Case No.: *22-2167*

United States Court of Appeals for the Sixth Circuit

In re: SETTLEMENT DOW CORNING TRUST

KOREAN CLAIMANTS

Interested Parties – Appellants

v.

CLAIMANTS' ADVISORY COMMITTEE; FINANCE COMMITTEE; DOW SILICONES CORPORATION

Defendants – Appellees

Brief of Appellant Korean Claimants

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I. STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Korean Claimants did not have a chance for oral argument from the District Court although the District Court issued a series of orders disfavoring the Korean Claimants.

The District Court's current Order regarding Various Motions filed the Korean Claimants (ECF Nos.1658,1660,1666,1667,1668,1677) was same so that the District Court did not give oral argument to the Korean Claimants.

The Korean Claimants filed the Notice of Appeal on December 29, 2022.

Because the Korean Claimants did not have a chance to be heard fully by the Courts, the Korean Claimants request this Court to provide an oral argument for this case including the cases pending this Court.

II. STATEMENT OF JURISDICTUION

The United States District Court Eastern District of Michigan has jurisdiction over the Amended Joint Plan of Reorganization of Dow Corning Corporation

effective on June 1, 2004 ("the Plan") to resolve controversies and disputes regarding interpretation and implementation of the Plan and the Plan Documents including the SFA.

On December 29, 2022, the District Court issued Order Regarding Various Motions Filed by the Korean Claimants (ECF Nos.1658,1660,1666,1667,1668, 1677).

The Korean Claimants filed this appeal in a timely manner. The Order of the District Court is the final order which cannot be contested in the District Court. Therefore, the United States Court of Appeals for the Sixth Circuit has jurisdiction over this appeal.

III. STATEMENT OF ISSUES

The first issue is whether the District Court erred in denying the Korean Claimants' Motion to Reopen the Time to File Appeal from Closing Order 5 in interpreting Federal Rule of Appellate Procedure 4(a)(6). The District Court denied the Korean Claimants' Motion on the basis that the Korean Claimants failed to file the Motion within 14 days after counsel "received" notice of Closing Order 5 on August 16, 2022 when counsel received the newsletter of

the Claimants' Advisory Committee and downloaded a copy of Closing Order 5 from the SF-DCT's website.

The second issue is whether the District Court erred in denying the Korean Claimants' Motion to Set Aside Closing Order 5 regarding the Korean Claimants in interpreting Fed.R.Civ.P.60(b)(1)(4). The District Court denied the Korean Claimants' Motion on the basis that Fed.R.Civ.P.60(b)(1)(4) shall not be applicable because the Motion involves the issue of lack of notice.

The third issue is whether the District Court erred in denying the Korean Claimants' Motion to Stay Order denying the Korean Claimants' Motion for Extension of Deadline for Filing Claims in interpreting Rule of 8(a) of the Federal Rules of Appellate Procedure and the relevant authority of a court case.

IV. STATEMENT OF CASE

While appeals regarding the premium payments, Closing Order 2 in relation to the Korean Claimants' address update/confirmation, and regarding extension of deadline for filing claims are pending this Court, the Korean Claimants filed various motions with the District Court.(RE1658,1660,1666,1667,1668,1677)

The District Court issued Closing Order 5 on June 13, 2022.(RE1642 Pg ID:#28800-28805)

While the Korean Claimants did not receive Closing Order 5 and did not know whether Closing Order 5 was issued, the District Court issued Memorandum Opinion and Order Regarding Two Orders to Show Causes against Attorney Yeon-Ho Kim and Various Motions Filed by the Korean Claimants on August 12, 2022.(RE1652 Page ID:#29349-29375)

The Korean Claimants filed the Notice of Appeal from the District Court's above Order denying the Motion for Extension of Deadline for Filing Claims on August 15, 2022.(Case No.22-1750)

The Korean Claimants filed the Notice of Appeal from Closing Order 5 on August 25, 2022.(Case No.22-1753)

The Korean Claimants filed the Motion to Stay Closing Order 5 on August 29, 2022.(RE1658 Pg ID:#29380-29446)

The Korean Claimants filed the Motion to Stay the District Court's Order denying Motion for Extension of Deadline for Filing Claims on August 30, 2022. (RE1660 Pg ID:#29450-29465)

Dow Corning Corporation, the Debtor's Representatives, the Finance Committee and Claimants Advisory Committee ("the Appellees") filed the Response to the Korean Claimants' Motion to Stay Closing Order 5 on

September 12, 2022.(RE1662 Pg ID:#29467-29888)

The Appellees filed the Response to the Motion to Stay the District Court's Order denying Motion for Extension of Deadline for Filing Claims on September 13, 2022. (RE1664 Pg ID:#29995-30469)

