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

Brief of Appellants Korean Claimants

Yeon-Ho Kim

Yeon-Ho Kim International Law Office

Suite 4105, Trade Center Building, 159 Samsung-dong, Kangnam-ku,

Seoul 135-729 Korea

Tel: +82-2-551-1256

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Other Authorities

I. STATEMENT IN SUPPORT OF ORAL ARGUMENT

Korean Claimants filed the Motion for Reversal of the SF-DCT Decisions Regarding Korean Claimants on September 26, 2011 (RE810). Dow Silicones Corporation and Debtor's Representatives filed the Cross-Motion to Dismiss the Motion for Reversal of the SF-DCT Decisions on October 13, 2011 (RE816). The SF-DCT filed the Cross-Motion to Dismiss Motion for Reversal of the SF-DCT Decisions on November 3, 2011 (RE820). Korean Claimants filed the Motion for Re-Categorization on April 7, 2014 (RE969). Dow Silicones Corporation, Debtor's Representatives and Claimants' Advisory Committee filed the Joint Motion for Mootness of Korean Motions on April 24, 2015 (RE1020).

Korean Claimants filed the Motion for Recognition and Enforcement of Mediation on December 14, 2016 (RE1271).

The District Court issued the Order Granting the Joint Motion to Render Moot the Korean Motions and dismissed the Motions for Reversal and Re-Categorization on December 28, 2017.

The Korean Claimants appealed. The Korean Claimants asked this Court that the three Motions (RE810, RE969, RE1271) must be considered together because the Motion for Recognition and Enforcement of Mediation (RE1271) pending the District Court was closely related to with the Motions for Reversal of SFDCT Decision (RE810).

On the other hand, the Finance Committee, the same party which did not respect the settlement agreement, filed Show Cause Motions with the District Court to defame Yeon-Ho Kim. The Finance Committee filed the Motion for Order to Show Cause with respect to Yeon-Ho Kim on January 10, 2018 (RE1352). Yeon-Ho Kim filed the Cross-Motion for Entry of Order to Show Cause with respect to the Finance Committee on January 17, 2018 (RE1357). The District Court issued the Order why Yeon-Ho Kim should not be Sanctioned and Held in Contempt on January 26, 2018 (RE1368). Yeon-Ho Kim filed the Motion for Joinder (RE1371). A Joint Hearing held on March 22, 2018 on January 30, 2018. Korean Claimants filed the Motion for Exclusion of Dow Silicones Corporation and the Claimants' Advisory Committee from the Korean Claimants' Cross-Motion for Entry of Order to Show Cause with respect to the Finance Committee on February 3, 2018 (RE1378). Yeon-Ho Kim knew that Dow Silicones Corporation and the Claimants' Advisory Committee were manipulators behind the Finance Committee. The Finance Committee filed the

Motion for Entry of Order to Show Cause with respect to Yeon-Ho Kim's Excessive Attorney's Fees on March 7, 2018 (RE1387). The District Court issued the Order to Show Cause why Yeon-Ho Kim should not be Sanctioned or Held in Contempt on March 9, 2018 (RE1388). A Hearing was held on March 22, 2018.

The District Court issued the Order Denying the Korean Claimants' Motion for Recognition and Enforcement of Mediation on December 12, 2018 (RE 1461). The Finance Committee's Show Cause Motions are pending the District Court.

The Korean Claimants appealed on December 17, 2018.

This Court dismissed the appeal of the Korean Claimants to the District Court's Order Granting the Mootness of the Korean Motions on January 14, 2019. This Court opined that this Court did not have jurisdiction over the Motion for Recognition and Enforcement of Mediation.

The reason that the counsel for the SF-DCT, the Claims Administrator and the Special Master conducted mediation with Yeon-Ho Kim was to resolve the disputes that the Korean Claimants raised through the Motion for Reversal

of the SF-DCT Decisions filed with the District Court. Therefore, the Motion for Reversal of the SF-DCT Decisions and the Motion for Recognition and Enforcement of Mediation were closely related. This Court dismissed the appeal to the Order Denying the Motion for Reversal of the SF-DCT Decisions without considering the Motion for Recognition and Enforcement of Mediation.

Korean Claimants did not have a chance to be heard of the Motion for Recognition and Enforcement of Mediation by this Court, while the appeal to the Order Denying the Motion for Reversal of the SF-DCT Decisions was pending.

In addition, the reasoning of the District Court in the Order denying the Motion for Recognition and Enforcement of Mediation is based upon the agency theory which has never been briefed and argued in the District Court. The reasoning of the District Court was unexpected by the Appellants. Therefore, the Korean Claimants request this Court to provide an oral argument.

II. STATEMENT OF JURISDICTUION

The United States District Court Eastern District of Michigan has

jurisdiction over the Amended Joint Plan of Reorganization of Dow Corning Corporation effective on June 1, 2004 ("the Plan") to resolve controversies and disputes regarding interpretation and implementation of the Plan and the Plan Documents including the SFA.

On December 12, 2018, the District Court issued an Order Denying the Motion for Recognition and Enforcement of Mediation which was filed with it on December 14, 2016.

Korean Claimants filed this appeal in a timely manner. The Order of the District Court is the final order which cannot be contested in the District Court. Therefore, the United States Court of Appeals for the Sixth Circuit has jurisdiction over this appeal.

III. STATEMENT OF ISSUES

The issues in this case are whether the counsel for the SF-DCT who filed the Cross-Motion to Dismiss the Korean Claimants' Motion for Reversal of the SF-DCT Decisions had the actual authority and the apparent authority to negotiations and the mediation which lead to the settlement agreement executed with the Korean Claimants, and whether the Finance Committee, and the two

specific members of the Finance Committee, the Claims Administrator and the Special Master, as agents of the SF-DCT shall have the actual authority, or the apparent authority, to negotiations and the mediation, and whether the SF-DCT under the Dow Corning Reorganization Plan and the SFA granted the Finance Committee including the Claims Administrator and the Special Master the apparent authority to negotiations and mediation to settle the Korean Claims pending the SF-DCT with the Korean Claimants, and whether Yeon-Ho Kim, the attorney representing the Korean Claimants, knew, or should have known, that the Finance Committee and the two specific members of the Finance Committee, the Claims Administrator and the Special Master, did not have the authority to negotiations and the settlement agreement executed with the Korean Claimants because Yeon-Ho Kim is a lawyer and knew the bankruptcy laws and process well including the Plan and the Documents, and whether the SF-DCT ratified the actions exceeding the scope of the authority of the Finance Committee, and the Claims Administrator and the Special Master.

IV. STATEMENT OF CASE

On February 16, 2001, the District Court issued the Stipulated Order, which was counter-signed by George Tarpley, the counsel for Dow Corning Corporation, and Kenneth Eckstein, the counsel for the Tort Claimants' Committee, to facilitate the orderly transition and implementation of Dow

Corning Settlement Facility under the Plan dated February 4, 1999. (RE.4, Stipulated Order as to the Dow Corning Settlement Facility, Pg ID#8-11)

The Finance Committee was established on an early stage of the SF-DCT. The functions of the Finance Committee was to exercise applicable duties and responsibilities and to take actions necessary and consistent with the Plan Documents in order to ensure an efficient and fair operation of the Settlement Facility as set out in the SFA.

Since the MDL-926 Claims Office was closing and the new settlement facility should be established quickly, the Finance Committee took over the whole tasks for setting up and operating of the SF-DCT.

The Finance Committee was composed of three members, the Claims Administrator, the Special Master, and the Appeals Judge. Therefore, the duties and the functions of the members on their own were overlapped with the duties and the functions of the Finance Committee but it was obvious that the Finance Committee itself and the three members of the Finance Committee each held out to be the agents of the SF-DCT regarding claims processing which was a main purpose of the SF-DCT.

The Korean Claimants submitted the SF-DCT 1,815 POM claim forms to the SF-DCT from 2004-2008 and received Notice of Status letters 1,762 POM claims have been approved by August 14, 2009.

