Case No. 18-2446

United States Court of Appeals
for the Sixth Circuit

In re: SETTLEMENT FACILITY DOW CORNING TRUST

KOREAN CLAIMANTS
***Interested Party – Appellant*,**

v.

CLAIMANTS' ADVISORY COMMITTEE, FINANCE COMMITTEE, DOW SILICONES CORPORATION, DEBTOR'S REPRESENTATIVES

Defendants – Appellees.

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

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

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-2446 Case Name: Korean Cl. v. Cl. Advisory Cmte et al.

Name of counsel: Jeffrey S. Trachtman, Esq.

Pursuant to 6th Cir. R. 26.1, Clamaints' 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 January 8, 2019 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, Esq.
1177 Avenue of the Americas
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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.

6CA-1
8/08

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-2446 Case Name: Korean Claimants vs. Claimants' Advisory Committee, et al.

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.

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.

The Debtor's Representatives consist of: two who are counsel to Dow Silicones Corporation; one who is counsel to Corning Incorporated; and two who are employees of The Dow Chemical Company.

CERTIFICATE OF SERVICE

I certify that on February 15, 2019 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, D.C. 2006

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6CA-1
8/08

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-2446 Case Name: Korean Claimants v. Claimants' Advisory Committee, et al.

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.
As of April 1, 2019, Dow Silicones Corporation is a wholly owned subsidiary of The Dow Chemical Company, which is a wholly-owned subsidiary of Dow Inc., which is a publicly owned corporation. Further, various publicly-owned corporations may be creditors of Dow Silicones Corporation's Chapter 11 bankruptcy estate, but Dow Silicones Corporation believes their interests are too attenuated to present any conflict of interest issues here.

CERTIFICATE OF SERVICE

I certify that on May 7, 2019 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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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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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is requested. This matter involves interpretation of a complex plan of reorganization and oral argument will allow the attorneys for the parties to assist the Court by providing additional explanation.

INTRODUCTION

This appeal arises out of an order of the district court that denied a motion filed by Korean Claimants (the Appellants) seeking to enforce a purported agreement allegedly reached in a "mediation" that had occurred four years earlier and that had not been agreed to or executed by the participants other than Korean Claimants or approved by the necessary parties or the district court. The Korean Claimants are individuals who elected to settle their claims in the settlement trust established by the Dow Corning Amended Joint Plan of Reorganization (the "Plan").[1] The settlement trust was established to compensate the personal injury tort

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[1] On February 1, 2018, Dow Corning Corporation changed its name to Dow Silicones Corporation. For the Court's and parties' convenience, Appellees Dow Silicones Corporation, the Claimants' Advisory Committee and the Debtor's Representatives (the "Plan Proponents") refer to Dow Silicones as Dow Corning for purposes of this appeal herein.

The Plan Proponents refer to certain capitalized terms in the Plan Documents, including the Debtor's Representatives, Claimants' Advisory Committee, Claims

claims of individuals (primarily individuals who claim injury resulting from use of a silicone gel breast implant made by Dow Corning) who elect the settlement option under the Plan. The settlement trust[2] is funded by Dow Corning Corporation ("Dow Corning"). Dow Corning has already paid the initial payment and insurance funds required by the Plan. At this stage, Dow Corning is required to provide additional funding, up to a cap, if and as needed to pay Allowed eligible claims and administrative expenses authorized under a budget approved by the district court. The district court retains jurisdiction over the Plan and the assets of the settlement trust. The assets remain *in custodia legis – i.e.,* in the custody of the district court – until actually paid to eligible recipients. The district court is the only entity that can authorize distributions from the settlement trust.

The Plan Documents prescribe detailed and exclusive criteria and procedures for the submission of claims and for determining whether claimants are eligible to receive a distribution from the settlement trust. For example, each disease claim is evaluated under specific criteria for diagnosis and categorization of the claimant's

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Administrator, and Finance Committee, which are defined in Article 1 of the Plan. *See* Plan, RE 1275-2, Page ID # 19382-19410.

[2] The settlement trust is a depository trust that exists to hold custody of assets and to make disbursements as provided in directives issued to the Trustee. *See* Settlement Facility and Fund Distribution Agreement § 2.05, RE 1275-6, Page ID # 19515.

degree of impairment, with varying levels of compensation laid out in a grid based on the extent of impairment. This process ensures that claimants with like conditions receive equivalent compensation from the settlement program. The Korean Claimants allege that they achieved a resolution of their claims not via the exclusive criteria and processes required by these Plan Documents but rather through the "mediation." The mediation, according to Korean Claimants, resulted in an alleged "agreement" that would resolve the claims of Korean Claimants simply by providing a lump sum payment of $5 million to counsel for Korean Claimants – with no guidelines or criteria, with no review or supervision by the district court or Claims Administrator, and with no accountability for the ultimate distribution of the lump sum amount. Korean Claimants assert that the payment was agreed to by the Special Master and the Claims Administrator (two members of the Finance Committee appointed by the district court) and is therefore enforceable. Korean Claimants do not allege that this purported mediation involved or received approval from the Plan Proponents or the district court.

The district court's decision should be affirmed for the simple and determinative reason that the relief requested in the Motion for Recognition and Enforcement of Mediation (the "Motion") is prohibited by the Plan. The requested lump sum payment would (1) result in the unauthorized distribution of assets in violation of the Plan's exclusive and mandatory requirements for approving

distributions; (2) effect an unlawful modification of the Plan; (3) unlawfully affect the funding obligations of Dow Corning in violation of the Plan; (4) permit an excess distribution – essentially a double recovery – to Korean Claimants resulting in disparate compensation to claimants with the same Plan classification in violation of the Plan and the Bankruptcy Code; and (5) reduce the assets available from the limited funds for eligible claims. The district court properly found that the Plan's express provisions bar the alleged mediation resolution and that neither the Finance Committee nor any of its members had actual or apparent authority to enter into an enforceable agreement to distribute Plan assets outside the procedures allowed in and required by the Plan.

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 December 12, 2018 final order pursuant to 28 U.S.C. § 1291. *See* RE 1461. Korean Claimants filed a timely notice of appeal on December 17, 2018. *See* Notice of Appeal, RE 1464, Page ID # 24039.

COUNTER-STATEMENT OF ISSUES FOR REVIEW

1. Whether the district court properly denied the Motion because the relief requested is prohibited by the confirmed and consummated Plan.

2. Whether the district court properly denied the Motion because the relief requested would have the effect of modifying a confirmed and consummated Plan of Reorganization in violation of the Bankruptcy Code and the express terms of the Plan.

3. Whether the district court properly denied the Motion because none of the Finance Committee, the members of the Finance Committee, or Mr. Austern had (or have) actual or apparent authority to enter into an agreement to distribute assets of the Plan in a manner that is not permitted by the Plan and without the authorization of the district court and agreement of the Plan Proponents.

4. Whether the Korean Claimants' new argument asserting an attorney client relationship that binds the Settlement Facility – raised for the first time on appeal – is barred.

STATEMENT OF THE CASE AND FACTS

A. Background – the Plan and Settlement Program.

This Court has addressed the history of Dow Corning's bankruptcy proceedings and Plan on multiple occasions. *See*, *e.g.*, *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).

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. Following appeals, the Plan became effective on June 1, 2004. *See In re Settlement Facility Dow Corning Trust*, 628 F.3d at 771; *see also* Plan, RE 1275-2, Page ID # 19372.

The centerpiece of the Plan is a settlement program for claimants seeking compensation based on their implantation with Dow Corning silicone gel breast implants. Claimants who elect the settlement option are Settling Personal Injury Claimants. The claims of Settling Personal Injury Claimants are reviewed, evaluated and paid by the Settlement Facility—Dow Corning Trust (the "Settlement Facility"). The Settlement Facility and Fund Distribution Agreement ("SFA") and the Dow Corning Settlement Program and Claims Resolution Procedures, Annex A to SFA ("Annex A") prescribe the exclusive rules under which these settling claims are individually evaluated and, if eligible, paid. The district court supervises the

Settlement Facility and the resolution of claims. SFA § 4.10, RE 1275-6, Page ID # 19527.

