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; DEBTOR'S REPRESENTATIVE
Defendants – Appellees.

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

BRIEF OF APPELLEE FINANCE COMMITTEE

SMYSER KAPLAN & VESELKA, L.L.P.
Karima Maloney
Sydney A. Scott
State Bar No. 24041383
700 Louisiana Street, Suite 2300
Houston, Texas 77002
(713) 221-2300
(713) 221-2320 (Fax)
kmaloney@skv.com
sscott@skv.com

Counsel for Appellee the Finance Committee

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: _______________ Case Name: __________________________________

Name of counsel: ____

Pursuant to 6th Cir. R. 26.1, ____
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

CERTIFICATE OF SERVICE

I certify that on ____________________________________ the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/____________________________
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

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STATEMENT REGARDING ORAL ARGUMENT

Appellee believes that oral argument is not needed. This appeal presents straightforward legal issues which are neither factually nor legally complex. Therefore, the Court's decisional process would not be significantly aided by oral argument.

STATEMENT OF JURISDICTION

The district court exercised jurisdiction pursuant to 28 U.S.C. § 1334 ("Bankruptcy cases and proceedings"). This Court has jurisdiction to review the district court's final order pursuant to 28 U.S.C. § 1291. *See Order Denying Motion for Recognition and Enforcement of Mediation* (the "Mediation Order"), RE 1461, Page ID ## 24002–24017.

COUNTER-STATEMENT OF ISSUES FOR REVIEW

1. The Dow Corning[1] Amended Joint Plan of Reorganization (the "Plan") dictates a detailed and specific process for evaluating, processing, and paying claims submitted by settling breast implant claimants that requires an individual review of each claim to determine whether the claim is eligible for payment. Korean Claimants seek to enforce an unsigned draft memorandum of understanding that proposes an alternative claims resolution process, namely a global settlement of claims, that is prohibited by the Plan. Even if the proposed alternative claims resolution process was viable under the Plan, there was no intention for the unsigned draft document to bind the parties until it was in final form and approved by all necessary parties, including the Finance Committee and the district court. Did the district court abuse its discretion by denying Korean Claimants' request to enforce an unsigned draft memorandum of understanding whose terms violated the Plan?

2. As a general rule, this Court will decline to consider arguments that were not raised before the district court in the first instance absent exceptional circumstances. Korean Claimants have asserted three new arguments on appeal to challenge the district court's finding that the Finance Committee lacked authority

[1] Dow Corning Corporation changed its name to Dow Silicones Corporation, effective February 1, 2018. For the Court's and parties' convenience, the Finance Committee will still refer to Dow Silicones as Dow Corning.

to execute a purported settlement agreement that Korean Claimants could have presented to the district court, but failed to do so. These arguments also fail as a matter of law. Do exceptional circumstances exist to warrant this Court's consideration of Korean Claimants' arguments raised for the first time on appeal?

INTRODUCTION

This appeal arises out of the district court's order which denied the Korean Claimants' motion to enforce an unsigned draft memorandum of understanding that was neither permissible under the clear terms of the Plan nor enforceable under well-established contract principles. The Korean Claimants are a group of claimants from South Korea who have elected to participate in the settlement program set forth under the Plan. The Settlement Facility-Dow Corning Trust ("Settlement Facility") is a settlement trust established to oversee and manage the Plan's settlement program. The settlement program was established to compensate individuals with eligible claims who have suffered a qualifying injury due to their use of silicone breast implants manufactured by Dow Corning. To ensure that only those with eligible claims receive payment, the Plan dictates a detailed and specific claims resolution process that requires the individual review of claims. The Plan does not authorize any other claims resolution process.

In their motion, the Korean Claimants belatedly sought to compel the Settlement Facility to pay $5 million pursuant to a draft memorandum of understanding that was never fully executed or approved by all necessary parties, including the district court. The draft document proposed to pay counsel for Korean Claimants a lump-sum settlement amount to resolve over 2,500 claims that had not been reviewed under the Plan's exclusive eligibility criteria to determine

whether each included claim could be properly paid. This proposed ad hoc global settlement of claims was in clear violation of the Plan's terms and otherwise unenforceable under well-established principles of contract law. Moreover, the Settlement Facility has since processed and paid pursuant to the normal procedure almost all of the claims that the draft memorandum of understanding proposed to resolve. The district court's decision not to enforce the unsigned draft memorandum of understanding was not an abuse of discretion. Appellee the Finance Committee therefore respectfully requests that this Court affirm the district court's order.

STATEMENT OF THE CASE

A. Background

This Court has discussed the history of Dow Corning's bankruptcy proceedings and Plan on multiple occasions. *See, e.g., In re Settlement Facility Dow Corning Trust,* 592 F. App'x 473, 475–76 (6th Cir. 2015); *Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, 628 F.3d 769, 771 (6th Cir. 2010); *In re Dow Corning Corp.*, 456 F.3d 668, 671–73 (6th Cir. 2006); *In re Dow Corning Corp.*, 86 F.3d 482, 485–87 (6th Cir. 1996). Recently, this Court addressed the Settlement Facility's over 13-year history reviewing, evaluating, and resolving claims, pursued by counsel for Korean Claimants, Mr. Yeon Ho-Kim ("Korean Claims"). *In re Settlement Facility Dow*

Corning Trust, 760 F. App'x 406 (6th Cir. 2019). Thus, the Finance Committee describes only the facts relevant to the instant appeal.

B. Dow Corning's Amended Joint Plan of Reorganization

On May 15, 1995, Dow Corning filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Michigan. On November 30, 1999, the district court entered the Order confirming the Plan of Reorganization of Dow Corning Corporation ("the Confirmation Order"), and on June 1, 2004, the Plan became effective. Pursuant to the Plan and the Confirmation Order, the Settlement Facility and Fund Distribution Agreement ("SFA") became effective on June 1, 2004.

Under the Plan, holders of breast implant claims may either litigate their claims with the Litigation Facility or settle their claims with the Settlement Facility. Claimants who elect settlement may seek and receive compensation for up to three payment options: (1) an explant payment to offset costs incurred to remove a Dow Corning implant; (2) a rupture payment to compensate claimants whose Dow Corning implant ruptured while implanted; and (3) either a disease payment to compensate claimants who suffer from a qualifying disease or an expedited release payment to compensate claimants who choose to forego a disease

payment and release any qualifying disease claim. SFA § 6.01(a), Page ID # 19532.[2]

The Plan divides claims and interest into 33 classes and subclasses. Plan § 3.2, Page ID ## 19413–14. Foreign Claimants—such as the Korean Claimants—are members of either Class 6.1 or 6.2, and are eligible to receive between 35% or 60% of the amounts paid to domestic payments, depending on the gross domestic product of the Foreign Claimant's country of origin. Annex A to the SFA, § 6.05(h), Page ID # 19601; Schedule III, Page ID # 19670.

The SFA and the Dow Corning Settlement Program and Claims Resolution Procedures, Annex A to the SFA ("Annex A," and together with the SFA, the "Claims Resolution Procedures") establish specific guidelines for submitting and processing claims. SFA § 5.01(a), Page ID # 19528. These guidelines require that each claim submitted for participation in the settlement program is eligible before receiving payment. *Id.* To safeguard against payment for ineligible claims, the Plan's claims resolution procedures require that each claim be individually evaluated under the exclusive criteria outlined in the Claims Resolution

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[2] All citations to the Plan, SFA, and Annex A to the SFA (collectively referred to herein as the "Plan") refer to Exhibits A, E–F to *Opposition of Dow Corning Corporation, the Debtor's Representatives, and the Claimants' Advisory Committee to Motion for Recognition and Enforcement of Mediation*, RE 1275, Page ID # 19344-69. Citations to the Plan Documents will include only a citation to the relevant section and Page ID number. All capitalized terms, unless otherwise defined herein, maintain the meanings assigned in the Plan.

