Case No.: *18-2446*

United States Court of Appeals for the Sixth Circuit

In re: SETTLEMENT FACILITY DOW CORNING TRUST

KOREAN CLAIMANTS

Interested Parties – Appellants

v.

CLAIMANTS' ADVISORY COMMITTEE; FINANCE COMMITTEE; DOW SILICONES CORPORATION

Defendants – Appellees

Reply Brief of Appellants Korean Claimants

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I. INTRODUCTION

The Appellees filed two briefs. The Finance Committee filed its brief. Dow Silicones Corporation and the Claimants' Advisory Committee (hereinafter, "Dow Silicones Corporation") filed their brief. Two briefs include almost identical arguments. The briefs exceeded the limitation of words under Fed. R. App. P. 32(a)(7)(B) because the total words are 21,875.[1] More than 13,000 words shall not be allowed. Therefore, the latter part pages over sixty percents of the total pages of each Appellee's brief shall not be read nor considered by the Court. This reply brief includes countering arguments to the Appellees' arguments selected from their briefs. The Korean Claimants keep the whole arguments in the Appellants' brief even if some of them are not stated in this reply brief.

II. ARGUMENTS

1. Korean Claimants' New Argument that David Austern, the Attorney for the SF-DCT, Had Authority to Bind the SF-DCT Has Not Been Waived on Appeal

[1] The Finance Committee certified 10,150 words and Dow Silicones Corporation certified 11,725 words. (*See* Certificate of Compliance)

The Appellees contend that the Korean Claimants' argument that Mr. David Austern was the attorney for the SF-DCT and he entered into negotiations for settlement with the attorney for the Korean Claimants on the behalf of the SF-DCT is a new argument which has never been raised in the District Court therefore the argument of the Korean Claimants regarding the attorney-client relationship has been waived on appeal and must be barred.

In addition to this contention, the Finance Committee alleges that Mr. David Austern has never been the counsel for either SF-DCT or the Finance Committee. This allegation has no value because Mr. Austern filed the Cross-Motion for Dismissal of the Korean Claimants' Motion *Styled Motion for Reversal* with the District Court on behalf of the SF-DCT and, in addition, Mr. Austern attended the mediation conference of August 10, 2012 in the capacity of the counsel for the SF-DCT, following his own submission of the 'Position Paper and the Response' to the mediator on behalf of the SF-DCT.

""It is the general rule… that a federal appellate court does not consider an issue not passed upon below.(citation omitted)….This rule is not jurisdictional; the Supreme Court has referred to it as a "practice" and a "rule of procedure"(citation omitted)….Deviations are permitted in "exceptional cases or particular circumstances," or when the rule would produce "a plain miscarriage of justice.'" *See Pinney Dock and Transport Co. v. Penn Cent. Corp.* 838 F. 2d 1445, 56 USLW 2453, 1988-1 Trade Cases P 67,876 *14 (6th Cir. 1988)

‘“““Two main policies justify this general rule. First, the rule eases appellate review “by having the district court first consider the issue.”(citation omitted) Second, the rule ensures fairness to litigants by preventing surprise issues from appearing on appeal.(citation omitted) Despite the rationale supporting this rule, “we have, on occasion, deviated from the general rule in ‘exceptional cases or particular circumstances’ or when the rule would produce a ‘plain miscarriage of justice.”””’ *See Scottsdale Ins. Co. v. Flowers*, 513 F. 3d 546 *7 (6th Cir. 2008)

“Factors guiding the determination of whether to consider an issue for the first time on appeal include: 1) whether the issue newly raised on appeal in a question of law, or whether it is requires or necessitates a determination of facts; 2) whether the proper resolution of the new issue is clear and beyond doubt; 3) whether failure to take up the issue for the first time on appeal will result in a miscarriage of justice or a denial substantial justice; and 4) the parties’ rights under our judicial system to have the issues in their suit considered by both a district judge and an appellate court.” See *In re Cannon*, 227 F. 3d 838, Bankr. L. Rep. P 78,572, 2002 Fed. App. 0026P *10 (6th Cir. 2002)

““The exceptions to the general rule are narrow. For example, we stated in *Pinney Dock* that we may reach an issue if it “is presented with sufficient clarity and completeness” for the court to resolve the issue.(citing *Foster v. Barilow,* 6 F. 3d 405 (6th Cir. 1993)) The *Pinney Dock* exception is most commonly applied where the issue is one of law, and further development of the

record is unnecessary.(citation omitted) The rationale for this exception is to promote finality in the litigation process.’”” *Id*.