The Plan establishes a Settlement Fund (SFA § 3.02(a)(ii), RE 1275-6, Page ID # 19516) of up to $1.95 billion (Net Present Value) that is used to pay claims resolved under the settlement program. *See* Plan § 5.3, RE 1275-2, Page ID # 19418; SFA § 3.02(a), RE 1275-6, Page ID # 19515-16. The Settlement Fund may be used only for prescribed and limited purposes: it may be used to pay Allowed claims of Settling Personal Injury Claimants along with related administrative expenses. SFA § 3.02(a)(ii), RE 1275-6, Page ID # 19516. A claim is "Allowed" only if it is determined to meet the requisite settlement criteria. *See* Plan § 5.4.1, RE 1275-2, Page ID # 19419-20 ("Settling Personal Injury Claimants shall receive payment of their Allowed Claims in accordance with the terms, provisions and procedures contained in the Settlement Facility Agreement."). Distributions may be made *"only to the holders of Allowed Claims ... ."* *Id.* at § 10.1, Page ID # 19459 (emphasis added).[3] Distributions must be approved by the district court. SFA §§ 4.08(b), 7.02(a)(iii), RE 1275-6, Page ID # 19523-19524, 19538.

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[3] "'Allowed' means, … (z) with respect to Products Liability Claims treated therein, has been approved for payment pursuant to the Settlement Facility Agreement or the Litigation Facility Agreement, or (e) that is expressly allowed in this Plan." Plan § 1.3, RE 1275-2, Page ID # 19383.

B. The Plan Prescribes Mandatory and Exclusive Criteria for Determining Allowed Claims.

To receive a settlement payment, claimants must satisfy specific criteria:

> The Claims Office shall process Settling Personal Injury Claims payable from the Settlement Fund in accordance with the Claims Resolution Procedures outlined in Annex A. *This Settlement Facility Agreement and Annex A shall establish the exclusive criteria for evaluating, liquidating, allowing and paying Claims*, except as modified in accordance with Sections 5.05 and 10.06. … *Only those Claims that satisfy the eligibility criteria specified in the Claims Resolution Procedures as applicable are eligible to receive payment*, …

SFA § 5.01(a), RE 1275-6, Page ID # 19528 (emphasis added).[4] The Plan requires the Claims Administrator to establish quality control procedures "to assure that payment is distributed only for Claims that satisfy the Claims Resolution Procedures." *See* SFA § 5.04(b), RE 1275-6, Page ID # 19531.

To qualify for payment, a settling claimant must submit both acceptable proof of manufacturer (proving the use of a Dow Corning Breast Implant) and appropriate documentation establishing the elements of the particular benefit option selected. Annex A details the documentation that must be submitted to demonstrate proof of manufacturer and the medical documentation that is required to support each of the

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[4] SFA Section 5.05 (Interpretation of Criteria/Consent of Parties) provides that the Claims Administrator may seek a Plan interpretation from the Debtor's Representatives and Claimants' Advisory Committee, and SFA Section 10.06 outlines the limitations and prohibitions on amending the SFA. SFA §§ 5.05, 10.06, RE 1275-6, Page ID # 19532, 19545.

different compensation options. The necessary documentation is specifically defined for each category of claim and includes medical records and physician statements that demonstrate test results, diagnoses, findings, and symptoms. *See* Annex A §§ 5.01(f), 6.02 and Schedules I and II, RE 1275-7, Page ID 19568-82, 19618-69. For example, to qualify for payment based on a claim for systemic lupus erythematosus (SLE), a claimant must show a diagnosis made "in accordance with the 1982 Revised Criteria for the Classification of Systemic Lupus Erythematosus, 25 Arthritis and Rheumatism No. 11 (November 1982) adopted by the American College of Rheumatology. *See* Kelley, 4th ed. at 1037, Table 61-11: A diagnosis of lupus is made if four of the eleven manifestations listed in the table were present, either serially or simultaneously, during any interval of observations." Annex A, Schedule 2, RE 1275-7, Page ID # 19652. These criteria are detailed and objective, allowing for an assessment of claims that promotes uniformity and fairness across the class of claimants.

C. Prohibition Against Plan Modification.

The Plan was consummated nearly 15 years ago and may not at this point be modified. 11 U.S.C. § 1127(b) ("The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan"). The SFA itself prohibits modification of

any of its terms absent written agreement of the Reorganized Dow Corning and the Claimant's Advisory Committee and/or approval by the Court:

> This Agreement may be amended to resolve ambiguities, make clarifications or interpretations or to correct manifest errors contained herein by an instrument signed by the Reorganized Dow Corning and the Claimants' Advisory Committee. All other amendments, supplements, and modifications shall require approval of the Court after notice to the Reorganized Dow Corning, the Shareholders, and the Claimants' Advisory Committee and such other notice and hearing as the Court may direct, provided that without the prior written consent of the Reorganized Dow Corning and the Claimants' Advisory Committee the Agreement shall not be amended, supplemented or modified if such amendment, supplement, or modification 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 1275-6, Page ID # 19545.

D. Administration of the Settlement Program.

The Claims Administrator administers the claims evaluation process and is charged with ensuring that the processing functions and substantive evaluation of claims accord with the Plan requirements, implementing procedures to assure reliability of claims and documents submitted in support of claims, and detecting and deterring fraud. The Finance Committee oversees the operations of the settlement trust and is responsible for financial matters and for ensuring the preservation of the assets of the trust for the benefit of eligible claimants and other

allowed expenditures. *See* Plan §§ 1.29 & 1.67, RE 1275-2, Page ID # 19388, 19394. The Finance Committee is composed of three members consisting of the individuals holding the positions of Special Master, Appeals Judge, and Claims Administrator. SFA § 4.08(a), RE 1275-6, Page ID # 19523. The actions of the Finance Committee members and the Settlement Facility are supervised by the district court. The Finance Committee and the Claims Administrator perform the administrative function of authorizing distributions of payments that have been approved by the district court. *See, e.g.,* SFA § 4.08(b), Page ID # 19524 (providing that the authority of the Finance Committee with respect to distribution of funds and review of claims operations is "[s]ubject to the approval and supervision of the District Court"); *id.* at § 7.02(a), Page ID # 19538 ("The Finance Committee shall have the authority to seek orders from the District Court generally authorizing distributions of First Priority Payments without separate orders regarding each such distribution and establishing procedures for distributing payments involving liens or disputed payees").[5] *See also id.* at § 4.02(e), Page ID # 19519 (General Powers of the Claims Administrator) ("Subject to the direction of the Finance Committee and the approval of expenditures by the District Court, the Trust shall have the authority

[5] The Plan Proponents, on behalf of the Finance Committee, sought and obtained an order from the court authorizing distribution of First Priority Payments early in the operations of the Settlement Program. *See* Order, RE 96, Page ID # 116.

to enter into such contracts or agreements as may be necessary to operate the Claims Office, to hire staff and contractors and/or to obtain services and equipment and shall have the authority to serve all functions of an employer."); *id.* at § 7.03(e), Page ID # 19541-42 ("the Finance Committee shall submit to the District Court for approval, … proposed guidelines for payment of all salaries, compensation, and expenses associated with the operation of the Claims Office, the Litigation Facility, and the Finance Committee, including financial management, investment, and audit functions, along with an annual proposed budget for all such costs and expenses.").[6]

The members of the Finance Committee are indemnified by the Settlement Fund in the event they are sued, and their actions taken pursuant to their appointments are protected, to the maximum extent allowable, by the doctrine of judicial immunity. *See* SFA § 4.08(h), RE 1275-6, Page ID # 19520;[7] Order

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[6] The district court maintains custody of the assets: "All funds in the Settlement Facility are deemed *in custodia legis* until such times as the funds have actually been paid to and received by a Claimant, and no Claimant or any other party can execute upon, garnish or attach the Settlement Facility in any manner or compel payment from the Settlement Facility of any Claim. Payment of Claims will be governed solely by the Plan, this Settlement Facility Agreement, the Claims Resolution Procedures, and the Funding Payment Agreement." SFA § 10.09, RE 1275-6, Page ID # 19546.

[7] Section 4.08(h) of the SFA states:

> If any member of the Finance Committee, or former member of the Finance Committee, is or may be a party in any action, suit, or proceeding by reason of their membership on the Finance Committee or in their individual

Appointing Francis McGovern as Special Master, RE 5, Page ID # 11-12; Order Appointing David Austern as Successor Claims Administrator, RE 147, Page ID # 1962-63; Order Appointing Ann M. Phillips as Successor Claims Administrator, RE 791, Page ID # 11902-03; Order Appointing Judge Pamela Harwood as Successor Appeals Judge, RE 971, Page ID # 16542.

