UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re: **DOW CORNING CORPORATION,** **Reorganized Debtor**	§	**Case No. 00-CV-00005-DT** **(Settlement Facility Matters)** **Hon. Denise Page Hood**

OPPOSITION OF DOW CORNING CORPORATION, THE DEBTOR'S REPRESENTATIVES AND THE CLAIMANTS' ADVISORY COMMITTEE TO MOTION FOR RECOGNITION AND ENFORCEMENT OF MEDIATION

For the reasons set forth more fully in the Memorandum in Support of the Opposition of Dow Corning Corporation, the Debtor's Representatives and the Claimants' Advisory Committee to the Korean Claimants' Motion for Recognition and Enforcement of Mediation (the "Mediation Motion"), filed contemporaneously herewith, Dow Corning Corporation ("Dow Corning"), the Debtor's Representatives (the "DRs") and the Claimants' Advisory Committee (the "CAC") oppose the Korean Claimants' Mediation Motion and respectfully submit that the Mediation Motion must be denied.

The Mediation Motion must be denied for several reasons. As an initial matter, the Mediation Motion seeks to enforce an unsigned draft document that was neither approved nor executed by the Finance Committee, and was negotiated without the knowledge or consent of the other necessary parties to any such

potential agreement to resolve the Korean Claims (*i.e.*, the CAC and the DRs). Moreover, the Mediation Motion purports to resolve 2,547 Korean Claims[1] without the individual evaluation process required by the Dow Corning Amended Joint Plan of Reorganization (the "Plan"); and ignores the fact that many of the Korean Claims have already been processed individually and paid, meaning those Korean Claimants would receive a significant additional payment over and above the amount allowed by the Plan resulting in disparate treatment among members of the same Plan Class.

The Mediation Motion thus seeks to benefit the Korean Claimants by enforcing an intrinsically unenforceable draft that was not executed or approved by all necessary parties and whose implementation would violate the Plan by paying claims in a manner that is contrary to the requirements of the Plan. Such a fundamental change in how the Plan compensates claimants constitutes an unlawful modification of the confirmed and consummated Plan.

Further, the essential factual basis of the purported mediation document – which was to resolve 2,547 Korean Claims – no longer exists. The Korean Claims that have been submitted have been processed and resolved by the SF-DCT in accordance with the eligibility criteria in the Plan. Indeed, if the purported

[1] The Mediation Motion refers to "about 2,600" Korean Claimants. Mediation Motion at 3. According to the SF-DCT, the correct number is 2,547.

mediation document were to be enforced, the Korean Claimants would receive a significant additional payment over and above the amount allowed by the Plan.

Accordingly, the Mediation Motion must be denied.

Dated: December 28, 2016

Respectfully submitted,

On Behalf of Dow Corning Corporation and the Debtor's Representatives

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re: **DOW CORNING CORPORATION,** **Reorganized Debtor**	§	**Case No. 00-CV-00005-DT** **(Settlement Facility Matters)** **Hon. Denise Page Hood**

PROPOSED ORDER OF DOW CORNING CORPORATION, THE DEBTOR'S REPRESENTATIVES AND THE CLAIMANTS' ADVISORY COMMITTEE DENYING MOTION FOR RECOGNITION AND ENFORCEMENT OF MEDIATION

The Court has considered the Opposition of Dow Corning Corporation, the Debtor's Representatives and the Claimants' Advisory Committee to the Korean Claimants' Motion for Recognition and Enforcement of Mediation (docket no. ____), and the Court finds and concludes that the Motion for Recognition and Enforcement of Mediation (docket no. 1271) lacks merit and should be denied with prejudice.

ACCORDINGLY, it is hereby ORDERED that the Motion for Recognition and Enforcement of Mediation is DENIED with prejudice.

Dated: _____

_____
DENISE PAGE HOOD
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re: **DOW CORNING CORPORATION,** **Reorganized Debtor**	§	**Case No. 00-CV-00005-DT** **(Settlement Facility Matters)** **Hon. Denise Page Hood**

MEMORANDUM IN SUPPORT OF OPPOSITION OF DOW CORNING CORPORATION, THE DEBTOR'S REPRESENTATIVES AND THE CLAIMANTS' ADVISORY COMMITTEE TO MOTION FOR RECOGNITION AND ENFORCEMENT OF MEDIATION

Dow Corning Corporation ("Dow Corning"), the Debtor's Representatives (the "DRs") and the Claimants' Advisory Committee (the "CAC") respectfully submit this Memorandum in Support of their Opposition to the Korean Claimants' Motion for Recognition and Enforcement of Mediation (the "Mediation Motion").