Procedures. *Id.* The Plan also requires that each claim eligible for payment is verified to ensure that the claimant receives the allowed amount under the Plan. *Id*. at § 7.02(b), Page ID #19538.

The Settlement Facility's core functions include assuming liability for and resolving claims of Settling Personal Injury Claimants, and distributing funds to claimants with eligible claims. SFA § 2.01, Page ID # 19514. The Settlement Facility also manages the Settlement Fund, which is the sole source for paying eligible claims. SFA § 8.03, Page ID # 19542. The Settlement Fund cannot be used to pay amounts that exceed what is allowed under the Plan, *id.* at § 3.02(a)(ii), Page ID # 19516, or be otherwise used in a manner that is inconsistent with the Plan. *Id.* at § 5.01, Page ID # 19528 & § 7.01(b)(i), Page ID # 19535. Importantly, the district court must approve any distribution from the Settlement Fund for the payment of claims. *Id.* at § 7.02(a)(iii), Page ID # 19538.

The responsibility and authority of the Finance Committee are unequivocally spelled out in the Plan. The Finance Committee is responsible for the financial management of the Settlement Facility. Plan § 1.67, Page ID # 19394. The Finance Committee has no authority to modify the claims resolution process. SFA § 10.06, Page ID # 19545. Instead, the Plan expressly enumerates the Finance Committee's authority, which is limited to administrative oversight of the Settlement Facility. SFA § 4.08(b)-(c), Page ID # 19523–24. The Finance

Committee's limited authority is subject to district court supervision, and the district court must approve certain actions before they can be taken by the Finance Committee. *Id.* In addition, the Finance Committee must first notify the Debtor's Representative and the Claimant's Advisory Committee ("CAC") before it finalizes any decision, recommendation, or action of mutual concern. SFA § 4.08(g), Page ID # 19525.

The Finance Committee is comprised of the Claims Administrator, the Special Master, and the Appeals Judge. Plan § 1.67, Page ID # 19394. The Claims Administrator is responsible for managing and administering the claims resolution process specifically outlined in the Claims Resolution Procedures. SFA § 2.02, Page ID # 19514. To this end, the Claims Administrator is charged with determining whether a claim meets the eligibility criteria for payment and ensuring that qualifying claims are processed, and if eligible, paid, consistent with the Claims Resolution Procedures. *Id.* The Claims Administrator is obligated to ensure that payments are distributed to claimants in accordance with the SFA's terms, SFA § 5.04(b), Page ID # 19531, and she cannot delegate this authority to third-parties absent approval from the Debtor's Representative, CAC, and the district court. SFA § 4.02(e), Page ID # 19519. Further, like the Finance Committee, the Claims Administrator lacks any authority under the Plan to modify the Plan's claims resolution procedures. SFA § 10.06, Page ID # 19545.

The Special Master is appointed by the district court. The Special Master (or the Appeals Judge) may consult with and provide assistance to the Claims Administrator to ensure a fair and efficient operation of the Settlement Facility if requested by the Debtor's Representative or the CAC. SFA § 4.10, Page ID # 19527. Otherwise, the Special Master's duties and obligations are limited to those of a member of the Finance Committee. *See* SFA § 4.08, Page ID ## 19523–26.

C. The Mediation[3]

Counsel for Korean Claimants has filed over 2,500 claims in this Chapter 11 proceeding. Ex. B to *Opposition of Dow Corning Corporation, the Debtor's Representatives and the Claimants' Advisory Committee to Motion for Recognition and Enforcement of Mediation* (hereinafter, "Dow Corning et al. Opposition"), RE 1275-3, Page ID # 19485. In support of most of these claims, counsel for Korean Claimants submitted affirmative statements from implanting physicians attesting to use of a breast implant manufactured by Dow Corning for the claimant's breast implant procedure—one of the threshold eligibility requirements for payment of their claims. Ex. J to *Motion for Reversal of Decision of SFDCT Regarding*

[3] In their brief, Korean Claimants recite numerous facts concerning the mediation that are outside the record of this appeal. *See* Korean Claimants Br. at 16–17. These facts should not be considered. *See Berger v. Medina Cty. Ohio Bd. of Cty. Comm'r*, 295 F. App'x 42, 46 (6th Cir. 2008) ("This court does not consider non-record materials.").

Korean Claimants ("Motion for Reversal"), RE 810-10, Page ID ## 12329–30. The Settlement Facility accepted these affirmative statements in lieu of hospital records and other preferred methods of proof of manufacturer based on counsel's representation that Korean hospitals and physicians destroyed such records after 10 years as permitted by Korean law. *Id.*

The Settlement Facility later learned, based on counsel for the Korean Claimants own words, that his representations concerning the destruction of Korean medical records were not true and that he had submitted unreliable documentation to support Korean Claims. *Id.* The Claims Administrator decided to place an administrative hold on Korean Claims and to conduct an in-depth review and investigation into these claims. Ex. B to *Dow Corning et al. Opposition*, RE 1275-3, Page ID # 19484. The Settlement Facility also determined that it would no longer accept affirmative statements as proof of manufacturer for Korean Claims that had not been filed; and that the Korean Claims that had been filed and paid based on affirmative statements were not eligible for further payments—including Premium Payments. Ex. J to *Motion for Reversal*, RE 810-10, Page ID ## 12329–30. The Claims Administrator advised counsel for Korean Claimants of these and other decisions in a letter on August 22, 2011. *Id.*

On September 26, 2011, in response to the August 22 letter, Korean Claimants filed the Motion for Reversal. *Motion for Reversal*, RE 810, Page ID

12286–12301. Though styled as a "motion," the Korean Claimants sought to appeal the Claims Administrator's adverse claim decisions to the district court, which was barred under the Plan's terms. *See* Annex A, Article VIII, Page ID # 19615–16.

On August 9, 2012, while the Motion for Reversal was still pending, Ms. Ann Phillips, the Claims Administrator, Mr. David Austern, the former Claims Administrator,[4] and counsel for Korean Claimants participated in a mediation in an effort to resolve the issues raised by the Motion for Reversal. *Motion for Recognition and Enforcement of Mediation* (hereinafter, the "Mediation Motion"), RE 1271-1, Page ID ## 19289–95; 19308. Mr. Francis McGovern, the Special Master, acted as the mediator. *Id.* The Appeals Judge did not participate.

Over a month later, on September 28, 2012, Mr. Austern sent counsel for Korean Claimants an email attaching a draft memorandum of understanding and release. Ex. 4 to *Mediation Motion*, RE 1271-1, Page ID ## 19312–18. The memorandum of understanding is conspicuously marked "**DRAFT**" on the front page. *Id.* In his cover email to counsel for Korean Claimants, Mr. Austern advised counsel for Korean Claimants that the memorandum of understanding "HAS NOT BEEN APPROVED IN FINAL FORM BY THE FINANCE COMMITTEE." *Id.*

[4] As the former Claims Administrator, Mr. Austern was not a member of the Finance Committee.

at # 19312 (emphasis in original). Mr. Austern also noted that the draft memorandum of understanding had been edited and requested that counsel provide any comments to the document. *Id.* The draft memorandum of understanding proposed that the Settlement Facility would pay counsel for Korean Claimants $5 million in exchange for a release of Korean Claims. *Id.* at ¶ A, # 19316. The draft document contemplated that counsel for Korean Claimants would be responsible for dividing funds and then distributing these funds to Korean Claimants. *Id.* at ¶ C, # 19314.

All parties knew or should have known that the CAC and Debtor's Representative would need to consent to any proposed global settlement of claims; that any such settlement would require ultimate approval from the district court before it could be an enforceable agreement; and that a modification to the Plan would be required to allow the alternative claims resolution process contemplated by the proposed settlement. *See. e.g.,* SFA §§ 4.01, 4.02(a), 4.08(b), Page ID ## 19517–18, 19523 (requiring district court approval); SFA § 4.08(g), Page ID # 19525 (requiring CAC and Debtor's Representative approval); SFA § 10.06, Page ID # 19545 (permitting Plan modifications under certain circumstances).

