

**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 FOR EXPEDITED HEARING FOR MOTION TO REOPEN TIME TO  
APPEAL REGARDING CLOSING ORDER 5 (ECF No. 1667)**

For the reasons set forth in the attached memorandum, Dow Silicones Corporation (“Dow Silicones”), the Debtor’s Representatives (the “DRs”), the Finance Committee (“FC”), and the Claimants’ Advisory Committee (“CAC”) (collectively, “Respondents”) hereby respond to the Korean Claimants’ Motion for Expedited Hearing for Motion to Reopen Time to Appeal Regarding Closing Order 5 (ECF No. 1667), ECF No. 1677 (“Motion to Expedite”). The Motion to Expedite requests that the Court hold an expedited hearing for the Korean Claimants’ Motion to Reopen Time to Appeal regarding Closing Order 5, ECF No. 1667 (“Motion to Reopen”), or to “rule quickly regarding the Motion to Reopen Time to Appeal.” The Appeal of Closing Order 5, to which the Motion to Reopen relates, has been fully briefed and submitted to the Court of Appeals. As addressed in Respondents’ Response of Dow Silicones Corporation, the Debtor’s Representatives, the

Finance Committee, and the Claimants' Advisory Committee to Korean Claimants' Motion to Reopen Time to Appeal Closing Order 5, ECF No. 1670 ("Joint Response to Motion to Reopen"), the Motion to Reopen was not filed timely and the Court of Appeals has already stated that the time to reopen the appeal deadline has passed.

Should this Court determine that it has jurisdiction to consider the Motion to Reopen, Respondents do not oppose the request for an expedited hearing or to expedite a determination on the Motion to Reopen. For the reasons set forth in the attached memorandum and in the Joint Response to Motion to Reopen, the Motion to Reopen should be denied.

Dated: November 7, 2022

Respectfully submitted,

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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
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**In re:**

**SETTLEMENT FACILITY DOW  
CORNING TRUST**



**Case No. 00-CV-00005  
(Settlement Facility Matters)**

**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 FOR EXPEDITED HEARING  
FOR MOTION TO REOPEN TIME TO APPEAL REGARDING CLOSING  
ORDER 5 (ECF No.1667)**

**CONCISE STATEMENT OF ISSUES PRESENTED**

1. Should the Court hold an expedited hearing or expedite the determination of the Motion to Reopen?

Respondents Answer: Respondents have no objection to an expedited hearing or expediting a determination on the Motion to Reopen if the Court determines that it has jurisdiction to consider the Motion to Reopen, but believe that the Court would have jurisdiction only to deny the Motion to Reopen.

## 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*, 22-1753, Doc. No. 32-2 (6th Cir. Sept. 14, 2022)
- Fed. R. App. P. 4(a)(6)
- Fed. R. Civ. P. 62.1

## INTRODUCTION

The Korean Claimants’ Motion for Expedited Hearing for Motion to Reopen Time to Appeal Regarding Closing Order 5 (ECF No. 1667), ECF No. 1677 (“Motion to Expedite”) seeks an expedited determination on their Motion to Reopen Time to Appeal Regarding Closing Order 5, ECF No. 1667 (“Motion to Reopen”).

Dow Silicones Corporation (“Dow Silicones”),<sup>1</sup> the Debtor’s Representatives (the “DRs”), the Finance Committee (the “FC”), and the Claimants’ Advisory Committee (the “CAC”) (collectively, “Respondents”) assert that the Motion to Reopen is untimely, and further note the jurisdictional issues raised by the unusual procedural posture resulting from the decision of the Korean Claimants to file the Motion to Reopen after filing an untimely appeal of Closing Order 5. The substantive appeal has now been fully briefed and is ready for decision or argument by the United States Court of Appeals for the Sixth Circuit. *See In re: Settlement Facility Dow Corning Trust*, Case No. 22-1753 (6th Cir.).

The Korean Claimants argue in the Motion to Expedite that this Court should address the Motion to Reopen and assert further that a decision in the “negative” would save judicial resources – presumably by removing that issue from the jurisdiction of the Court of Appeals. *See* Motion to Expedite, ECF No. 1677, at

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<sup>1</sup> As Dow Silicones Corporation previously advised the Court, Dow Corning Corporation changed its name to Dow Silicones Corporation on February 1, 2018.

PageID.32233 (“if this Court decides in the negative the Korean Claimants have no need to argue for substantive issues regarding Closing Order 5 in the Sixth Circuit. The Sixth Circuit has no need to determine whether the Korean Claimants have a merit in the appeal regarding Closing Order 5 as well.”).

Respondents respectfully submit that they have no objection to the request for an expedited hearing or ruling if the Court determines that it has jurisdiction, but as noted in the Response of Dow Silicones Corporation, the Debtor’s Representatives, the Finance Committee, and the Claimants’ Advisory Committee to Korean Claimants’ Motion to Reopen Time to Appeal Closing Order 5, ECF No. 1670 (“Joint Response to Motion to Reopen”), which is incorporated by reference and attached hereto as Exhibit A, Respondents believe that this Court would have jurisdiction only to deny the Motion to Reopen, but not to grant it.