Out of 1,815 POM claims, 1,488 Claimants submitted POM claims on the basis of the Affirmative Statements. (Motion for Reversal of the SF-DCT Decisions, RE810, Pg ID#12317)

On August 14, 2009, the Claims Administrator (Mr. Davis Austern) sent an e-mail to Yeon-Ho Kim, the attorney for the Korean Claimants, as follows;

"With respect to the POM claims you sent, a few observations: We have performed a POM review on 1,815 claims you have submitted. Of these, 1,488 (82%) were based on affirmative statements, a hugely greater number than any other group of claims submitted to us. Nonetheless, we have approved POM for 1,742 of the claims, an approval rate of 97% or approximately 8% higher than the average POM approval rate for all claims submitted to the Facility. (By the way, 274 of the 1,762 approved claims do not have a Claim Form and we will need such a form before further review of these claims) For your records, we show you have also submitted 1,504 Disease Claim Forms, 1,504 Rupture Forms, and 498 Explant Forms. In addition to 1,762 approved POM claims, there are 66 additional claims pending translation. We have approved all but 53 of the affirmative statement basis POMs—after spending one year reviewing them. These 53 claims had certain inconsistencies in the claim files. We did not "take back" the "acceptable" POM determination but we did write to you and request additional information before proceeding with their further review (i.e., disease review). We need further explanation for these claims—and don't forget, we need claim Forms for 274 of the POM approved claims noted above." (RE810, Pg ID#12317)

On August 22, 2011, the **new** Claims Administrator (Mrs. Ann Phillips) sent a letter to Yeon-Ho Kim as follows;

"We can no longer accept your statements that all Korean medical records were destroyed after a ten year period. Note also that for claimants who have yet to file a claim form, no Affirmative Statements will be accepted as proof of manufacture. Of 1,762 Claimants who filed claim forms, **any claimant previously paid based solely on an Affirmative Statement is not eligible for further benefits, including Premium Payments**. A list of those claimants will be sent by the Quality Management Department shortly. Claims where a determination has/will be made that documents have been altered will be removed from processing. Claimants in Class 7, who were implanted outside the date range, do not meet the minimum standards for an eligible Class 7 claim and are therefore not eligible for a review. **As an alternative**, for those claimants on the attached list the Plan allows for **a Limited Proof of Manufacturer Expedited Payment Option**. Some claimants may be eligible to participate in the Class 6.2.3 Payment Option **which provides for a $600 payment for limited proof of manufacturer**. In fairness to you and your clients, please be informed that we intend to consult with Korean attorneys or with Korean government officials concerning the mis-statements you have made to the SF-DCT, as well as your submission of certain medical records which, as you know, we now have proof that the records were altered."(RE810, Pg ID#12330)

On September 26, 2011, Korean Claimants filed the Motion for Reversal of the SF-DCT Decisions with the District Court to seek the following measures:

"(1) the SF-DCT failed to establish separate processing for 6.2 Class (2) The Claims Administrator did not keep promises made to Korean Claimants through the counsel (3) the SF-DCT violated the expectations of the rights of 1,762 Claimants who already received notification letters of POM approval and the expectations or the rights of 660 Claimants who already received the payments and are waiting for premium payments just in case (4) Affirmative Statements of Korean Claimants were not fabricated because they were signed by the

implanting physicians and the form of Affirmative Statement had been approved by the Claims Administrator (5) the SF-DCT abused power and authority because the Claims Administrator canceled all of 1,762 Claimants who received notification letters of POM approval resulting that even the Claimants who never submitted documents older than a ten year period are subject to the cancellation of POM approval" (RE810, Pg ID#12298).

Korean Claimants sought reliefs in that Motion that the SF-DCT's decisions of the Claims Administrator's letter of August 22, 2011 must be reversed. In addition, Korean Claimants claimed that the SF-DCT breached the SFA by failing to establish a separate processing for 6.2 Class and the SF-DCT should restructure the employees of the SF-DCT who were routinely prejudiced to the Korean Claimants.

On October 13, 2011, Dow Silicones Corporation filed the Cross-Motion to Dismiss *the Korean Claimants' Appeal (Styled as Motion for Reversal).* (RE816, Pg ID#12686-12976)

On November 3, 2011, the SF-DCT, through its counsels, Mr. Edward Adams, Jr. and **Mr. David Austern**, filed the Cross-Motion to Dismiss *the Motion for Reversal.* (RE820, Pg ID#13160-13170)

Mr. David Austern retired from the position of the Claims Administrator of the SF-DCT and Mrs. Ann Phillips became the new Claims Administrator

around July 2011 (Response to Joint Motion for Order *Suggesting Mootness re: Korean Motions*, RE1025, Pg ID#17248). The SF-DCT retained Mr. Austern as the counsel representing the SF-DCT's Cross-Motion and he filed the Cross-Motion for the SF-DCT. Mr. Austern acted as the counsel for the SF-DCT until he died of cancer.

While the Korean Claimants' Motion for Reversal of the SF-DCT Decisions and the SF-DCT's Cross-Motion were pending the District Court, Mr. Austern, the counsel for the SF-DCT, proposed Yeon-Ho Kim, the counsel for the Korean Claimants, to mediate the Claims of the Korean Claimants around June 2012. Obviously, Mr. Austern communicated with Mrs. Ann Phillips and Professor Francis McGovern.

Yeon-Ho Kim agreed to the SF-DCT counsel's proposal and also agreed to choose the sole mediator Prof. McGovern, the Special Master. Following the mediator's instructions, Yeon-Ho Kim submitted "Statement of Position" which was identical to the Motion for Reversal of the SF-DCT Decisions to the sole mediator on July 19, 2012. Mrs. Phillips submitted "SF-DCT Response and Position Paper" to the mediator on August 3, 2012. Yeon-Ho Kim submitted "Reply to the SF-DCT Position Paper" to the mediator on August 7, 2012 (Motion for Recognition and Enforcement of Mediation, RE1271, Pg

ID#19287-19306). All papers were copied to the opposing party by e-mail.

The mediation conference was held on the seventh floor of an alternative dispute resolution center building in Washington D.C. at 10:00 am August 10, 2012. Mr. Austern and Mrs. Phillips attended for the SF-DCT and Yeon-Ho Kim attended for the Korean Claimants. Prof. McGovern controlled the conference as the mediator. Arguments of both Parties were made. After listening to both sides, Prof. McGovern arranged a separate meeting each side. Prof. McGovern asked Yeon-Ho Kim how much the Korean Claimants wanted for settlement. Yeon-Ho Kim said that the Korean Claimants wanted 12 million dollars. Prof. McGovern indicated that it was too much and asked Yeon-Ho Kim to leave the room. During separate meeting, Mrs. Phillips made a couple of phonecalls to the SF-DCT Houston Office according to the instruction of Prof. McGovern. After Prof. McGovern had a separate meeting with Mr. Austern and Mrs. Phillips, Prof. McGovern called Yeon-Ho Kim in for another separate meeting. Yeon-Ho Kim asked for 8 million dollars at least but 8 million dollars was not accepted. Prof. McGovern proposed 5 million dollars. He said that it was the maximum that the SF-DCT could propose. Yeon-Ho Kim hesitated to accept it but agreed to 5 million dollars. Prof. McGovern called for a joint meeting. In this final joint meeting, the SF-DCT and the Korean Claimants agreed to 5 million dollars for settlement. Yeon-Ho Kim and Mrs. Austern and Mrs. Phillips

shook hands before Prof. McGovern. Yeon-Ho Kim left the conference room immediately although Hamburg-type food and beverages were set on the side table for lunch.

Before Yeon-Ho Kim left, Mr. Austern promised to deliver the documents of the settlement agreement to the hotel that Yeon-Ho Kim stayed. But Mr. Austern mistook Washington Court Hotel where Yeon-Ho Kim stayed for Washington Court Hotel, a better hotel. Mr. Austern himself came to Washington Hotel and left the documents of the settlement agreement on the front desk. Although Mr. Austern confirmed from the front desk that Yeon-Ho Kim stayed in that hotel, the documents could not be delivered to Yeon-Ho Kim because Yeon-Ho Kim did not stay there. After receiving an inquiry from Yeon-Ho Kim later, Mr. Austern sent an e-mail of September 28, 2012 accompanied with the documents of the settlement agreement titled as "Memorandum of Understanding and the Release". Mr. Austern added in this e-mail, "This Memorandum of Understanding HAS NOT BEEN APPROVED IN FINAL FORM BY THE FINANCE COMMITTEE." (RE1271, Pg ID#19309-19321)

Mr. Austern sent an e-mail of September 29, 2012 accompanied with the list of the Korean Claimants, asking whether the list was same as what Yeon-Ho Kim' s law office kept. This e-mail was copied to Mrs. Ellen Bearicks, the

Quality Control Manager of the SF-DCT, and Mrs. Ann Phillips, the Claims Administrator (RE1271, Pg ID#19320-19321).

Yeon-Ho Kim signed on it and sent the signed version back to Mr. Austern and Mrs. Phillips immediately.

On October 16, 2012, Yeon-Ho Kim sent Mr. Austern and Mrs. Phillips an e-mail, confirming that Yeon-Ho Kim consented to the settlement agreement, and enclosed the Exhibit B, the list of the Korean Claimants, for approval.