Although the parties continued to discuss the draft memorandum of understanding after the mediation, the draft document was never signed by the Finance Committee or approved by any necessary party, and was ultimately

abandoned. *See* Ex. 12 to *Mediation Motion*, RE 1271-1, Page ID # 19334 (counsel for Korean Claimants acknowledging that the "previous mediation failed to be implemented"). Subsequently, on January 17, 2014, the Settlement Facility reversed its prior decision on accepting affirmative statements for Korean Claims, and resumed reviewing and processing Korean Claims on a claim-by-claim basis in accordance with the Plan's terms. Ex. B to *Dow Corning et al. Opposition*, RE 1275-3, Page ID # 19485; Ex. 1 to *Joint Motion Suggesting Mootness*, RE 1020-2, Page ID # 17047. The Settlement Facility's subsequent decision mooted many of the issues raised by the Motion for Reversal and addressed in the mediation.[5] Since the mediation, the Settlement Facility has reviewed all but 11 of the Korean Claims that have been submitted, and paid over $3 million to Korean Claimants. Ex. B to *Dow Corning et al. Opposition*, RE 1275-3, Page ID # 19485. As of December 2016, the Settlement Facility has paid Korean Claimants approximately $7.3 million in total. *Id.* In addition, counsel for Korean Claimants filed 160

[5] The district court found that the Motion for Reversal was moot to the extent it challenged the Claims Administrator's decision to place a hold on Korean Claims, and denied to the extent it sought a substantive review of the Claims Administrator's claims decision. RE 1347, Page ID ## 21590-99. This Court affirmed the district court's decision on appeal. *In re Settlement Facility Dow Corning Trust,* 760 F. App'x 406 (6th Cir. 2019).

explant claims after the mediation but before the June 2, 2014 deadline for filing these claims.[6]

D. The Mediation Motion[7]

On December 14, 2016, over four years after the mediation, and almost two years after the Settlement Facility resumed processing the claims which were placed on hold because of the affirmative statement issue, the Korean Claimants filed the Mediation Motion, seeking to resurrect the unapproved, unsigned draft

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[6] Korean Claimants claim that they did not file any explant claims in reliance on the draft memorandum of understanding. This is not true. Korean Claimants have filed 160 explant claims since the mediation but before the June 2, 2014 filing deadline. To correct this misrepresentation, the Finance Committee has filed concurrently with this brief the *Appellee Finance Committee's Motion to Correct Misrepresentation of Appellants, or Alternatively, Motion to Strike Misrepresentation of Appellants*, which attaches the declaration of Ms. Kimberly Smith, Claims Operations Manager, for the Court's consideration.

[7] Korean Claimants discuss two Show Cause Motions that the Finance Committee filed after it became concerned that counsel for Korean Claimants might be (1) negotiating benefits checks but not delivering the proceeds to claimants; and (2) charging claimants attorney's fees in excess of what is permitted under the Plan. *Finance Committee's Motion for Entry of an Order to Show Cause with Respect to Yeon Ho Kim*, RE 1352, Page ID # 21662; *Finance Committee's Motion for Entry of an Order to Show Cause with Respect to Yeon Ho Kim's Excessive Attorney's Fees*, RE 1387, Page ID # 22657. As Korean Claimants acknowledge, however, these motions are currently pending before the district court, and thus, not relevant to this appeal. Korean Claimants sole reason for referencing these irrelevant motions is to claim that the Finance Committee has filed these motions to defame counsel for Korean Claimants. Korean Claimants Br. at 6. This is false. The Finance Committee has instead filed these Show Cause Motions to ensure that settlement funds are distributed consistent with the Plan's terms. Further, neither the Finance Committee nor its members have been manipulated by the CAC or Debtor's Representative in carrying out its obligations under the Plan as alleged by Korean Claimants. *Id.*

memorandum of understanding that the parties previously abandoned. *Mediation Motion*, RE 1271, Page ID ##19277–86. Korean Claimants claimed that the unsigned draft document was an enforceable agreement that the Settlement Facility had breached. *Id.*

The Finance Committee and all of the CAC, Dow Corning, and the Debtor's Representative opposed the Mediation Motion, arguing that the unapproved draft memorandum of understanding was unenforceable, that any global settlement of claims is barred by the Plan's terms and thus could not be achieved absent a modification of the Plan, and that a lump-sum payment to the handful of remaining Korean Claimants would constitute a windfall payment in violation of the Plan's terms. *Finance Committee's Response to Mediation Motion* RE 1274, Page ID ## 19342–43; *Dow Corning et al. Opposition,* RE 1275, Page ID ## 19344–69. The CAC and Dow Corning additionally argued that the putative settlement agreement was unenforceable because the Finance Committee lacked authority to execute any settlement outside the Plan's terms and that the draft agreement failed for lack of consideration given that all but 11 Korean Claims supposedly covered under the alleged agreement had been processed. *Dow Corning et al. Opposition*, RE 1275, Page ID ## 19356–62.

E. The District Court's Order

On December 12, 2018, the district court denied the Mediation Motion. *Mediation Order*, RE 1461, Page ID ## 24002–17. The district court found that the Claims Administrator and Special Master, as members of the Finance Committee, lacked actual or apparent authority under the Plan to enter into settlement negotiations or execute a binding agreement with the Korean Claimants. *Id.* at # 24015. With regard to actual authority, the district court found that the Plan did not authorize the Claims Administrator or Special Master to negotiate settlement or mediation with any claimants and that there is no provision in the Plan for such negotiations. *Id.* Instead, the SFA's provisions require an individual review of claims. *Id.* On the issue of apparent authority, the district court found that apparent authority did not exist because counsel for Korean Claimants is well versed in the Dow Corning bankruptcy proceedings and the Plan and therefore knew or should have known that the Finance Committee members lacked authority to mediate and settle the Korean Claims. *Id.* at # 24016.

On December 17, 2018, the Korean Claimants filed a notice of appeal to challenge the district court's Mediation Order. *Notice of Appeal*, RE 1464, Page ID ## 24039. Appellee the Finance Committee now timely files its response.

SUMMARY OF THE ARGUMENT

The district court properly denied the Korean Claimants' Mediation Motion because it sought to belatedly resurrect and enforce an unsigned draft memorandum of understanding that contemplated an ad hoc global settlement of all Korean Claims that is prohibited by the Plan. The Plan outlines a detailed and specific claims resolution process that requires each claim to be reviewed individually to determine whether the claim is eligible for payment. There are no exceptions. Further, the Plan does not authorize any party to perform any act that is inconsistent with its prescribed claims resolution process. The district court properly found that the Finance Committee lacked authority under the Plan to execute any purported settlement agreement with the Korean Claimants.

Moreover, the parties did not intend for the unsigned draft document to be an enforceable agreement until it obtained all necessary approvals—including one from the district court—and it was signed by both parties. This never happened. The parties ultimately abandoned the proposed global settlement of claims. Since the mediation, the Settlement Facility has processed and paid nearly all of the claims submitted by Korean Claimants, reviewing each claim individually to determine whether it is eligible for payment as required by the Plan.

On appeal, Korean Claimants raise three new arguments that were not presented to the district court: (1) Mr. Austern was the Settlement Facility's

counsel with authority to execute the purported settlement agreement with Korean Claimants; (2) the Settlement Facility is estopped from disclaiming that the Finance Committee had apparent authority because the Settlement Facility failed to repudiate the purported settlement agreement and the Korean Claimants relied on the draft document to their detriment; and (3) the Settlement Facility ratified the draft document because past and present members of the Finance Committee continued to communicate with counsel for Korean Claimants about the draft document after the mediation. These arguments fail as a matter of law, but in any event, by failing to first raise these arguments to the district court for consideration, these arguments are waived on appeal.