As set out in the case law above, this Court restrictively permitted a new argument on appeal if the four conditions as above were met, and if the argument supported sufficient clarity and completeness to resolve the issue, and, if not taken by this Court, the application of the general rule disallowing a new argument on appeal would result in a plain miscarriage of justice.

The argument of the Korean Claimants that Mr. David Austern had the attorney-client relationship with the SF-DCT satisfies the four conditions. First, the issue of the attorney-client relationship is a question of law even though the Finance Committee alleges that Mr. Austern was not the attorney for either the SF-DCT or the Finance Committee. This Court is not required or needed to determine the Finance Committee’s allegation because the fact is obvious from the records of the District Court that Mr. Austern filed the Cross-Motion for Dismissing the Korean Claimants’ Motion as the attorney for the SF-DCT. Second, whether the proper resolution of the attorney-client relationship is clear and beyond doubt is manifest. If Mr. David Austern was the attorney for the SF-DCT, the rule of the attorney-client relationship must be properly resolved in this Motion. Third, if this Court fails to take up this issue for the first time on appeal, it will result in a plain miscarriage of justice or a denial substantial justice because the Korean Claimants will lose and the Appellees will get away from the settlement agreement that the District Court determined a ‘contract’

made by the SF-DCT. And fourth, The Korean Claimants have rights under this Court's judicial system to have the issue of the attorney-client relationship in their suit considered by both a district judge and an appellate court. Accordingly, the four conditions for reviewing a new argument on appeal were met.

Furthermore, the attorney-client relationship supports sufficient clarity and completeness to resolve the issue. The filing of Mr. Austern's Cross-Motion is meant to be that he was the attorney for the SF-DCT. If it is right, as the Finance Committee insists, that he was neither the attorney for the SF-DCT nor the attorney for the Finance Committee, he must have committed a judicial fraud. If this Court takes up the issue of the client-attorney relationship, this Court can complete the issue of whether the settlement agreement determined by the District Court that it was a "contract" is enforceable.

If this Court does not take up this issue and applies the general rule disallowing the new argument on appeal, it would produce a plain miscarriage of justice in consequence.

2. The Settlement Agreement Executed by the Attorney for the SF-DCT is Enforceable under the New York Law

""It is well settled that under New York law, the parties' intentions govern the time of contract formation. Thus, parties are free to bind themselves

orally, and the fact that they contemplate later formalizing their agreement in an executed document will not, standing alone, prevent enforcement of the oral agreement.(citation omitted) Accordingly, courts in this circuit have enforced settlement agreement even when such agreements have not been reduced to writing, but generally only when some other indicia of formality is present.(citation omitted) However, "[p]arties who do not intend to be bound until the agreement is reduced to a signed writing are not bound until that time" Thus, in evaluating the enforceability of an oral settlement agreement, the dispositive issue is whether the parties intended to be bound by an oral agreement in the absence of a writing.(citation omitted) Evaluating the intent of the parties to be bound by an oral agreement is a factual inquiry that requires an examination of the totality of the circumstances.(citation omitted) The Second Circuit has identified four factors to guide this inquiry into whether the parties intended to be bound: (1) whether there has been express reservation of the right not to be bound in the absence if writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and, (4) whether the agreement at issue is the type of contract that is usually committed to writing.((citing *Winston v. Mediafare Entertainment Corp,* 777 F 2d. 78 (2nd Cir. 1985), *Powell v. Omnicom,* 497 F. 3d 124 (2nd Cir. 2007))"" *See Cook v. Huckabey,* Not Reported in F. Supp. 2d, 2009 WL 3245278 *2-3 (E.D.N.Y. 2009)

""[Type of Agreement Usually Reduced to Writing] The final *Winston* factor asks whether a settlement is the type of agreement that is usually reduced

to writing. The Second Circuit has previously answered that question in the affirmative…..Moreover, under New York law agreements pertaining to litigation are governed by statute, and settlement agreements are only enforceable under one of three conditions: (i) where the agreement is memorialized in a signed writing; (ii) where the agreement is made orally between counsel in open court, or (iii) where the agreement is reduced to the form of an order and entered. *See* N.Y. C.P.L.R § 2104 However, New York courts have recognized "substantial compliance" with these technical requirements as sufficient under New York law.(citing *Monaghan v. SZS 33 Associates.*, L. P., 73 F. 3d 1276(2nd Cir. 1996))"" *Id.* *5

NY Civil Procedure Law and Rule 2104 (Stipulations) prescribes, "An agreement between parties or their attorneys relating to any matter in an action, other than on made between counsel in open court, is not binding upon a party unless it is a writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk."