E. The Underlying Motion.

This appeal arose out of a disagreement between Korean Claimants and the Claims Administrator regarding the documentation necessary to support proof of manufacturer – which is a necessary element of a claim for compensation. A panel of this Court recently addressed the background of this dispute:

> In 2006, the Settlement Facility began having doubts about this proof. According to the Settlement Facility, there were several odd things about the Korean Claimants' claims. Under the plan documents, affirmative statements in general are disfavored, and are only permitted as proof of manufacturer if there are no medical records. But the

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> capacities as Claims Administrator, Appeals Judge or Special Master, or by reason of serving or having served in any capacity at the request of and on behalf of the Settlement Facility or the Finance Committee, he or she shall be indemnified by the Settlement Facility against reasonable expenses, costs and fees (including reasonable attorneys' fees), judgments, awards, costs, amounts paid in settlement, and liabilities of all kinds incurred by the Finance Committee member in connection with or resulting from such action, suit, or proceeding, with respect to the actions at issue, if he or she acted in good faith and in a manner the Finance Committee member reasonably believed to be in, or not opposed to, the best interests of the Settlement Facility. All such amounts shall be paid from the Settlement Fund. …

Id.

> number of Korean Claimants' claims relying on an affirmative statement was very high: over 94% of Mr. Kim's clients submitted affirmative statements as proof of manufacturer, higher than every other law firm that had submitted more than 100 claims. In other words, almost every Korean Claimant appeared to be unable to locate her medical or hospital records. There were other oddities as well. On some claims the date and facility listed for the procedure would be different on the affirmative statement than the date on registration forms. Correction fluid was used on many forms. Perhaps most troublingly, when questioned regarding these, and similar, documentation problems, Mr. Kim apparently sent the Settlement Facility medical documentation as proof, despite his representation that there were no medical records for these operations. According to Mr. Kim, he used the affirmative statements because the Settlement Facility had agreed that they would be acceptable proof of manufacturer.
>
> After noticing these various problems, the Settlement Facility put the brakes on processing certain claims filed by the Korean Claimants. In August 2011, the Settlement Facility informed Mr. Kim that it was no longer processing claims supported by these affirmative statements. In their briefs before us, all of the parties refer to these actions as an administrative "hold."
>
> In response to the August 2011 letter informing Mr. Kim of the hold, the Korean Claimants filed a "Motion for Reversal of Decision of [the Settlement Facility] Regarding Korean Claimants.

In re Settlement Facility Dow Corning Trust, 2019 WL 181508 (6th Cir. Jan. 14, 2019).

Korean Claimants assert that this dispute led to a mediation between counsel for Korean Claimants (Mr. Kim) and the Claims Administrator, with one member of the Finance Committee acting as the mediator. *See* Korean Claimants' Br. at 12-15. Korean Claimants contend that this "mediation" culminated in a binding agreement that resolves the claims of Korean Claimants for a lump sum payment of $5 million

and that those claims would not, therefore, be reviewed and evaluated as required by the Plan. Korean Claimants assert that this agreement was finalized in 2012.

After this "mediation" in 2012, the Settlement Facility proceeded to process the claims filed by the Korean Claimants. By 2016, the Settlement Facility had processed 1,731 of the Korean Claimants' claims – representing 99 percent of the total number of claims that had been filed. By the end of 2016, 1,194 of these claims had received payment; others had been denied, had payments pending or were on hold for investigation of fraud. *See* Declaration of Ann M. Phillips Regarding Korean Claimants' Motion for Recognition and Enforcement of Mediation ("Phillips Dec."), RE 1275-3, Page ID # 19484-85.

More than four years after the "mediation," and after virtually all the filed claims had been processed and after receiving payment for over 1,100 claims, Korean Claimants filed the Motion. The Motion asked the district court to direct the Finance Committee to pay the sum of $5 million to counsel for Korean Claimants based on the purported mediation agreement. Motion, RE 1271, Page ID # 19277-82. Korean Claimants submitted with their pleadings in the district court numerous exhibits that contain email correspondence between counsel for Korean Claimants and members of the Finance Committee and Mr. Austern, a former Claims Administrator. The correspondence consists primarily of inquiries to the Claims Administrator or former Claims Administrator and to the Special Master from

counsel for Korean Claimants about the status of the mediation and requests to "reactivat[e]" the mediation or enter into a new mediation – since, as counsel for Korean Claimants noted, the 2012 mediation had "failed." *See* Motion Exhs. 11, 12 & 13, RE 1271-1, Page ID # 19332-37. The correspondence includes responses from the Claims Administrator and Special Master indicating that the Finance Committee was seeking approval and/or input from the Claimant's Advisory Committee and the Reorganized Debtor and that the Finance Committee would raise the issue at a status conference with the district court. *Id.* at Exhs. 9 & 11, Page ID # 19327, 19332. There is no confirmation that these exhibits constitute all communications among these individuals regarding the mediation or the purported agreement.

There is no dispute that the document that Korean Claimants characterize as a binding agreement was never finally approved (*see* Motion, Exh. 5, RE 1271-1, Page ID # 19312) or executed by the Finance Committee and was never approved or agreed to by the district court or the Claimants' Advisory Committee or the Reorganized Debtor (which is the entity that ultimately would have to pay the lump sum demanded in the Motion). Korean Claimants acknowledge that Dow Corning (one of the Plan Proponents and a party that must affirmatively agree to any modification of the SFA) not only did not approve the document but advised the

Finance Committee that the document would violate the Plan and could not be implemented. Korean Claimants' Br. at 31; RE 1271-1, Page ID # 19334, 19337.

The Plan Proponents jointly opposed the Motion and the Finance Committee filed a separate opposition. *See* RE 1275; RE 1274.

The district court heard oral argument on March 22, 2018. *See* RE 1421.

F. The District Court's Decision.

On December 12, 2018, the district court denied the Motion. RE 1461. The district court rejected the Korean Claimants' argument "that the SF-DCT is bound by the Memorandum of Understanding and Release because members of the Finance Committee agreed to the settlement and the provisions set forth in the agreement have been met." *Id*. at Page ID # 24008. The district court held that the Finance Committee members did not have the authority to mediate the Korean Claimants' claims "in light of the provisions of the Plan, specifically the Settlement Facility and Fund Distribution Agreement ("SFA"), which expressly sets forth the authority of the Finance Committee and the purpose of the SF-DCT." *Id*. at Page ID # 24009-24010 (citing, *inter alia*, SFA §§ 2.01; 4.08). The court concluded:

> Based on the Court's interpretation of the Plan and the SFA, the Finance Committee, or the two specific members involved in the mediation, the Claims Administrator and the Special Master, did not have the authority to enter into any settlement negotiations or mediation with any class member. The duties of the Finance Committee and its members are expressly stated in the Plan and the SFA. Neither the Claims Administrator nor the Special Master had the "actual authority" to enter into settlement discussions or mediation proceedings with the Korean

> Claimants. The express language in the Plan and the SFA did not create any direct authority for the Claims Administrator and the Special Master to conduct such discussions or proceedings. In addition, there is no provision in the SFA that allows for mediation with claimants, other than individual reviews of each claimant's claim.

Id. at Page ID # 24015. The district court also held that the members of the Finance Committee did not have the "apparent authority" to bind the Settlement Facility to the agreement:

> a party cannot claim that an agent acted with apparent authority when it "knew, or should have known, that [the agent] was exceeding the scope of its authority." *Sphere Drake*, 263 F.3d at 33. Mr. Kim, the Korean Claimants' counsel, is well aware of the bankruptcy action, the confirmation of the Plan and the SFA document which sets forth the responsibilities of the Finance Committee and how claims are processed. As set forth above, based on the provisions in the Plan and the SFA, Mr. Kim "knew or should have known" that although the actions by the Claims Administrator and the Special Master were well-intentioned in order to resolve ongoing claims by the Korean Claimants, such actions exceeded the scope of their authority. Their actions did not bind the SF-DCT.

Id. at Page ID # 24015-16.

This appeal followed. *See* RE 1464.

SUMMARY OF ARGUMENT

The district court's opinion should be affirmed because the relief requested in the Motion is prohibited by the Plan and would result in an unauthorized and inequitable distribution of the limited assets of the Settlement Fund. The Plan specifies the exclusive means by which Settlement Fund assets may be distributed. There are no exceptions. No claim may be paid unless the Claims Administrator has determined, after review, that it meets the specific requirements to be Allowed. This individual review process and the payment criteria were the subject of arduous and careful negotiation. These terms assure the equitable treatment of claims, and protect the interests of eligible claimants and the Reorganized Debtor. The lump sum payment to counsel requested in the Motion would undermine these carefully constructed rules and protections, result in inequitable treatment of claims classified in the same Plan class, and would jeopardize the interests of eligible claimants by reducing the limited Settlement Fund.