STANDARD OF REVIEW

Contrary to Korean Claimants' contention, this Court reviews the district court's denial of the Mediation Motion under the abuse-of-discretion standard. *Therma-Scan, Inc. v. Thermoscan, Inc.*, 217 F.3d 414, 419 (6th Cir. 2000). To the extent the district court made any findings of fact, the clearly erroneous standard applies to such findings. *Id.*

The district court's decision involved interpretation of the Plan's language. *Mediation Order*, RE 1461, Page ID # 24009–16. Where, as here, the district court's interpretation is confined to the Plan documents, without reference to

extrinsic evidence, this Court conducts a *de novo* review. *Settlement Facility Dow Corning Trust*, 592 F. App'x at 478.

The formation and enforceability of a purported settlement agreement is governed by state contract law. *See Bamerilease Capital Corp. v. Nearburg*, 958 F.2d 150, 152 (6th Cir. 1992). It is undisputed that New York state law applies. *See* Plan § 6.13, Page ID # 19439; SFA § 10.07, Page ID # 19546.

ARGUMENT

A. The Unsigned Draft Memorandum of Understanding is Unenforceable Because it Violates the Plan's Clear and Unambiguous Terms.

Korean Claimants seek to enforce an unsigned draft memorandum of understanding that would circumvent the Plan-prescribed process for reviewing and resolving eligible claims and could result in Korean Claimants receiving compensation that is well in excess of the amounts allowed under the Plan. In short, Korean Claimants request relief that is plainly barred by the Plan's clear and unambiguous terms that must be denied.

The draft memorandum of understanding is unenforceable under the Plan for three primary reasons. First, the proposed bulk resolution of claims that were not individually reviewed to determine whether the claim is eligible for payment is in direct violation of the Plan. The Plan provides the exclusive criteria for evaluating the eligibility of settling breast-implant claims and distributing funds to claimants

with eligible claims. SFA § 5.01, Page ID # 19528. The Claims Administrator is obligated to review claims on an individual, claim-by-claim basis to ensure that only eligible claims that meet the detailed and specific Plan-prescribed criteria receive payment. *See id.*; *see also* Annex A, § 5.01, Page ID # 19568–69. As the district court correctly found, there are no exceptions and no provisions in the Plan that allow the Claims Administrator to deviate from the claims resolution procedure dictated by the Plan. Thus, the proposed global resolution of claims that were not individually scrutinized under the Plan's exclusive criteria violated the Plan's terms.

Second, the draft memorandum contemplated delegating to the Korean Claimants' counsel one of the Claims Administrator's core claims-processing functions: the distribution of settlement funds to eligible claimants. Ex. 5, ¶ C to *Mediation Motion*, 1271-1, Page ID # 19314. The Claims Administrator cannot delegate this or any other claims-processing function to a third party without the consent of the Debtor's Representative, the CAC, and the approval of the district court, none of which occurred. SFA § 4.02(e), Page ID # 19519. The unapproved, and therefore impermissible, delegation of one of the Claims Administrator's central responsibilities is in direct violation of the Plan's terms and serves as yet another basis for declaring the draft memorandum of understanding unenforceable under the Plan.

Third, enforcement of the draft memorandum of understanding would result in millions of dollars[8] being paid to a small handful of Korean Claimants. As of over three years ago, all but 11 of the 2,547 claims proposed to be covered by the draft memorandum of understanding that were filed have been reviewed and paid if eligible. Ex. 1 to *Dow Corning et al. Opposition*, RE 1275-3, Page ID #19485. Payment of millions of dollars to Korean Claimants at this point—after they have already received $7.3 million in claims payments—would be used to: (1) pay the 11 remaining claims that were in the review process as of three years ago; (2) provide additional payments to Korean Claimants who have already received their allowed compensation under the Plan; (3) pay claims that the Settlement Facility determined were ineligible under the Plan; or (4) pay claims that were never submitted to the Settlement Facility for evaluation. *See id.* None of these uses of funds are permitted under the Plan. *See* SFA § 5.01, Page ID # 19528; § 7.01(b)(i), Page ID # 19535–36. To the extent that the Korean Claimants would receive more under this proposed alternative claims resolution procedure than other Foreign Claimants would receive under the Plan, such disparate treatment would also

[8] Although the draft memorandum of understanding contemplated a payment of five million dollars, counsel for Korean Claimants has reduced his claimed amount to two million dollars. *See Hearing Tr.*, RE 1421, Page ID # 23845. Regardless of whether Korean Claimants seek five million dollars or two million, any payment of funds outside of the Plan's specific and detailed claims resolution procedure is precluded under the Plan.

violate one of the central tenets of federal bankruptcy law. *See* 11 U.S.C. § 1123(a)(4) (requiring bankruptcy plans 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"). Finally, and importantly, any distribution of assets from the Settlement Fund would require district court approval. SFA § 7.02(a)(iii), Page ID # 19538. That approval was never obtained and it is highly unlikely that the district court would approve the distribution of funds pursuant to an alternative claims resolution procedure that violates the Plan's terms.

To bring the alternative claims resolution procedure proposed in the draft memorandum of understanding in line with the Plan would require a modification to the Plan's terms mere months before the Plan's June 3, 2019 claims filing deadline. Any attempt to modify the Plan's exclusive and binding claims resolution procedures would fail as a matter of law. Indeed, the Bankruptcy Code precludes modification of a substantially consummated bankruptcy plan, especially where, as here, the modification could result in the disparate treatment of similarly situated claims that section 1123(a)(4) of the Code precludes. *See* 11 U.S.C. § 1127(b) ("The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan *and before substantial consummation of such plan*, *but may not modify such plan so that such plan as*

modified fails to meet the requirements of sections 1122 and 1123 of this title." (emphasis added)).[9] The Plan—now almost 15 years past its effective date—has been substantially consummated. *See* 11 U.S.C. § 1101 (substantial consummation occurs when there has been "transfer of all or substantially all of the property proposed by the plan to be transferred; assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and commencement of distribution under the plan."). Further, as this Court has recognized, "the district court ha[s] no authority to modify the Plan, equitable or otherwise." *In re Clark-James*, No. 08–1633, 2009 WL 9532581, at *2 (6th Cir. Aug. 6, 2009).

In their opening brief, Korean Claimants do nothing to dispute the fact that the alternative claims resolution procedure proposed by the draft memorandum of understanding is barred by the Plan's plain and unambiguous terms—nor could they. The Plan speaks clearly for itself: The exclusive and binding claims resolution procedure requires the Claims Administrator to review each submitted claim on an individual basis to make an eligibility determination. Only claims that have been deemed eligible under the Plan-prescribed criteria can be paid and the Claims Administrator is obligated to ensure that funds are distributed consistent

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[9] Even if the Plan was not substantially consummated, the Korean Claimants are not "plan proponents," and thus could not seek any modification of the Plan. *See* 11 U.S.C. § 1127(b); Plan § 1.138, Page ID # 19405.

with the Plan's terms. There are no exceptions. The draft memorandum of understanding cannot be enforced in light of the substantially consummated Plan's clear and binding terms.

B. Neither the Mediation nor the Unsigned Draft Memorandum of Understanding Created a Binding Agreement Because the Plan Does Not Authorize any Party to Enter into an Agreement that Violates its Terms.