Prof. McGovern sent Yeon-Ho Kim an e-mail of October 16, 2012, "Please assist Mr. Kim in any way possible". This e-mail was copied to Mr. Austern and Mrs. Phillips. (RE1271, Pg ID#19322-19323)

Mr.Austern sent an e-mail of October 20, 2012 to Yeon-Ho Kim, saying, "There are certain conditions that must be adhered to pursuant to **our Agreement** before payment can be made. I will explain this in a longer e-mail to follow tomorrow or early next week. This e-mail was copied to Prof. McGovern. (RE1271, Pg ID#19324-19325)

Mr. Austern sent an e-mail of October 21, 2102, saying, "You made a

number of representations in the Agreement. While I believe it would be unfair for the SF-DCT to insist on proof of each representation, we do require you to demonstrate that "…pursuant to Korean law, [you] are authorized to accept the payment described…" in the Agreement (*See* paragraph B of the Memorandum of Understanding). An opinion letter from another Korean counsel or a statement from the authority regulating the conduct of Korean attorneys would be sufficient. You further represented that you would dismiss all pending actions in the United States Courts in order to effectuate the purposes of the Release. No such dismissals have been filed. We do not have a signed (by you) copy of the Memorandum of Understanding or the Release. We will continue to discuss this matter with the Creditors and the CAC, we need the documents referred to above as a first step." This e-mail was copied to Mrs. Phillips and Prof. McGovern. (RE1271, Pg ID#19327)

Yeon-Ho Kim sent Mr. Austern and Mrs. Phillips an e-mail of October 24, 2012, saying that first, an opinion letter from another Korean attorney, whose translation into English was notarized, was enclosed, and second, the draft of Motion for Dismissal regarding Korean Claimants was enclosed and it was asked for comment whether it is O.K. from the standpoints of the SF-DCT, and then it could be filed with the Michigan Eastern District Court immediately, and third, the last pages of signed copy of both Memo of Understanding and

Release that Yeon-Ho Kim had consented to were enclosed. It was copied to Prof. McGovern. Prof. McGovern answered, “Thanks”. Yeon-Ho Kim sent Prof. McGovern an e-mail of October 26, 2012, saying that as the value of US dollars vs. the Korean currency was dwindling, the quicker payment would help the Korean Claimants thus asked him to remind Mr. Austern of what was needed. Prof. McGovern responded, “Done”. This e-mail was copied to Mr. Austern. (Re1271, Pg ID#19329-19330)

Yeon-Ho Kim sent Mr. Austern and Mrs. Phillips an e-mail of November 6, 2012, saying that Yeon-Ho Kim wanted to receive whether they wanted to revise the draft of Motion for Dismissal that Yeon-Ho Kim had sent and once approved, the Motion would be filed with the Court immediately, and then, asked to proceed the steps from mediation as soon as possible. Mrs. Phillips sent Yeon-Ho Kim an e-mail of November 8, 2012, saying, “The Finance Committee did have a conference call regarding the documentation that you provided. The settling parties are now examining the documentation; we will go back with you as soon as discussions are completed. Note also, David Austern has been ill, therefore, most, if not all, future responses may be from me and other members of the Finance Committee.” (Response to Joint Motion for Order *Suggesting Mootness re: Korean Motions*, RE1025, Pg ID#17289)

Mrs. Phillips sent Yeon-Ho Kim an e-mail of November 22, 2012, saying, "The Finance Committee would like to move this matter along, if at all possible, to closure. At issue are the terms of the Memorandum of Understanding and its attached Exhibit A, as compared to the documentation provided and the contents thereof. The Opinion Letter signed by Hong Jung Pyo, fails to meet the language as outlined in the Memorandum because it fails to cite applicable Korean law, under which you are authorized to accept the payment as described in the Memorandum…In addition, the un-filed Motion for Dismissal Regarding Korean Claimants, lacks specific reference to the "Exhibit B" Claimants as well as any reference to the Korean Court in which a similar Motion was (or will be) filed. The Memorandum calls for a similar Motion filing in a Korean Court of competent jurisdiction. We cannot move forward without these assurances…Please let me know if you have any questions. We wait the revised and filed documents." This e-mail was copied to Mr. Austern and Prof. McGovern. (RE1025, Pg ID#17291)

Yeon-Ho Kim sent Mrs. Phillips an e-mail of November 23, 2012, saying, "Pursuant to the requirement of the second and third paragraphs of your e-mail, I enclosed herewith the revised opinion letter from Jung-Pyo Hong. Please advise whether it is acceptable. In addition, you said in the last paragraph of the e-mail as follows……One thing that I should make clear to you is that I have

never filed an action or motion in the Courts of Korea since I participated in Dow Corning Re-Orgarnization Confirmation procedure as of 1995. Thus there is no actions or motions that I am able to file the motion for dismissal…..Further, you said that I will file, in the US Court and Korean Court, any pleadings that are necessary to effectuate the purpose of the Memorandum. However, there is no possible legal action or motion to be filed in Korean Court, whatever type of action is, for the purpose of release SF-DCT because there is no dispute between the Parties (Exhibit B Claimants and SF-DCT) on the settlement agreement is to be signed. Conclusively, there is none of possible way of filing in Korean Court…For these points as above, I enclosed herewith the revised Motion for Dismissal to be filed with the US Court. Please review it and advise me whether it is acceptable…..Please let me have your advice to move forward." This e-mail was copied to Mr. Austern and Prof. McGovern.

Mrs. Phillips sent Yeon-Ho Kim an e-mail of November 24, 2012, saying, "Thank you, Mr. Kim, we appreciate the follow-up; the Facility is on holiday until Monday, we will review and respond as soon as possible." This e-mail was copied to Mr. Austern and Prof. McGovern. (RE1025, Pg ID#17294)

Mrs. Phillips sent an e-mail of January 10, 2013, saying, "I spoke with Professor McGovern who asked that I respond to your e-mail to his attention.

My apologies for the delay, as you may be aware we have been on holidays here in the States and are just getting back on track. The documents you provided have been sent to the parties for comment regarding their sufficiency. After we receive a response I will follow-up with you. I hope to hear something by mid-week of next week. Thank you for your understanding." (RE1025, Pg ID#17296)

Yeon-Ho Kim sent Mrs. Phillips and Mr. Austern and Prof. McGovern an e-mail of March 25, 2013, saying, "It has been over seven months since the mediation conference in Washington D.C. last August. I signed on MOU and the Agreement which has been e-mailed. Then, you added two conditions for payment pursuant to mediation. One is whether I am able to sign on and receive money under Korea law, and the other is that I must file a dismissal with Korean Courts. I could not understand the conditions because they had never been the issues at the mediation conference. If so, you must have raised in the conference. I proposed, however, to meet the conditions in November, 2012. Since then, I sent the several e-mails to ask for prompting your decisions on the propositions. All of you failed to reply. At least, I want to hear the time table for your decision. Particularly, Mrs. Phillips sent an e-mail last January that the responses of the Parties would arrive the following week. I would like all of you to inform what happened to the propositions to me, the courter-party of mediation that you referred to." (RE1025, Pg ID#17298)

Mrs. Phillips sent Yeon-Ho Kim an e-mail of March 27, 2013, saying, "The Finance Committee met yesterday to address this matter. We are exploring other alternatives in light of the fact that the documentation did not meet the agreement in the MOU. We are continuing to discuss this matter with the Parties and should have something to you by the week of April 15." (RE1025, Pg ID#17298)

Yeon-Ho Kim sent Mrs. Phillips an e-mail of May 6, 2013, saying, "I received Notice of Deadline for Filing Explant Claim. I understand that the mediation result is discussed on your side with Mr. Austern and Prof. McGovern. I ask you whether you assume that it is unnecessary to continue or Korean Claimants do not expect it to be respected by SF-DCT. Please let me know your positions."(RE1025, Pg ID#17300)

Mrs. Phillips sent Yeon-Ho Kim an e-mail of May 7, 2013, saying, "As indicated in my earlier e-mail a response is forthcoming. Your continued patience is greatly appreciated. The Explant deadline notice was mailed to all represented and unrepresented claimants to ensure all are aware of the deadline as stated in the Plan." This e-mail was copied to Prof. McGovern. (RE1025, Pg ID#17300)

Yeon-Ho Kim sent Mrs. Phillips an e-mail of June 14, 2013, saying, "I wonder if you are ready to response. If not, please inform me of time schedule that you are projecting, although not fixed." (RE1025, Pg ID#17300)

Mrs. Phillips sent an e-mail of June 15, 2013, saying, "Thank you Mr. Kim, we continue to discuss this matter, you will be provided with a written communication as soon as one is available. Continued apologies for the delay." This e-mail was copied to Prof. McGovern. (RE1025, Pg ID#17300)

Yeon-Ho Kim sent Mrs. Phillips an e-mail of January 7, 2014, saying, "I am waiting for your words for Korean Claimants. In addition, since the deadline for Explantation is approaching, I wonder if it is necessary for the Korean Claimants who are qualified for Explantation Claims to file the Claim Form of Explantation and a supportive operation report with the SF-DCT. The number of qualified Claimants for Explantation ranges from 200 to 300." (RE1025, Pg ID#17302)

Mrs. Phillips sent an e-mail of January 8, 2014, saying, "After review and analysis the SF-DCT has determined to withdraw exclusion previously imposed on your claims with respect to Affirmative Statements. We will review

and process your claims consistent with the Plan of Reorganization. Claims and documents that do not meet Plan requirements for an acceptable level of reliability will be denied. If you dispute the outcome of a claim decision you have the ability to request an Error Correction review. Appeal to the Claims Administrator or the Appeals Judge. As reviews are completed you will be notified in writing regarding the status of each claim. The Explant Claim filing deadline is June 2, 2014." (RE1025, Pg ID#17302)

Mrs. Phillips sent Yeon-Ho Kim an e-mail of February 17, 2014, saying, "As indicated in the Reminder Notice(s), and in all prior correspondence related to this issue, the deadline for all claimants, to file all 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." (RE1025, Pg ID#17309)

Mrs. Phillips sent Yeon-Ho Kim an e-mail of February 19, 2014, saying, "Acceptable Proof of Manufacture is required to be eligible for a review in the Explant Payment Option. Your POM claims will be re-reviewed after the Explant filing deadline to allow you the opportunity to provide all documents available by the Explant filing deadline. Thank you for your cooperation." (RE1025, Pg ID#17309)

On April 7, 2014, Yeon-Ho Kim filed the Motion for Re-Categorization. (RE965, Pg ID#16262-16332). Yeon-Ho Kim discovered by chance that a per-capita GDP of South Korea exceeded sixty (60) percents of a per-capita GDP of the United States of America.