The Korean Claimants filed the Reply to the Appellees' Response to the Motion to Stay Court's Order denying Motion for Extension of Deadline for Filing Claims on September 14, 2022. (RE1665 Pg ID:#30470-30478)

The Korean Claimants filed The Motion to Dismiss the Motion to Stay Closing Order 5 on September 15, 2022.(RE1666 Pg ID:#30479-30480)

In addition, the Korean Claimants filed the Motion to Reopen Time to File Appeal regarding Closing Order 5 on September 15, 2022.(RE1667 Pg ID:#30481-30571)

Separately, the Korean Claimants filed the Motion to Set Aside Closing Order 5 regarding the Korean Claimants on September 17, 2022. (RE1668 Pg ID:#30572-30579)

The Appellees filed the Response to the Korean Claimants' Motion to Reopen Time to Appeal from Closing Order 5 on September 29, 2022. (RE1670 Pg ID:#30581-31108) The Appellees also filed the Motion for Leave to File certain

exhibits under seal regarding the Appeals Judge's decisions on the Korean Claimants' submission of appeals pending the SF-DCT.

The Appellees filed the Response to the Korean Claimants' Motion to Set Aside Closing Order 5 on October 3, 2022. (RE1672 Pg ID:#31177-31651)

The Korean Claimants filed the Reply to the Response to the Motion to Reopen on October 5, 2022. (RE1674 Pg ID:#31654-31906)

The Korean Claimants filed the Reply to the Response to the Motion to Set Aside Closing Order 5 on October 10, 2022. (RE1675 Pg ID:#31907-32177)

The Korean Claimants filed the Motion for Expedited Hearing for the Korean Claimants' Motion to Reopen Time to Appeal from Closing Order 5 on October 22, 2022. (RE1677 Pg ID:#32232-32300)

The Appellees filed the Response to the Korean Claimants' Motion for Expedited Hearing on November 7, 2022. (RE1681 Pg ID:#32304-32360)

The Korean Claimants filed the Reply to the Appellees' Response to the Motion for Expedited Hearing on November 12, 2022. (RE1682 Pg ID:#32361-32416)

On December 29, 2022, the District Court issued Order granting the Korean

Claimants' voluntary dismissal of the Motion to Stay Closing Order 5, denying the Motion to Reopen Time to File Appeal from Closing Order 5, denying the Motion to Set Aside Closing Order 5, and denying the Korean Claimants' Motion to Stay the Order for Extension of Deadline for Filing Claims. (RE1689 Pg ID:#32427-32441)

V. SUMMARY OF ARGUMENT

The Korean Claimants argue with respect to the District Court's denial of the Motion to Reopen Time to File Appeal from Closing Order 5 of June 13, 2022 that the District Court erred in not finding that service is not effective because the Court "learned" that it did not reach counsel for the Korean Claimants as prescribed in Fed.R.Civ.P.5(b)(2)(E), resulting that a formal notice under Fed.R.Civ.P.77(d) was not made, and therefore, the requirement that a movant of motion to reopen must file within 14 days after the movant "received" notice shall not be applicable. Instead, the District Court decided that there is no requirement that notices of orders filed be "re-served" once a party updates an invalid contact information. The Korean Claimants further argue that even if the Korean Claimants did not file the Motion to Reopen within 14 days after the Korean Claimants' counsel "received" notice on August 16, 2022, the District Court could have treated the Korean Claimants' Notice of Appeal from Closing Order 5 of August 25, 2022 and/or the Korean Claimants' Motion to Stay Closing Order 5 of August 29, 2022 as a motion to reopen, but did not do so.

Both were filed within 14 days after August 16, 2022.

The Korean Claimants argue with respect to the District Court' denial of the Motion to Set Aside Closing Order 5 that the relief under Fed.R.Civ.P.60(b)(1) and(4) should be applicable because the Korean Claimants asserted other basis in relation to the SF-DCT's requirements of the Korean Claimants' address update/confirmation beside the lack of notice in the Motion to Set Aside Closing Order 5. The Korean Claimants further argue that the District Court erred in mistakenly limiting the arguments of the Korean Claimants in the Motion to Set Aside Closing Order 5 to the issue of the lack of notice, which is not allowed for moving for a relief under Fed.R.Civ.P.60(b).

The Korean Claimants argue with respect to the District Court' denial of the Korean Claimants' Motion to Stay the Order denying the Korean Claimants' Motion for Extension of Deadline for Filing Claims that the four requirements for a stay of an order were met.

VI. ARGUMENTS

A. Motion to Reopen Time to File Appeal from Closing Order 5

The Standard of review for this argument is an abuse of discretion.