""Open court" as used in CPLR 2104, is a technical term that refers to the formalities attendant upon documenting the fact of the stipulation and its terms, and not to the particular location of the courtroom itself"" *See Popovic v. New York City Health and Hospitals Corp.*, 180 A.D.2d 493, 579 N.Y.S.2d 399 *1-2 (N.Y. 1992)

"In this case, there was substantial compliance with CPLR § 2104. It is undisputed that the settlement was reached at a mediation, the object of which was to resolve the pending litigation. It is undisputed that the mediator placed the terms before both parties and secured their agreement both to the terms and to the proposition that the settlement was binding and enforceable. Both counsel thereafter succeeded in reducing the agreement to a mutually acceptable writing that confirmed both the existence and the material terms of the oral agreement, which in any case is not denied. If as courts have held, a settlement at a disposition or conference held on the record, and even a settlement reached without a record following a court conference, satisfies the "open court" requirement of Section 2104, a *fortiori* settlement reached at a mediation in circumstances in which no one present has disputed either the making of the settlement or its terms does so as well." *See Lee v. Hospital for Special Surgery,* Not Reported in F. Supp. 2d, 2009 WL 2447700 *2 (S.D.N.Y. 2009)

""The *Winston* factors militate in favor of declining to enforce the parties' agreement in principle. Nonetheless, the plaintiff relies on *Lee* to argue that the oral agreement reached at the mediation session is binding and enforceable. In *Lee*, the parties agreed to enter into mediation. After a day of negotiations, the plaintiff agreed to settle the case. The Court found that, "[a]fter the [p]arties agreed to these terms, [the mediator] brought both parties into a conference room and confirmed that the agreement reached at the mediation was binding and enforceable, notwithstanding the fact that the agreement had not yet been reduced to writing, and [mediator] again reviewed the terms. Subsequently, the

Plaintiff changed her mind and decided she wished to proceed with the lawsuit."" *See Clark v. Gotham Lasik, PLLC*, Not Reported in F. Supp. 2d. 2012 WL 987476 *4 (S.D.N.Y. 2012)

As set out in the above cases, the settlement agreement between the Korean Claimants and the SF-DCT was reached at the mediation, the object of which was to resolve the pending litigation [the Korean Claimants' Motion for Reversal of the SF-DCT's Decisions]. The mediator, Prof. McGovern, brought both parties into a conference room and confirmed that the agreement reached at the mediation was binding and enforceable, notwithstanding the fact that the agreement had not yet been reduced to writing, and the mediator again reviewed the terms. In other words, the mediator placed the terms before both parties and secured their agreement both to the terms and to the proposition that the settlement was binding and enforceable. More importantly, both counsel, Yeon-Ho Kim and Mr. David Autern, thereafter finished reducing the agreement to a mutually acceptable writing [the MOU and the Release] that confirmed both the existence and the material terms of the 'oral' agreement.

Therefore, the settlement agreement satisfied the requirements of 'oral' settlement agreement[2] under the New York case law, and moreover, the formality required under NY Civil Procedure Law and Rule 2014, even if the argument of an 'oral' agreement in mediation were not accepted. Accordingly,

[2] The Appellees contend that the MOU and the Release is just an unsigned document. If they prevail, the written 'contract' argument of the Korean Claimants is gone and an 'oral' agreement argument only is remaining. Even if it were the case, the NY case law supports the enforceability of the oral settlement agreement in mediation.

the settlement agreement must be enforceable.

In addition, the following case law reinforces the enforceability of settlement agreement executed by the attorney for client in mediation.