Mrs. Phillips sent Yeon-Ho Kim an e-mail of May 9, 2014, saying, "The issue of a re-categorization request is addressed in Annex A Section 6.05(h)(ii) Adjustment to Categories… In order for your request to be considered it must first be submitted to the Finance Committee. "If the Debtor's Representatives and/or the Claimants' Advisory Committee and/or the Finance Committee do not agree to re-categorization" then you "may file a motion in the District Court seeking re-categorization" Because you have already filed a motion in the District Court, the Plan does not provide for simultaneous review (by the Court and the Claims Administrator) of your request. Therefore, after the matter before the Court is resolved, the process prescribed by the Plan may be considered by the Finance Committee." (RE1025, Pg ID#17312)

Yeon-Ho Kim sent Mrs. Phillips an e-mail of May 12, 2014, saying, "I want to hear whether you are not available for me to see you. Please spare a time for me in May or June."

Mrs. Phillips sent Yeon-Ho Kim an e-mail of May 14, 2014, saying, "As I am sure you are aware, verbal conversations tend to be misinterpreted or misunderstood. In addition, your repeated requests for a meeting this close to the filing deadline is without cause or explanation. More importantly, it is inappropriate for us to meet without a clear agenda. The best interest of your claimants is served by documenting any discussions in writing. Therefore, if you have matters that must be discussed, I suggest you put them in writing-so that you may receive a written response." (RE1025, Pg ID#17314)

Yeon-Ho Kim sent Prof. McGovern an e-mail of June 11, 2014, saying, "Thank you for your kind e-mail…..I do not have any appeal pending before the Appeals Judge. For a matter at the next status conference, please consider reactivating mediation. It should be the best award to me. I do not want to go back to the Settlement Facility. I am so tired of haggling with it. Please mediate for quick resolutions for the issues." (Motion for Recognition and Enforcement of Mediation, RE1271, Pg ID#19332)

Prof. McGovern sent an e-mail of June 12, 2014, saying, "Thank you for your e-mail. We have a status conference with the Court next week, and I will raise your request at that time." This e-mail was copied to Mrs. Phillips. (RE1271, Pg ID#19332)

Yeon-Ho Kim sent Prof. McGovern an e-mail of July 30, 2014, saying, "I wonder whether a status conference with the Court last time had a discussion about mediation for the Korean Claimants. Would you guide me for mediation?" (RE1271, Pg ID#19332)

Prof. McGovern sent Yeon-Ho Kim an e-mail of July 31, 2014, saying, "We had a discussion both at the status conference and today with Judge Pamela Harwood, the replacement for Judge Frank Andrews. We have scheduled a meeting with Judge Hood for September 18 when we are hopeful that the issues you have raised can be resolved. Ann Phillips, Judge Harwood, and I will be in touch with you as soon as we know any future developments in your case." (RE1271, Pg ID#19332)

Mrs. Phillips sent Yeon-Ho Kim an e-mail of January 12, 2015, saying, "Attached for your records in a copy of the letter sent to the Court regarding your request for Re-Categorization." (RE1271, Pg ID#19335)

Yeon-Ho Kim sent Mrs. Phillips an e-mail of March 3, 2015, saying, "As you know, the previous mediation failed to be implemented because I refuse to receive the Court order to dismiss all Korean claims from the Korean Court,

which I found the way for the Order if SF-DCT or Dow Corning agrees to receive the service of process by designating a representative in Korea." (RE1271, Pg ID#19334)

Mrs. Phillips sent Yeon-Ho Kim an e-mail of March 5, 2015, saying, "The prior mediation is not an option and the Parties advised that post confirmation mediations are not authorized by the Plan." (RE1271, Pg ID#19334)

Yeon-Ho Kim sent Mrs. Deborah Greenspan, the counsel representing Dow Corning Corporation and the Debtor's Representatives, an e-mail of June 2016, saying, "Basically, I want to open a negotiation for settlement for the Korean Claimants. As you are aware, Mr. Austern under authorization proposed to me to settle in 2012. He even drafted the Memo of Understanding which included the terms of that we reached into agreement. In addition, it was mediated by Prof. McGovern, a member of the Finance Committee. Now, you do not respect it by saying that Mr. Austern played it by himself. It must be a joke. How the Claims Administrator could lead it himself without the commitment of Dow Corning as well as you? What about Prof. McGovern? Could he act himself without a communication with you during mediation? Did you really know nothing about settlement negotiation? I urge you to be

responsible." (RE1271, Pg ID#19337)

Mrs. Greenspan sent an e-mail of July 1, 2016, saying, "First, let me repeat as clearly as I can that the roles of David Austern (who is deceased) and Francis McGovern with respect to your claims regarding or against Dow Corning have always been that of neutral court appointees and never as representatives or agents of Dow Corning. Neither I nor Dow Corning ever gave either of them authority to enter into settlement negotiations with you. Neither I nor Dow Corning had any knowledge of the mediation in Washington until after the fact when Mr. Austern advised us, and the CAC, of the mediation during a subsequent conference call. We were very much surprised and consistently objected to any such offer or agreement as beyond the authority of the Finance Committee." (RE1271, Pg ID#19337)

On December 14, 2016, Yeon-Ho Kim filed Motion for Recognition and Enforcement of Mediation. (RE1271, Pg ID#17277-19338)

On December 28, 2017, the District Court issued the Order Granting Joint Motion of Dow Silicones Corporation, Debtor's Representatives, and the Claimants' Advisory Committee and Dismissing the Korean Claimants' Motion for Reversal of the SF-DCT Decisions and Motion for Re-Categorization (Order

Granting Joint Motion to Render Moot Motions filed on behalf of Korean Claimants, RE1347, Pg ID#21590-21599).

Following the Order of December 28, 2017, the Finance Committee filed Motion to Show Cause with respect to Yeon-Ho Kim law office regarding the 88 Claimants' claims funds (Motion for Order to Show Cause *with respect to Yeon Ho Kim* by Finance Committee, RE1352, Pg ID#21662-21670). Korean Claimants filed the Cross-Motion to Show Cause with respect to the Finance Committee regarding settlement agreement by mediation (Cross Motion for Entry of an Order to Show Cause with respect to the Finance Committee, RE1357, Pg ID#22010-22015).

The Finance Committee filed Motion to Show Cause with respect to Yeon-Ho Kim law office's excessive attorney's fees (Motion for Order to *Show Cause with respect to Yeon Ho Kim's Excessive Attorney's fees* by the Finance Committee, RE1387, Pg ID#22675-22664). A hearing was held on March 22, 2018.

The Korean Claimants appealed the Order Granting Joint Motion of Dow Silicones Corporation, Debtor's Representatives, and the Claimants' Advisory Committee to this Court. The appeal was dismissed on January 14,

2019. This Court opined that there was no jurisdiction over the Motion for recognition and enforcement of settlement agreement.

