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

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

MOTION TO SET ASIDE CLOSING ORDER 5 REGARDING KOREAN CLAIMANTS

The Korean Claimants file this motion to set aside Closing Order 5 issued on June 13, 2022 regarding the Korean Claimants.

I. Background

The Korean Claimants, of which around 1,400 Claimants were included on the list of claimants permanently closed in the processing of the SF-DCT on September 17, 2022, did not receive the notice of Closing Order 5 when it was issued.[1]

The Korean Claimants filed a notice of appeal to Closing Order 5, pending the United States Court of Appeals for the Sixth Circuit.

---

[1] Dow Corning Corporation, the Debtor's Representatives, the Claimants' Advisory Committee and the Finance Committee (hereinafter referred to as "the Respondents" collectively) asserted that the Korean Claimants received the notice of Closing Order 5 by the ECF to yhkimlaw@unitel.co.kr. However, the server of email address at that time did not operate so that Yeon-Ho Kim, the attorney or record, was not able to access to it nor has not known that Closing Order 5 was issued. I

The Korean Claimants filed a motion to stay Closing Order 5 pending appeal with the appellate court but was denied.

The Korean Claimants filed a motion to dismiss a motion to stay Closing Order 5 with this Court.

II. Reasons for Relief

A. Due Process Violation

Closing Order 5 is a result of due process violation. Closing Order 5 has not been noticed to the Korean Claimants before issuance nor noticed after issuance.

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

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

The various deadlines must be noticed to creditors in bankruptcy procedure and the absence of notice is a violation of the Fifth Amendment.

The deadline under Closing Order 5, which is September 17, 2022 to respond regarding address verification of the SF-DCT, is a deadline that the SF-DCT should afford creditors (the claimants) an opportunity to present their objections.

Closing Order 5 was issued without it.

Furthermore the Korean Claimants did not receive the notice of Closing Order 5 after it was issued. The Korean Claimants could not file a notice of appeal on time. It is another violation of the Fifth Amendment. Closing Order 5 is void.

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

Closing Order 5 must be set aside regarding the Korean Claimants.

B. Fed. R. Civ. P. 60(b)(1)

The court may relieve a party or its legal representative from a final judgment, order, or proceeding for following reasons: (1) mistake, inadvertence, surprise, or excusable neglect.

""The sequence of procedural steps required of one seeking judgment by default was set forth by the court in Meehan v. Snow, 652 F.2d 274, 276 (Second Cir. 1981): The procedural

steps contemplated by the Federal Rules of Civil Procedure following a defendant's failure to pleas or defend as required by the Rules begin with the entry of a default by the clerk upon a plaintiff's request. Rule 55(a). Then, pursuant to Rule 55(a), the defendant has an opportunity to seek to have the default set aside. If that motion is not made or is unsuccessful, and if no hearing is needed to ascertain damages, judgment by default may be entered by the court, or if the defendant has not appeared, by the clerk. Rule 55(b). Finally, Rule 55(c) authorizes a motion to set aside a default judgment pursuant to Rule (60)(b)… In considering a motion to set aside entry of a judgment by default a district court must apply Rule 60(b) "equitably and liberally… to achieve substantial justice."" (*See United Coin Meter Co. v. Seaboard C. Railroad*, 705 F.2d 839 (Sixth Cir. 1983)

"When Rule 60 is invoked to set aside a default judgment, a trial court must find that one of the specific requirements of Rule 60(b) is met and consider the equitable factors relevant to good cause for setting aside a default judgment under Federal Rule of Civil Procedure 55(c)… These equitable factors are: (1) whether culpable conduct of the defendant led to the default, (2) whether the defendant has a meritorious defense, and (3) whether the plaintiff will be prejudiced." (*See Countrywide Home Loans, Inc. v. Terlecky (In re Fusco)*, 2008 Bankr. Lexis 2362 (Sixth Cir. 2008)

""In order to show that relief is appropriate under Rule 60(b)(1) based on "excusable neglect," Debtor must show both (1) that his conduct in failing timely respond to Creditor's Objection constituted "neglect" within the meaning of Rule 60(b)(1); and (2) that his "neglect" was excusable. In Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380, 388, 113 S. Ct. 1489, 123 L. Ed. 74 (1993), the Supreme Court explained that [t]he ordinary meaning of "neglect" is 'to give little attention or respect' to a matter, or …. 'to leave undone or unattended to esp[ecially] through carelessness'" Id."" (*See In re Sharkey*, 560 B. R. 470 (E.D. Mich. 2016))