The Korean Claimants filed the Motion to Reopen Time to File Appeal from Closing Order 5 on the basis of F.R.App.P.4(a)(6), which prescribes;

(6) *Reopening the Time to File an Appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied;

> (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be applied within 21 days after entry;
>
> (B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after moving party received notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and
>
> (C) the court finds that no party would be prejudiced.

The District Court found that the Korean Claimants' counsel was served with Closing Order 5 electronically as so noted on the Court's docket when Closing Order 5 of June 13, 2022 was filed on CM/ECF and served on counsel's then-email address, which satisfies the service required by Fed.R.Civ.P.77(d). The District Court further found that the Korean Claimants have met the requirement under Fed.R.App.P.4(a)(6)(A) because counsel did not "receive" a copy of Closing Order 5 within 21 days after the entry of the order, based on counsel's representation that the server to his email provider stopped working

and counsel could not "receive" or retrieve the notice via email. However, the District Court decided that the Korean Claimants "received" a notice of a copy of Closing Order 5 when counsel downloaded a copy of Closing Order 5 from the SF-DCT's website on August 16, 2022 so that the Korean Claimants' Motion to Reopen the Time to File Appeal from Closing Order 5 was filed on September 15, 2022, which is beyond the 14-days required by Fed.R.App.4(a)(6), and the Korean Claimants were unable to meet the timely filing requirement.

The Korean Claimants agree that counsel did not "receive" a copy of Closing Order 5 within 21 days after the entry of the order but do not agree on the District Court's conclusion.

The District Court's interpretation on service of entry and the acts of the Korean Claimants' counsel is like this;

- On June 13, 2022, Closing Order 5 was entered and **served**.
- The Korean Claimants did not receive notice under Fed.R.Civ.P.77(d) within 21 days of the entry.
- The Korean Claimants' counsel received notice under Fed.R.Civ.P.77(d) of the entry when he downloaded a copy of Closing Order 5 from the SF-

DCT's website on August 16, 2022.

- The Korean Claimants did not file the Motion to Reopen Time to File Appeal within 14 days after August 16, 2022.

The issue here is whether the Korean Claimants' counsel was served pursuant to Fed.R.Civ.P.77(d) since the above clause says, "*after moving party received notice under Federal Rule of Civil Procedure 77(d) of the entry.*"

Fed.R.Civil P.77(d)(1) prescribes:

> (1) Service. Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in defaulting for failing to appear, the clerk must record the service on the docket.

Fed.R.Civil P.5(b)(2)(E) prescribes:

> (E) sending to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing-in either of which events service is complete upon filing or sending, but *is not effective if the filer or sender learns that it did not reach the person to be served*;

In this case, the District Court or the clerk "learned" that Closing Order 5 did not reach the counsel for the Korean Claimants when counsel notified the clerk by an email of June 24, 2022 that the email address of the counsel would be changed from yhkimlaw@unitel.co.kr to yhkimlaw@naver.com or when the Korean Claimants filed the Notice of Appeal from Closing Order 5 on August

25, 2022, obviously after 60 days after the entry of Closing Order under Fed.R.App.P.4(a)(1) and (5), or when the Korean Claimants filed the Motion to Stay Closing Order 5 on August 29, 2022, contending that the counsel for the Korean Claimants did not receive the notice of Closing Order 5. Because the District Court or the clerk "learned" that service did not reach the Korean Claimants' counsel, service was not effective under Fed.R.Civ.P.77(d) and Fed.R.Civ.P.5(b)(2)(E).

Since the 14 days runs after a moving party received notice under Federal Rule of Civil Procedure 77(d) of the entry, it does not apply to the Korean Claimants' Motion to Reopen because notice of service was not effective.

The District Court found that the Korean Claimants' counsel "received" a notice of a copy of Closing Order 5 when he downloaded a copy of Closing Order 5 from the SF-DCT website on August 16, 2022.

"Rule 4(a)(6) has been amended to specify more clearly what type of "notice" of the entry of a judgment or order precludes a party from later moving to reopen the time to appeal. In addition, Rule 4(a)(6) has been amended to

address confusion about what type of "notice" triggers the 7-day[1] period to bring a motion to open. … Because Civil Rule 77(d) requires that notice of the entry of an judgment or order be formally served under Civil Rule 5(b), any notice that is not so served will not operate to preclude the reopening of the time to appeal under new subdivision (a)(6)(A). The subdivision now makes clear that only formal notice of the entry of a judgment or order under Civil Rule 77(d) will trigger the 7-day period to move to reopen the time to appeal." *See Phillips v. Lafler*, 2007 U.S.Dist.Lexis 35274 (E.D.Mich. 2007) at 7-8

"In *Bowles v. Russell*, 551 U.S. 205, 127 S.Ct. 2360, L.Ed. 2d 96 (2007), the appellant did not receive timely notice of the judgment. He timely moved for relief under Rule 4(a)(6), and his motion was granted. Under the Rule, the appellant had 14 days from the date of the order granting his motion to file a notice of appeal. However, in its order, the district court erroneously told him that he could file a notice of appeal by a date that was 17 days after entry of the order. The appellant took the court at its word, and filed on the 17th day. Too bad, said the Supreme Court." *See Berg v. Metrish*, 2015 U.S.Dist. Lexis 173020 (E.D.Mich. 2015) at 8.