The Mediation Motion is an effort to compel the Settlement Facility-Dow Corning Trust (the "SF-DCT") and its Claims Administrator to adopt and implement an unsigned draft mediation document that was rejected more than four years ago. The Mediation Motion must be denied for several reasons:

First, the so-called mediation agreement is simply a draft that was neither signed nor approved by the Claims Administrator or the Finance Committee. By its terms and nature, the document evinces the parties' intent to memorialize in a

final executed document any eventually-agreed upon terms. Clearly, that did not occur.

Second, the provisions of the draft document set forth procedures for the resolution of Korean Claims in a manner that is not permitted by the Dow Corning Amended Joint Plan of Reorganization (the "Plan"). Ex. A. The draft document provides for the payment of a lump sum of $5 million to resolve all Korean Claims irrespective of their eligibility for payment under the Plan. But the Plan does not permit bulk resolution of claims; it requires individual evaluation of each claim pursuant to the criteria set forth in the Plan. The SF-DCT would not have authority to agree to this purported mediation agreement absent a modification of the Plan.

Third, the essential purpose of the draft mediation document no longer exists and enforcement of its terms would be barred by basic contract principles. In the almost five years since that draft document was prepared, the SF-DCT has completed the processing and payment (or preparation for payment) of all but 11 Korean Claims that have been submitted for evaluation.[1] That is, the claims at issue have been paid (or shortly will be paid) the full amount Allowed[2] under the

[1] The breakdown and status of claims is set forth in detail below. See Background, *infra*.; Declaration of Ann Phillips ("Phillips Dec."), Ex. B.

[2] Under the Plan, "Allowed" means, with respect to a Claim, all or a portion thereof (a) that has been agreed to by the Claimant and the Debtor; (b) that has been allowed by Final Order; (c) that has been estimated for purposes of allowance pursuant to section 502(c) of the Bankruptcy Code; (d) that either (i) is listed in the

Plan. The fundamental purpose of the draft mediation document was to resolve the 2,547 Korean Claims.[3] Since they have already been resolved (or were never submitted), the SF-DCT would not obtain any consideration for the payment of the proposed lump sum. Further, if the lump sum were to be paid, the Korean Claimants would receive payments in excess of the amounts Allowed under the Plan in violation of the terms of the Plan.

BACKGROUND

Counsel for Korean Claimants filed approximately 2,550 proofs of claim in the Dow Corning Chapter 11 case. In the latter half of 2010, the Claims Administrator placed a large percentage of Korean Claims on 'administrative hold' pending further investigation into the reliability of documents supporting proof of manufacturer forms submitted by Korean Claimants. Memorandum in Support of Settlement Facility-Dow Corning Trust ("SF-DCT") Cross-Motion to Dismiss the

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schedules, other than a Claim that is listed as "disputed," "contingent," or "unliquidated," or (ii) the proof of which has been timely filed pursuant to the Bar Order or filed pursuant to any other Final Order, or otherwise deemed timely filed under applicable law, and as to which either (x) no objection to its allowance has been filed within the periods of limitation fixed by this Plan or by any Final Order, or (y) any objection to its allowance has been settled or withdrawn or has been decided by a Final Order, or (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. Ex. A, Plan § 1.3.

[3] The Mediation Motion refers to "about 2,600" Korean Claimants. Mediation Motion at 3. According to the SF-DCT, the correct number eligible for resolution in the SF-DCT is 2,547. Ex. B, Phillips Dec.

Motion Filed by Yeon-Ho Kim, Esq. ("Motion for Reversal") and in Support of Dow Corning's Cross-Motion to Dismiss the Motion For Reversal, *In re Settlement Facility Dow Corning Trust*, No. 00-MC-00005 (E.D. Mich. Nov. 3, 2011) ("SF-DCT Memorandum"). Ex. C. The Claims Administrator indicated in pleadings filed with the Court that the administrative hold was necessary because there were reasonable concerns about the validity of some of the Korean Claims. *Id*.; *see also* Mediation Motion at Ex. 1. Based on the exhibits to the Mediation Motion, the mediation occurred shortly after this determination – in August of 2012.[4] *See*, *e.g.*, Mediation Motion at Ex. 3.