""If Debtor shows "neglect", the next issue is whether Debtor's neglect was excusable. In Pioneer, the Supreme Court explained that a determination of

> Whether a party's neglect of a deadline is excusable ... is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission … [including] the danger of prejudice to the [party opposing relief], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including it was within the reasonable control of the movant, and whether the movant acted in good faith. Id. at 395."" (*Id.* at 6)

""In determining whether Debtor's failure to timely respond to the Creditor's Objection was "excusable," the Court must focus not only on whether Debtor's failure was excusable, but also on whether the failure or neglect of his attorney was excusable. The Supreme Court discussing this point at some length and made this clear in Pioneer, concluding that "the proper focus is upon whether the neglect of [the movants] and their counsel was excusable. Id. at 396-97 "" (*Id.* at 6)

1. Excusable Neglect of the Korean Claimants

Even if the Respondents' assertion, made in their Response to the Korean Claimants' Motion to Stay Closing Order 5 in this Court, that Yeon-Ho Kim has received the notice of June 13, 2022 of Closing Order 5 by the ECF system to yhkimlaw@unitel.co.kr is accepted by this Court, the fact that the Korean Claimants failed to file a response to Closing Order 5 or file a notice of appeal timely constitutes "neglect" within the meaning of Rule 60(b)(1).

To find whether "neglect" is excusable, a court should take account of all relevant circumstances surrounding the party's omission. First of all, there is no danger of prejudice to the Respondents. Because the Respondents will operate the SF-DCT until 2023 or the early 2024 and the SF-DCT will conduct processing claims until then, the Respondents would not

have any danger of prejudice even if Closing Order 5 is set aside regarding the Korean Claimants.

Second, the length of the delay was not meaningful. Since Closing Order 5 was issued on June 13, 2022, the length of the delay, which can be calculated as a month, should not be meaningful. The Korean Claimants were able to file a response by July 13, 2022, the last day of 30 days for filing a notice of appeal, if they had received the notice on June 13, 2022. Third, there was not a potential impact on judicial proceedings. The SF-DCT would not be impacted because of Closing Order 5. Neither would the Respondents.

Finally, the reason for delay was out of control of the Korean Claimants. 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.

The failure of receiving notice of Closing Order 5 by yhkimlaw@unitel.c.kr on June 13, 2022 and the delay of filing within the 30 day deadline for a notice of appeal were not within control of the Korean Claimants and their attorney.

The Korean Claimants acted in good faith. The Korean Claimants appealed to Closing Order 2. Closing Order 5 was derived from Closing Order 2. Closing Order 5 is respect to a confirmed current address. The Korean Claimants have submitted over 600 Claimants' current address to the SF-DCT on June 1, 2019. The SF-DCT not only ignored and disrespected the filing of the Korean Claimants' confirmed current address but also prohibited the attorney from filing the Korean Claimants' confirmed current address.

2. Meritorious Defense of the Respondents and Prejudice to the Respondents

The Respondents do not have any meritorious defense to the Korean Claimants. In addition, there would be no prejudice to the Respondents even if this Court sets aside Closing Order 5 regarding the Korean Claimants.

III. Requested Relief

For the forgoing reasons, the Korean Claimants request this Court to GRANT this Motion to set aside Closing Order 5 regarding the Korean Claimants and ORDER that the SF-DCT shall not close the processing of the Korean Claimants from September 17, 2022.

Date: September 17, 2022

Respectfully submitted,

(signed) Yeon-Ho Kim
Yeon-Ho Kim Int'l Law Office
Suite 4105, Trade Tower
159 Samsung-dong, Kangnam-ku
Seoul 06164 Korea
+82-2-551-1256
yhkimlaw@naver.com

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2022, this Motion has been electronically filed with the Clerk of Court using ECF system, and the same has been notified to all of the relevant parties of record.

Dated: September 17, 2022

Signed by Yeon-Ho Kim