The above precedents imply that Fed.R.App.P.4(a)(6)(B) that the motion is

[1] Now is 14-day.

filed within 14 days after the moving party receives notice requires a "formal notice" under Fed.R.Civ.P.77(d) of the entry, not *any* notice such as the counsel's downloading of a copy of the order from the SF-DCT's website, that the District Court found. In this case, the Korean Claimants did not receive a "formal notice" under Fed.R.Civ.P.77(d) from the District Court or the clerk.

In addition, even if the 14-day requirement should be applied to this case, the Korean Claimants filed the Notice of Appeal from Closing Order 5 on August 25, 2022. Pursuant to the precedents, a district court was flexible in interpreting the nature of a party's filings so that the filing of a notice of appeal was treated as a motion to reopen time to file appeal.

Furthermore, the Korean Claimants filed the Motion to Stay Closing Order 5 on August 29, 2022. The District Court was able to treat the Korean Claimants' Motion to Stay Closing Order 5 as a motion to reopen time to file appeal.

Both filings were within 14-days after August 16, 2022 that the District Court found that the Korean Claimants' counsel "received" notice. The District Court has been so stringent to the Korean Claimants that the Court failed to follow the precedents and practice.

"Whether or not the motion should be construed hinges on the intent of the movant at the time the motion was filed. If the movant articulates a desire for appellate review, the motion may be construed as one to reopen the time to file an appeal; If the movant's clear desire was to continue proceeding before the district court, then Rule 4(a)(6) construction of the motion is not to be adopted, even if appellate review would more likely provide the movant with the relief he or she desires." *See Chatman v. Metrish*, 2011 U.S.Dist. Lexis 47343 (W.D.Mich. 2011) at 14

The Korean Claimants filed the Motion to Stay Closing Order 5 with the Sixth Circuit at the same time. The Korean Claimants' desire was not to continue proceedings before the District Court but was to bring the cases of the Korean Claimants for appellate review when the Korean Claimants' counsel was filing the Motion to Stay Closing Order 5 in relation to address update/confirmation with the District Court.

In conclusion, the 14 day requirement for filing a motion to reopen time to file appeal under F.R.App.P.4(a)(6)(B) is not applicable to this case and even if it is applicable, the Korean Claimants filed the Motion to Reopen within 14 days after August 16, 2022 when the District Court found that the Korean Claimants "received notice" by the counsel's downloading of a copy of Closing

Order 5 from the SF-DCT's website.

The District Court erred in not finding that service was not done pursuant to Fed.R.Civ.P.77(d)(1) and therefore the requirement that a movant of motion to reopen must file within 14 days after the movant "received" notice shall not be applicable.

Instead, the District Court decided that there is no requirement that notices of orders filed be "re-served" once a party updates an invalid contact information. The District Court or the clerk knew that Closing Order 5 was not able to reach the Korean Claimants' counsel when the clerk received the counsel's email of June 24, 2022 asking for a change of email address. While the clerk did not reply to the counsel's email, the Korean Claimants filed the Notice of Appeal regarding Closing Order 5 on August 25, 2022. The clerk could have found that Closing Order 5 was not served timely. And then, the Korean Claimants filed the Motion to Stay regarding Closing Order 5 on August 29, 2022. The clerk has noticed that Closing Order 5 was not served timely because the Korean Claimants contended that they did not receive Closing Order 5. The District Court decided that there is no requirement for re-serving the notices of orders although the clerk failed to do a thing regarding notice to the Korean Claimants.

The District Court covered up the mistake of the clerk who "learned" that Closing Order 5 did not reach the Korean Claimants' counsel.

With respect to other requirement under F.R.App.P.4(a)(6)(C) that no party would be prejudiced, the District Court found that reopening the time to appeal is prejudicial to the trust operations, the ongoing closure activities, and would further delay the ongoing closing activities.

Although this Court decided that a stay of Closing Order 5 would cause harm by disrupting trust operations, the reasoning is not applicable to the Motion to Reopen. The Korean Claimants and the Appellees have already finished a briefing schedule.

And the SF-DCT will continue operating whether the District Court's Order regarding Closing Order 5 is affirmed or overruled. There would be no such thing as a prejudice to the trust operations, halting ongoing closure activities, or delaying the ongoing closing activities taking place because of the Korean Claimants' Motion to Reopen Time to File Appeal from Closing Order 5.