““From the nature of the attorney-client relationship itself, an attorney derives authority to manage the conduct of litigation on behalf of a client, including the authority to make certain procedural or tactical decisions.(citation omitted) But that authority is hardly unbounded. Equally rooted of authority from the client, and attorney cannot compromised or settle a claim(citation omitted) and settlement negotiated by attorneys without authority from their clients have not been binding.(citation omitted)…..Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that gave 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. “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.(citation omitted) Moreover, a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable.(citation omitted) Here, as a matter of law, *Hallock* [client] clothed *Quartararo* [attorney] with apparent authority to enter into the settlement. *Quartararo* had represented plaintiffs [clients] through the litigation, engaged in prior settlement negotiations for them and, in furtherance

of the authority which had been vested in him, appeared at the final pretrial conference, his presence there constituting an implied representation by *Hallock* [client] to dependants that *Quartararo* [attorney] had authority to bind him to the settlement…In the circumstances, it necessarily fell to *Phillips* [client] or *Quartararo* [attorney] himself to reveal any restrictions on the attorney's authority to settle,[3] and absent such disclosure defendants' reliance on the appearance of authority was entirely reasonable. Plaintiffs insist that apparent authority is an equitable doctrine having it origin in the principle of estoppels(citation omitted), and that defendants must establish detrimental reliance before the settlement stipulation can be enforced. The discontinuance of lengthy litigation on the day of trial, in reliance on the adversary's settlement stipulation---even for defendants, who often may prefer that judgment be deffered---coupled with plaintiffs' silence for more than two months thereafter, is itself a change of position, if such a showing is indeed required before the doctrine of apparent authority may be invoked. We need not inquire whether there was any actual loss of witnesses or evidence, for we recognized that, after five years, halting the machinery of litigation when a trial scheduled to begin that day is marked off the calendar constitutes detriment."" *See Hallock v. State*, 64 N.Y. 2 224, 474 N.E. 2d 1178, 485 N.Y.S. 2d 510 *4-5 (Court of Appeals of New York, 1984)

The Appellees contend that the Plan does not authorize negotiations for

[3] In this respect, Dow Silicones Corporation asserts that there is a duty to inquire into the status of an agent's authority. See their brief *36. They are suggesting that the Korean Claimants had a duty to inquire Mr. Austern in the status of his authority. To the contrary, the case law of New York said that the SF-DCT['principal'] had a duty to reveal any restrictions on Mr. Austern, which has been never observed.

settlement with the Claimants other than individual review of claims.[4] Even if the contention of the Appellees is right, the case law of New York supports that Mr. Austern, the attorney for the SF-DCT, had the 'apparent' authority to negotiations for settlement with the attorney for the Korean Claimants.

Dow Silicones Corporation contends that the SF-DCT is not a 'principal' because the SF-DCT is simply a depository trust that can take no action without the approval of the District Court. This contention alludes that the principal should be the District Court itself. It is impossible. Mr. Austern shall not be an 'agent' of the Court. Since Dow Silicones Corporation asserts that the Claims Administrator and the Special Master are 'agents' of the Finance Committee, they cannot be 'agents' of the SF-DCT. Since the Finance Committee asserts that Mr. Austern was not the attorney for either the SF-DCT or the Finance Committee, Mr. Austern cannot be an 'agent' of SF-DCT or the Finance Committee. Who is a 'principal' is confusing but the issue is simple. Mr. Austern filed the Cross-Motion for Dismissal of the Korean Motion on behalf of the SF-DCT. The SF-DCT did not object to it. The SF-DCT failed to notify Yeon-Ho Kim that Mr. Austern was not the attorney for the SF-DCT. The District Court did not warn Mr. Austern that he had no authority to file such Motions. In these circumstances, the Korean Claimants may rely on the appearance of Mr. Austern.

[4] The Finance Committee asserts, "This proposed ad hoc global settlement of claims was in clear violation of the Plan's terms…" *See* the brief *6, and "Thus, members of the Finance Committee lacked actual authority to enter into any purported settlement agreement with the Korean Claimants." *See* the brief *28. It is a fact, however, that the Claims Administrator proposed settlement negotiations and the two members of the Finance Committee were involved in settlement agreement. The Finance Committee unfolds numerous *self-destructive* arguments in its brief.

The point here is not whether the SF-DCT is a depository trust that can take no action without the approval of the District Court but whether the case law of New York can apply to these circumstances.