Given the mandatory requirements for authorizing a distribution from the Settlement Fund, the lump sum payment requested in the Motion could not be permitted absent a modification of the Plan and the SFA. If there were to be a modification of the SFA that would permit a distribution such as that requested by Korean Claimants, such modification would have to be agreed to in writing by the

Reorganized Debtor and the Claimants' Advisory Committee and approved by the district court. No such agreements or approval occurred.

The Finance Committee and its individual members do not have the authority to agree to the lump sum payment requested in the Motion. The Finance Committee must abide by the Plan, do not have discretion to change the Plan requirements, and cannot agree to any action that violates the Plan. They have limited authority to carry out specified tasks subject to district court approval. While the Finance Committee is the administrative entity that directs disbursements, the Finance Committee may only direct disbursements that have been authorized by the district court. The assets of the Settlement Fund are maintained under the control and supervision of the district court and no distribution may be made absent district court approval. In this manner, the district court is able to account for and assure appropriate use of the Settlement Fund. The district court thus properly found that neither the Finance Committee nor its individual members have actual authority to allow or agree to divert millions of dollars from the Settlement Fund to provide the lump sum payment requested in the Motion.

Although the Motion asks the district court to order the Finance Committee to enforce the mediation by issuing the lump sum payment, in reality the Finance Committee could do no such thing. The members of the Finance Committee are granted judicial immunity under orders implementing the Plan and the Finance

Committee is further indemnified by the Settlement Fund against claims and actions. Should the mediation be "enforced" as the Korean Claimants request, the payment would be made from the limited assets of the Settlement Fund. This, in turn, would reduce the funds available for eligible Allowed claims (including funds available for both First and Second Priority Payments) and potentially could increase the funding that otherwise would be required of the Reorganized Debtor. Such a result is patently inequitable and forbidden by the Plan and the SFA.

Further, there is no basis to find that the Finance Committee – which does not have any authority to agree to or allow the unlawful distribution requested in the Motion – somehow had apparent authority to do so. Korean Claimants' "apparent authority" argument is based on two factors: First, Korean Claimants contend that the Finance Committee's administrative role coupled with the titles of the individual members of the Finance Committee confers apparent authority. Second, Korean Claimants contend for the first time on appeal that Mr. Austern (a former Claims Administrator) served as counsel to the Settlement Facility and therefore had the authority to bind the Settlement Facility and commit to the payment of Settlement Fund assets. The law is clear: a principal can only be bound by the actions of an agent under the doctrine of apparent authority if the principal took an action that reasonably caused the third party to believe that the agent had authority and to rely on that apparent authority. Korean Claimants seem to suggest that the Settlement

Facility is the "principal." But the Settlement Facility is simply a depository trust that can take no action without the approval of the district court. The trustee of the depository trust acts only at the direction of the Finance Committee or Claims Administrator, and in turn, the Finance Committee and Claims Administrator act only as authorized by the Plan and approved by the district court. The Korean Claimants' argument in effect asserts that the Finance Committee members are both the principal and the agent – because the only "acts" that the Korean Claimants recite are those of the Finance Committee members.

Even if the Finance Committee could be deemed to be the "principal," the acts of the Finance Committee members belie the contention that the Finance Committee intended to enter into a binding agreement on its own. After the mediation and before the Motion was filed, the Finance Committee members communicated to counsel for Korean Claimants that they were seeking review of the draft agreement by the Plan Proponents. Korean Claimants were thus directly informed – well before the Motion was filed – that the Finance Committee did not believe it had entered into a binding agreement or that it could finalize the draft agreement on its own.

Nor can Korean Claimants credibly claim lack of familiarity with the Plan's structure or requirements to support the apparent authority argument. Counsel for Korean Claimants participated actively in the Chapter 11 case and negotiated with the Plan Proponents over Plan terms. Since the Effective Date counsel for Korean

Claimants has appeared at numerous hearings and actively participated in (including by initiating) litigation over the implementation of the Plan in multiple proceedings and submissions seeking district court approval for resolution of disputes over certain Plan procedures.

The Korean Claimants' assertion that the purported agreement is binding is contradicted by their own actions. Before the Motion was filed, the Korean Claimants admitted that the mediation had failed. Between the time of the mediation and the filing of the Motion, Korean Claimants made multiple requests of the Claims Administrator and Finance Committee to consider the mediation or to reactivate the mediation – indicating clearly that Korean Claimants understood that there was no agreement. The Korean Claimants' own submissions make clear that counsel for Korean Claimants was informed and fully understood that the type of agreement contemplated by the mediation – if it could even be considered – would require approval by other parties. Korean Claimants cannot now claim that they believed that the Finance Committee members on their own had "apparent authority" to enter into and in fact did enter into a binding agreement that could now be "enforced."

Perhaps most importantly, the Korean Claimants have already received payment for most of the claims that they have submitted. Their effort now to "enforce" the mediation would result in a double recovery to Korean Claimants out of the limited Settlement Fund assets – to the detriment of eligible claimants whose

claims have not yet been reviewed or paid – resulting in disparate treatment of claims classified in the same Plan class – an outcome forbidden by the Code.

For all these reasons, the decision of the district court should be affirmed.

STANDARD OF REVIEW

This appeal involves the application of unambiguous provisions of Plan language that govern the review and payment of claims and the authority of the Finance Committee and its members. "Questions of contract interpretation are generally considered questions of law subject to *de novo* review." *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 653 (6th Cir. 1996). This Court "appl[ies] principles of contract interpretation when interpreting a confirmed bankruptcy plan." *In re Settlement Facility Dow Corning Trust*, 592 F. App'x 473, 477 (6th Cir. 2015). Accordingly, the Court reviews the District Court's interpretation of the Plan and SFA *de novo*. *See id*. at 478.

The district court's determination that the Finance Committee and its members lacked apparent authority to enter into an agreement without any other approval should be reviewed on an abuse of discretion standard and its factual findings may only be rejected if clearly erroneous. *See Therma–Scan, Inc., v. Thermoscan, Inc.,* 217 F.3d 414, 419 (6th Cir.2000) (abuse of discretion standard applies to review of district court's decision on motion to enforce a settlement and

clearly erroneous standard is applicable to the extent that the district court makes findings of fact that the parties had agreed to the settlement terms).

"The factual findings underlying a district court's decision to enforce a settlement agreement are reviewed for clear error." *Stenger v. Freeman*, 683 F. App'x 349, 350 (6th Cir. 2017) (citing *Therma-Scan, Inc.*, 217 F.3d at 419). "The existence of apparent authority is normally a question of fact … ." *Minskoff v. Am. Exp. Travel Related Services Co., Inc.*, 98 F.3d 703, 708 (2d Cir. 1996); *accord Orchard Grp., Inc. v. Konica Medical Corp.*, 135 F.3d 421, 426 n.1 (6th Cir. 1998) ("While apparent authority is a legal conclusion, its elements are chiefly factual matters … .") (applying Ohio law). Accordingly, the District Court's factual determinations regarding apparent authority are reviewed for clear error.

ARGUMENT

A. The District Court Properly Determined that the Plan Does Not Permit Enforcement of the "Mediation."

The Plan expressly defines and limits the circumstances under which the Settlement Fund may be distributed. No individual claimant may receive a distribution unless the claim is Allowed after it is evaluated through the claims administration procedures and found to meet the specific, explicit, and exclusive eligibility and compensation criteria.[8] There are no exceptions and there is no provision in the Plan for any alternative method for resolution. *See, e.g.,* SFA § 6.04, RE 1275-6, Page ID # 19534 (The Claims Administrator "shall process the Claims according to the terms and conditions set forth in Annex A."); Annex A § 2.01, RE 1275-7 Page ID # 19563 ("The Claims of all Settling Personal Injury Claimants shall be resolved under the terms of these Claims Resolution Procedures."). The SFA and Annex A "shall establish the *exclusive* criteria for evaluating, liquidating, allowing and paying Claims," and "[o]nly those Claims that satisfy the *eligibility criteria* specified in the Claims Resolution Procedures as applicable are eligible to receive payment ... ." SFA § 5.01(a), RE 1275-6, Page ID # 19528 (emphasis added).