The exhibits submitted with the Mediation Motion and other documents filed by Korean Claimants make clear that the draft mediation document was never approved by the Finance Committee and ultimately it was abandoned. In 2012, 2013 and 2014, the Claims Administrator sent numerous emails to counsel for Korean Claimants advising that the Finance Committee was still evaluating the mediation concept and requirements. *See*, *e.g.*, Response [of Korean Claimants] to Suggestion of Mootness Regarding "Motion for Re-Categorization of Korea", "Motion For Reversal of Decision of SFDCT Regarding Korean Claimants", and "Motion of Korean Claimants For The Settlement Facility To Locate Qualified

[4] Neither Dow Corning, the CAC nor the DRs had any knowledge of or information about the reasons for the mediation process. Dow Corning, the CAC and the DRs were informed of the mediation process after the meetings had taken place and after the draft document had been prepared. Mediation Motion at Ex. 13.

Medical Doctor To Travel to Korea And Conduct The Disease Evaluations Or Hire Qualified Medical Doctor in Korea To Conduct the Reviews At The Settlement Facility's Expense", *In re Settlement Facility Dow Corning Trust*, No. 00-MC-00005 (E.D. Mich. Dec. 11, 2015) ("Korean Mootness Response"), Ex. D at Exs. 17, 18, 20-22; Mediation Motion at Exs. 5, 9. Subsequently, the Finance Committee engaged a third party to conduct an audit of Korean Claims to evaluate the issues previously identified in the SF-DCT Memorandum. Ex. B, Phillips Dec. In 2014, after that audit was completed, the Claims Administrator released the administrative hold and processed the Korean Claims. *Id*.; Korean Mootness Response at Ex. 23. As of the date of this submission, the claims of virtually all of the Korean Claimants who have actually filed benefits claims have been paid (or are pending payment). Ex. B, Phillips Dec. Of the 2,547 claims that were noted in the draft mediation document, 1194 have been paid, 155 were initially processed and are being reviewed for fraud or lack of valid address or identification, 102 were processed but were found ineligible because of proof of manufacturer deficiencies, 280 are pending payment and 11 are being evaluated. *Id*. The remaining 805 Korean Claimants have never submitted any claims. *Id*. Since the time of the 2012 mediation, the SF-DCT has paid approximately $3 million to Korean Claimants.[5] *Id*.

[5] To date, the SF-DCT has paid approximately $7.3 million to Korean Claimants.

Counsel for Korean Claimants now seeks, belatedly, to resurrect and enforce the unsigned and never-consummated four-year old mediation document (which, indeed, would have been unlawful to consummate and unenforceable under federal bankruptcy law and the express terms of the Plan) despite the fact that its essential purpose – the resolution of 2,547 unresolved Korean Claims – is moot. If this mediation document were to be enforced, the Korean Claimants – almost all of whom have already been paid the full value of their claims in accordance with the Plan – would receive an additional $5 million of Settlement Fund assets.[6] For the reasons set forth herein, the request to enforce the draft mediation document must be rejected and the Mediation Motion must be denied.

ARGUMENT

I. The Mediation Motion Must Be Denied and Dismissed Because The Purported Mediation Document Is Not An Enforceable Agreement.

a. The Mediation Document Is Not Enforceable Because It Was Not Executed By The Finance Committee.

Korean Claimants assert that the draft mediation document is an enforceable agreement because counsel for the Korean Claimants signed the draft provided by Mr. Austern to counsel for Korean Claimants. Citing no legal authority, Korean

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Of that total amount, over half ($4,329,400) had been paid before 2012 when the draft mediation document was prepared. Ex. B, Phillips Dec.

[6] To be clear, the $5 million would be paid in addition to the $7.3 million already paid, which was already paid based on the amounts Allowed under the Plan.

Claimants assert that "[i]t is not necessary for the agreement of mediation to be signed by both parties to be effective …". Mediation Motion at 5.