The SF-DCT *held out* to the Korean Claimants that it is responsible for processing claims and determining the eligibility for benefits under the Plan. The SF-DCT sent out numerous letters to the Claimants under its own name without any individual's signature. The SF-DCT acted just like a 'principal'. When Mr. Austern filed the Cross-Motion to Dismiss the Korean Motion, the SF-DCT failed to inform the Korean Claimants that the SF-DCT was simply a depository trust that can take no action without an approval of the District Court. Had Mr. Austern lacked the approval, Judge Hood must have declared in the hearing for Motion for Mootness that the Cross-Motion of the SF-DCT filed by Mr. Austern was an 'unauthorized' act. These failures constitute misleading conduct of the 'principal' communicated to a third party that give rise to the appearance and belief that the 'agent' had the authority to enter into a transaction.

In addition, the SF-DCT *clothed* Mr. Austern with 'apparent' authority to enter into the settlement. Mr. Austern represented the SF-DCT to the Korean Claimants, engaged in settlement negotiations, and appeared at the mediation conference for the SF-DCT. His presence there constitutes an implied representation by the SF-DCT which made a reservation for the conference room of mediation, or by the Finance Committee if the SF-DCT was simply a

depository trust, to the Korean Claimants that Mr. Austern had authority to bind the SF-DCT to the settlement agreement. The Korean Claimants' reliance on the appearance of authority was entirely reasonable.

The Finance Committee contends that Yeon-Ho Kim must establish detrimental reliance before the settlement agreement can be enforced but the Korean Claimants failed to prove it. The Finance Committee asserts that the Korean Claimants rather received 3 million dollars from the SF-DCT after the settlement agreement, and Yeon-Ho Kim misrepresented that the Korean Claimants could not file the explants claims whose deadline was June 1, 2014 since the records of the SF-DCT shows that 160 Korean Claimants filed the explants claims after the settlement agreement. The Appellees assert that all Korean Claims but for 11 claims were processed and, if 5 million dollars were given to the Korean Claimants, it should be a windfall to the Korean Claimants with disparaging treatment to other Claimants.

First of all, the assertions of the Appellees are meritless. The 160 Korean Claimants filed the explants claims in May 2014. However, there were many more additional Claimants who wanted to file and waited for gathering their explants claims documents for submission. They even gave up the application for the Assistance Program for Explants because the settlement agreement had been executed with the SF-DCT. The assertion of the Korean Claimants that they lost a chance for filing the explants claims because of the settlement agreement with the SF-DCT is not a misrepresentation.

The Korean Claimants are over 2,500 Claimants as the Claims Administrator admitted in her Declaration. Less than 1,100 Claimants received a payment. Out of 1,745 Claimants who filed claims, there are over 500 Claimants that the SF-DCT denied a payment.[5] The SF-DCT is unjustly holding numerous payments to the Korean Claimants.

More importantly, the assertion of the Appellees that all Korean Claimants but for 11 claims were processed does not reflect the releality. Over 500 Claimants who completed their filings for review did not receive a payment. Over 800 Claimants exist waiting for filing benefits claims. The Korean Claimants' claims are not yet finished. There will be no windfall to the Korean Claimants. No other Claimants can be disparagingly treated just because of the settlement agreement with the Korean Claimants.

The case law of New York clarified, "The discontinuance of lengthy litigation coupled with plaintiffs' silence for more than two months thereafter, is itself a change of position, if such a showing is indeed even required before the doctrine of apparent authority may be invoked. We [New York courts] need not inquire whether there was any actual loss of witnesses or evidence, for we recognize that, after five years, halting the machinery of litigation when a trial scheduled to begin that day is marked off the calendar constitutes detriment." *See Hallock*, *5 (64 N.Y. 2d 224)

[5] They are on various stages at the SF-DCT. Some of them are pending before the Appeals Judge. Some of them are pending for examination into records. Some of them were rejected to issue a check, even if review was completed, since the SF-DCT demanded the current addresses.

The Korean Claimants did not file a single claim after the day of settlement (August 10, 2012). The Korean Claimants lost the chance of the substantial number of explants claims. After the settlement agreement became known to the Korean Claimants, they called to ask when they could receive money. The SF-DCT changed the mind that a settlement is not an option under the SF-DCT after nearly three years from the exchange of the settlement agreement. The SF-DCT's denial ruined Yeon-Ho Kim's law office. There are many more to prove the reliance by the Korean Claimants. But those above are the greater weight of a change of position than the examples set out in the case law.