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[8] The Plan provides that it "shall be governed by and construed in accordance with the laws of the State of New York and applicable federal law." Plan, § 6.13, RE 1275-2 Page ID # 19439.

The Claims Administrator must ensure that these mandatory criteria are applied correctly to every claim. *Id.* at § 4.02, Page ID # 19517-19518. The Claims Administrator has no authority to deviate from the criteria. *Id.* at §§ 2.02, 4.03, 5.01, Page ID # 19514, 19521, 19528, 19535-19542; Annex A, Art. VI, RE 1275-7, Page ID # 19569-601. Payments are made on an individual basis to individually approved claims. *See* SFA § 6.05, RE 1275-6, Page ID # 19534 ("If the Claimant qualifies for and accepts the Allowed payment amount, the Claims Office shall authorize the Claim for payment. … The payment draft or check shall be printed on a document that specifies and clearly advises the Claimant that endorsement and cashing of the check or draft shall be deemed to serve as additional documentation of the release of the Debtor and the Released Parties").

Claims that do not meet the requirements are deficient and may not be paid. SFA § 5.01(a), RE 1275-6, Page ID # 19528. In this manner, the Plan assures that claims are treated and resolved consistently within the applicable Plan class – as required by the Code. *See* 11 U.S.C. § 1123(a)(4). These provisions and requirements are clear and unambiguous: the assets of the Settlement Fund may be used only to pay claims that are found to meet the enumerated criteria based on a review by the Claims Administrator.

The so-called mediation document would circumvent these mandatory requirements for distributing Settlement Fund assets to claimants. It would simply

provide a lump sum amount – unrelated to any evaluation of the claims or determination that they are even eligible for payment. This is unequivocally prohibited by the Plan.

The district court's decision correctly recognizes that the Plan's requirements for distribution of Settlement Fund assets must be enforced as written. *See*, *e.g.*, *In re Dow Corning Corp.,* 456 F.3d 668, 676 (6th Cir. 2006) ("[I]f a plan term is unambiguous, it is to be enforced as written.").

B. Enforcement of the Mediation Would Modify the Confirmed and Consummated Plan in Violation of its Terms and the Bankruptcy Code.

The district court has no power to modify a confirmed plan.[9] *Clark-James v. Settlement Facility Dow Corning Trust*, 2009 WL 9532581, *2 (6th Cir. Aug. 6, 2009) ("the district court had no authority to modify the Plan, equitable or otherwise"); *In re MCorp Fin., Inc.*, 137 B.R. 219, 228 (Bankr. S.D. Tex. 1992) (section 1127 provides that "only the proponent of a chapter 11 plan can seek to have it modified," and a court "cannot, *sua sponte*, modify the chapter 11 plan.") (internal citations omitted); *see also Goodman v. Philip R. Curtis Enterprises, Inc.*, 809 F.2d

[9] The Bankruptcy Code provides that "[t]he proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and *before substantial consummation* of such plan." 11 U.S.C. § 1127(b) (emphasis added). The Plan has, indisputably, been consummated.

228, 234 (4th Cir. 1987) ("Under § 1127(b), post-confirmation modification can only be initiated by the proponent of a plan or a reorganized debtor.").[10] The SFA prohibits modification of any of its terms absent written agreement of the Reorganized Dow Corning and the Claimant's Advisory Committee and/or approval by the Court. SFA § 10.06, RE 1275-6, Page ID # 19545. Korean Claimants do not contend that any such agreements and approval exist.

To enforce the mediation document would effectively modify the Plan in two respects: it would distribute funds in a manner not permitted and it would have the effect of potentially increasing the payment obligations of the Reorganized Debtor. Such modification is prohibited both by the Bankruptcy Code and the Plan itself.

C. The Mediation Document Is Not Enforceable Because The Finance Committee And The Settlement Facility Do Not Have Authority to Distribute Settlement Fund Assets Except as Expressly Permitted By The Plan And Approved By The District Court.

Korean Claimants' argument rests on the proposition that individual members of the Finance Committee have authority to enter into an agreement to distribute Settlement Fund assets in any manner they choose – without regard to the limitations

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[10] Even if the Korean Claimants' request to change the claim resolution procedures was not invalid, they lack standing to modify the Plan, because they do not constitute "proponents of a plan." Courts have uniformly rejected on standing grounds attempts by claimants, creditors or other parties in interest who are not plan proponents to modify a confirmed plan. *See In re Longardner & Assocs., Inc.*, 855 F.2d 455, 462 n.8 (7th Cir. 1988); *Goodman,* 809 F.2d at 233.

of the Plan. That proposition is incorrect. The Finance Committee and its individual members do not have any such authority. They have limited administrative authority that is expressly defined in the Plan and Plan Documents. They carry out prescribed administrative tasks but they are not permitted to deviate from the Plan requirements and they are not allowed to obligate payments from the Settlement Fund absent court approval. They may direct the trust to pay First Priority Payments (base payments for claimants who satisfy the Plan requirements) only because the court entered an order at the outset of operations of the Settlement Fund authorizing the payment of claims that satisfy the requirements for a First Priority Payment. *See* Order, RE 96. They may authorize the trust to issue payments to vendors providing services to the trust only in accordance with the administrative budget that the court authorizes each year. They have no other authority.

A contract may only be enforced if the party to the contract had authority to enter into that contract. *See Local 798 Realty Corp. v. 152 West Condominium*, 866 N.Y.S.2d 51, 52, (N.Y. App. Div. 2008) (contracts of sale and leases entered into by a building owner's business representative were null and void where the representative did not have authority to enter into the leases or contracts for sale); *1230 Park Associates, LLC v. Northern Source*, LLC, 852 N.Y.S.2d 92, 93 (N.Y. App. Div. 2008) (loan contracts declared null and void where part owner of borrower did not have actual or apparent authority to enter into contracts and lender took no

action to assure itself that part owner had such authority); *see also Camuso v. Brooklyn Portfolio, LLC*, 83 N.Y.S.3d 160, 162–63 (N.Y. App. Div. 2018) (sale of partnership by one general partner that had the effect of dissolving the partnership was null and void where partnership agreement required consent of all general partners to dissolve the partnership).

The enumerated functions of the Finance Committee and its members do not contain any authorization to adopt or implement an alternative method for paying claims, to implement a bulk claims resolution process or to settle claims that have not been submitted to and reviewed by the Claims Administrator and the Settlement Facility and Allowed according to the Plan-prescribed eligibility criteria. *See* SFA § 4.08, RE 1275-6, Page ID # 19523-26. To the contrary, the Finance Committee and the Claims Administrator are obligated to carry out the mandates of the Plan. *See* SFA §§ 2.02, 2.03, RE 1275-6, Page ID # 19514-15, 19523-19526.

Korean Claimants acknowledge that the Finance Committee's authority is "subject to the Court's supervision with respect to the distribution of funds." Korean Claimants' Br. at 44. This acknowledgment defeats Korean Claimants' entire argument: they cannot assert in good faith that the Finance Committee or any of its members had actual or apparent authority to obligate Settlement Fund assets or enter into a binding agreement without approval of the district court.

Nevertheless, Korean Claimants attempt to construct alternative arguments. They assert that the Plan should be construed to permit the Finance Committee to resolve claims through mediation because there is no provision in the Plan that expressly prohibits a group resolution or mediation. Korean Claimants' Br. at 35. The fact that the Plan does not prohibit mediation does not mean that it is permissible. The Plan unambiguously dictates the "exclusive" means of determining compensation for settling claims. *See* SFA § 5.01(a), RE 1275-6, Page ID # 19528. The use of the word "exclusive" means that other mechanisms are not permitted. *See* Definition of Exclusive, Oxforddictionaries.com, https://en.oxforddictionaries.com/definition/exclusive (last visited May 5, 2019) ("Excluding or not admitting other things" and "excluding all but what is specified"); *see also Global Reinsurance Corp. of Am. v. Century Indem. Co*., 91 N.E.3d 1186, 1193 (N.Y. 2017) ("'courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include'") (quoting *Vermont Teddy Bear Co. v. 538 Madison Realty* Co., 807 N.E.2d 876, 879 (N.Y. 2004)).