In addition, the Korean Claimants' appeal regarding Closing Order 2 is pending this Court. Closing Order 2 is the founding of Closing Order 5. Therefore there would be no disruption of trust operations by the reopening of appeal to Closing Order 5 and there would be no serious prejudice to the Appellees.

This Court explained recently, ""Appellate Rule 4 is not jurisdictional as applied in this case, *See In re Indu.Craft.Inc.*, 749 F.3d 107, 114 (Second Cir. 2014). Rather, it amounts at most to a mandatory claims-processing rule. *See Hamer*, 138 S.Ct. at 17; *Gunter*, 906 F.3d at 492 … To be sure, unlike jurisdictional rules, mandatory claims-processing rules can be waived or forfeited … *Gunter*, 906 F.3d at 492. … Likewise, the Supreme Court has "reserved whether mandatory claims-processing rules may be subject to equitable exceptions." *Hamer*, 138 S.Ct. at 18 n 3. But even if Rule 4 were amenable to equitable exceptions in principle, no such exception would apply in this case. The Korean Claimants say that they did not discover Closing Order 5 until well after it was posted on the district court's electronic docket. That oversight, however, is not the kind of unavoidable delay that could justify tolling an otherwise mandatory deadline. *E.g., Graham-Humpreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560-61 (Sixth Cir. 2000) (Typically, equitable tolling applies only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control.)"" *See In re Settlement Facility Dow Corning Trust*, 22-1752, Doc.No. 32-2 (Sixth Cir. September 14, 2022) at 3

This Court explained that Fed.R.App.P.4 is not jurisdictional in the context of bankruptcy filing, rather at most to a mandatory claims-processing rule, can be waived or forfeited, and may be subject to equitable exceptions. The District Court was able to exercise an equitable decision but did not exercise an

equitable exception.

B. Motion to Set Aside Closing Order 5

The Standard of review for this argument is an abuse of discretion.

The District Court decided, "Because the Korean Claimants' arguments in their Motion to Set Aside involve the issue of lack of notice and there has been no allegation that any party caused the lack or the delay of notice, this Court has no jurisdiction to review the Korean Claimants' Motion to Set Aside under Rule 60(b)."

The District Court found the basis in this Court's case, *Tanner v. Yukins*, 776 F.3d 434, 440 (Sixth Cir.2015).

The District Court explained, "t[T]he Sixth Circuit has noted that Rule 60(b) is an appropriate means of considering equitable interests when a notice of appeal is filed late for reasons other than lack of notice. If the request for relief from judgment under Rule 60(b) is not to solve a problem related to a failure to receive notice, but to restore a right to appeal that was lost due to an unconstitutional conduct by a party which prevented the filing of a notice of appeal, then the district court may review a Rule 60(b) motion. Otherwise, the court of appeals lacks jurisdiction to hear an appeal outside the 14-day period in

Rule 4(a)(6), even where weighty equitable considerations exist in light of the drafting history of Rule 4(a)(6) which demonstrates that the time period in Rule 4(a)(6) are themselves an accommodation of equitable considerations. The Sixth Circuit has held that a federal appeals court lacks jurisdiction to decide the merits of a case if the notice of appeal was filed with the district court more than 14 days after a Rule 4(a)(6) motion was filed."

The District Court further found, "In their Motion to Set Aside Closing Order 5, the Korean Claimants argue that Closing Order 5 should be set aside under Rule 60(b)(1) and (4) because they did not receive the notice of the June 13, 2022 Closing Order 5 because his email server had stopped working. This is the same argument raised in their Motion to Reopen the Time to File an Appeal - a lack of notice argument."

The District Court erred in finding that the Korean Claimants' arguments involve the issue of lack of notice and that the Korean Claimants argue that Closing Order 5 should be set aside under Rule 60(b)(1) and (4) because they did not receive the notice of the June 13, 2022 Closing Order.

The Korean Claimants argued in the Motion to Set Aside; (1) due process violation, and (2) excusable neglect under Rule 60(b)(1). And then, the Korean Claimants argued by articulating meritorious underlying claims in the Reply to the Appellees' Response; (1) Closing Order 5 is void, (2) Closing Order 5 along with Closing Order 2 was to approve wrongdoings of the SF-DCT, (3) Closing

Order 5 along with Closing Order 2 has no founding under the Plan and violates Section 1129(b), (4) List of Claimants under Closing Order 5 was arbitrary, (5) the Korean Claimants should be exempted from Closing Order 5, and (6) The SF-DCT eliminated the requirement of a valid, confirmed current address on its own.