On December 12, 2018, the District Court issued the Order denying the Motion for recognition and enforcement of settlement agreement. (Order Denying for Recognition and Enforcement of Mediation, RE1461, Pg ID#24002-24017)

The Order ruled, "The Finance Committee, or the two specific members involved in the mediation, the Claims Administrator and the Special Master, did not have the authority to enter into any settlement negotiations or mediation with any class member… Neither the Claims Administrator nor the Special Master had the "actual authority" to enter into settlement discussions or mediation proceedings with the Korean Claimants….In addition, there is no provision in the SFA that allows for mediation with claimants, other than individual reviews of each claimant's claim…The Claims Administrator and the Special Master did not have the "apparent authority" to bind the SF-DCT to the agreement. Although their positions as members of the Finance Committee and their titles as Claims Administrator and Special Master (acting as a mediator) may have conveyed to the Korean Claimants that they have such apparent authority, as noted above, a party cannot claim that an agent acted with apparent

authority when it "knew, or should have known, that [the agent] was exceeding the scope of its authority" Mr. Kim, the Korean Claimants' counsel, is well aware of the bankruptcy action, the confirmation of the Plan and the SFA document which set forth the responsibilities of the Finance Committee and how claims are processed….Mr. Kim "knew or should have known" that although the actions by the Claims Administrator and the Special Master were well-intentioned in order to resolve ongoing claims by the Korean Claimants, such actions exceeded the scope of their authority. Their actions did not bind the SF-DCT." (RE1461, Pg ID #24015-24016)

V. SUMMARY OF ARGUMENT

The Korean Claimants argue that Mr. David Austern was the counsel representing the SF-DCT for the Cross-Motion to Dismiss the Korean Claimants' Motion for Reversal of the SF-DCT Decisions regarding the Korean Claims; that Mr. Austern proposed mediation to resolve the disputes that the Korean Claimants raised through the Motion for Reversal of the SF-DCT Decisions including the SF-DCT's cancelation of the POM approvals of the Korean Claimants; that Mr. Austern had the "actual authority" to the settlement agreement executed with Yeon-Ho Kim; that, even if Mr. Austern did not have actual authority, he had the "apparent authority" to the settlement agreement;

that the District Court's decision that Yeon-Ho Kim, the counsel representing the Korean Claimants for the Motion for Reversal of the SF-DCT Decisions, knew, or should have known, that Mr. Austern was exceeding the scope of his authority is groundless so this Court should reverse it.

In addition, the Korean Claimants argue that the Finance Committee and the two specific members, the Claims Administrator and the Special Master, conducted mediation to resolve the disputes over the Korean Claims pending the SF-DCT along with the counsel for the SF-DCT; that since the Finance Committee's decision shall be made in a majority vote, the Finance Committee executed the settlement agreement; that the Finance Committee and the Claims Administrator and the Special Master had the "actual authority" to the settlement agreement executed with the Korean Claimants; that the lack of the express language in the Plan and the SFA with respect to the "actual authority" shall not mean that the Claims Administrator and the Special Master do not have the authority to conduct settlement discussions or mediation proceedings, other than individual reviews of each claimant' claims; that, even if the Finance Committee and the Claims Administrator and the Special Master did not have actual authority, they had the "apparent authority"; that the District Court's decision that Yeon-Ho Kim, the counsel for the Korean Claimants, knew, or should have known, that the Finance Committee and the Administrator and the Special Master were exceeding the scope of their authority is groundless; that, even if the Finance Committee and the Claims Administrator and the Special Master did not have the authority to negotiate and mediate with the Korean

Claimant, the SF-DCT ratified the acts exceeding the scope of their authority; that this Court must reverse the decision of the District Court that the Motion for Recognition and Enforcement of Mediation shall be denied.

VI. ARGUMENTS

1. The SF-DCT's counsel for the Cross-Motion to Dismiss the Korean Claimants' Motion for Reversal of the SF-DCT Decisions shall have the actual authority and the apparent authority to negotiate the settlement agreement with the Korean Claimants

The Standard of review for this argument is de novo review.

The District Court did not make a decision on the client-attorney relationship. Actually, Mr. David Austern (District of Columbia Bar. No. 44057) was the counsel for the SF-DCT and filed the Cross-Motion to Dismiss Korean Claimants' Motion for Reversal of the SF-DCT Decisions with the District Court on November 3, 2011. (*See* Cross-Motion to Dismiss *Motion for Reversal* by the SF-DCT, RE820, Pg ID#13160-13170)

Mr. Austern had been the Claims Administrator several years before he became the counsel for the SF-DCT.

Mr. Austern had the "actual authority" to the settlement agreement executed with Yeon-Ho Kim in 2012 under the rule of client-attorney relationship

.

""The lawyer-client relations being one of agent-principal, Restatement of the Law Governing Lawyers ch. 2, Introductory Note (Tent. Draft No.5. 1992), actual authority "may be inferred from words or conduct which the principal has reason to know indicates to the agent that he is to do the act.'"" *See U.S. v. International Broth. of Teamsters, Chauffeurs*, 986 F.2d 15, at *5 (2nd Cir. 1993)

""Actual authority is authority that a principal confers on an agent through its direct manifestations. A principal, through its "written or spoken words or other conduct," may expressly or impliedly authorize it an agent to act on its behalf. The agent, however, must reasonably believe that the principal wants the agent to engage in the actions in question. Because actual authority depends on the relationship between the principal and the agent, whether such an agency is formed depends on the actual interaction between the putative principal and agent, not on any perception in a third party may have of the relationship."" *See Marathon Enterprises, Inc. v. Schroter GMBH & Co.*, Not Reported in F. Supp. 2d, 2003 WL355238 at *7 (S.D.N.Y. 2003)

Mr. Austern reasonably believed that the SF-DCT wanted him to

negotiate and settle the Korean Claims pending the SF-DCT with Yeon-Ho Kim, the counsel for the Korean Claimants, while the Korean Claimants' Motion for Reversal of the SF-DCT Decisions on the Korean Claims was pending the District Court. Based upon this belief, he collaborated with the Claims Administrator and the Special Master, the two specific members of the Finance Committee, in negotiating and mediating with the Korean Claimants. Therefore, Mr. Austern had the "actual authority" to the negotiations for the settlement agreement executed with Yeon-Ho Kim.

Even if Mr. Austern did not reasonably believe that the SF-DCT wanted him to negotiate with the Korean Claimants, Mr. Austern had the "apparent authority". ("Were we not so convinced that the officers' attorney had actual authority, we do not hesitate to find apparent authority." *See U.S.*, (986 F.2d 15) at*5)

""Apparent authority is "the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third party."" Restatement (Second) of Agency § 8 (1958) "Apparent authority exists when a third party reasonably believes that principal has conferred authority on its agent. It is created by a third party's reasonable reliance on the acts of principal, not its agent: [T]he existence of the apparent authority must be traceable to the principal, and cannot be established by the unauthorized acts, representations, or conduct of the agent. A party arguing for the existence of

apparent authority must also show that the third party changed its position in reliance on the principal's act." *See Marathon Enterprises,* 2003 WL355238 at *8 (S.D.N.Y. 2003)

""Courts in this Circuit have consistently recognized that an attorney may bind his client to a settlement agreement so long as the attorney has apparent authority. *See, e.g., Fennell v. TLB Kent Co.*, 865 F.2d 498, 502 (2nd Cir. 1989) ("If an attorney has apparent authority to settle a case, and the opposing counsel has no reason to doubt that authority, the settlement will be upheld"). In this context, apparent authority is "the power to affect the [client's] legal relations… by transactions with third persons, professedly as agent for the [client], arising from and in accordance with the [client's] manifestations to such third persons." *United States v. International Bhd. of Teamsters*, 986 F.2d 15, 20 (2d Cir. 1993)"" *See Alvarez v. City of New York*, 146 F. Supp. 2d 327, at*4 (S.D.N.Y. 2001)

""Courts in this Circuit have consistently recognized that an attorney may bind his client to a settlement agreement so long as the attorney has apparent authority." (*omitted citing*) "Apparent authority exists when a third party reasonably believes that a principal has conferred authority on its agent."(*omitted citing*) "[T]o create apparent authority, the [client] must manifest to the third party that he consents to have the act done on his behalf by the person purporting to act for him." (*omitted citing*) "Plaintiff bears the burden

of proving Mr. Rozynski [*plaintiff's attorney*] for lacked apparent authority to sign the MOU." (*omitted citing*) "This burden "is not insubstantial."" *See Jian Wang v. International Business Machines Corp.*, Not Reported in F. Supp. 3d, 2014 WL6645251, at*3 (S.D.N.Y 2014)

"Although the decision to settle a case rests with the client, courts will presume that an attorney who enters into a settlement agreement has the authority to do so." *See Alvarez*, 146 F. Supp. 2d. 327, at*3

Yeon-Ho Kim reasonably believed that Mr. Austern, the counsel for the SF-DCT, had authority to negotiate and mediate to settle the Korean Claims pending the SF-DCT on the behalf of the SF-DCT. And also, the SF-DCT manifested Yeon-Ho Kim under the circumstances that Mr. Austern as the counsel for the SF-DCT filed the Cross-Motion to Dismiss the Korean Claimants' Motion for Reversal of the SF-DCT Decisions with the District Court, and he has been the Claims Administrator for many years, and he had the experiences in negotiations with Yeon-Ho Kim to settle the issues arising from processing of the Korean Claims pending the SF-DCT. Yeon-Ho Kim had no suspicion that Mr. Austern lacked authority to negotiate and mediate the Korean Claims when Mr. Austern proposed to enter into a mediation which produced the settlement agreement.

