UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 18-2446, *Korean Claimants v. Claimants' Advisory Committee, et al*
Originating Case No. : 2:00-mc-00005

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Mr. David J. Weaver

Enclosure

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0314n.06

Case No. 18-2446

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KOREAN CLAIMANTS, Interested Party-Appellants, v. CLAIMANTS' ADVISORY COMMITTEE, FINANCE COMMITTEE, DOW SILICONES CORPORATION, DEBTOR'S REPRESENTATIVES, Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: SILER, GIBBONS, and READLER, Circuit Judges.

SILER, Circuit Judge. Appellants, the Korean Claimants, are a group of individuals from South Korea who elected to settle their tort claims against Dow through a bankruptcy-produced settlement program. While their claims were still being processed and reviewed for eligibility, counsel for Korean Claimants, Yeon-Ho Kim, met with members of the Finance Committee in an attempt to settle all of the Korean Claims. This meeting produced a draft memorandum of understanding under which the Settlement Facility would pay a $5 million lump-sum settlement in exchange for a release of the Korean Claims. However, following the meeting, the Finance Committee members advised Kim that the memorandum of understanding was only a draft and not a finalized agreement, that the Finance Committee had no authority to enforce the draft memorandum unilaterally, and that any disbursement of settlement funds had to be approved by

the Plan Proponents and the district court. Undeterred, Korean Claimants filed a motion to enforce the draft memorandum, arguing that: (1) it constituted a final, enforceable agreement; (2) the mediation and global settlement of claims was not expressly prohibited by the terms of the Reorganization Plan; and (3) the doctrine of apparent authority bound the Settlement Facility to its terms. The district court dismissed the motion, finding that the alleged mediation and the draft memorandum agreement it produced were prohibited under the terms of the Reorganization Plan, that the parties to the alleged mediation lacked apparent authority to enter into mediation and settle claims unilaterally, and that in any event, the settlement agreement was unenforceable because it was not finalized. For the reasons that follow, we **AFFIRM**.

I.

A.

This appeal concerns Dow breast implant claims that were filed pursuant to a bankruptcy plan. This court has discussed this plan and these types of claims on previous occasions.[1] *See In re Settlement Facility Dow Corning Tr.*, 628 F.3d 769 (6th Cir. 2010); *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002); *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996). We repeat only the essential background information necessary to understand the context of this appeal. In the early 1990s, Dow faced thousands of products liability lawsuits relating from its production of breast implants. To facilitate the equitable and prompt settlement of claims, Dow filed for bankruptcy under Chapter 11 of the Bankruptcy Code. *In re Dow Corning Corp*., 280 F.3d at 653-54. In 1999, Dow Corning and the Tort Claimants Committee submitted the Amended Joint Plan of Reorganization ("Plan"), which was confirmed by the Bankruptcy Court and became effective

[1] Dow Corning Corporation has since changed its name to Dow Silicones Corporation. For convenience, we refer to it throughout this opinion as Dow.

on June 1, 2004. *In re Settlement Facility Dow Corning Tr.*, No. 00-00005, 2013 U.S. Dist. LEXIS 181564, 2013 WL 6884990, at *1 (E.D. Mich. Dec. 31, 2013).

The Plan establishes a program through which claimants may choose to settle or litigate their claims against Dow. Claimants who choose to settle have their claims reviewed, evaluated, and paid by the Settlement Facility-Dow Corning Trust ("Settlement Facility"). *See In re Settlement Facility Dow Corning Trust*, 628 F.3d at 771. The Plan documents contain the exclusive criteria and procedures for the submission of claims and determination of eligibility to receive payment from the trust. Claims resolved under the settlement program are paid from the "Settlement Fund," which is funded up to $1.95 billion. *Id.* The district court supervises the Settlement Facility and the claim resolution process and must approve any distributions from the Settlement Fund.

Under the terms of the Plan, the settlement program is administered by the "Claims Administrator" and the "Finance Committee," both of which are overseen by the district court. The Finance Committee—which is composed of the Claims Administrator, a Special Master, and an Appeals Judge—is responsible for the financial management of the Settlement Facility, including the preservation of trust assets. The Claims Administrator's duties include setting procedures to ensure that claim processing is conducted according to Plan requirements, determining whether a claim is eligible for payment, and fulfilling eligible claims consistent with the Plan. Together, the Claims Administrator and Finance Committee authorize payment distributions from the Settlement Fund, subject to approval from the district court. All funds in the Settlement Facility remain in the custody of the district court until such approval is granted.

B.