The Korean Claimants also argued with a number of basis other than the issue of lack of notice in the Motion to Set Aside. Therefore, the District Court's finding that the Korean Claimants' arguments involve the issue of lack of notice and that the Korean Claimants argue that Closing Order 5 should be set aside under Rule 60(b)(1) and (4) because they did not receive the notice of the June 13, 2022 Closing Order was taken by mistake.

Even if the District Court's finding that Korean Claimants' arguments involve the issue of lack of notice is right, the Korean Claimants' Motion to Set Aside is different from the Korean Claimants' Motion to Reopen Time to File Appeal from Closing Order 5. The basis for the two Motions is different and the requests to the Court are different.

Presumably, the District Court took the Appellees' allegation that because the Korean Claimants filed the Motion to Set Aside two days after this Court explained that the Korean Claimants could no longer move the district court to extend or reopen the time for appeal and the Korean Claimants filed the Motion

to Set Aside one day after the Korean Claimants filed the Motion to Reopen Time to File Appeal, the Motion to Set Aside must be a disguise to circumvent Fed.R.App.P.4(a)(6). This kind of assumption has no rationality and simply raised suspicion that the filings of the Korean Claimants regarding the Motion to Reopen were not read.

This Court explained that Fed.R.App.P.4 is not jurisdictional in the context of bankruptcy filing, rather at most to a mandatory claims-processing rule, can be waived or forfeited, and may be subject to equitable exceptions. (*See In re Settlement Facility Dow Corning Trust*, 22-1752, Doc.No.32-1 (Sixth Cir. 2022)

Closing Order 5 was derived from Closing Order 2. Closing Order 5 along with Closing Order 2 is pending this Court and both were fully briefed by the parties.

"If the untimely appeal is still pending in this court [appellate court], the district court should consider the merits of the Rule 60(b) motion and issue an opinion indicating whether it is inclined to grant the motion." *See Lewis v. Alexander*, 987 F.2d 392 (Sixth Cir. 1993) at 396 "A district court may therefore employ Rule 60(b) to permit an appeal outside the time constraints of Fed.R.App.P.4(a)(5)" *See Davenport v. Tribley*, 2011 U.S.Dist. Lexis 15800 (E.D.Mich. 2011)

""*Lewis* thus remains good law in this circuit, and the district court in this case erred in concluding otherwise. ...Although we concluded that "[t]he district court did not abuse its discretion in refusing to rule that the attorney's misinterpretation of the rules was a 'mistake' within Rule 60(b), "our analysis actually presumed the availability of Rule 60(b) as a basis on which to provide a party with relief from Rule 4(a) in some circumstances."" *See Tanner*, 776 F.3d 434 (Sixth Cir. 2015) at 442.

The Korean Claimants did not file the Motion to Set Aside to circumvent the specific requirement of Fed.R.App.P.4(a)(6). The case law of this Court does not preclude the availability of Rule 60(b) as a basis for providing the Korean Claimants with relief in some circumstances other than the issue of lack of notice. The District Court simply concluded that the filing of the Korean Claimants' Motion to Set Aside Closing Order 5 was only related to the issue of lack of notice. It is not true so that the decision of the District Court regarding the Motion to Set Aside should be overruled.

C. Motion to Stay Order Denying the Korean Claimants' Motion for Extension of Deadline for Filing Claims

The Standard of review for this argument is an abuse of discretion.

The District Court explained, "The following four factors are weighed in

order to determine whether a stay pending appeal should be issued; 1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; 2) the likelihood that the moving party will be irreparably harmed absent the stay; 3) the prospect that others will be harmed if the court grants the stay; and 4) the public interest in granting the stay. *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (Sixth Cir.1991)."

The District Court said with respect to the first factor, ""The Court finds that the Korean Claimants will not likely prevail on the merits on appeal because "excusable neglect" standard does not apply to the establishment of the June 3, 2019 final deadline to file claims.""

The District court found with respect to the second factor, "t[T]hey cannot show irreparable harm if the stay was not issued because there is no firm Settlement Facility final closing date. … The Settlement Facility cannot close until all claims are resolved. If the Court of Appeals allows an extension of time for the Korean Claimants to submit their claims, the Settlement Facility will remain open to process these claims."

The District Court found with respect to the third factor, "Regarding whether other parties will be harmed if the Korean Claimants were allowed to submit late claims, costs to process the claims would increase and create uncertainty because other claimants who missed the final deadline may seek to file late claims. The Finality of claim processing by the Settlement Facility would be

further delayed."

The District Court found with the fourth factor, "t[T]he public has a strong interest in implementing a bankruptcy plan and respecting deadlines set forth in a plan."

First of all, the District Court erred in finding that the Korean Claimants will not likely prevail on the merits on appeal because the "excusable neglect" standard does not apply to the establishment of the June 3, 2019 final deadline to file claims and the Court has no authority to extend any deadlines set forth under the Plan agreed to by Dow Corning and the CAC.

