UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:

Case No. 00-00005

Settlement Facility Dow Corning Trust.

Honorable Denise Page Hood

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ORDER DENYING MOTION FOR RECOGNITION AND ENFORCEMENT OF MEDIATION FILED BY THE KOREAN CLAIMANTS

I. BACKGROUND

This matter is before the Court on a Motion for Recognition and Enforcement of Mediation Filed by Yeon-Ho Kim, counsel for the Korean Claimants. (Doc. No. 1271) Responses were filed by the Finance Committee ("Finance Committee") of the Settlement Facility Dow Corning Trust ("SF-DCT"), the Reorganized Debtor Dow Corning Corporation ("Dow Corning")[1] and the Claimants' Advisory Committee ("CAC"). (Doc. Nos. 1274, 1275) A reply was filed by the Korean Claimants. (Doc. No. 1280)

In June 2012, the Korean Claimants assert that the late Claims Administrator, David Austern, and the current Claims Administrator, Ann Phillips, agreed to mediate the Korean Claimants' claims which were pending before the SF-DCT. The Korean

[1] Now known as Dow Silicones Corporation, but continued to be referred to as Dow Corning.

Claimants further assert that the sole mediator was Professor Francis E. McGovern, a "leading member of the Finance Committee." (Doc. No. 1271, PageId.19277) The SF-DCT and the Korean Claimants submitted position papers to Professor McGovern prior to the mediation conference, which was held in Washington, D.C. on August 10, 2012. *Id.* at PageID.19287-308. At the mediation conference, the SF-DCT and the Korean Claimants agreed to settle the Korean claims. The SF-DCT and the Korean Claimants agreed that the SF-DCT pay $5 million to settle about 2,600 Korean Claimants' claims and that the Korean Claimants would withdraw and dismiss their claims before the SF-DCT. *Id.* at PageID.19313-18. A Memorandum of Understanding, along with a Release, was hand-delivered by Mr. Austern to Mr. Kim's hotel on August 11, 2012, the day after the mediation hearing. Mr. Kim indicated he did not receive the hand-delivered copy. On September 28, 2012, Mr. Austern emailed to Mr. Kim the Memorandum of Understanding and Release. *Id.* at PageID.19312. Mr. Austern's indicated that "this Memorandum of Understanding HAS NOT BEEN APPROVED IN FINAL FORM BY THE FINANCE COMMITTEE." *Id.*

The Korean Claimants sent the signed Memorandum of Understanding and Release to Mr. Austern and Professor McGovern. *Id.* at PageID.19323. The Korean Claimants assert they sent the documents which were required under the

Memorandum of Understanding and Release. *Id.* at PageID.19329-30. After inquiries as to the status of the payment, Professor McGovern indicated on July 31, 2014 that a status conference would be held in September to further discuss the settlement. *Id.* at PageID.19332. On March 5, 2015, Ms. Phillips informed the Korean Claimants that the Parties advised that post-Confirmation mediation of claims before the SF-DCT were not authorized by the Plan. *Id.* at PageID.19334. Dow Corning's representative, Deborah Greenspan, informed the Korean Claimants on July 1, 2016 that Dow Corning did not give either Mr. Austern or Professor McGovern the authority to enter into settlement negotiations with the Korean Claimants. Ms. Greenspan indicated that neither Dow Corning, nor the CAC, had any knowledge of the mediation conference until after the fact when Mr. Austern advised the Parties during a subsequent conference call. She further indicated the Parties were "very much surprised and consistently objected to any such offer or agreement as beyond the authority of the Finance Committee." *Id.* at 19337. The instant motion was thereafter filed by the Korean Claimants.