Korean Claimants contend that mediation of claims is permitted because one of the purposes of the Settlement Facility is to resolve claims. Korean Claimants' Br. at 43-44. That is indeed a purpose of the Settlement Facility. And the SFA and Annex A spell out in detail the manner by which claims are to be resolved. Korean

Claimants omit the remainder of the sentence of SFA section 2.01 upon which they erroneously rely – which provides unequivocally that such resolution of claims must be "in accordance with the terms of the Plan and this Agreement and the Dow Corning Settlement Program and Claims Resolution Procedures" [*i.e.,* the SFA and Annex A] and to "distribute funds … to Claimants with Allowed Claims … in accordance with the terms of the Funding Payment Agreement, the Litigation Facility Agreement, the Depository Trust Agreement, and this Agreement." SFA § 2.01, RE 1275-6, Page ID # 19514. The general recitation of purpose does not and cannot override the explicit language in the same document that prescribes the exclusive method and criteria for resolving claims. *See Aramony v. United Way of Am.,* 254 F.3d 403, 413–14 (2d Cir. 2001) ("it is a fundamental rule of contract construction that 'specific terms and exact terms are given greater weight than general language.' … 'specific words will limit the meaning of general words if it appears from the whole agreement that the parties' purpose was directed solely toward the matter to which the specific words or clause relate.") (quoting 11 Richard A. Lord, Williston on Contracts § 32:10, at 449 (4th ed.1999), Restatement (Second) of Contracts § 203(c) (1981)); *In re Lehman Bros. Holdings Inc.*, 439 B.R. 811, 827–28 (Bankr. S.D.N.Y. 2010) ("This reading of the language would lead to unintended consequences by giving greater significance to the meaning of general provisions than the more specific provisions within the security agreement. This is contrary to

the way that agreements are to be construed. The specific is supposed to trump the general, not vice versa.”).

Korean Claimants then inexplicably cite provisions that govern the resolution of Non-Settling Personal Injury Claims (*i.e.,* claims asserted by individuals who rejected the settlement program and instead elected to litigate their claims). Korean Claimants’ Br. at 44 (citing SFA, § 4.08(b)(ii)(3)). The argument that language governing the treatment of Non-Settling claims should somehow modify the express provisions that govern the resolution of Settling Personal Injury claims contradicts all principles of contract interpretation and common sense. *See Global Reinsurance Corp. of Am.*, 91 N.E.3d at 1193.

D. The Claims Administrator And Special Master Did Not Have The “Apparent Authority” To Bind The Settlement Facility.

Korean Claimants’ assertion that the Finance Committee and its members, “as agents of the Settlement Facility,” had apparent authority to enter into the agreement is without merit. “‘Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority.’” *Melstein v. Schmid Laboratories, Inc.*, 497 N.Y.S.2d 482, 483 (App. Div. 1986) (citation omitted). “‘Rather, the existence of “apparent authority” depends upon a factual showing that the third party relied upon the misrepresentation of the agent because

of some misleading conduct on the part of the principal—not the agent.'" *Id.* (citations omitted).[11] *See also Cook v. Massachusetts Mut. Life Ins. Co.*, 64 N.Y.S.3d 812, 814 (App. Div. 2017) (rejecting claim of apparent authority where defendant did not "attribute any conduct or words by plaintiff that gave rise to the appearance or a reasonable belief that the co-producer possessed the authority to enter into a contract.… It is the conduct of the principal that is relevant in determining whether apparent authority exists … and defendant's reliance on documents that contained no representations of plaintiff and in no way suggested that the co-producer had the authority to act on plaintiff's behalf was unreasonable."); *Marshall v. Marshall*, 905 N.Y.S.2d 182, 184 (App. Div. 2010) (holding that district court "properly determined that the defendants failed to submit any evidence identifying an act or word on the part of the [principal] which would have given rise to the appearance and reasonable belief that the [agent] possessed the authority to execute a release on her behalf").

Korean Claimants assert that the Settlement Facility is the "principal" but fail to explain how the Settlement Facility "misled" Korean Claimants into believing that the Finance Committee members had some sort of "authority" to alter the Plan.

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[11] The Plan Documents are to be interpreted under New York law, but we note that Michigan law is in accord: Michigan law provides that "apparent authority must be traceable to the principal and cannot be established only by the acts and conduct of the agent." *Alar v. Mercy Mem. Hosp.,* 529 N.W.2d 318, 323 (Mich. Ct. App. 1995).

There is no allegation that the district court (whose approval is required for any distribution of Settlement Fund assets), or the Plan Proponents (who would have to agree to any Plan modification), took any action or in any way indicated that the Finance Committee or any of its members had the authority to reach an agreement to distribute funds outside the confines of the requirements of the Plan. In fact, there is no allegation that either the district court or the Plan Proponents had any prior knowledge of the so-called mediation. The correspondence submitted by Korean Claimants, however, makes clear that the Finance Committee sought the input of the Plan Proponents after the mediation. Korean Claimants were clearly on notice that the Finance Committee did not consider the draft agreement to be binding and that no agreement could be achieved without the approval and participation of the Plan Proponents.

Nor is there any assertion that Korean Claimants undertook to inquire about the authority of the Claims Administrator or Special Master to enter into an agreement that would bind the settlement trust and the district court. Under the doctrine of apparent authority, there is a duty to inquire into the status of an agent's authority when "(1) the facts and circumstances are such as to put the third party on inquiry, (2) the transaction is extraordinary, or (3) the novelty of the transaction alerts the third party to a danger of fraud." *FDIC v. Providence Coll.*, 115 F.3d 136, 141 (2d Cir.1997). Surely an agreement to eschew the requirements of the Plan

should be considered "extraordinary." *See Fennell v. TLB Kent Co.*, 865 F.2d 498, 503 (2d Cir. 1989) ("'[o]ne who deals with an agent does so at his peril, and must make the necessary effort to discover the actual scope of authority'") (quoting *Ford v. Unity Hosp.*, 32 N.Y.2d 464, 472 (1973)); *Cook*, 64 N.Y.S.3d at 814 ("Defendant failed to inquire about the scope of the co-producer's authority to bind plaintiff … and thus entered into the producer contract without plaintiff at its own peril) (citations omitted); *150 Beach 120th Street, Inc. v. Washington Brooklyn Ltd,* 833 N.Y.S.2d 667, 668-69 (App. Div. 2007) ("respondents failed to conduct a reasonable inquiry into the scope of [the agent's] alleged authority").[12]

Counsel for Korean Claimants is extremely familiar with the Plan and the procedures for resolving claims under the settlement program. He has filed almost 2,000 claims and has attended numerous hearings and held numerous meetings with the Claims Administrator. *See* Phillips Dec., RE 1275-3, Page ID # 19484-85; RE 690 (transcript 4/7/05); RE 691 (transcript 7/21/05); RE 1243 (transcript 10/20/15);

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[12] Michigan law similarly provides that "a principal is not bound where his agent lacks authority and the person dealing with the agents knows or should know that the agent lacks authority. A person dealing with an agent should inquire into the agent's authority." *Liberty Heating & Cooling, Inc. v. Builders Square, Inc.*, 788 F. Supp. 1438, 1445-46 (E.D. Mich. 1992) (internal citations omitted); *see also Cutler v. Grinnel Bros.*, 325 Mich. 370, 376 (1949) ("One dealing with an agent is bound to inquire into the extent of his authority, not from the agent, in the absence of written evidence thereof, but from the principal, if accessible; and dealings or engagements of the agent beyond the scope of his authority do not bind the principal.").

RE 1401 (transcript 12/10/15). He has filed at least seven motions challenging actions under the terms of the Plan and engaged in litigation responding to proposals and consent agreements submitted by the Plan Proponents.[13] He participated actively in the bankruptcy court proceedings where the proposed plan was discussed, reviewed, and ultimately confirmed. *See* Korean Claimants' Br. at 22; Motion Exh. 2, RE 1271-1, Page ID # 19298-99. There is no credible basis to conclude that Korean Claimants lacked knowledge of the Plan's requirements. As the district court correctly determined, "Mr. Kim, the Korean Claimants' counsel is well aware of the bankruptcy action, the confirmation of the Plan and the SFA document which sets for the responsibilities of the Finance Committee and how claims are processed," and "Mr. Kim 'knew or should have known' that although the actions by the Claims Administrator and the Special Master were well-intentioned in order to resolve ongoing claims by the Korean Claimants, such actions exceeded the scope of their authority." RE 1461, Page ID # 24016. Given Korean Claimants' two-

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[13] *See* RE 77 (Motion to Locate Qualified Medical Doctor); RE 810 (Motion for Order of Reversal); RE 958 (Motion for Extension of Deadline of Class 7 Claimants); RE 965 (Motion for Re-Categorization); RE 1298 (Motion for Release of Exhibits of Finance Committee, Claimants' Advisory Committee and Dow Corning Corporation); RE 1357 (Cross Motion Entry of an Order to Show Cause with respect to the Finance Committee); RE 1371 (Motion Joinder and Joint Hearing on March 22, 2018 by Korean Claimants); RE 1378 (Motion for Exclusion of Dow Corning Corporation etc. from the Cross Motion by Korean Claimants); RE 1076 (Objection to the Proposed Consent Order To Establish Guidelines For Distributions From the Class 7 Silicone Material Claimants' Fund).

decade long involvement in the bankruptcy case and implementation of the Plan, and the district court's long experience with counsel for Korean Claimants, these findings could not be construed as clearly erroneous.