Further, Yeon-Ho Kim relied on negotiations and the mediation with Mr. Austern. Yeon-Ho Kim had to fly to the Washington D.C. where he had no

business except attending the mediation conference on August 10, 2012. After Yeon-Ho Kim reached to the settlement agreement, Yeon-Ho Kim sent out his clients notices that the settlement agreement was signed by him on the behalf of the Korean Claimants. In addition, the SF-DCT did not make prompt objections to the settlement agreement to Yeon-Ho Kim after a subsequent conference call took place between Mr. Austern and Mrs. Greenspan, the counsel for Dow Corning Corporation. On the contrary, the Claims Administrator, the instrumentality of the SF-DCT, said to Yeon-Ho Kim, "the Finance Committee would like to move this matter along, if at all possible, to closure" on November 23, 2012 (*See* Response to Joint Motion for Order *Suggesting Mootness re: Korean Motions*, RE#1025, Pg ID#17291), "My apologies for the delay" on January 10, 2013 (*See* RE1025, Pg ID#17298).

The Court of New York hardly denied a settlement agreement executed by counsel for client on the client's behalf.

""In *Fennell*, this court found that the plaintiff's attorney did not have apparent authority to settle and that, therefore, the settlement was not binding on the client. *Fennell v. TLB Kent Co.*, No. 865 F.2d 498, 2nd Cir. 1989 The circumstances in *Fennell*, however, were completely different: a "settlement agreement" was reached in a phone conference by counsel in which no party participated and *Fennell* made objections to that agreement upon being advised as to its terms."" *See U.S.* 986 F. 2d. 15, at *5

To sum up, Yeon-Ho Kim reasonably believed that Mr. Austern had authority to negotiate with the Korean Claimants and Yeon-Ho Kim relied on his proposal for negotiations and mediation and changed his position in reliance on Mr. Austern's acts. Therefore, the settlement agreement binds the SF-DCT.

2. The Finance Committee, or the two specific members involved in the mediation, the Claims Administrator and the Special Master, shall have the actual authority, or the apparent authority, to the settlement agreement with the Korean Claimants

The Standard of review for this argument is de novo review of legal error.

The District Court opined that it could be construed that there may have existed an agreement to Memorandum of Understanding and Release between the Korean Claimants and the Finance Committee.

The District Court decided it correctly. The Appellees strongly contended that the Memorandum of Understanding and Release was just an unsigned draft. This contention is clearly in contravention of the contract laws of New York as the District Court explained at length in the Order.

The District Court, however, decided that, based on the Court's interpretation of the Plan and the SFA, the Finance Committee, or the two specific members involved in the mediation, the Claims Administrator and the

Special Master, did not have the authority to enter into any settlement negotiations or mediation with any class member, and that neither the Claims Administrator nor the Special Master had the "actual authority" to enter into settlement discussions or mediation proceedings with the Korean Claimants, and additionally that the Claims Administrator and the Special Master did not have the "apparent authority" to bind the SF-DCT to the agreement since a party cannot claim that an agent acted with apparent authority when it "knew, or should have known, that [the agent] was exceeding the scope of his authority. (Citing *Sphere Drake Ins. Ltd. v. Clarendon Nat. Ins. Co.*, 263 F.3d 26 (2nd Cir. 2001))

The District Court made an error in interpretation as to the authority of the Finance Committee. The Korean Claimants cannot accept the District Court's decision that the Finance Committee, or the two specific members involved in the mediation, the Claims Administrator and the Special Master, did not have the "actual authority" to enter into any settlement negotiations or mediation with any class member.

One of the purposes of the SF-DCT is to resolve claims of Settling Personal Injury Claimants (*See* SFA, § 2.01(1)). "Resolve claims" is meant to include not only "individual reviews of each claimant's claims" but "negotiation and mediation with a pool of Claimants situated under the same kind of conditions as the POM claims." There is no provision in the SFA that the SF-DCT shall be prohibited from negotiating and mediating with the Claimants for

review of the Claimants' claims. The District Court opined that there is no provision in the SFA that allows for mediation with claimants but rather, this Court must see it conversely so that there is no provision in the SFA that does not allow for negotiations or mediation with the Claimants.

And the Finance Committee, one of the instrumentalities of the SF-DCT, has extensive powers subject to the Court's supervision with respect to the distribution of funds and review of claims operations (*See* SFA, § 4.08(b)(c)). Although there is no provision for the Finance Committee's power about settlements with Settling Personal Injury Claimants, there is a provision for the Finance Committee's power about settlements with Non-Settling Personal Injury Claimants (*See* SFA, § 4.08(b)(ii)(3), "*review proposed settlements of Non-Settling Personal Claims*"). This provision implies that the SF-DCT has the authority to settle the claims pending the SF-DCT even if there is no provision in the SFA that allows for settlement negotiations and mediation.

Furthermore, the Claims Administrator, a member of the Finance Committee, has full powers and the responsibilities for supervising processing of Claims and overseeing all aspects of the Claims Office (*See* SFA, § 4.02(a)(e)). "Supervising processing of Claims and Overseeing the SF-DCT" is meant to include not only "individual review of each claimant's claims" but "negotiations and mediation for disputes arising from processing the Claims with the Claimants." Had the SFA been intended not to allow the Claims administrator such group settlements with the Claimants, the SF-DCT must

have included a specific provision in the SFA.

Therefore, the decision of the District Court that the Claims Administrator and the Special Master did not have the authority to enter into any settlement negotiations or mediation with any class member under the Plan and the SFA must be a misinterpretation thus shall be reversed by this Court.

The Finance Committee was established on an early stage of the SF-DCT in 2001 three years before the Effective Date of the Plan (*See* RE04, Stipulated Order, Pg ID#8-11). Since the MDL-926 Claims Office was closing and the new settlement facility should be established quickly, the Finance Committee took over the whole tasks for setting up and operating of the SF-DCT.

Afterwards, the SF-DCT held out to the Claimants that the Finance Committee, and the two specific members of the Finance Committee, the Claims Administrator and the Special Master, were be the agents of the SF-DCT through numerous communications with the Claimants.

The Finance Committee, and the Claims Administrator and the Special Master, of the SF-DCT have similarities with the president or the other general officer of a corporation. Just as a corporation is operated by the president and

the other officer, the SF-DCT is operated by the Claims Administrator and the Finance Committee. Therefore, the rules applying to the president or the other officer of a corporation should be applied to the Finance Committee, the Claims Administrator and the Special Master.

"In two early opinions, the New York Court of Appeals stated that the president or other general officer of a corporation engaged in business activities had, by virtue of his office, prima facie power to make any contract for the corporation that the board of directors could have authorized or ratified, and that the burden of proving any lack of authorization was on those seeking to impeach the contract." *See Scientific Holding Co., Ltd. v. Plessey Inc.*, 510 F.2d 15, at*8 (2nd Cir. 1974) (citing *Paterson v. Robinson*, 116 N. Y 193, 22 N.E. 372 (1889)(president), *Hastings v. Brooklyn Life Ins. Co.*, 138 N.Y. 473, 34 N.E. 289 (1893)("secretary who was one of corporation's general managing agents")

The Claims Administrator supervises processing of claims and oversees all aspects of the Claims Office. The Special Master is a member of the Finance Committee. The Finance Committee develops recommendations for submission to the District Court regarding the release of funds payable from the Settlement Fund and review proposed settlements of Non-Settling Personal Injury Claims.

Basically, the Finance Committee, and the two specific members of the Finance Committee, the Claims Administrator and the Special Master, assumes all responsibilities for the operations of the SF-DCT just as the president and

other general officer assumes all responsibilities for the operations of the corporation.

Therefore, the Claims Administrator and the Special Master, the two specific members of the Finance Committee, by virtue of their office, must have prima facie power to make any contract for the SF-DCT that the Finance Committee could have authorized or ratified and thus the burden of proving any lack of authorization must be on the Appellees seeking to impeach the settlement agreement

In addition, the SF-DCT held out that the Finance Committee, and the Claims Administrator and the Special Master, were the representatives for the SF-DCT.

"It is well-settled principle of agency that, as a general rule, the principal is bound by notice to or knowledge of his agent in all matters with the scope of the agency, although in fact, the information may never have actually been communicated." *See Scientific Holding*, 510 F.2d 15 (1974), at*10 (citing *Howell v. Mills*, 53 N.Y. 322, 328 (1973))

In conclusion, the District Court's decision that the Finance Committee, or the two specific members involved in the mediation, the Claims Administrator and the Special Master, did not have the "actual authority" to enter into any settlement negotiations or mediation with any class member must

be a misinterpretation of the SFA thus this Court should reverse it.

On the other hand, the District Court's decision that the Claims Administrator and the Special Master of the Finance Committee did not have the "apparent authority" to bind the SF-DCT to the agreement since a party cannot claim that an agent acted with apparent authority when it "knew, or should have known, that [the agent] was exceeding the scope of his authority" has more serious flaws.