The Korean Claimants' assertion is incorrect. An agreement exists only if there is a true offer and acceptance by persons with authority to enter into a binding agreement and if the agreement is memorialized in accordance with the parties' intent. Well-established principles of contract law make clear that where the parties evidence their intent to enter into a written agreement if a mutual understanding is achieved, an unsigned draft cannot be deemed a final binding agreement. "[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 the formation of a binding contract." *Dow Chemical Co. v. General Elec. Co.*, 2005 WL 1862418, *32 (E.D. Mich. 2005); *Michigan Broadcasting Co. v. Shawd*, 90 N.W.2d 451, 457 (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."); *see also* NY CPLR 2104 (an agreement between parties "is not binding upon a party unless… it is in a writing subscribed by him or his attorney ….");[7] *Bonnette v*

[7] The Plan and the Settlement Facility and Fund Distribution Agreement (the "SFA"), Ex. E, provide that their terms are to be interpreted under New York law. Plan, § 6.13; SFA, § 10.07.

Long Is. Coll. Hosp., 819 N.E.2d 206, 208-09 (N.Y. 2004) ("[T]o be enforceable under CPLR 2104, an out-of-court settlement must be adequately described in a signed writing.").[8]

The correspondence between counsel for Korean Claimants and members of the Finance Committee makes clear that the Claims Administrator and the Finance Committee did not view the draft document as a final agreement and certainly did not contemplate or intend that any agreement, were one to be achieved, would be effective without formal approval and execution of a written agreement. *Dow Chemical Co.* 2005 WL 1862418 at *32. The mere fact that the draft document was created (along with proposed exhibits) is evidence of the intent to memorialize an agreement, were one to be reached, in a writing approved by the Finance Committee and executed by all parties. *Id*. The Exhibits to the Mediation Motion make clear that the draft document had not been finalized, that it had not been

[8] Generally, we would expect Michigan law to apply, *United Constr. Co. v. Milam*, 124 F.2d 670, 671 (6th Cir. 1942), but given the unusual circumstances, under any conceivable analysis, other States' whose law may have relevance to this matter are in accord. *See*, *e.g.*,*Foreca ,S.A. v. GRD Development Co., Inc.*, 758 S.W.2d 744, 746 (Tex. 1988) (intent of the parties as to whether an executed document is contemplated controls formation of settlement); *Scott v. Ingle Bros. Pac., Inc.*, 489 S.W.2d 554, 555 (Tex. 1972) (same); ; *Kramer Associates, Inc. v. Ikam, Ltd.*, 888 A.2d 247, 252 (D.C. 2005) (mutual assent to form a contract "is most clearly evidenced by the terms of a signed written agreement") (citations omitted); *Simplico v. National Scientific Personnel Bureau, Inc.*, 180 A.2d 500, 502 (D.C. 1962) (circumstances surrounding negotiations indicated "that the appellant did not intend to be bound until a written agreement had been signed by both sides"); Restatement (Second) of Contracts § 27 cmt. b (Am. Law Inst. 1981) (contract does not exist if one party is aware that the other party must still assent to terms or the contract has been reduced to a mutually-agreed upon writing).

approved by the Finance Committee, that there were multiple conditions and approvals that were required before any terms could be finalized and that ultimately the draft document was rejected by the Finance Committee. *See*, *e.g.*, Mediation Motion at Ex. 5, November 28, 2012 email from D. Austern to Y. Kim (stating that "This Memorandum of Understanding HAS NOT BEEN APPROVED IN FINAL FORM BY THE FINANCE COMMITTEE.") (emphasis in original); Mediation Motion at Ex. 9, October 21, 2012 email from D. Austern to Y. Kim (making clear that any agreement, were one to be finalized required a signed written agreement: "We do not have a *signed copy* (by you) of the Memorandum of Understanding or the Release.") (emphasis added).

b. The Mediation Document Is Not Enforceable Because Its Terms Violate The Plan And The Finance Committee Does Not Have Authority To Enter Into A Binding Agreement For An Alternative Resolution of Claims That Is Not Permitted By The Plan.

The Plan contains detailed and specific criteria defining the eligibility of claims for compensation and the amount of compensation that is allowable. The SFA sets forth the obligations of the Claims Administrator and the essential requirements for compensation of claims. The Claims Resolution Procedures, Annex A to the SFA, Ex. F, sets forth the detailed criteria for determining eligibility for each benefit option. To be compensable, a claim must satisfy the applicable criteria. There are no exceptions and there is no provision in the Plan

for any alternative resolution process. The Plan quite clearly provides that all claims must be determined under these specific criteria and the Claims Administrator has no authority to deviate from the criteria. Ex. E, SFA, §§ 2.02, 4.03, 5.01; Ex. F, SFA, Annex A, Art. VI.