3. The Settlement Agreement in the form of the MOU and the Release is a Contract for Settlement thus Enforceable

The Appellees contend that the MOU and the Release is not enforceable.

"The agreement upon which the [petitioner] relies was signed by the [respondents] alone, and not by the [petitioner]. However, it is not necessary that both parties sign a contract to make it an agreement in writing. If a person has accepted a written agreement and has acted upon it he is bound by it although he may not have set his hand to the document.(citation omitted) It needs not to be signed so long as there is other proof that the parties actually agreed on it.(citation omitted)" *See Dreyfus & Co., v. Maresca*, 224 N.Y.S. 2d

813 *2 (N. Y. 1961)

““[A] contract is to be construed in accordance with the parties’ intent, which is generally discerned from the four corners of the document itself. Consequently, ‘a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.’”(citation omitted)” *See IDT Corp v. Tyco Group, S.A.R.L.,* 13 N.Y. 3d 209 *3 (N.Y. 2009)

“An individual who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of the other contracting party, is conclusively presumed to know its contents and to assent to them.(citation omitted)” *See Imero Fiorentino Assoc. v. Green,* 85 A.D. 2d 419 *2 (N.Y. 1982)

“Parties may enter into a binding contract under which their obligations are conditioned on the negotiation of future agreements, in which case the parties are obliged to negotiate in good faith. However, the parties are not bound to negotiate forever, and the obligation to negotiate in good faith can come to an end without a breach by either party.” *See IDT Corp. v. Tyco Group, S.A.R.L.*, 23 N.Y. 3d 497 *1(Court of Appeals N.Y. 2014)

Yeon-Ho Kim representing the Korean Claimants signed on the MOU and the Release. The languages in the MOU and the Release possess no doubt about the terms of settlement. The Claims Administrator and the mediator, more importantly the attorney for the SF-DCT, were delivered the signed one by the

Korean Claimants. They drafted the MOU and the Release on their own. After they received the signed MOU and the Release from the Korean Claimants, they asked the Korean Claimant to fulfill the conditions under the signed MOU and the Release. Yeon-Ho Kim submitted the documents satisfying the conditions. Therefore, the MOU and the Release became a 'contract' for settlement.

The Appellees contend that the SF-DCT did not sign on the MOU and the Release, "DRAFT" was written on the front page, the Finance Committee did not approve it, and it was not approved by the District Court which is not going to do because the Plan does not allow a group settlement.

As the case law of New York set out, neither the SF-DCT nor the Finance Committee necessarily have to sign on the MOU and the Release because an oral agreement was reached in mediation. The parties' intent is discerned for the four corners of the document itself, the MOU and the Release. The mark on the front page, "DRAFT", cannot negate a 'contract' because the MOU and the Release has been signed by the counter party, Yeon-Ho Kim representing the Korean Claimants. Since the Finance Committee is composed of three members and forms decisions by majority, the Finance Committee is deemed to approve the MOU and the Release by the two members who were involved in negotiations for settlement and mediation. Whether the District Court can approve the MOU and the Release is uncertain but the SF-DCT has never attempted to request the approval to the Court so the Appellees cannot use the District Court as a basis for contention that the MOU and the Release is not

enforceable because the District Court did not approve it.

4. The Attorney for the SF-DCT and the Members of the Finance Committee Have the Apparent Authority to Negotiations for Settlement and Mediation for Settlement

Countering the argument of the Korean Claimants that Mr. David Austern, the attorney for the SF-DCT, and Mrs. Ann Phillips and Prof. Francis McGovern, the two Members of the Finance Committee, had the 'apparent' authority to negotiate and mediate for settlement, the Appellees contend that the Korean Claimants knew, or should have known, that the Plan does not allow settlement negotiations of claims and thus they did not have 'actual' authority to settle claims therefore they were exceeding their scope of authority. And the Appellees brought various assumptions that support their argument that Yeon-Ho Kim knew the Plan and limitations on the authority of the SF-DCT and the Claims Administrator and the Special Master under the Plan.