The district court properly found that the Finance Committee lacked actual or apparent authority under the Plan to negotiate or execute a purported settlement agreement with the Korean Claimants. *Mediation Order*, RE 1461, Page ID #24015–16.[10] To be an enforceable agreement under New York law, both parties must have authority—actual or apparent—to sign the agreement. *See Local 798 Realty Corp. v. W. Condo.*, 866 N.Y.S.2d 51, 52 (N.Y. App. Div. 2008) (declaring lease agreements and contracts void where purported agent lacked authority to contract on building owner's behalf); *1230 Park Assocs., LLC v. N. Source, LLC*, 852 N.Y.S.2d 92, 93 (N.Y. App. Div. 2008) (holding that loan transactions were null and void because part owner lacked actual or apparent authority to enter into the transactions under the business's operating agreement and bank took no steps to assure itself that the owner had the required authority).

[10] Korean Claimants assert that the agency argument was not briefed or argued before the district court. Korean Claimants Br. at 8. This assertion is incorrect. *See Dow Corning et al. Opposition*, RE 1275, Page ID ## 19356–60; and *Hearing Tr.* RE 1421, Page ID ## 23879–80.

Actual authority is the authority that a principal confers on its agent through "direct manifestations," including those communicated through a formal agreement governing the parties' relationship. *See Peltz v. SHB Commodities, Inc.*, 115 F.3d 1082, 1088 (2d Cir. 1997) (applying New York law). Apparent authority exists when the principal's words or actions cause a third party to reasonably believe that the principal has conferred authority on its agent. *See Standard Funding Corp. v. Lewitt*, 89 N.Y.2d 546, 551 (1997). "[A]n agent cannot, through his own acts, cloak himself with apparent authority." *1230 Park Assocs.*, 852 N.Y.S.2d at 93. "This rules holds especially true where a party fails to conduct a reasonable inquiry into the scope of the purported agent's authority." *Id.*; *see also Ford v. Unity Hosp.,* 32 N.Y.2d 464, 472 (1973) ("One who deals with an agent does so at his peril, and must make the necessary effort to discover the actual scope of authority." (citation omitted)). Where, as in this case, a party's reliance on any purported apparent authority is inconsistent with the known terms of a contract, such reliance is ineffective to bind the principal. *Van Arsdale v. Metro. Title Guar. Co.*, 425 N.Y.S.2d 482, 484 (Dist. Ct. 1980) (citation omitted).

Korean Claimants' argument that two members of the Finance Committee possessed actual authority to execute the purported settlement agreement is foreclosed by the Plan's terms. As discussed above, the Plan requires an individual, claim-by-claim analysis to determine whether a claim satisfies the

exclusive eligibility requirements outlined in the Plan. SFA § 5.01, Page ID # 19528; Annex A, § 5.01, Page ID # 19568–69. The Plan further requires that each claim be certified for payment so that correct payments are issued. *Id.* at § 7.02(b), Page ID # 19538. The Finance Committee is not authorized to take any action that falls outside of the Plan's clear dictates. To the contrary, the Plan requires that any action taken by the Finance Committee or its individual members must be in accordance with the Plan's terms. *See, e.g.,* Annex A, Preamble, Page ID # 19563 ("The Claims Administrator will administer these Claims Resolution Procedures consistent with the [SFA]"); Annex A § 7.02(g), Page ID # 19604 ("The Claims Administrator will distribute payment in accordance with the [SFA]"). There are no exceptions. Thus, members of the Finance Committee lacked actual authority to enter into any purported settlement agreement with the Korean Claimants. *See Lewitt*, 89 N.Y.2d at 549–550 (holding that insurance agent lacked actual authority to bind insurer where nothing in the agency agreement authorized the agent to negotiate or enter into premium financing arrangements on insurer's behalf); *see also 1230 Park Assocs.*, 852 N.Y.S.2d at 93.

Korean Claimants admit that "there is no provision for the Finance Committee's power about settlements with Settling Personal Injury Claimants." Korean Claimant Br. at 44. Despite this admission, Korean Claimants maintain that the Finance Committee possessed actual authority under the Plan. Korean

Claimants Br. at 42–45. This argument, however, is based on Korean Claimants' misinterpretation of the SFA and their impermissible attempt to read favorable terms into the Plan. Citing section 4.08(b)(ii) of the SFA, Korean Claimants argue that the Finance Committee's actual authority should be implied based on its ability to review proposed settlements of Non-Settling Personal Injury Claims. *Id.* at 44. But this provision concerns the Finance Committee's responsibilities related to managing the pool of money dedicated to resolving *litigation claims*, and is irrelevant to the present dispute. *See* SFA § 4.08(b)(ii), Page ID # 19523–24.

Korean Claimants also attempt to read new language into the Plan that would permit "negotiations and mediation for disputes arising from processing the Claims with the Claimants." Korean Claimants Br. at 44. However, it is axiomatic that Korean Claimants cannot use these judicial proceedings to manufacture new terms to include in the Plan. *See Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 557 (6th Cir. 1998) (en banc) (observing "the basic principle of contract law that courts are not permitted to rewrite contracts by adding additional terms"). Fundamental tenets of contract law also foreclose Korean Claimants' invitation to ignore the Plan's plain language prohibiting any deviation from the individual review process to focus on the fact that the Plan does not specifically preclude mediations. *See W.W.W. Assocs., Inc. v. Giancontieri*, 566 N.E.2d 639, 642 (N.Y. 1990) ("A familiar and eminently sensible proposition of law is that, when parties set down

their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms."). All of Korean Claimants' arguments offered to support that the Finance Committee possessed actual authority collapse under the Plan's clear and unambiguous terms and black letter contract law.

Korean Claimants' arguments to support apparent authority suffer a similar fate. Indeed, Korean Claimants' knowledge of the Plan's plain and unambiguous terms is fatal to their claim that the Finance Committee had apparent authority to enter into any alleged settlement agreement. *See* Korean Claimants Br. at 48–54. As both the district court and this Court have observed, counsel for Korean Claimants is familiar with the Dow Corning bankruptcy proceedings, including pre-confirmation negotiations and the Plan's ultimate confirmation, the Plan's terms, and the mechanism outlined in the Plan for processing claims. *See Mediation Order*, RE 1461, Page ID # 24016; *In re Settlement Facility Dow Corning Trust*, 670 F. App'x 887, 889 (6th Cir. 2016). In fact, counsel for Korean Claimants has admitted his familiarity with the Plan, the bankruptcy proceedings, and federal bankruptcy law. *See Hearing Tr.*, RE 1421, Page ID # 23850; *see also* Ex 2 to *Mediation Motion*, RE 1271-1, Page ID # 19298–19306. And for well over a decade, counsel for Korean Claimants has interacted with the Claims Administrator and members of the Settlement Facility's staff to address issues with claims submitted by Korean Claimants under the Plan's terms. *See* Korean

Claimants Brief at 40 (acknowledging that counsel for Korean Claimants had experience with negotiating and settling claims-processing issues with the Settlement Facility); Ex. C to *Motion for Reversal*, RE 810-3, Page ID ## 12308–09.[11] Based on the foregoing, Korean Claimants—through their attorney of record—knew or should have known that a global settlement of claims was not permitted by the Plan and that executing the purported global settlement was outside the scope of authority granted to the Finance Committee under the Plan. *See Sphere Drake Ins. Ltd. v. Claredon Nat. Ins. Co.*, 263 F.3d 26, 33 (2d Cir. 2001) (no apparent authority existed where insurer knew or should have known that agent did not have authority to bind reinsurer based on insurer's receipt of the binding authority outlining the scope of the agent's authority); *Scientific Holding Co. Ltd. v. Plessey, Inc.*, 510 F.2d 15, 24 (2d. Cir. 1974) ("It is an accepted principle of the law of agency that a person with notice of a limitation which has been placed on an agent's authority cannot subject the principal to liability upon a

[11] Korean Claimants appear to suggest that their counsel reasonably believed that the Claims Administrator had "plenary powers" under the Plan, including the power to execute an ad hoc settlement agreement, based on the Claims Administrator's decision not to accept affirmative statements as proof of manufacturer after concerns arose that such statements were unreliable. Korean Claimants Br. at 53. However, Korean Claimants ignore the fact that the Claims Administrator's decision was not based on any so-called "plenary power," but rather rooted in the Plan's clear mandate that the Claims Administrator ensure that all claims are supported by acceptable forms of proof and otherwise eligible for payment. *See* SFA § 5.04(b), Page ID # 19531; Annex A § 5.01(f), Page ID # 19569.

transaction with the agent if he knows or should know that it is outside the scope of the agent's authority."). Counsel for Korean Claimants' plea of ignorance rings hollow.