### **BACKGROUND**

This Court is well acquainted with the relevant facts: 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”) directed the Settlement Facility to close those claims submitted by individuals (including certain Korean Claimants) for whom the Settlement Facility could not verify a valid current address – after providing a 90-day notice period. Closing Order 5, ECF No. 1642, PageID.28803-



28804. The Korean Claimants filed an untimely appeal of Closing Order 5 and sought a stay of its implementation in both this Court and the Court of Appeals. The Court of Appeals denied the stay and, in so doing, noted that the appeal was untimely and that the time to seek an extension of the deadline for appeal had expired. *In re Settlement Facility Dow Corning Trust*, Case No. 22-1753, Doc. No. 32-2, at 2 (6th Cir. Sept. 14, 2022) (attached hereto as Exhibit B) (“September 14 Order”). This history is outlined in detail in the Joint Response to Motion to Reopen.

On October 6, 2022, the Korean Claimants filed a Reply to Response of Dow Corning Corporation, the Debtor’s Representatives, the Finance Committee, and the Claimants’ Advisory Committee to Korean Claimants’ Motion to Reopen Time to Appeal Closing Order 5, ECF No. 1674 (“Korean Claimants’ Reply”). The Korean Claimants contend that their appeal was untimely only because they were not properly served with Closing Order 5 when it was docketed. Without repeating the long sequence of correspondence, we note that the Korean Claimants’ Reply confirms that their counsel knew of the closure of his email address provided for the ECF system and was able to notify others before the entry of Closing Order 5 but failed to fulfill his obligation to notify this Court timely. *See* Korean Claimants Reply at 6, ECF No. 1674, PageID.31659 and at Exh. 5, ECF No. 1674-2, PageID.31671-31723.

## ARGUMENT

Respondents do not seek here to reiterate the arguments set forth in the Joint Response to Motion to Reopen. We bring to the Court's attention the jurisdictional issue created by the facts that the untimely appeal was filed before the Motion to Reopen and that the Motion to Reopen is itself untimely. While arguably this Court has jurisdiction to address the Motion to Reopen (because the appeal is untimely), the Sixth Circuit has already addressed the timing issue in denying the motion to stay.

The Korean Claimants, however, filed their notice of appeal seventy-three days after the district court entered Closing Order 5. And they *can no longer move the district court to extend or reopen the time to appeal*. Fed. R. App. P. 4(a)(5). As a result, their appeal is untimely and faces dismissal.

September 14 Order at 2 (emphasis added). Further, now that the appeal itself is fully briefed,<sup>2</sup> the Sixth Circuit may determine to address all issues. As stated in the Joint Response to Motion to Reopen, the Respondents believe that this Court could deny the Motion to Reopen pursuant to Fed. R. Civ. P. 62.1 without encroaching on

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<sup>2</sup> The Korean Claimants filed their Brief of Appellant Korean Claimants on September 19, 2022, Respondents herein filed their Brief of Appellees Dow Silicones Corporation, the Debtor's Representatives, the Claimants' Advisory Committee, and the Finance Committee on October 21, 2022 ("Appellees' Brief"), and the Korean Claimants filed a Reply of Appellant Korean Claimants on October 25, 2022. See *In re Settlement Facility Dow Corning Trust*, Case No. 22-1753, Doc. Nos. 33, 37 and 38.

the jurisdiction of the Court of Appeals.<sup>3</sup> But a decision denying the Motion to Reopen could also result in yet another appeal.<sup>4</sup>

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<sup>3</sup> Fed. R. Civ. P. 62.1(a) provides:

If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

- (1) defer considering the motion;
- (2) deny the motion; or
- (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

Fed. R. Civ. P. 62.1(a).

<sup>4</sup> Similarly, in their Appellees' Brief before the Court of Appeals for the Sixth Circuit, the Respondents herein noted the following with respect to the Korean Claimants' Motion to Set Aside Closing Order 5 Regarding Korean Claimants, ECF No. 1668, which is also pending before this Court:

These circumstances create a procedural question: on one hand, if the district court were to indicate that it would rule favorably on the motion to set aside, this Court could theoretically consider (but need not grant) a limited remand under Fed. R. App. P. 12.1 and Fed. R. Civ. P. 62.1. But in this case a panel of this Court, in denying the motion to stay, has already stated that the appeal was untimely and that no equitable exceptions to the filing deadline would apply. In this appeal, and in the motions pending in the district court, Appellants make the same argument that they made in their motion to stay seeking relief from the deadline—that they should be excused from the filing deadline because counsel's email was not working and, therefore, he did not receive the docket notice. In subsequent motions, the Korean Claimants have embellished and changed their description of the email issue, but there is no material difference in the argument: they continue to assert that counsel's failure to update his email for purposes of receiving service should relieve them of the need to file timely.

*See Appellees' Brief, In re Settlement Facility Dow Corning Trust*, Case No. 22-1753, Doc. No. 37, at 13.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Motion to Reopen and that, if the Court determines it has jurisdiction, grant only that portion of the Motion to Expedite that seeks an expedited hearing and determination.

Dated: November 7, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 7, 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: November 7, 2022

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