Claimants who choose to settle may seek compensation from up to three payment categories based on the nature of their injury. Under any category, claimants are required to submit evidence of the injury and evidence that the injury is traceable to Dow. On behalf of the Korean Claimants, Kim has submitted thousands of claims to the Settlement Facility for review. As proof that Dow was the manufacturer of their breast implants—a basic requirement for eligibility—the majority of the Korean Claims were supported by an "affirmative statement" from the claimants' treating physicians confirming that the breast implant used in the claimant's breast implant procedure was manufactured by Dow. Affirmative statements are disfavored under the plan documents and are only permitted when medical records and other preferred methods of proof of manufacturer are unavailable. Kim represented that Korean hospitals and physicians had destroyed the relevant medical records after ten years, as was permitted under Korean law. A panel of this court summarized the Settlement Facility's concerns about this proof:

> [T]he number of Korean Claimants' claims relying on an affirmative statement was very high: over 94% of Mr. Kim's clients submitted affirmative statements as proof of manufacturer, higher than every other law firm that had submitted more than 100 claims. In other words, almost every Korean Claimant appeared to be unable to locate her medical or hospital records. There were other oddities as well. On some claims the date and facility listed for the procedure would be different on the affirmative statement than the date on registration forms. Correction fluid was used on many forms. Perhaps most troublingly, when questioned regarding these, and similar, documentation problems, Mr. Kim apparently sent the Settlement Facility medical documentation as proof, despite his representation that there were no medical records for these operations. According to Mr. Kim, he used the affirmative statements because the Settlement Facility had agreed that they would be acceptable proof of manufacturer.

In re Settlement Facility Dow Corning Trust, 760 F. App'x 406, 408 (6th Cir. 2019).

In 2011, the Settlement Facility placed an administrative hold on the Korean Claims so that a comprehensive investigation into their validity could be conducted. In addition, the Claims Administrator informed Korean Claimants that it would no longer process claims that used

affirmative statements as proof of manufacturer and that Korean Claims that had been paid based on affirmative statements were no longer eligible for further payments. In response, Korean Claimants filed a motion seeking reversal of the Settlement Facility's decision.

In 2012, with the motion for reversal still pending, Kim met with two members of the Finance Committee: Claims Administrator Ann Phillips and Special Master Francis McGovern. Additionally, the former Claims Administrator, David Austern, was present. Neither the record nor oral argument before this court could elucidate why the meeting was held, or with whom the idea for the meeting originated. Nevertheless, following the meeting—which both the Finance Committee and Korean Claimants refer to as a mediation—Austern emailed Kim a draft memorandum of understanding and release. This memorandum proposed that in exchange for the release of Korean Claims, the Settlement Facility would pay Kim a lump-sum settlement of $5 million, to be divided among Korean Claimants by Kim.

The parties continued to discuss the draft memorandum of understanding after the mediation, but it was never signed by the Finance Committee or approved by any necessary party. Importantly, the Settlement Facility resumed processing the Korean Claims and by 2016 had processed 99 percent of the total number of claims filed by the Korean Claimants. By the end of 2016, 1,194 of 1,731 claims had been paid, while others were either denied, awaiting payment, or were on hold for investigation of fraud.

Despite the continued fulfillment of claims, in December 2016 the Korean Claimants filed a Motion for Recognition and Enforcement of Mediation ("mediation motion"), alleging that the 2012 meeting had produced an enforceable agreement which bound the Settlement Facility to its

terms.[2] The Plan Proponents[3] jointly opposed the mediation motion, and the Finance Committee filed a response separately. The district court denied Korean Claimants' motion, finding that the Finance Committee had neither actual nor apparent authority to bind the Settlement Facility to the alleged mediation agreement. Following the denial of their motion to enforce the mediation, Korean Claimants brought this appeal.

II.

The district court's decision involved the interpretation and application of the plain language of the reorganization plan. Where, as here, the district court's interpretation is confined to the Plan documents without reference to extrinsic evidence, we review *de novo*. *In re Settlement Facility Dow Corning Trust*, 592 F. App'x 473, 477 (6th Cir. 2015) (citation omitted).

We review the district court's determinations regarding the apparent authority of various persons for abuse of discretion and any accompanying factual findings for clear error. *See Therma–Scan, Inc. v. Thermoscan, Inc.*, 217 F.3d 414, 419 (6th Cir. 2000) (abuse of discretion standard applies to review of district court's decision on motion to enforce a settlement and clearly erroneous standard is applicable to the extent that the district court makes findings of fact that the parties had agreed to the settlement terms). "The factual findings underlying a district court's decision to enforce a settlement agreement are reviewed for clear error." *Stenger v. Freeman*,

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[2] Between the time of the 2012 mediation and the 2016 mediation motion, the Settlement Facility paid $3 million to filed and approved Korean Claims. Thus, Korean Claimants now only seek $2 million of the original $5 million requested in the mediation motion.

[3] Appellees Dow Silicones Corporation, the Claimants' Advisory Committee, and the Debtor's Representatives comprise the "Plan Proponents."

683 F. App'x 349, 350 (6th Cir. 2017) (Clay, J., concurring) (citing *Therma-Scan*, 217 F.3d at 419).

III.

A.