Finally, there is no legal or factual basis for the Korean Claimants' argument (raised for the first time on appeal) that "even if the Finance Committee and the Claims Administrator and the Special Master did not have the authority to negotiate and mediate with the Korean Claimant, the SF-DCT ratified the acts exceeding the scope of their authority." Korean Claimants' Br. at 35-36.

The argument should be rejected both because it was not raised in the district court (*see infra*. at 42) and because it is legally and factually incorrect. Korean Claimants attempt to establish ratification by the Settlement Facility by stringing together a long list of emails that they attempt to characterize as a demonstration of the agreement of the Settlement Facility to the terms of the purported agreement. *See* Korean Claimants' Br. at 55-58. If anything, these emails demonstrate only that the Finance Committee did not finalize or execute the "agreement" and, after examination, concluded that the "agreement" was not permissible. (RE 1271-1, Page ID # 19334) (Claims Administrator on March 5, 2015: "Mr. Kim, The prior mediation is not an option and the Parties advised that post Confirmation mediations are not authorized by the Plan."); (RE 1271-1, Page ID # 19332) (Kim on June 11, 2014: "For a matter at the next status conference, please consider *reactivating* a

mediation. It should be the best award to me. I do not want to go back to the Settlement Facility.") (emphasis added).[14]

Significantly, the actions of the Claims Administrator in continuing to process the Korean Claimants' claims individually in accordance with the Plan demonstrates conclusively that the Claims Administrator and the Settlement Facility did not ratify the purported agreement. *See* Phillips Dec. at ¶ 11, RE 1275-3, Page ID # 19485. After the mediation document was drafted in 2012 (according to Korean Claimants), the Settlement Facility continued to process claims submitted by Korean Claimants. By December 20, 2016 (less than a week after the Motion was filed), the claims of almost all of the Korean Claimants who actually filed benefits claims had been reviewed and most had been paid (or were pending payment). *Id.* at ¶ 9, Page ID # 19485. Of the 2,547 claims identified, 1,742 had been filed at the time of the Motion. Of the 1,742 filed, 1,194 had been paid, 155 were held for fraud or lack of valid address or identification, 102 were found ineligible because of proof of

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[14] Nor could the "Settlement Facility" have "ratified" an agreement that would violate the Plan and the Bankruptcy Code. *Cf. New York State Medical Transporters Ass'n, Inc. v. Perales*, 566 N.E.2d 134, 137-38 (N.Y. 1990) (ratification doctrine could not be applied to bind a government agency where law required prior approval from the state agency before processing claims for transportation services and where "there has been no showing that respondent knew of and intentionally condoned its agent's practice" and where "petitioners' arguments suffer from an even more fundamental flaw. Illegal contracts are not generally enforceable … – a rule that applies as well to ratification. A principal cannot ratify an agent's act that the principal itself could not have authorized … ").

manufacturer deficiencies, 280 were pending payment and 11 were being evaluated. *Id*. The remaining 805 Korean Claimants had not submitted any claims. *Id*. at ¶ 10. As of December 20, 2016, the Settlement Facility had paid over $7 million to Korean Claimants, $3 million of which was paid after the "mediation." *Id*. at ¶ 11. Counsel for Korean Claimants does not dispute that Korean Claimants have received substantial payments after the 2012 "mediation." *See* Transcript, RE 1421, Page ID # 23844-45. These actions belie any ratification argument. To the contrary, they demonstrate a determination that no such agreement existed.

In fact, the doctrine of ratification is not even arguably applicable. Ratification may be implied "where the principal retains the benefit of an unauthorized transaction with knowledge of the material facts." *Standard Funding Corp. v. Lewitt*, 678 N.E.2d 874, 877 (N.Y. 1997). The Settlement Facility obtained no benefit from the purported agreement.

Korean Claimants also refer to the concept of apparent authority by estoppel for the first time on appeal. Under this doctrine, "'[a] principal may be estopped from denying apparent authority if (1) the principal's intentional or negligent acts, including acts of omission, created an appearance of authority in the agent, (2) on which a third party reasonably and in good faith relied, and (3) such reliance resulted in a detrimental change in position on the part of the third party.'" *See* Korean

Claimants Br. at 48 (quoting *Marathon Enters., Inc. v. Schroter GMBH & Co.*, 2003 WL 355238, at *8 (S.D.N.Y. Feb. 18, 2003) (quoting *Minskoff*, 98 F.3d at 708)).

As Korean Claimants concede, apparent authority by estoppel requires "'some misleading conduct on the part of the principal, *not the agent*.'" Korean Claimants' Br. at 52 (quoting 2A N.Y. Jur.2d Agency § 104) (emphasis added). Korean Claimants have not identified any act of any principal at all. The only acts that Korean Claimants reference are those of the persons that Korean Claimants describe as the "agents."

Nor did Korean Claimants experience any detrimental change in position: the factual record demonstrates that their claims had been processed and substantially paid by the time the Motion was filed.

There is no support, factually or legally, for any of the attempts by Korean Claimants to demonstrate "apparent authority."

E. Korean Claimants' New Argument That The Former Claims Administrator David Austern Had Authority To Bind the Settlement Facility Or Finance Committee As An Alleged Attorney Should Be Rejected.

Korean Claimants argue, for the first time in this appeal, that David Austern (a former Claims Administrator) had actual or apparent authority to settle on behalf of the Settlement Facility as an attorney for the Settlement Facility. This argument was never presented to the district court and therefore should not be considered. *See Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir.

2002) ("'It is well-settled that this court will not consider arguments raised for the first time on appeal unless our failure to consider the issue will result in a plain miscarriage of justice.'") (quoting *Bailey v. Ford Cnty. Bd. Of Educ.*, 106 F.3d 135, 143 (6th Cir. 1997)); *see also White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 559 (6th Cir. 1990) ("This court will not decide issues or claims not litigated before the district court.").[15]

In any event, the argument has no merit. Assuming, *arguendo*, that Mr. Austern was acting as counsel and the issue is properly before the Court on appeal, the mere existence of an attorney-client relationship does not automatically confer authority – actual or apparent – on the attorney. *See Fennell*, 865 F.2d at 502 ("A client does not create apparent authority for his attorney to settle a case merely by retaining the attorney."); 6A NY Jur. Attorneys at Law § 149 ("The existence of apparent authority depends upon a factual showing that the third party relied upon the misrepresentation of the attorney because of some misleading conduct on the part of the client, not the attorney. An attorney cannot by his or her own acts imbue himself or herself with apparent authority."). Korean Claimants have not provided any showing of such misrepresentation and misleading conduct.

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[15] There is no indication in any of the multiple emails and correspondence that Mr. Austern represented that he was acting as an attorney for the Claims Administrator, the Settlement Facility or the Finance Committee.

F. The Purported Mediation Document Would Not be Enforceable Even if the Finance Committee Has the Authority Because it Was an Unexecuted Draft.

Korean Claimants incorrectly assume that the district court held that an enforceable agreement did exist. Korean Claimants' Br. at 42. The district court did not decide the issue. It is clear, however, that the document cannot be deemed an enforceable agreement under any circumstances.