Specifically, the Claims Administrator is responsible for determining "whether Claims are eligible based upon the eligibility criteria set forth in Annex A and shall process the Claims according to the terms and conditions set forth in Annex A." Ex. E, SFA § 6.04. The SFA provides, *inter alia*, that it and Annex A "shall establish the *exclusive* criteria for evaluating, liquidating, allowing and paying Claims," and that "[o]nly those Claims that satisfy the *eligibility criteria* specified in the Claims Resolution Procedures as applicable are eligible to receive payment . . .." *Id.* (emphases added). The Claims Administrator is assigned the task of ensuring that these mandatory criteria are applied correctly to every claim. Ex. E, SFA, § 4.02. The Plan, thus, requires that every claim is to be reviewed and evaluated by the Claims Administrator and the Claims Administrator's staff in accordance with these specific criteria and that only claims that meet the requirements may be Allowed claims. *See*, *e.g.*, Ex. E, SFA §§ 5.01, 6.01, 6.04. Claims that do not meet the requirements are deficient and may not be paid. Ex. E, SFA § 5.01(a).

The draft mediation document would circumvent this clear mandate of the Plan. The document would eliminate the careful review of each claim by the Claims Administrator under the specific mandatory criteria and instead would simply provide a lump sum to the counsel for Korean Claimants to distribute to individuals in his discretion. Such a process is not authorized by the Plan and would result in payments that are inconsistent with the mandate of the Plan.

In addition to specifying the criteria necessary to authorize payment to a claimant, the SFA further defines and limits the obligations and authority of the Claims Administrator and the Finance Committee with respect to processing claims. The SFA makes clear that the Claims Administrator is required to manage the claims resolution process in accordance with the terms of the Plan and that the Claims Administrator may not delegate claims processing functions to any third party (such as counsel for Korean Claimants) absent specific approval from the CAC and the DRs and the Court. Ex. E, SFA § 4.02. The enumerated functions of the Finance Committee do not contain any authorization to adopt or implement an alternative claims resolution mechanism, to implement a bulk claims resolution process or to settle claims that have been submitted to the SF-DCT. Ex. E, SFA § 4.08.

Accordingly, neither the Claims Administrator nor the Finance Committee

would have authority absent a modification of the Plan – which would have to be agreed to by the DRs and the CAC, approved by the Court and determined to be permitted under the Bankruptcy Code[9] – to adopt a procedure for a lump-sum resolution of claims. Mediation Motion at Ex. 12, March 5, 2012 email from A. Phillips to Y. Kim (advising that a post-confirmation mediation is not authorized by the Plan). To be an enforceable agreement, the party to a contract must have authority to enter into that contract. *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 Pasquarella v 1525 William St., LLC*, 990 N.Y.S.2d 760, 762

[9] "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." 11 U.S.C. § 1127(b). Of course, the Plan has been substantially consummated. *See also* Ex. E, SFA § 10.06 (Providing that amendment of the SFA requires agreement of the CAC and Dow Corning and further providing that the SFA may not be amended if the proposed amendment would have the effect of increasing the liquidation value of any claim or the amount payable for a claim. The payment of a lump sum amount for a group of claims with no review or application of criteria clearly has the potential to increase the amount payable for an individual claim).

(N.Y. App. Div. 2014) ("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") (internal citations omitted).[10] Since neither the Claims Administrator nor the Finance Committee has authority under the Plan to adopt or enter into an agreement to adopt an alternative claims resolution procedure, neither the Claims Administrator nor the Finance Committee could enter into the draft mediation document. Accordingly, the draft mediation document is not an enforceable agreement under any circumstances.

II. The Factual Circumstances Present At The Time Of The Mediation No Longer Exist And The Relief Requested In The Mediation Motion Would Result In A Windfall Double Payment To Korean Claimants In Violation Of The Plan And The Bankruptcy Code.

a. Enforcement Of The Draft Mediation Agreement Would Result In A Windfall To Korean Claimants.