The district court did not err. The Finance Committee lacked authority under the Plan to negotiate or execute an ad hoc settlement that violates the Plan's terms.

C. The Draft Memorandum of Understanding is Unenforceable Because Both Parties did not Sign the Draft Document as Intended and the Parties Failed to Secure all Necessary Approvals.

Korean Claimants recite at length the alleged facts surrounding the mediation—many of which fall outside of the record—yet fail to present any argument that a valid agreement existed between the parties, relying instead on conclusory contentions. *See* Korean Claimants Br. at 42. Consequently, the Korean Claimants have waived this issue on appeal. *See Barrett v. Detroit Heading, LLC*, 311 F. App'x 779, 796 (6th Cir. 2009) (concluding "because [appellant] failed to identify . . . an issue in its 'statement of the issues presented for review,' we deem it waived"); *Dog Pound, LLC v. City of Monroe, Mich.*, 558 F. App'x 589, 593 (6th Cir. 2014) ("[T]he appellant is required to articulate an argument in support of its claim in its opening brief in order to preserve that claim

on appeal." (relying on Fed. R. App. P. 28(a)(8)); *See Marshall v. City of Farmington Hills*, 693 F. App'x 417, 429 (6th Cir. 2017).[12]

In any event, the draft memorandum of understanding is not a valid and enforceable agreement under New York law. For a binding contract to exist, there must be objective manifestations that the parties intended to be bound to the material terms of the transaction—*i.e.*, that there was a "meeting of the minds." *See Express Indus. & Terminal Corp. v. New York State Dep't of Transp.*, 93 N.Y.2d 584, 589 (1999) ("To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." (citation omitted)); *Cent. Fed. Sav., F.S.B. v. Nat'l Westminister Bank, U.S.A.*, 574 N.Y.S.2d 18, 19 (N.Y. App. Div. 1991). As

[12] Similarly, if the Korean Claimants argue in reply (as they suggested in their reply brief to the district court, *Reply to Response of Finance Committee, and Dow Corning Corporation, the Debtor's Representatives and the Claimants' Advisory Committee*, RE 1280, Page ID # 19934) that the parties reached any oral settlement agreement at the mediation, Korean Claimants have waived such argument by failing to raise it in their opening brief. *See Kuhn v. Washtenaw Cty.*, 709 F.3d 612, 624 (6th Cir. 2013) ("This court has consistently held that arguments not raised in a party's opening brief, as well as arguments adverted to in only a perfunctory manner, are waived." (citation omitted)). Further, any argument that the parties reached an oral settlement agreement at the mediation would fail as a matter of law. Under New York law, settlements are unenforceable unless made in open court, written and subscribed, or reduced to a court order and entered. *See Bartley v. Fed. Exp. Corp.*, 683 N.Y.S.2d 737, 738 (N.Y. Sup. Ct. 1998) (citing C.P.L.R. § 2104). Because none of these statutorily required actions occurred, any oral settlement agreement is unenforceable. *See id.* (holding that oral settlement agreement made during a mediation was unenforceable).

a general rule, "the parties' intent . . . is generally discerned from the four corners of the document itself." *IDT Corp. v. Tyco Grp., S.A.R.L.*, 13 N.Y.3d 209, 214 (2009). "It is well settled that, if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed." *Scheck v. Francis*, 260 N.E.2d 493, 494 (N.Y. 1970). Where, as here, an agreement requires future approval, "there is a strong presumption against finding a binding and enforceable obligation." *Carmon v. Soleh Boneh Ltd.*, 614 N.Y.S.2d 555, 556 (N.Y. App. Div. 1994).

Here, the parties' words and actions demonstrate that there was no objective manifestation of any intent to be bound to the draft memorandum of understanding. The draft document is titled "memorandum of understanding," which by its terms is a "non-committal writing preliminary to a contract." Black's Law Dictionary (10th ed. 2014) (defining by reference to "letter of intent"). In addition, the fact that the first page of the memorandum of understanding is conspicuously marked "**DRAFT**"—bolded, underlined, and in all caps—weighs heavily against a finding that a binding agreement exists. *Cf. Prospect Street Ventures I, LLC v. Eclipsys Solutions Corp.*, 804 N.Y.S.2d 301, 302 (N.Y. App. Div. 2005) ("The intent not to be bound is also manifested in the references in the letter to a 'proposed' commitment and a 'proposed' transaction."). And as some courts have found, the

inclusion of signature lines in the draft document indicated that the parties did not intend to be bound until all necessary parties signed the agreement. *See, e.g, Lightwave Techs., Inc. v. Corning Glass Works*, 725 F. Supp. 198, 200 (S.D.N.Y. 1989). All of these facts, apparent from the face of the draft document, militate against the conclusion that it is a binding and enforceable agreement. *See Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.,* 46 A.D.3d 530, 531 (N.Y. App. Div. 2007) (holding that an unsigned draft agreement did not support a finding that the parties intended to be bound absent a fully executed formal agreement).

Furthermore, Korean Claimants knew that any putative settlement agreement would require multiple approvals before any formal execution. In his cover email to counsel for Korean Claimants, Mr. Austern advised that the draft memorandum of understanding "HAS NOT BEEN APPROVED IN FINAL FORM BY THE FINANCE COMMITTEE," RE 1271-1, Page ID # 19312 (emphasis in original), manifesting the intent not to be bound until this necessary approval was obtained. Korean Claimants admittedly knew that any purported settlement agreement would also require district court approval as required under the Plan—which the Claims Administrator confirmed in subsequent communications. *See* Korean Claimants Br. at 46 (acknowledging that releases of settlement funds are subject to the district court's approval); Ex. 18 *to Korean Claimants Response to Mootness Motion*, RE 1025-18, Page ID # 17291 ("As we have made clear, the documents you provided

will be submitted to Judge Hood for approval."); *see. e.g.,* SFA §§ 4.01, 4.02(a), 4.08(b), Page ID ## 19517–18, 19523. In addition, the Debtor's Representative and CAC would need to approve the alleged settlement agreement. SFA § 4.08(g), Page ID # 19525. The parties' known and expressed need to secure all necessary approvals before executing the draft memorandum of understandings cuts sharply against finding that the parties intended to be bound to the draft document. *See Carmon*, 614 N.Y.S.2d at 556; *see also Goldstein v. Solucorp Indus., Ltd.,* No. 11 CIV 6227, 2017 WL 1078739, at *5 (S.D.N.Y. Feb. 10, 2017)*, report and recommendation adopted,* No. 11 CV 6227, 2017 WL 1067792 (S.D.N.Y. Mar. 21, 2017) (finding that board's refusal to approve a proposed settlement agreement was "fatal" to the plaintiffs' subsequent efforts to enforce the agreement).

Korean Claimants have failed to offer any argument with citation to relevant authorities to support concluding that the unsigned draft memorandum of understanding is a valid and enforceable agreement. Accordingly, any such argument has been waived on appeal. *See* Fed. R. App. P. 28(a); *see also Barrett*, 311 F. App'x at 796; *Dog Pound*, 558 F. App'x at 593. Should the Court nevertheless consider Korean Claimants' conclusory contention that the draft memorandum is enforceable under New York law, that contention lacks merit.

D. Korean Claimants' New Arguments Offered to Challenge the District Court's Finding on Authority Lack Merit and Have Been Waived on Appeal.