First, Dow Silicones Corporation lies that Yeon-Ho Kim held numerous meetings with the Claims Administrator. Yeon-Ho Kim proposed a meeting to Mrs. Phillips many times from her taking the office in 2011 but has been turned down. Yeon-Ho Kim never held a meeting with the current Claims Administrator. Yeon-Ho Kim held a meeting with Mrs. Wendy Tracht-Huber once in 2003 and held a meeting with Mr. Austern twice in 2006 and 2008.

Second, Dow Silicones Corporation exaggerates that Yeon-Ho Kim has filed at least seven motions. However, all of them were either denied or dismissed. It reflects the fact that Yeon-Ho Kim was not familiar with the Plan and the process of Bankruptcy Code and actions. The appearance in litigation responding to consent agreements submitted by the Plan Proponents is not decisive evidence that Yeon-Ho Kim should have known the Plan and actions well. The Korean Claimants often heard that they have gotten nothing favorable even though Yeon-Ho Kim appeared in the US courts many times. It is overriding evidence that Yeon-Ho Kim was unfamiliar with the Plan and the actions.

Third, the Dow Silicones Corporation contends that under the doctrine of 'apparent' authority, there is a duty to inquire into the status of an agent's authority when the transaction is extraordinary. It alludes that Yeon-Ho Kim failed to inquire the status of Mr. Austern, Mrs. Phillips and Prof. McGovern. This contention goes against their practices regarding the SF-DCT. Whenever Yeon-Ho Kim asked Dow Silicones Corporation and the Claimants' Advisory Committee, they always referred to the Claims Administrator who turned down a meeting. The *very* Claims Administrator with the attorney for the SF-DCT proposed to negotiate for settlement of the claims pending before the SF-DCT for many years. There was not need to inquire into the status of her authority. Dow Silicone Corporation is now suggesting in this Court that Yeon-Ho Kim failed to inquire whether Mr. Austern and Mrs. Phillips had the authority to negotiate and mediate the claims of the Korean Claimants. This contention is

absurd.

Fourth, Dow Silicones Corporation contends that the correspondence submitted by the Korean Claimants, however, makes clear that the Finance Committee sought the input of the Plan Proponents after the mediation thus the Korean Claimants were clearly on notice that no agreement could be achieved without the approval and participation of the Plan Proponents. This contention is overreaching. The correspondence submitted by the Korean Claimants did not include any word about the Plan Proponents before and during mediation. The Claims Administrator prolonged the answers to questions of Yeon-Ho Kim when the SF-DCT would pay pursuant to the settlement agreement for nearly three years until her confirmation on the Plan Option. On the other hand, the attorney for the SF-DCT, Mr. Austern, asked the Korean Claimants the documents conditioned under the MOU and the Release. The mediator, the Special Master, sent e-mails indicating that the status conference of the Finance Committee was coming for the settlement agreement. There was no word in the correspondence submitted by the Korean Claimants, indicating that the Plan Proponents must approve the signed MOU and the Release.

Therefore, to the contrary of the Appellees' contention that there is no credible basis to conclude that Korean Claimants lacked knowledge of the Plan's requirements, there is no credible basis to conclude that the Korean

Claimants had knowledge of the Plan's requirements.[6] The determination of the District Court that Yeon-Ho Kim knew or should have known that such [the attorney for the SF-DCT and the members of the Finance Committee's] actions exceeded the scope of their authority is incorrect and is an abuse of discretion. The finding of facts basing the conclusion is clearly erroneous.

Fifth, the Appellees allege that the Korean Claimants made multiple requests of the Claims Administrator and the Finance Committee to consider the mediation or to reactivate indicating clearly that the Korean Claimants understood that there was no agreement. This wording was taken from an e-mail of June 11, 2014 to Prof. McGovern. (RE1271 Pg ID#19332) However, it was simply a Korean Claimants' complaint or their begging to the mediator for the execution of payments under the settlement agreement. The correspondence added in the latter part, "[the Korean Claimants] do not want to go back to the Settlement Facility." The Korean Claimants meant in this correspondence that the mediation agreement had to be implemented as agreed. Because of that, the