The draft mediation document would provide for the payment of $5 million in a lump sum to resolve approximately 2,547 Korean Claims. At this point, the vast majority of those 2,547 Korean Claims have either been paid or have not filed

[10] Thus a party negotiating an agreement, such as counsel for Korean Claimants negotiating the purported mediation agreement, must exercise due diligence to determine the agent's authority to bind the principal. *1230 Park Associates, LLC*, 852 N.Y.S.2d at 93. Here, any lawyer who reads the Plan would know that the Claims Administrator is not vested with authority to unilaterally settle claims outside the Plan's requirements. Any claim of apparent authority that counsel for Korean Claimants might conjure up evaporates in the face of the structure and language of Plan that prohibits such disparate treatment of claims.

a claim for benefits. Ex. B, Phillips Dec. If the sum of $5 million were to be paid at this time, it would be used: (1) to pay the 11 claims that are 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 amount that they are Allowed to receive under the Plan; (3) to pay claims that the SF-DCT has found to be deficient or ineligible; or (4) to pay claims that have never been submitted to the SF-DCT without the evaluation required by the SFA. However, the Settlement Fund may not be used for any of these purposes.

Regardless of whether the draft mediation document could have led to a binding contract at the time it was being negotiated, the Court could not now permit the payment of $5 million because the basis for the alleged agreement no longer exists. The $5 million lump sum amount referenced in the draft mediation document clearly was intended to resolve 2,547 claims. There are no longer 2,547 Korean Claims to be resolved. This means that the "consideration" for the $5 million no longer exists. Under standard contract principles, this amounts to a "failure of consideration" that precludes enforcement of the purported agreement.

"Failure of consideration is '[a] seriously deficient contractual performance that causes a contract's basis or inducement to cease to exist or to become

worthless.'" *Innovation Ventures v. Liquid Manufacturing*, 885 N.W.2d 861, 871 (Mich. 2016) (quoting Black's Law Dictionary (10th ed.)). A contract is not enforceable when there is a failure of consideration. *Adell Broadcasting v. Apex Media Sales*, 708 N.W.2d 778, 782 (Mich. Ct. App. 2005). Failure of consideration can occur when the original consideration has become worthless or has ceased to exist. *See*, *e.g.*, *Vowels v. Arthur Murray Studios of Michigan, Inc.*, 163 N.W.2d 35, 38 (Mich. Ct. App. 1968) (finding failure of consideration when closing of a dance studio made contract for dance lessons impossible to perform); *see also Independent Energy Corp. v. Trigen Energy Corp.*, 944 F. Supp. 1184, 1199 (S.D.N.Y. 1996) ("Where a [party] has received little or nothing of value, recision based upon failure of consideration is warranted.").[11]

b. Enforcement Of The Draft Document Would Violate The Plan And The Bankruptcy Code.

As noted, a payment of $5 million at this point – when virtually all Korean Claims have been paid (or are in the payment process) – would necessarily result in payment of amounts in excess of the amounts Allowed by the Plan for the claims of Korean Claimants. Of course, payment of amounts in excess of the

[11] Enforcing the mediation today also would unjustly enrich the Korean Claimants, either by providing for a double payment or providing the few remaining Korean Claimants payments in excess of what they should receive under the Plan. A claim of unjust enrichment requires the establishment of the receipt of a benefit by one party and an inequity resulting from the retention of that benefit. *Karaus v. Bank of New York Mellon*, 831 N.W.2d 897, 905 (Mich. Ct. App. 2012). Here, Korean Claimants would clearly receive a benefit that would be inequitable, providing for $5 million for significantly fewer than the 2,547 claims originally contemplated.

Allowed payments would violate the Plan and further would create disparity among members of the same class, in clear violation of the equal treatment provision of the Bankruptcy Code. 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.").

III. Korean Claimants' Assertion That Dow Corning Exercised Control Over The Mediation Is False; Further, Dow Corning Retains The Right To Assure That The Plan Is Properly Implemented.

Korean Claimants allege that Dow Corning exercised control or veto power over the mediation. Mediation Motion at 5-6. This assertion is unsupported and incorrect and fails to recognize the structure of the Plan. The Plan expressly provides for and defines the role of the Claims Administrator, the CAC and the DRs. The Claims Administrator and the SF-DCT are independent of Dow Corning, the DRs and the CAC. The Claims Administrator does not represent Dow Corning or the CAC. Ex. E, SFA § 4.02. Notably, Dow Corning is prohibited by the Plan Documents from reviewing or even having access to claim filings, claim decisions or any determination of the SF-DCT. Ex. E, SFA § 5.03; Ex. F, SFA Annex A, §§ 7.01 and 8.06. The Plan explicitly provides, however, that the Claims Administrator may request an interpretation of Plan provisions by the CAC and the DRs and that any such interpretation agreed to by the CAC and

the DRs is binding on the Claims Administrator. Ex. E, SFA § 5.05. The Plan expressly provides that the DRs and CAC have authority to participate in Finance Committee meetings and to provide guidance to the Finance Committee. Ex. E, SFA §§ 4.08(g), 4.09(c)(i). The Plan expressly recognizes the right and obligation of the DRs and the CAC to enforce the terms of the Plan. Ex. E, SFA § 4.09(c)(v). Both the CAC and the DRs have the right to take action if they believe that the terms of the Plan are not properly being implemented. *See*, *e.g.*, Ex. E, SFA § 4.09.