II. ANALYSIS

New York law[2] provides that the "essential elements" of a breach of contract

[2]The Plan "shall be governed by and construed in accordance with the laws of the State of New York and applicable federal law." (Plan, § 6.13)

claim "are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach." *Neckles Builders, Inc. v. Turner*, 117 A.D.3d 923, 986 N.Y.S.2d 494, 496 (2014). "'[A] contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself.'" *IDT Corp. v. Tyco Grp.*, 13 N.Y.3d 209, 890 N.Y.S.2d 401, 918 N.E.2d 913, 916 (2009) (alteration in original) (quoting *MHR Capital Partners LP v. Presstek, Inc.*, 12 N.Y.3d 640, 884 N.Y.S.2d 211, 912 N.E.2d 43, 47 (2009)). A court "must" construe the contract "to accord a meaning and purpose to each of its parts," *Graphic Scanning Corp. v. Citibank, N.A.*, 116 A.D.2d 22, 499 N.Y.S.2d 712, 714 (1986), and "should not adopt an interpretation which will operate to leave a provision of a contract without force and effect," *Laba v. Carey*, 29 N.Y.2d 302, 327 N.Y.S.2d 613, 277 N.E.2d 641, 644 (1971) (internal quotation marks and ellipsis omitted). While "a mere 'agreement to agree'" is unenforceable, *Prospect St. Ventures I, LLC v. Eclipsys Solutions Corp.*, 23 A.D.3d 213, 804 N.Y.S.2d 301, 302 (2005), "parties may enter into a binding contract under which the obligations of the parties are conditioned on the negotiation of future agreements," *IDT Corp. v. Tyco Grp.*, 23 N.Y.3d 497, 991 N.Y.S.2d 574, 15 N.E.3d 329, 331–32 (2014).

To enforce a contract against a party, the objective assent of the party to be

charged is necessary and it must be shown that the party has conducted itself in such a manner that its assent may be fairly inferred. *New York Tel. Co. v. Teichner*, 69 Misc.2d 135, 329 N.Y.S.2d 689, 691 (N.Y.Dist.Ct.1972). A party's signature may be *prima facie* evidence of that party's assent to the contract; however, a signature is not required. *See Imero Fiorentino Assocs., Inc. v. Green*, 85 A.D.2d 419, 447 N.Y.S.2d 942 (N.Y.App.Div.1982). If there is no signature, then other affirmative action, which objectively manifests the requisite assent, is required. *Dreyfus & Co. v. Maresca*, 224 N.Y.S.2d 813, 815 (N.Y.City Ct.1961) (noting that a contract "need not be signed so long as there is other proof that the parties actually agreed on it").

An agent has actual authority if the principal has granted the agent the power to enter into contracts on the principal's behalf, subject to whatever limitations the principal places on this power, either explicitly or implicitly. *Ford v. Unity Hosp.*, 32 N.Y.2d 464, 346 N.Y.S.2d 238, 299 N.E.2d 659, 664 (1973) ("An agent's power to bind his principal is coextensive with the principal's grant of authority."). Actual authority is created by direct manifestations from the principal to the agent, and the extent of the agent's actual authority is interpreted in the light of all circumstances attending those manifestations, including the customs of business, the subject matter, any formal agreement between the parties, and the facts of which both parties are aware. *Peltz v. SHB Commodities, Inc.*, 115 F.3d 1082, 1088 (2d Cir.1997) (internal

quotation marks omitted).

Where an agent lacks actual authority, he may nonetheless bind his principal to a contract if the principal has created the appearance of authority, leading the other contracting party to reasonably believe that actual authority exists. "Apparent authority exists when a principal, either intentionally or by lack of ordinary care, induces [a third party] to believe that an individual has been authorized to act on its behalf." *Peltz*, 115 F.3d at 1088 (internal quotation marks omitted); *see also Wells Fargo Home Mortgage, Inc. v. Hiddekel Church of God, Inc.*, 1 Misc.3d 913, 781 N.Y.S.2d 628, 2004 WL 258144, *6 (Sup.Ct.2004)("'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.'" (quoting *Standard Funding Corp. v. Lewitt*, 89 N.Y.2d 546, 656 N.Y.S.2d 188, 678 N.E.2d 874, 877 (1997))). However, "[t]he mere creation of an agency for some purpose does not automatically invest the agent with 'apparent authority' to bind the principal without limitation." *Ford*, 346 N.Y.S.2d 238, 299 N.E.2d at 664. 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 Ins. Ltd. v. Clarendon Nat'l Ins. Co.*, 263 F.3d 26, 33 (2d Cir. 2001).