Korean Claimants make three new arguments for the first time on appeal to enforce the unsigned draft memorandum of understanding. Korean Claimants Br. at 36–42, 54–59. Korean Claimants argue that: (1) Mr. Austern was the Settlement Facility's counsel and was authorized to execute the proposed settlement with counsel for Korean Claimants; (2) the Settlement Facility is estopped from disclaiming the draft memorandum of understanding because it failed to repudiate the draft document and Korean Claimants relied on the document to their detriment; and (3) the Settlement Facility ratified the draft proposed settlement agreement by continuing to discuss the draft document after the mediation. None of these new arguments have any merit, and in any event, the Korean Claimants have waived the arguments on appeal.[13]

[13] Korean Claimants also rely on the district court's statement suggesting that the Claims Administrator and Special Master might have conveyed to the Korean Claimants that they had apparent authority to support their claim that they reasonably believed that the Finance Committee had apparent authority to execute the draft memorandum of understanding. Korean Claimants Br. at 48. But it is the acts of the *principal* with the third party, not those of the purported *agent* that are relevant to the Court's apparent authority analysis. *See 1230 Park Assocs.*, 852 N.Y.S.2d at 93. Further, as a factual matter, there is no evidence in the record to support Korean Claimants' contention that any member of the Finance Committee made any misrepresentations to or deceived their counsel. *See* Korean Claimants Br. at 51. To the contrary, the Finance Committee, particularly the Claims Administrators and their staff, have cooperated with counsel for Korean Claimants

First, Mr. Austern did not have authority to execute any proposed settlement with counsel for Korean Claimants. As a factual matter, Mr. Austern was not the Settlement Facility's counsel and there is no evidence in the record to support Korean Claimants' claim that he attended the mediation in this capacity.[14] At the time of the mediation, Mr. Austern was not a member of the Finance Committee. *See Stipulation to Appoint Ann M. Phillips as Successor Claims Administrator for the Settlement Facility-Dow Corning Trust*, RE 791, Page ID # 11898. Nevertheless, because the law of agency does not apply differently to the attorney-client relationship, any claim that Mr. Austern possessed actual or apparent authority to execute an alleged settlement agreement fails for the same reasons that any claim that members of the Finance Committee possessed such authority fails: the Plan did not authorize anyone to act outside of its exclusive and binding claims resolution procedures and Korean Claimants knew or should have known that Mr. Austern lacked authority to act outside of these terms. *Sphere Drake Ins. Ltd.*, 263

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in good faith to process and resolve any issues with Korean Claims for over a decade. *See, e.g.,* Ex. F to *Motion for Reversal*, RE 810-6, Page ID ## 12317.

[14] Korean Claimants' sole basis for this claim is that Mr. Austern was listed as counsel (along with his District of Columbia bar number) on one pleading: the *Cross-Motion to Dismiss the "Motion for Reversal,"* RE 820, Page ID # 13160–70. However, Mr. Austern was never listed as an attorney of record for the Settlement Facility, and the only document listing him as "counsel" also identifies him as the President of the unrelated Claims Resolution Management Corporation. *See id.* at Page ID # 13162.

F.3d 26 at 33.[15] Further, Korean Claimants claimed reliance on Mr. Austern's conduct during or after the mediation cannot support apparent authority because apparent authority is based on the actions of the *principal* not the *agent*, *see 1230 Park Assocs., LLC*, 852 N.Y.S.2d at 93; and given their familiarity with the Plan's clear terms and authorized claims-processing procedure, any alleged reliance was not reasonable. *Sphere Drake Ins. Ltd.*, 263 F.3d 26 at 33; *See Van Arsdale*, 425 N.Y.S.2d at 484 (citation omitted).

Second, Korean Claimants' new estoppel argument fails as a matter of law. Under New York law, a principal may be estopped from denying apparent authority if: (1) the principal's actions created the appearance that authority was conferred on the agent; (2) the third party reasonably relied on the principal's actions; and (3) the third party detrimentally change its position based on this reliance. *Minksoff v. Am. Exp. Travel Related Servs. Co.,* 98 F.3d 703, 708 (2d Cir. 1996) (applying New York law).

Here again, the Plan's language forecloses any argument that the Finance Committee possessed any authority to agree to an ad hoc global settlement and

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[15] These reasons apply with equal force to Korean Claimants' attempt to analogize the present situation to one involving a president's or other officer's ability to bind a corporation. *Scientific Holding Co. Ltd. v. Plessey, Inc.*, 510 F.2d 15, 24 (2d. Cir. 1974) (applying "well-settled" principles of agency law in considering whether a corporate president had authority to bind the corporation to a contract amendment).

Korean Claimants' knowledge of the Plan's terms dooms any claim that they reasonably relied on any appearance of authority. *See Sphere Drake Ins. Ltd.*, 263 F.3d at 33; *Van Arsdale*, 425 N.Y.S.2d at 484. Also fatal to their claim of estoppel is that the Korean Claimants did not change their position to their detriment based on the proposed draft settlement agreement. The Korean Claimants point to their decision not to submit Explant Claims to support a claim of detrimental reliance.[16] However, Korean Claimants cannot demonstrate detrimental reliance on the purposed global settlement because contrary to their claims, they filed 160 Explant Claims after the mediation but before the June 2, 2014 deadline.[17]

Moreover, Korean Claimants received written notice of the Explant Claims deadline, and counsel for Korean Claimants was well aware of this deadline, receiving both written notice from the Settlement Facility and multiple email confirmations from the Claims Administrator that the filing deadline applied notwithstanding any discussions about the mediation or unexecuted memorandum

[16] Korean Claimants also suggest that their counsel's trip to Washington D.C. for the mediation and publication of the purported settlement agreement was all done in reliance on the draft memorandum of understanding. Korean Claimants Br. at 49. There is no evidence that counsel for Korean Claimants publicized the settlement agreement, but in any event, these actions do not arise to the level of the prejudicial change in position that the law generally seeks to protect. *See Gen. Elec. Capital Corp. v. Armadora S.A.*, 37 F.3d 41, 45–46 (2d. Cir. 1994) (observing that estoppel under New York law requires "a party to change its position to its *substantial* detriment" and finding that a party who relinquished its contractual right satisfied this test (emphasis added)).

[17] *See* discussion *supra* note 5.

of understanding. Ex. 26 *to Korean Claimants Response to Mootness Motion*, RE 1025-26, Page ID # 17309 ("As indicated in the Reminder Notice(s), and in all prior correspondence related to this issue, the deadline for all claimants to file Explant Claims remains: June 2, 2014. I remind you that this deadline is pursuant to the Plan of Reorganization and no extensions will be granted."). Korean Claimants were also aware in January 2014—six months *before* the June filing deadline—that the Settlement Facility had decided to review and process the claims involved in the mediation. App'x C, to Ex. 1 *Joint Motion Suggesting Mootness*, RE 1020-2, Page ID # 17055. Finally, and more broadly, there can be no argument that Korean Claimants suffered any detrimental harm as a result of the putative settlement agreement because since the mediation, the Settlement Facility has processed Korean Claims and paid Korean Claimants over $3 million to fully resolve eligible claims. *See* Ex. B to *Dow Corning et al. Opposition*, RE 1275-3, Page ID # 19485.

Third, Korean Claimants' ratification argument fails because the Settlement Facility could not ratify an action—executing a global settlement of claims outside of the Plan's strict eligibility requirements—that it did not itself have the authority to do. *See N.Y. State Medical Trans. Ass'n v. Perales*, 566 N.E.2d 134, 138 (N.Y. 1990) ("A principal cannot ratify an agent's act that the principal itself could not

have authorized." (citation omitted)). The Plan simply did not authorize any party or entity to take any action inconsistent with its terms.