""[A] principal may be estopped from denying apparent authority if (1) the principal's intentional or negligent acts, including acts of omission, created an appearance of authority in the agent, (2) on which a third party reasonably and in good faith relied, and (3) such reliance resulted in a detrimental change in position on the part of third party." *See Marathon Enterprises*, 2003 WL355238, at*8 (citing *Minskoff v. Am. Express Travel Related Servs. Co.*, 98 F.3d 703, 708 (2nd Cir. 1996)) "Apparent authority exists when a third party reasonably believes that a principal has conferred authority on its agent."" *See Marathon Enterprises*, at *8

The District Court indirectly approved in the Order that the Claims Administrator and the Special Master of the Finance Committee were the agents. ("Claims administrator and Special Master (acting as a mediator) may have conveyed to the Korean Claimants that they have such apparent authority, as noted above, a party cannot claim that an *agent* acted with apparent authority…"

See Order, RE1461 Pg ID#240150)

Yeon-Ho Kim reasonably believed that the SF-DCT has conferred authority on its agents, the Finance Committee, the two members of the Finance Committee.

After receiving a proposal for mediation, Yeon-Ho Kim submitted the Special Master (the sole mediator) the position paper of the Korean Claimants and the reply to the position paper of the SF-DCT. The Claims Administrator and the counsel for the SF-DCT submitted the mediator the position paper of the SF-DCT. Yeon-Ho Kim made a long trip to Washington D.C. where he had no business other than attending the mediation conference arranged by the SF-DCT on August 10, 2012.

Yeon-Ho Kim relied on the MOU and the Release drafted by the Finance Committee, which is the settlement agreement. Yeon-Ho Kim disseminated it to the Korean Claimants and the other Korean lawyers representing the Claimants. Jung-Pyo Hong, a Korean lawyer who prepared the Notarized Opinion Letter submitted to the Finance Committee, was one of the Korean lawyers representing several Claimants. Yeon-Ho Kim would not have made the settlement agreement to the public if he had known that the settlement agreement were denied by the SF-DCT and unenforceable. Yeon-Ho Kim had no doubt as to the authority of the Claims Administrator and the Special Master along with the counsel for the SF-DCT.

While the Finance Committee was reviewing the documents submitted by Yeon-Ho Kim, prepared under the MOU and Release, the Korean Claimants lost an opportunity to file the Explant Claims whose deadline for filing was approaching, June 1, 2014. The Korean Claimants relied on the settlement agreement. Because the SF-DCT was delaying the payments under the settlement agreement, many Korean Claimants could not file the Explant Claims. No Claimants would prepare to file documents for the Explant Claims after they knew that the settlement agreement was executed. In other words, the Korean Claimants relied on the settlement agreement and changed their position. (In this context, the Claims Administrator said to Yeon-Ho Kim conversely, "the Finance Committee would like to move this matter along, if at all possible, to closure" on November 23, 2012, *See* RE#1025, Pg ID#17291.

"Essential to the creation of apparent authority are words or conduct of the principal, communicated to the third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction." *See Wells Fargo Home Mtge. v. Hiddekel Church of God*, 1 Misc. 3d 913(A), 781 N.Y.S. 2d 628 (Kings County N.Y. 2004), at*7 (citing *Standard Funding corp. v. Lewitt*, 89 N.Y. 2d 54, 678 N.E.2d 874 (Court of Appeals of N.Y 1997))

Neither the Claims Administrator nor the Special Master said to Yeon-Ho Kim during negotiations for mediation and the mediation conference and later the exchanges of the MOU and Release that the settlement agreement must be

authorized by the SF-DCT. Rather, they manifested Yeon-Ho Kim that the SF-DCT authorized them to negotiate and mediate the Korean Claims pending the SF-DCT. In addition, the counsel for the SF-DCT who filed the Cross-Motion to Dismiss the Korean Claimant's Motion for Reversal of the SF-DCT Decisions manifested that the Claims Administrator was authorized to negotiate and the Special Master was authorized to mediate the Korean Claims.

The District Court reasoned in the Order that since a party cannot claim that an agent acted with apparent authority when it "knew, or should have known, that [the agent] was exceeding the scope of his authority, and Yeon-Ho Kim is well aware of the bankruptcy action, the confirmation of the Plan and the SFA document which set forth the responsibilities of the Finance Committee and how claims are processed. (*See* Order, RE1461, Pg ID#24016)

If the reasoning were correct, the Claims Administrator and the Special Master were exceeding the scope of their authority and in consequence, they misrepresented it and deceived Yeon-Ho Kim.

The District Court opined that Yeon-Ho Kim knew, or should have known, that the Claims Administrator and the Special Master were exceeding the scope of authority under the Plan and the SFA.

"[T]he 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." *See* 2A N.Y. Jur. 2d Agency § 104

""The mere creation of an agency for some purpose does not automatically invest the agent with "apparent authority" to bind the principal without limitation."" See *Ford v Unity Hosp*. 32 N.Y. 2d. 484 (Court of Appeals N.Y. 1973), 299 N.E. 2d. 659, 346 N.Y.S. 2d 238 (citing *Ernst Iron Works v. Duralith Corp. v. Hudson*, 268 N.Y. 722) ""Apparent authority exists "when a principal, either intentionally, or by lack of ordinary care, induces a third party to believe that an individual has been authorized to act on its behalf."" *See Peltz v. SHB Commodities, Inc.*, 115 F. 3d 1082 (2nd Cir. 1997)

Yeon-Ho Kim did not know that the Claims Administrator and the Special Master were not allowed to enter into negotiations and mediation with the Korean Claimants under the Plan and the SFA. Yeon-Ho Kim had no doubt about the authority of the two specific members of the Finance Committee. If Yeon-Ho Kim had known about it, he would not have made a long trip to Washington D.C. to attend a mediation conference. In addition, Yeon-Ho Kim found on the front desk of the building where the mediation conference took place that the reservation for a room of the mediation conference was made under the name of the SF-DCT. Worse to Yeon-Ho Kim, he had to spend several thousand dollars for the trip.

The finding of the District Court that Yeon-Ho Kim is well aware of the

bankruptcy action, the confirmation of the Plan and the SFA document which set forth the responsibilities of the Finance Committee and how claims are processed can be appreciated as a compliment but factually wrong.

Yeon-Ho Kim does not know the bankruptcy action of the US and the Plan and the SFA well even if he appeared before the District Court and this Court several times. Yeon-Ho Kim does not know how claims are processed in the SF-DCT well. He is simply a self-employed Korean lawyer who was forced to appear before the US Courts to protect rights of his clients, the Korean Claimants. He regrets the involvement in this miserably long-period Dow Corning breast implant class action. If Yeon-Ho Kim had known the bankruptcy action of the US well, he would have immigrated to the United States to practice law.

Knowing that the Claims Administrator and the Special Master were not allowed to enter into negotiations or mediation to settle the claims with any class members under the Plan and the SFA was beyond the ability of Yeon-Ho Kim. Since the cancelation of the POM approvals which had been approved by the SF-DCT was made by the decision of the Claims Administrator, Yeon-Ho Kim believed that the Claims Administrator had plenary powers over the claims pending the SF-DCT therefore the Claims Administrator's acts for settlement negotiations with the Korean Claimants were inevitably the acts authorized by the SF-DCT. In addition, Yeon-Ho Kim accepted a proposal of Mr. Austern that the mediator should be Professor Francis McGovern, the Special Master of the

Finance Committee. Yeon-Ho Kim thoroughly believed that negotiations and mediation was the acts of the SF-DCT. Yeon-Ho Kim had no doubt that the Claims Administrator and the Special Master had the authority to enter into negotiations and mediation for settlement with the Korean Claimants.

"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 transactions with the agent if he knows or should have that it is outside the scope of the agent's authority… The decisive point is that even assuming arguendo the Mach 2 amendment to be invalid as unauthorized, *Scientific*'s failure to repudiate this amendment for lack of authorization until mid-July estopped it from doing so later. A principle of law is: Where a person wronged is silent under a duty to speak, or by an act or declaration recognizes the wrong as an existing and valid transaction, in some degree, at least, gives it effect so as to benefit himself or so as to affect the rights or relations created by it between the wrongdoer and a third party, he acquiesces in and assents to it and is equitably estopped from impeaching it." (*See Scientific Holding*, at*9 (510 F.2d 15(1974)), citing *Rothschild v. Title Guarantee & Trust Co.*, 204 N.Y. 458, 459, 97 N.E. 879, 880 (N.Y. 1912).

The SF-DCT did not repudiate the settlement agreement executed by the Finance Committee. The Claims Administrator, the instrumentality of the SF-DCT, repudiated the settlement agreement in her e-mail on March 5, 2015 for the first time, nearly three years later, by saying, "The prior mediation is not an

option and the Parties advised post confirmation mediations are not authorized by the Plan." (*See* RE1271, Pg ID#19334) The failure to repudiate the settlement agreement for lack of authorization until March 5, 2015 estopped the SF-DCT from doing so.