The Korean Claimants argue 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. The Korean Claimants assert that the agreement need not be signed by both parties to be effective. The Korean Claimants further assert that Dow Corning has no authority over the SF-DCT and so any objections by Dow Corning has no effect.

The Finance Committee responds that notwithstanding extensive efforts to settle the Korean Claimants' claims as a group, no agreement was ever executed. The Finance Committee claims that because all of the Korean Claimants' claims have now been processed individually in accordance with the Plan, the Korean Claimants' motion must be denied.

Dow Corning and the CAC jointly respond that the settlement agreement is an unsigned draft document that was neither approved nor executed by the Finance Committee, and negotiated without the knowledge or consent of other necessary parties–Dow Corning and the CAC. They also argue that because many of the Korean Claims have now been processed individually and paid, any further payment to the Korean Claimants would be additional payments not allowed under the Plan resulting in disparate treatment among members of the same Class.

Pursuant to New York law, a signature is not required to enforce an agreement,

as long as there is other proof that the parties actually agreed on it. The Korean Claimants submitted evidence that the Memorandum of Understanding and Release were drafted by the SF-DCT. Two of the three members of the Finance Committee were actively involved in the mediation conference, the Claims Administrator and the the Special Master. Documents required under the Release were provided by the Korean Claimants to the SF-DCT. Mr. Kim indicated by email and by signing the documents that he agreed to the terms of the Memorandum of Understanding and Release. Although Mr. Austern's email to Mr. Kim initially indicated that the draft of the of the documents had not been approved in "final form" by the Finance Committee, as noted above, two of the members of the Finance Committee had knowledge of the provisions of the documents. Based on the evidence submitted by Mr. Kim, even without the signature of a Finance Committee member, it could be construed that there may have existed an agreed to Memorandum of Understanding and Release between the Korean Claimants and the Finance Committee.

However, as raised by Dow Corning and the CAC, neither Mr. Austern nor Professor McGovern had the authority to mediate the Korean Claimants' claims. The Court agrees 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:

> The purposes of the Settlement Facility are: (I) to assume liability for and to liquidate and resolve claims of Settling Personal Injury Claimants and Settling Other Claimants and to pay expenses and costs in accordance with the terms of the Plan and this Agreement and the Dow Corning Settlement Program and Claims Resolution Procedures ("Claims Resolution Procedures") (Annex A to this Settlement Facility Agreement), subject to and without exceeding the available assets of the Settlement Fund as set forth at Section 3.02; (ii) to supervise the receipt, holding and investing of funds paid to the Trust (as defined in Section 2.05) in accordance with the terms of the Funding Payment Agreement and this Settlement Facility Agreement; (iii) to distribute funds paid to the Settlement Facility to Claimants with Allowed Claims and for administrative and other expenses in accordance with the terms of the Funding Payment Agreement, the Litigation Facility Agreement, the Depository Trust Agreement, and this Agreement; and (iv) to assure that the Trust qualifies as a Qualified Settlement Fund pursuant to § 468B of the Internal Revenue Code and the Treasury Regulations promulgated thereunder.

(SFA, § 2.01 Purpose) The Finance Committee "shall be composed of three members consisting of the individuals holding the following positions: the Special Master, a single Appeals Judge, and the Claims Administrator" and "shall act by majority vote." (SFA, § 4.08(a) and (d)) With respect to the distribution of funds and review of claims operations, subject to the approval and supervision of the District Court:

> (I) the Finance Committee shall (1) select the Financial Advisor (as provided at Section 4.04) who shall in turn select any investment managers under the procedures specified in the Depository Trust Agreement to oversee the

investment of the assets paid to the Settlement Facility under the terms of the Funding Payment Agreement; and (2) provide direction to the Financial Advisor regarding liquidity needs of the Trust and tax planning and supervise the Financial Advisor to assure that the investment management and other tasks assigned to the Financial Advisor are performed in accordance with this Settlement Facility Agreement and the Depository Trust Agreement;