""To be sure, unlike jurisdictional rules, mandatory claims-processing rules can be waived or forfeited. … Likewise, the Supreme Court has "reserved whether mandatory claims-processing rules may be subject to equitable exceptions. … (Typically, equitable tolling applies only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control.")"" *See In re Settlement Facility Dow Corning Trust*, 22-1752, Doc.No. 32-2 (Sixth Cir. September14, 2022) at 3

This Court explained that a mandatory claims-processing rule can be waived or forfeited, and may be subject to equitable exceptions.

The Plan and the Settlement Facility Agreement do not specify deadlines.

Annex A to the SFA indicates the deadline for filing a disease claim like other claims. Even in Annex A, however, the June 3, 2019's deadline is not specified. Annex A regarding deadline for filing a disease claim indicates, "the fifteenth anniversary of the Effective Date".

The Claimants did not know when the Effective Date was. The Effective Date is an abstract term. The Deadline for filing a disease claim has not been certain from the **face** of the Plan and the agreements of the Parities. The reason that the District Court authorized the distribution of notice of the June 3, 2019 deadline is not because of a gentleman-type act to the Claimants but because of having known that the Plan and the agreements of the Parties did not specify that June 3, 2019 is the deadline for filing the disease claims.

As far as the deadline for filing is concerned, the Plan itself speculated that it **could be extended**.

Annex to SFA section 6.02(f) says;

> (f) Expedited Release Payment Option. Eligible Breast Implant Claimants may elect to receive compensation of $2,000 for a complete release of their right to participate in the Disease Payment Option. Breast Implant Claimants who elect this Expedited Release Payment Option will (if eligible) be allowed to recover under the Explantation Payment Option and the Rupture Payment Option. (i) **Duration. The Expedited Release Payment Option will be available until the third anniversary of the Effective Date**, except as provided at paragraph (iii) below and at Section 7.09 below. **The Claims Administrator shall have the discretion to extend the Expedited Release Payment Option for an additional time period.**

Section 6.02(f) of Annex to SFA is with respect to expedited payment for the disease claims. The deadline for expedite disease payments was June 3, 2007 in accordance with the Appellees' calculation. But it was extended to June 3, 2019, twelve years longer. Nobody believe that the Claims Administrator decided it alone in discretion. The Plan proponents agreed.

The Appellees assert that the Korean Claimants contend that the deadline may be modified. The Korean Claimants do not request the Appellees to modify the Plan. The Korean Claimants request to apply the Plan in accordance with the spirit and the meaning of the Plan if a precise wording does not exist.

The District Court found that the Korean Claimants would not likely prevail in the appeal because the "excusable neglect" standard does not apply to the establishment of the June 3, 2019 final deadline to file claims.

However, this Court explained, "the equitable tolling applies *only* when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances *beyond that litigant's control*."

The Korean Claimants have the basis for prevailing because not-filing by the June 3, 2019 final deadline unavoidably arose from circumstances beyond the Korean Claimants' control.

The Korean Claimants have been engaged in several Motions and some Motions pending appeal. The Korean Claimants' appeal regarding late-filing claims is pending this Court. (Case No. 22-1750)

The Korean Claimants have not been fully notified that the Closing Order 1 fixing the Deadlines for Filing Claims under the Plan because they did not understand English. In addition, the Korean Claimants have been aware that the SF-DCT offered the mediation settlement in full with the Korean Claimants as a group although it has not been in force because of the Debtor's objection. Therefore the Korean Claimants did not pay an attention to prepare their documents for Claims until June 3, 2019. Furthermore, the final decision of the this Court on the mediation settlement denying recognition and enforcement of settlement was issued well after the June 3, 2019 deadline.

During debating over the settlement in the Courts, the Appellees have been aware of future filings of the Korean Claimants after the Deadline. The late-filings of the Korean Claimants should not be a surprise to the SF-DCT.

The Korean Claimants could not file their submission of Claims to the SF-DCT on time due to COVID-19 quarantine measures enforced by the Government. Most clinics including implanting physicians who were responsible for issuing affirmative statement for proof of manufacturer and diagnosis doctors were closed. Although COVID-19 situations started from the

last half of 2019 following the reports of the outbreak in Wuhan City in China, the impact from it was pre-dated because the mails of the United Postal System that the Settlement Facility used for the notice of filing the Deadline to the Korean Claimants and counsel around 2019 arrived at least five to nine months later than they were supposed to be delivered.