Moreover, the Settlement Facility did not receive any benefit contemplated in the draft memorandum of understanding—namely, the release of claims and dismissal of pending actions or appeals in U.S. and Korean courts—nor do the Korean Claimants contend that it did. *See La Candelaria E. Harlem Cmty. Ctr., Inc. v. First Am. Title Ins. Co. of New York*, 46 N.Y.S.3d 14, 16 (N.Y. App. Div. 2017) ("[R]atification may be implied where the principal retains the benefit of an unauthorized transaction . . . ."); *Lewitt*, 89 N.Y.2d at 552 (concluding that ratification did not apply where insurer did not receive any premiums or other benefits from the unauthorized financing agreements). Instead, the Settlement Facility, consistent with its obligations under the Plan, individually reviewed claims and paid over $3 million to Korean Claimants after the mediation, *see* Ex. B to *Dow Corning et al. Opposition*, RE 1275-3, Page ID # 19485, and has been forced to litigate the then-pending actions, including the Motion for Reversal that was the predicate for the mediation. *See Settlement Facility Dow Corning Trust,* 760 F. App'x 406. This reinstitution of the status quo demonstrates that the Settlement Facility did not ratify the proposed ad hoc settlement agreement.[18]

[18] Korean Claimants also claim that the parties' ongoing discussions about the draft memorandum of understanding were based on the premise that the Settlement Facility ratified the draft document. Korean Claimants Br. at 58. These

Because the Korean Claimants failed to raise any of these issues for the district court to consider in the first instance, this Court need not consider them on appeal. *See St. Marys Foundry, Inc. v. Emp'r Ins. of Wausau*, 332 F.3d 989, 996 (6th Cir. 2003) ("We exercise our discretion to rule on an issue not decided below only in exceptional cases." (internal quotation marks and citation omitted)); *United States v. Richardson*, 385 F.3d 625, 631 (6th Cir. 2004) ("[C]ourts of appeals generally should decline to consider arguments that were not raised below and were not passed on by the district court."). No exceptional circumstances exist to warrant the Court's consideration of the Korean Claimants new arguments. Korean Claimants had the opportunity to raise these arguments before the district court, but merely failed to do so. *See St. Marys Foundry, Inc.*, 332 F.3d at 996.

None of the Korean Claimants newly raised arguments impugned the district court's finding that no apparent authority existed to create a binding ad hoc

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communications actually vitiate the Korean Claimants' ratification argument because they demonstrate that the Settlement Facility had *not* approved, adopted or accepted the draft document, which would be necessary to support any ratification argument. *See Standard Funding Corp. v. Lewitt*, 89 N.Y.2d 546, 552 (1997) (concluding that there was no express ratification where insurer did not accept or otherwise act on the terms and conditions contained in a contract executed by its unauthorized agent). Moreover, the record does not support Korean Claimants' incorrect assertion that the Mr. Austern or the Claims Administrator continued to request documents from their counsel related to the draft memorandum of understanding after July 2016 as stated in their brief. Korean Claimants Br. at 59.

settlement agreement that violated the Plans terms; but in any event, these new arguments are waived and should be rejected.

CONCLUSION

The district court did not abuse its discretion by denying the Mediation Motion. Accordingly, the Finance Committee respectfully requests that the Court affirm the district court's Mediation Order.

Dated: May 9, 2019.

Respectfully submitted,

SMYSER KAPLAN & VESELKA, LLP

/s/ Karima Maloney
Karima Maloney
Sydney A. Scott
700 Louisiana Street, Suite 2300
Houston, Texas 77002
(713) 221-2300
(713) 221-2320 (Fax)
kmaloney@skv.com
sscott@skv.com

Counsel for Appellee the Finance Committee

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face volume limitation of Rule 32(a)(7)(B) of the Federal Appellate Rules of Procedure. According to Microsoft Word, the word processing program used to prepare this brief, this brief contains 10,150 words.

/s/ Karima G. Maloney
Karima G. Maloney

CERTIFICATE OF SERVICE

I certify that on May 9, 2019, I electronically filed a copy of the foregoing Brief of Appellee the Finance Committee with the Clerk of Court through the Court's electronic filing system, which will send notice and a copy of this brief to all registered counsel in this case.

/s/ Karima G. Maloney
Karima G. Maloney

ADDENDUM DESIGNATING RELEVANT DOCUMENTS
IN THE DISTRICT COURT DOCKET (00-00005)

RE#	DESCRIPTION	PAGE ID #
791	Stipulation to Appoint Ann M. Phillips as Successor Claims Administrator for the Settlement Facility-Dow Corning Trust	11898-11903
810	Motion for Reversal of Decision of SFDCT Regarding Korean Claimants	12286-12301
810-3	Exhibit C to Motion for Reversal of Decision of SFDCT Regarding Korean Claimants	12307-12309
810-6	Exhibit F to Motion for Reversal of Decision of SFDCT Regarding Korean Claimants	12316-12317
810-10	Exhibit J to Motion for Reversal of SF-DCT Regarding Korean Claimants	12328-12344
820	Cross-Motion to Dismiss the "Motion for Reversal" Filed by Yeon-Ho Kim, Esq. of the Decision by the Claims Administrator of the Settlement Facility-Dow Corning Trust	13160-13170
1020-2	Exhibit 1 to Suggestion of Mootness Regarding "Motion For Recategorization Of Korea," "Motion For Reversal Of Decision Of SFDCT Regarding Korean Claimants," And "Motion Of Korean Claimants for the Settlement Facility to Locate Qualified Medical Doctor Of Korea and Either Pay for that Qualified 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"	17045-17056
1025-18	Exhibit 18 to Response 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 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"	17290-17292

RE#	DESCRIPTION	PAGE ID #
1025-26	Exhibit 26 to Response 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 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"	17308-17310
1271	Motion for Recognition and Enforcement of Mediation	19277-19286
1271-1	Exhibits to Motion for Recognition and Enforcement of Mediation	19287-19338
1274	Response to Motion for Recognition and Enforcement of Mediation	19342-19343
1275	Opposition of Dow Corning Corporation, The Debtor's Representatives and The Claimants' Advisory Committee to Motion for Recognition and Enforcement of Mediation	19344-19369
1275-2	Exhibit A to Opposition of Dow Corning Corporation, The Debtor's Representatives and The Claimants' Advisory Committee to Motion for Recognition and Enforcement of Mediation	19371-19482
1275-3	Exhibit B to Opposition of Dow Corning Corporation, The Debtor's Representatives and The Claimants' Advisory Committee to Motion for Recognition and Enforcement of Mediation	19484-19485
1275-6	Exhibit E to Opposition of Dow Corning Corporation, The Debtor's Representatives and The Claimants' Advisory Committee to Motion for Recognition and Enforcement of Mediation	19507-19552
1275-7	Exhibit F to Opposition of Dow Corning Corporation, The Debtor's Representatives and The Claimants' Advisory Committee to Motion for Recognition and Enforcement of Mediation	19553-19670
1280	Reply to Response of Finance Committee, and Dow Corning Corporation, The Debtor's Representatives	19925-19940

RE#	DESCRIPTION	PAGE ID #
	and the Claimants' Advisory Committee	
1347	Order Granting Joint Motion to Render Moot Motions Filed on Behalf of the Korean Claimants	21590-21599
1352	Finance Committee's Motion for Entry of an Order to Show Cause with Respect to Yeon Ho Kim	21662-21670
1387	Finance Committee's Motion for Entry of an Order to Show Cause with Respect to Yeon Ho Kim's Excessive Attorney's Fees	22657-22664
1421	Motions Hearing Transcript	23796-23845
1461	Order Denying Motion for Recognition and Enforcement of Mediation Filed by the Korean Claimants	23994-24001
1461	Order Denying Motion for Recognition and Enforcement of Mediation Filed by the Korean Claimants	24002-24017
1464	Korean Claimants Notice of Appeal	24039