' Advisory Committee to Motion to Expedite Hearing and Relief	29323-29324
1647	07/20/2022	Korean Claimants' Reply to the Response of Dow Silicones Corp., The Debtors' Representatives, and The Claimants' Advisory Committee to Motion to Expedite Hearing and Relief and Exhibits	29325-29332
1652	08/12/2022	Memorandum Opinion and Order Regarding Two Orders to Show Cause Against Attorney Yeon-Ho Kim and Various Motions Filed by the Korean Claimants	29349-29365
1654	08/15/2022	Notice of Appeal Regarding Memorandum Opinion and Order Regarding Two Orders to Show Cause Against Attorney Yeon-Ho Kim and Various Motions Filed by the Korean Claimants	29373-29374
1656	08/25/2022	Notice of Appeal	29376-29378
1660	08/30/2022	Korean Claimants' Motion to Stay the Court's Memorandum Opinion and Order Regarding Two Orders to Show Cause Against Attorney Yeon-Ho Kim and Various Motions Filed by the Korean Claimants and Exhibits	29450-29465
1664	09/13/2022	Response of Dow Silicones Corp., The Debtors' Representatives, The Finance Committee and The Claimants' Advisory Committee Korean Claimants' Motion to Stay the Court's Memorandum Opinion and Order Regarding Two Orders to Show Cause Against Attorney Yeon-Ho Kim and Various Motions Filed by the Korean Claimants and Exhibits	29995-30469
1665	09/14/2022	Reply to the Response of Dow Silicones Corp., The Debtors' Representatives, The Finance	30470-30478

		Committee and The Claimants' Advisory Committee Korean Claimants' Motion to Stay the Court's Memorandum Opinion and Order Regarding Two Orders to Show Cause Against Attorney Yeon-Ho Kim and Various Motions Filed by the Korean Claimants	