In determining whether a binding settlement agreement exists, courts consider whether parties intended to be bound in the absence of a signed writing. "It is well settled that, if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed." *Scheck v Francis*, 260 N.E.2d 493, 494 (N.Y.1970).[16] Korean Claimants cannot credibly assert that the

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[16] *See also Ciaramella v. Reader's Digest Ass'n, Inc.,* 131 F.3d 320, 322 (2d Cir. 1997) ("Under New York law, parties are free to bind themselves orally, and the fact that they contemplate later memorializing their agreement in an executed document will not prevent them from being bound by the oral agreement. However, if the parties intend not to be bound until the agreement is set forth in writing and signed, they will not be bound until then.") (citations omitted); *Dow Chemical Co. v. General Elec. Co.*, 2005 WL 1862418, at *32 (E.D. Mich. Aug. 4, 2005) ("[I]f the parties intend to signal their agreement only by the execution of a written document and do not intend to be bound unless and until all parties sign, no amount of negotiation or oral agreement, no matter how specific, will result in formation of a binding contract."); *Michigan Broadcasting Co. v. Shawd*, 90 N.W.2d 451, 453 (Mich. 1958) ("If the parties indicate that the expected document is to be the exclusive operative consummation of the negotiation, their preceding communications will not be operative as offer or acceptance.").

members of the Finance Committee – who have formal obligations and can act only with approval of the district court – would not have required execution and approval of any document. The correspondence provided by Korean Claimants demonstrates the expectation of the Finance Committee and Mr. Austern that no agreement would be final absent execution by all parties. The document itself has all the indicia of a draft that would not be valid absent execution and agreement that necessary conditions were satisfied. The document contains blank signature blocks, was labelled "DRAFT" and communicated with the admonition that it had 'NOT BEEN APPROVED IN FINAL FORM," states it is "entered into on ____" date, and contained conditions that the Finance Committee determined had not been met. Motion Exh. 5, RE 1271-1, Page ID # 19313-18. *See O'Connor-Goun v. Weill Cornell Med. Coll. of Cornell Univ.,* 956 F. Supp. 2d 549, 552–53 (S.D.N.Y. 2013) (document labeled "draft" with blank signature blocks); *Winston v. Mediafare Entm't Corp*., 777 F.2d 78, 81 (2d Cir. 1985); *H&R Block Tax Servs., LLC v. Strauss*, 2016 WL 5107114, at *4 (N.D.N.Y. Sept. 20, 2016) (preamble provided that "entered into as of this ______ day of August, 2015"); *Hernandez v. Fresh Diet Inc.*, 2017 WL 4838328, at *3 (S.D.N.Y. Oct. 25, 2017) (merger clause stating that the "Agreement may only be modified, altered [,] or changed in writing, signed by the Parties," was "persuasive evidence" that the parties did not intend to be bound prior to the execution of a written agreement.).

"[T]he proponent of a contract … has the burden of proving the existence of a contract by a preponderance of the evidence" including that "both parties intended to be bound … in the absence of a fully executed document." *Lindner v. Am. Exp. Corp.*, 2007 WL 1623119, at *4 (S.D.N.Y. June 5, 2007). Korean Claimants have not satisfied and could not satisfy that burden.

G. The District Court's Order Should Be Affirmed Because The Relief Requested Would Result In Inequitable Distributions Within A Plan Class, Jeopardize Funds for Eligible Allowed Claims, And Unlawfully Increase The Funding Obligations Of The Debtor.

As of 2016, the vast majority of the Korean Claimants had been paid. Phillips Dec., RE 1275-3, Page ID# 19485. If the sum of $5 million were to be paid at this time, it could be used only for improper purposes: (1) to pay the 11 claims that were still in the claims review process – in which case those claimants would receive an amount of payment far in excess of the amount authorized in the Plan; (2) to provide additional payments to claimants who have already received the Allowed amount of their claims permitted under the Plan; (3) to pay claims that the Settlement Facility has found to be deficient or ineligible; or (4) to pay claims that have never been submitted to the Settlement Facility without the evaluation required by the SFA. None of these outcomes is permissible.

The payment of the proposed lump sum amount would affect the legitimate protected interests of both eligible claimants and the Reorganized Debtor whose

funding obligations are specified by the Plan and may not be altered absent its agreement. The Settlement Fund is a limited fund and the Plan provides mechanisms to assure that similarly situated eligible claimants receive equal treatment. The distribution of a lump sum for claims that are not entitled to payment will reduce the total funds available for distribution to eligible claimants and will affect the interests of eligible claimants because it will result in disparate treatment of claims within the same Plan class in violation of the Bankruptcy Code. *See* 11 U.S.C. § 1123(a)(4) (a plan is required to "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest").

The distribution of the proposed lump sum for claims that are not entitled to payment also will affect detrimentally the interests of the Reorganized Debtor because it will affect the timing and potentially the total amount of its funding obligations. (The amount of funding would be increased to the extent that the funding required for eligible claims would not otherwise reach the full capped amount.) The Plan clearly forbids any action that would change the funding obligations of the Debtor without the express written agreement of the Debtor. In short, the proposed payment would result in a windfall to a limited number of individuals at the expense of the Reorganized Debtor and eligible claimants.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that the Court affirm the December 12, 2018 Order of the district court.

Dated: May 9, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). According to the word processing program used to prepare this brief (Microsoft Word), this brief contains 11,725 words.

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CERTIFICATE OF SERVICE

I certify that on May 9, 2019, I electronically filed a copy of the foregoing Response Brief of Appellees Debtor's Representatives, Dow Silicones Corporation and the Claimants' Advisory Committee, 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
5	02/16/2001	Order Appointing Francis McGovern as Special Master	11-12
96	05/20/2004	Order Authorizing Payment of First Priority Payments Pursuant to Amended Joint Plan of Reorganization	116
77	12/15/2004	Motion to Locate Qualified Medical Doctor	374-379
147	05/25/2005	Order Appointing David Austern as Successor Claims Administrator	1962-1963
690	08/04/2009	Transcript of Motion held on 04/07/05.	9205-9442
691	08/04/2009	Transcript of Motion held on 07/21/05.	9443-9523
791	06/29/2011	Order Appointing Ann M. Phillips as Successor Claims Administrator for the Settlement Facility-Dow Corning Trust	11902-03
810	9/26/2011	Motion for Reversal of Decision of SF-DCT Regarding Korean Claimants	12286-12301
958	03/07/2014	Motion for Extension of Deadline of Class 7 Claimants by Korean Claimants	15939-15945
965	04/07/2014	Motion for Re-Categorization of Korea by Korean Claimants	16262-16268
971	05/29/2014	Order Appointing Judge Pamela Harwood as Successor Appeals Judge	16542

RE#	Filing Date	Document Description	Page ID
1076	07/22/2015	Objection to Proposed Consent Order to Establish Guidelines for Distributions from the Class 7 Silicone Material Claimants' Fund by Korean Claimants	17708-17715
1243	03/08/2016	Transcript of Motion Hearing held on 10/20/15	19107-19203
1271	12/14/2016	Motion for Recognition and Enforcement of Mediation by Korean Claimants.	19277-19286
1271-1	12/14/2016	Exhibits to Motion for Recognition and Enforcement of Mediation by Korean Claimants	19287-19338
1274	12/28/2016	Response to Motion for Recognition and Enforcement filed by the Settlement Facility-Dow Corning Trust Finance Committee	19342-19343
1275	12/28/2016	Opposition of Down Corning Corporation, the Debtor's Representatives and the Claimants' Advisory Committee to Motion for Recognition and Enforcement of Mediation	19344-19370
1275-2	12/28/2016	Amended Joint Plan of Reorganization	19371-19482
1275-3	12/28/2016	Declaration of Ann M. Phillips Regarding Korean Claimants' Motion for Recognition and Enforcement of Mediation	19484-19485
1275-6	12/28/2016	Settlement Facility and Fund Distribution Agreement	19507-19552
1275-7	12/28/2016	Annex A to Settlement Facility and Fund Distribution Agreement	19553-19670
1298	02/28/2017	Motion for Release of Exhibits of Finance Committee, Claimants' Advisory Committee and Dow Corning Corporation by Korean Claimants	20249-20254

RE#	Filing Date	Document Description	Page ID
1357	01/17/2018	Cross Motion for Entry of an Order to Show Cause with Respect to the Finance Committee by Korean Claimants	22010-22015
1371	01/30/2018	Motion for Joinder and Joint Hearing on March 22,2018 by Korean Claimants	22248-22251
1378	02/03/2018	Motion for Exclusion of Dow Corning Corporation from the Cross Motion by Korean Claimants	22526-22529
1401	03/23/2018	Transcript of Motion Hearing held on 12/10/15	23315-23348
1421	05/21/2018	Transcript of Motions Hearing held on 03/22/18	23796-23890
1461	12/12/2018	Order Denying Motion for Recognition and Enforcement of Mediation Filed by the Korean Claimants	24002-24017
1464	12/17/2018	Notice of Appeal by Korean Claimants	24039