"[P]rincipal is not bound thereby unless such *ultra vires* acts have been ratified or apparently authorized by the principal." (*See Van Arsdale v. Metropolitan Tit. Guar. Co.*, 103 Misc. 2d 104, 428 N.Y.2d 482, at *2 (Nassau County N.Y. 1980)) "The rule that ratification may be implied where the principal retains the benefit of an unauthorized transaction with knowledge of the material facts." (*See Standard Funding*, 89 N.Y. 2d 546, 878 N.E. 2d 874, at*4 (1997), *See also, Deyo v. Hudson*, No. 225 N.Y. 602 (Court of Appeals N.Y 1919)

After the settlement agreement was executed, the Claims Administrator, and the Special Master, and the counsel for the SF-DCT, sent Yeon-Ho Kim e-mails as follows;

> The Special Master said, "Please assist Mr. Kim in any way possible." (*See* Motion for Recognition and Enforcement of Mediation, RE1271, Pg ID#19322-19323, 10/16/2012);
>
> the counsel of the SF-DCT said, "There are certain conditions that must be adhered to pursuant to our agreement before payment can be made." (*See* RE1271, Pg ID#19324-19325, 10/20/2012);

the Counsel for the SF-DCT said, "An opinion letter from another Korean counsel or a statement from the authority regulating the conduct of Korean attorneys would be sufficient." (*See* RE1271, Pg ID#19327, 10/21/2012);

the Special Master said after receiving a signed copy of the settlement agreement, "Thanks." (*See* RE1271, Pg ID#19329-19330, 10/24/2012);

the Special Master said to request for a quick payment from Yeon-Ho Kim, "Done." (*See* RE1271, Pg ID#19329-19330, 10/26/2012);

the Claims Administrator said, "The Finance Committee did have a conference call regarding the documentation that you provided…We will go back with you as soon as discussions are complete." (*See* Response to Joint Motion for Order Suggesting Mootness re; Korean Motions, RE1025, Pg ID#17289, 11/06/2012);

the Claims Administrator said, "The Finance Committee would like to move this matter along, if at all possible, to closure. At issue are the terms of the Memorandum of Understanding and its attached Exhibit A, as compared to the documentation provided and the contents thereof." (*See* RE1025, Pg ID#17291, 11/22/2012);

the Claims Administrator said, "Thank you, Mr. Kim, we appreciate the follow-up." (*See* RE1025, Pg ID#17294, 11/24/2012);

the Claims Administrator said, "The documents you provided have been sent to the parties for comment regarding their sufficiency. After we receive a response I will follow-up with you." (*See* RE1025, Pg ID#17296, 01/10/2013);

the Claims Administrator said, "The Finance Committee met yesterday to address this matter. We are exploring other alternatives in light of the fact that the documentation did not meet the agreement in the MOU." (*See* RE1025, Pg ID#17298, 03/27/2013);

the Claims Administrator said, "As indicated in my earlier e-mail a response is forthcoming. Your continued patience is greatly appreciated." (*See* RE1025, Pg ID#17300, 05/06/2013);

the Claims Administrator said, "Thank you Mr. Kim, we continue to discuss this matter, you will be provided with a written communication as soon as one is available." (*See* RE1025, Pg ID#17300, 05/07/2013);

the Claims Administrator said, "After review and analysis the SF-DCT has determined to withdraw exclusion previously imposed on your claims with respect to Affirmative Statements." (*See* RE1025, Pg ID#17302, 01/08/2014);

the Special Master said, "We have a status conference with the Court next week. And I will raise your request at that time." (*See* RE1271, Pg ID#19332, 01/12/2014);

the Special Master said, "We have scheduled a meeting with Judge Hood for September 18 when we are hopeful that the issues you have raised can be resolved." (*See* RE1271, Pg ID#19332, 01/31/2014);

the Claims Administrator said, "The prior mediation is not an option and the Parties advised that post confirmation mediations are not authorized by the Plan." (*See* RE1271, Pg ID#19334, 03/03/2015); and

the Counsel for Claims Administrator said, "[T]he roles of David

> Austern and Francis McGovern regarding Dow Corning have always been that of neutral court appointees and never as agents of Dow Corning. Neither I nor Dow Corning ever gave either of them authority to enter into settlement negotiations with you." (*See* RE1271, Pg ID#19337, 06/?/2016)

Even if neither the Claims Administrator nor the Special Master had the authority to enter into negotiations or mediation to settle with the Korean Claimants, the SF-DCT, as above, ratified the settlement agreement impliedly.

The Claims Administrator and the Special Master and the counsel for the SF-DCT asked Yeon-Ho Kim to provide the documents and actions required under the MOU and the Release, the settlement agreement, such as the opinion letters of other Korean counsel testifying that Yeon-Ho Kim could be paid from the settlement agreement under the Korean laws, the filing of Motion to dismiss all actions pending the Korean Courts, and the filing of Motion to dismiss all actions pending the US Courts including the US District Court of the Eastern Michigan. Those requirements that the Claims Administrator and the counsel for the SF-DCT asked Yeon-Ho Kim to fulfill, as above, were on the premise that the SF-DCT ratified the settlement agreement. Even after a subsequent conference call between the counsel for the SF-DCT and the counsel for Dow Silicones Corporation took place, where [we] the counsels for Dow Silicones

Corporation and the Claimants' Advisory Committee were very much surprised and consistently objected to any such offer or agreement as beyond the authority of the Finance Committee (*See* RE1271, Pg ID#19337), the counsel for the SF-DCT and the Claims Administrator continued asking for documents and having commitments to the counsel for the Korean Claimants.

In other words, the SF-DCT ratified the settlement agreement executed by the Finance Committee.

Therefore, the Finance Committee, the two specific members of the Finance Committee, the Claims Administrator and the Special Master, had the actual authority, or the apparent authority, to enter into negotiations and mediation with the Korean Claimants, and, even if not, the SF-DCT ratified the actions of the Finance Committee, and the two members of the Finance Committee, and as the result, the decision of the District Court that the actions of the Finance Committee did not bind the SF-DCT is groundless and has no merit.

3. Conclusion

For the foregoing reasons, the Korean Claimants request this Court to reverse the District Court's Order Denying Motion for Recognition and Enforcement of Mediation filed by the Korean Claimants, and to decide the settlement agreement between the SF-DCT and the Korean Claimants to be

recognized and enforceable, and to order the SF-DCT to pay Yeon-Ho Kim the agreed amount of money under the settlement agreement for distribution to the his clients.

Date: April 9, 2019

Respectfully submitted,

(signed by) Yeon-Ho Kim
Yeon-Ho Kim Int'l Law Office
Suite 4105, Trade Center Bldg.,
159 Samsung-dong, Kangnam-ku
Seoul 135-729 Korea
Tel: +82-2-551-1256,
yhkimlaw@unitel.co.kr
For the Korean Claimants

APPENDIX

Page ID#19277-19338

RE.1274 Response to Motion for Recognition and Enforcement of Mediation filed by the Finance Committee Page ID#19342-1343

RE.1275 Opposition of Dow Corning Corporation, the Debtor's Representatives and Claimants' Advisory Committee to Motion for Recognition and Enforcement of Mediation

Page ID#19344-19369

RE.1280 Reply to Response of the Finance Committee, and Dow Corning Corporation, the Debtor's Representative and the Claimants' Advisory Committee to Motion for Recognition and Enforcement of Mediation Page ID#19925-19989

RE.1347 Order Granting Joint Motion to Render Moot Motions Filed on behalf of Korean Claimants Page ID#21590-21599

RE.1352 Motion for Entry of Order to Show Cause with respect to Yeon Ho Kim by the Finance Committee Page ID#21662-21670

RE.1357 Cross Motion for Entry of Order to Show Cause with respect to the Finance Committee by Korean Claimants

Page ID#22010-22015

RE.1368 Order to Yeon-Ho Kim to Show Cause Why He Should not be Sanctioned and Held in Contempt Page ID#22153

RE.1371 Motion for Joinder and Joint Hearing held on March 22, 2018 filed by Korean Claimants Page ID#22248-22251

RE.1378 Motion for Exclusion of Dow Corning Corporation and the Claimants' Advisory Committee from Cross Motion for Entry of

	Order to Show Cause with respect to the Finance Committee filed by Korean Claimants	Page ID#22526-22529
RE.1387	Finance Committee's Motion for Entry of Order to Show Cause with respect to Yeon Ho Kim's Excessive Attorney's Fee	Pg ID#22657-22664
RE.1388	Order to Show Cause	Pg ID#22855
RE.1421	Transcript	Pg ID#23796-23890
RE.1461	Order Denying Motion for Recognition and Enforcement of Mediation	Pg ID#24002-24017

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 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: April 9, 2019 Signed by Yeon-Ho Kim

Form 6. Certificate of Compliance With Type-Volume Limit

Certificate of Compliance With Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This document complies with [the type-volume limit of Fed. R. App. P. [_____]] [the word limit of Fed. R. App. P. [_____]] because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) [and [_____]]:

   ☐ this document contains _____words, or

   ☐ this brief uses a monospaced typeface and contains _____ lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

   ☐ this document has been prepared in a proportionally spaced typeface using _____ in

   _____, or

   ☐ this document has been prepared in a monospaced typeface using

   _____ with

   _____.

   /s/_____

   Attorney for _____

   Dated: _____