Dow Corning did not "intru[de] into [the] decision-making of the SF-DCT" forcing the SF-DCT "not [to] respect the agreement of mediation with Korean Claimants." Mediation Motion at 6. In fact, as noted, neither Dow Corning, the DRs nor the CAC had any knowledge of the mediation. Mediation Motion at Ex. 13. Dow Corning, the DRs and the CAC, however, always have the right and the obligation to take action to prevent a violation of the Plan or a failure to carry out Plan obligations and thus have the right to comment on or oppose the draft mediation document on the ground that it does not comport with the Plan.

IV. Enforcing the Mediation Would Constitute an Impermissible Plan Modification.

By asking this Court to "order the SF-DCT to implement the terms of the agreement of mediation", Mediation Motion at 6, the Korean Claimants are

seeking a resolution of their claims in a manner inconsistent with the Plan, in essence requesting a Plan modification to which they are not entitled.

Under settled contract principles, "if a plan term is unambiguous, it is to be enforced as written." *See*, *e.g.*, *In re Dow Corning Corp.,* 456 F.3d 668, 676 (6th Cir. 2006). As set forth above, the SFA and Annex A unambiguously provide the exclusive procedures by which claims are to be reviewed and resolved, and a mediation to allow and pay claims in bulk is inconsistent with those procedures. *See* Section I, supra.

Korean Claimants ask this Court to "order the SF-DCT to respect the agreement of mediation and execute it pursuant to the terms under the Memo of Understanding". Mediation Motion at 6. In other words, the Korean Claimants ask this Court to change the confirmed and substantially consummated Plan in order to allow for the bulk settlement of claims.

The Court has no power to modify a confirmed plan.[12] *Clark-James v. Settlement Facility Dow Corning Trust*, 2009 WL 9532581, *2 (6th Cir. 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

[12] 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.

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 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.").[13]

This Court should reject the Korean Claimants' request to alter the terms of the confirmed and substantially consummated Plan by allowing for the bulk resolution of claims.

[13] 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 v. Phillip R. Curtis Enter., Inc.,* 809 F.2d 228, 233 (4th Cir. 1987); *In re Logan Place Prop., Ltd*., 327 B.R. 811, 813-14 (Bankr. S.D. Tex. 2005) (rejecting attempt by trust to modify the plan based on mutual mistake to reflect property's current value as trust was neither debtor nor plan proponent and noting that debtor/plan proponent opposed the modification); *In re Vencor, Inc.*, 284 B.R. 79, 85 (Bankr. D. Del. 2002) (denying creditors' request for relief from confirmed plan which purported to release it from certain claims that creditors might assert; request was tantamount to request for modification, which creditors did not have standing to seek); *In re Charterhouse, Inc*., 84 B.R. 147, 151 (Bankr. D. Minn. 1988) (bondholders' committee was not plan proponent since it "did not engage in the initial process of plan formulation or preparation" and therefore lacked standing to seek plan modification that would authorize use of interest accrued on settlement fund in a manner not provided in confirmed plan).

CONCLUSION

For the foregoing reasons, the Motion for Recognition and Enforcement of Mediation should be denied with prejudice.

Dated: December 28, 2016

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:		
DOW CORNING CORPORATION,	§	**Case No. 00-CV-00005 -DT (Settlement Facility Matters)**
REORGANIZED DEBTOR	§	**Hon. Denise Page Hood**

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2016, I electronically filed the *Opposition of Dow Corning Corporation, the Debtor's Representatives and the Claimants' Advisory Committee to Motion for Recognition and Enforcement of Mediation* and the *Memorandum in Support of Opposition of Dow Corning Corporation, the Debtor's Representatives and the Claimants' Advisory Committee to Motion for Recognition and Enforcement of Mediation* with the Clerk of the Court using the ECF system. The persons listed below were sent notification through the ECF system, or served via electronic mail or first-class mail if non-ECF participants.

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