The late-filed 405 new claims were outside the control of the Korean Claimants. They waited for this Court's ruling regarding motion for recognition and enforcement of mediation offered by the Finance Committee by June 2020. They encountered the Covid-19 pandemic situations. The clinics which should issue an affirmative statement for proof of manufacturer and the doctors who were requested to issue diagnosis for disease have closed. To prepare the documents to file with the SF-DCT needed significant time to exchange communications among the claimants, doctors and the attorney. In addition, the mails of the SF-DCT including notice of June 3, 2019 Deadline arrived to the claimants and counsel at least five or nine months late.

The Appellees assert that Covid-19 situations have no basis because the deadline of June 3, 2019 was well before the onset of the Covid-19 pandemic. First, the onset of the Covid-19 pandemic is different from the Covid-19 pandemic of the US. Pre-pandemic warnings and quarantines in fact started overlapping with June 3, 2019. In addition, most of 405 claimants received the notice of June 3, 2019 deadline after June 3, 2019.

Therefore the Korean Claimants' failure to meet the deadline of June 3, 2019 unavoidably arose from circumstances *beyond their control.*

In addition, the addition of 405 new claims would not increase funding required to pay claims and administrative costs and thus increase the funding obligations of the Debtor. The SF-DCT will not close by 2023 or early 2024 and will continue operations for claims. The 405 new claims do not incur administrative costs because the SF-DCT would not have to hire new staffs for 405 new claims. The existing staffs are ready and professional to review the files of 405 new claims. The staffs are familiar with the Korean files because the files are very similar. In addition, the 405 new claims must hurdle over eligibility of claim even if they are allowed to process. Therefore, the funding requirement of the Debtor would not be increased significantly.

Furthermore, to allow these 405 late claims would not be unfair to other claimants. Other claimants under SF-DCT have been paid in full. They would not be unfair. Other claimants who missed the deadline or who decided not to submit a late claim because they understood that the deadline had passed would not be unfair if these 405 late claims were allowed but rather be fair.

The addition of 405 new claims for processing would not extend the operations of the SF-DCT by one or two years. The SF-DCT will continue operations at least until 2023 or early 2024. Because the SF-DCT will continue operations at least until 2023 or early 2024, the addition of 405 new claims would not extend

the operations by increasing costs or creating uncertainty. The finality of claim processing would not be delayed. The SF-DCT has already reviewed the 405 new claims files that have the same affirmative statement for proof of manufacturer and the same doctor's diagnosis for disease payment from 2004. The SF-DCT would finish processing the 405 new claims quickly once it begins.

VII. CONCLUSION

For the foregoing reasons, the Korean Claimants request this Court to overrule the District Court's Orders regarding the Motion to Reopen Time to File Appeal from Closing Order 5, the Motion to Set Aside Closing Order 5, and the Motion to Stay the Order for Extension of Deadline for Filing Claims.

Date: January 4, 2023

Respectfully submitted,

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

APPENDIX

RE1642	Closing Order 5	Pg ID:#28800-28805
RE1652	Memorandum Opinion and Order regarding Two Orders to Show Cause against Attorney Yeon-Ho Kim and Various Motions Filed by the Korean Claimants	Pg ID:#29349-29375
RE1658	Motion to Stay Closing Order 5	Pg ID:#29380-29446
RE1660	Motion to Stay Memorandum Opinion regarding Extension of Deadline for Filing Claims	Pg ID:#29450-29465
RE1662	Response to Motion to Stay Closing Order 5	Pg ID:#29467-29888
RE1664	Response to Motion to Stay regarding Extension of Deadline for Filing Claims	Pg ID:#29995-30469
RE1665	Reply to Response	Pg ID:#30470-30478
RE1666	Motion to Dismiss the Motion to Stay Closing Order 5	Pg ID:#30479-30480
RE1667	Motion to Reopen Time to File Appeal	Pg ID:#30481-30571
RE1668	Motion to Set Aside Closing Order 5	Pg ID:#30572-30579
RE1670	Response to Motion to Reopen Time to File Appeal	Pg ID:#30581-31108
RE1672	Response to Motion to Set Aside Closing Order 5	Pg ID:#31177-31651
RE1674	Reply to Response to Motion to Reopen	Pg ID:#31654-31906
RE1675	Reply to Response to Motion to Set Aside Closing Order 5	

Pg ID:#31907-32177

RE1677 Motion for Expedited Hearing for Motion to Reopen Time to Appeal Pg ID:#32232-32300

RE1681 Response to Motion for Expedited Hearing Pg ID:#32304-32360

RE1682 Reply to Response to Motion for Expedited Hearing Pg ID:#32361-32416

RE1689 Order Denying Motion to Reopen Time to File Appeal, Denying Motion to Stay Closing Order 5, Denying Motion to Stay the Order for Extension of Deadline for Filing Claims Pg ID:#32427-32441

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2023, I have electronically filed the above document with the Clerk of Court by ECF system that will notify to all relevant parties in the record.

Date: January 4, 2023 Signed by Yeon-Ho Kim