[6] The Finance Committee asserts that counsel for Korean Claimants had admitted his familiarity with the Plan, the bankruptcy proceedings, and federal bankruptcy law, by citing Hearing Transcript, RE 1421, Page ID #23850 and Exhibit 2 to Mediation Motion, RE 1271-1, Page ID 19298-19306. *See* the brief of the Finance Committee *30. The Finance Committee is distorting. The Transcript, Page ID #20850 is as follows; "THE COURT : Mr. Kim, you know the bankruptcy in the United States works and how we came to have this Plan of Reorganization and the Settlement Facility. And while you may not agree with it, you certainly do know how that process works, right?", "MR. KIM : Yes", "THE COURT : And that is why the Debtor and the Creditors' representatives are here today", "MR. KIM : Yes, I know that. Because I studied in United States law school just over here, I know briefly about bankruptcy". This line of questions and answers took place because Yeon-Ho Kim complained to the Court that too many representatives for the Appellees including Dow Silicones Corporation' employees were sitting in the courtroom. There was nothing more than that. Counsel for Korean Claimants never admitted his familiarity with the Plan in the Transcript. Rather, he emphasized, "I know **briefly** about bankruptcy." And, the Finance Committee cited Exhibit 2, RE 1271-1, Page ID 19298-19306 to support that counsel for Korean Claimants had admitted his familiarity with the Plan. This Exhibit is "REPLY TO SF-DCT RESPONSE". There is nothing in it that Yeon-Ho Kim admitted the familiarity with the Plan. The Exhibit simply explained how the SF-DCT changed its positions about the Affirmative Statements that Yeon-Ho Kim submitted for POM claims. The Finance Committee is attempting to mislead this Court.

Korean Claimants stressed in the correspondence that the mediation should be *the best award* to [the Korean Claimants]. Contrary to the allegation of the Appellees, the Korean Claimants have never understood that there was no agreement. In addition, the Appellees allege that before the Motion was filed, the Korean Claimants admitted that the mediation had failed. This wording was taken from an e-mail of March 23, 2015 to the Claims Administrator. (RE1271, PgID#19334) However, the correspondence was to ask the Claims Administrator to designate a person or an entity to receive the service of the process in Korea to file to dismiss all Korean Claims from the Korean courts. It was to follow the conditions under the settlement agreement on dismissing all of the Korean motions in the Korean courts. Accordingly, the correspondence had nothing to do with the allegation of the Appellees that the Korean Claimants admitted that the mediation had failed.[7] The Korean Claimants never understood and never regarded that the mediation agreement had failed before the filing of this Motion.

Finally, countering the ratification argument of the Korean Claimants, Dow Silicones Corporation asserts that the claims of almost all of the Korean Claimants who actually filed benefits claims had been reviewed and most had been paid after mediation therefore the SF-DCT obtained no benefit from the purported agreement. As the Appellees admitted, *See* the brief of Dow Silicones

[7] Dow Silicones Corporation asserts that the general recitation of purpose does not and cannot override the explicit language in the same document….it is a fundamental rule…that specific terms and exact terms are given greater weight than general language.(citation omitted) *See* the brief *33. Since the Appellees have the knowledge of the rule for reading a document, the Appellees must read the correspondence of the Korean Claimants in accordance with the rule.

Corporation *40, 805 Claimants did not yet file benefits claims and 548 filed Claimants (155 held for fraud or lack of identification and address + 102 ineligible for POM deficiencies + 280 pending payment + 11 being evaluated) did not receive a payment. Nevertheless, the Appellees assert that the SF-DCT obtained no benefit from the settlement agreement. The benefits that the SF-DCT obtained from the settlement agreement are a lot: (1) holding of payments to 548 filed Claimants; (2) 805 unfiled Claimants exist waiting for filing benefits claims; (3) denying of the premium payments prompted by the District Court; and (4) releasing from paying liabilities to the Korean Claimants under the Plan.

6. Conclusion

For the forgoing reasons, the Korean Claimants request that this Court dismiss the arguments of the Appellees in their briefs and reverse the District Court's Order Denying the Motion for Recognition and Enforcement of Mediation.

Date: May 20, 2019 Respectfully submitted,

(signed by) Yeon Ho Kim
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For the Korean Claimants

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2019, I have electronically filed the above document with the Clerk of Court by ECF system that will notify to all relevant parties in the record.

Date: May 20, 2019

Signed by Yeon Ho Kim

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