(ii) in conjunction with the Independent Assessor, the Finance Committee shall (1) in accordance with the provisions of Section 7.01, conduct the analysis and projections necessary to determine the availability of funds for payment of all categories of Claims, including periodic analyses and estimates regarding cost and projected costs of processing and resolving Claims subject to the Litigation Facility Agreement; (2) develop recommendations for submission to the District Court regarding the release of funds payable from the Settlement Fund and the Litigation Fund, as specified at Article VII herein; (3) review proposed settlements of Non-Settling Personal Injury Claims to determine the adequacy of funds for payments of such Claims and to assure processing, litigation and resolution of Non-Settling Personal Injury Claims within the allotted Litigation Fund; (4) develop recommendations for submission to the District Court regarding the necessity for deferrals or reductions in Claim payments;

(iii) the Finance Committee shall, as specified in the Depository Trust Agreement, (1) direct the paying agent to disburse payments for Allowed Claims or for other purposes approved in accordance with this Settlement Facility Agreement; and (2) in connection with the annual budget process, recommend and establish salaries, benefits, fees and expenses of the staff as specified at Sections 4.02(e) and 7.03(e) and as consistent with the Litigation Facility Agreement. The Finance Committee shall receive

> all reports and audits regarding Claims resolution in the Settlement Facility and the Litigation Facility, including results of quality control reviews and appeals, and may request and arrange for any additional reports or reviews.

(SFA, § 4.08(b)) The Finance Committee's general powers include:

> (i) The Finance Committee shall have the authority to hire and shall hire accountants, and auditors, along with the Financial Advisor, as necessary, and shall have the authority to hire such experts and consultants as necessary to prepare the projections and analyses specified at Section 5.03 and to authorize the hiring of such bankers and/or investment managers as may be necessary and appropriate, subject to the approval of the District Court.
>
> (ii) The Finance Committee shall have the authority to bring actions on behalf of the Trust and to defend the Settlement Facility, the Trust, the Claims Administrator, the Finance Committee, and any agents or employees of the Trust, including actions to enforce obligations in the Plan Documents. Subject to the approval of the District Court, the Finance Committee shall have the authority from time to time, if and when it determines that it needs legal advice and assistance, to retain, and pay reasonable fees for, counsel to perform tasks necessary for the Finance Committee to fulfill its duties and obligations under the Settlement Facility and Fund Distribution Agreement and the other Plan Documents.
>
> (iii) The Finance Committee shall procure such general liability and other insurance as necessary and as required by law with respect to the employees and staff performing the claims administration functions. The Claims Administrator may purchase and maintain reasonable amounts and types of insurance, including insurance on behalf of an individual who is or was a Claims Administrator, Appeals Judge, Special Master, and/or member of the Finance Committee,

against liability asserted against or incurred by such individual in that capacity or arising from his or her status as a Claims Administrator, Appeals Judge, Special Master, employee or agent provided that the

> costs of such insurance are reasonable. The cost of such coverage shall be paid from the Settlement Fund.

(SFA, §4.08(c))

The Claims Administrator is supervised by the District Court and is responsible for: supervising processing of Claims resolved under the terms of the Settlement Facility Agreement and the Claims Resolution Procedures; overseeing all aspects of the Claims Office; preparing and distributing reports; serving as a member of the Finance Committee; and, the hiring and appointing of staff. (SFA, § 4.02(a) & (e)) The Special Master (acting as a mediator) is appointed by the District Court under the terms of the Case Management Order and Litigation Facility Agreement. (SFA, §

1.10) The Special Master's duties under the SFA are only those set forth above as a member of the Finance Committee.

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.

The Claims Administrator and the Special Master did not have the "apparent authority" to bind the SF-DCT to the agreement. Although their positions as members of the Finance Committee and their titles as Claims Administrator and Special Master (acting as a mediator) may have conveyed to the Korean Claimants that they have such apparent authority, as noted above, 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. The Korean Claimants' Motion for Recognition and Enforcement of Mediation must be denied.

III. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that the Korean Claimants' Motion for Recognition and Enforcement of Mediation **(Doc. No. 1271)** is DENIED.

S/DENISE PAGE HOOD
DENISE PAGE HOOD
Chief United States District Judge

DATED: December 12, 2018

CERTIFICATE OF SERVICE/MAILING

I certify that a copy of this document was served on this date electronically or by ordinary mail to all parties in interest.

Dated: December 12, 2018

/s/ Sarah Schoenherr
Deputy Clerk (313) 234-5090