We follow contract principles when interpreting a confirmed plan, because the plan is "effectively a new contract between the debtor and its creditors." *In re Dow Corning Corp.*, 456 F.3d at 676. The Plan documents create a detailed framework for evaluating and paying eligible claims, and provide the exclusive rules by which the Settlement Fund may be distributed. SFA § 5.01(a) (The SFA and Annex A "shall establish the exclusive criteria for evaluating, liquidating, allowing and paying Claims," and "[o]nly those Claims that satisfy the eligibility criteria specified in the Claims Resolution Procedures as applicable are eligible to receive payment ... ."); Annex A § 2.01 ("The Claims of all Settling Personal Injury Claimants shall be resolved under the terms of these Claims Resolution Procedures."). Within this framework, Korean Claimants seek to enforce a draft memorandum that contemplates a global settlement of the Korean Claims – which would include ineligible claims, claims still under review, claims already fulfilled, and claims that were never even submitted for evaluation. But the Plan provides that payments are to be made on an individual basis to individually approved claims. *See* SFA § 6.05 ("If the Claimant qualifies for and accepts the Allowed payment amount, the Claims Office shall authorize the Claim for payment. . . . "); SFA § 5.01 ("To be eligible to participate in the Dow Corning Settlement Program [each claim] must satisfy the following criteria in addition to the specific criteria applicable for each settlement option . . . "). Moreover, the Claims Administrator is obligated to ensure that each claim is analyzed pursuant to the relevant criteria, SFA § 4.02, and

has no authority to deviate from the Plan's claims resolution procedures. *See* SFA §§ 2.02, 4.03, 5.01. This aligns with the Bankruptcy Code's requirement that a plan "provide the same treatment for each claim or interest of a particular class." 11 U.S.C. § 1123(a)(4). Finally, any distribution of assets from the Settlement Fund requires the district court's approval. SFA § 7.02(a)(iii). The district court's interpretation of the Plan was correct – Korean Claimants' requested relief cannot be afforded without violating the Plan's express terms.

B.

Not only does the Plan expressly prohibit a global claim settlement—it also prohibits the Finance Committee members from negotiating or executing the purported settlement. The Plan obligates the Finance Committee and its members to follow its mandates, *see* SFA §§ 2.02, 2.03, and provides no basis for the Finance Committee and its members to exercise authority beyond what is directly stated in the Plan. *See, e.g.*, Annex A, Preamble, ("The Claims Administrator will administer these Claims Resolution Procedures consistent with the [SFA]"); Annex A § 7.02(g), ("The Claims Administrator will distribute payment in accordance with the [SFA]."). Simply put, the enumerated functions of the Finance Committee and its members do not authorize the global settlement of claims, the settlement of unsubmitted and unreviewed claims, or alternative methods of claim payment.

Korean Claimants acknowledge that the Finance Committee's authority is "subject to the Court's supervision with respect to the distribution of funds and review of claims operations," and that the Plan contains "no provision for the Finance Committee's power about settlements with Settling Personal Injury Claimants." Nevertheless, Korean Claimants maintain that the Finance Committee had actual authority under the terms of the Plan. But the Plan makes clear that its claim resolution procedures are "exclusive." *See* SFA § 5.01(a).

Korean Claimants also argue that the Finance Committee's actual authority is implied in § 4.08(b)(ii) of the SFA, which grants the Finance Committee authority to review the proposed settlements of Non-Settling Personal Injury Claims. This argument is irrelevant – because the Korean Claimants have elected to settle, the Non-Settling provisions have no bearing on their claims. *See* SFA § 4.08(b)(ii).

C.

Enforcement of the draft memorandum would require modification of the terms of the Plan. But the ability to modify the Plan is restricted by both the Bankruptcy Code and the Plan itself. Pursuant to 11 U.S.C. § 1127(b) of the Bankruptcy Code, "only the plan proponent or the reorganized debtor may seek modification of a plan after confirmation." *In re Elec. Maint. & Constr., Inc.*, No. 8:11-bk-18670-CED, 2016 Bankr. LEXIS 2054, at *10 (Bankr. M.D. Fla. May 19, 2016). Nor may a court "*sua sponte*, modify the chapter 11 plan." *In re MCorp Fin.*, Inc., 137 B.R. 219, 228 (Bankr. S.D. Tex. 1992). As Korean Claimants are neither plan proponents nor the reorganized debtor, they have no ability to initiate a modification. In addition, the Bankruptcy Code limits modification of a confirmed plan when the plan has been substantially consummated. *See* 11 U.S.C. § 1101(2). The record indicates that the Plan—which became effective in 2004—has been substantially consummated.

Finally, the Plan itself states that "modifications shall require approval of the Court" and "notice to . . . Dow Corning, the Shareholders, and the Claimants' Advisory Committee." SFA § 10.06. And if not expressly consented to by Dow and the CAC, a modification that would potentially have the effect of increasing the amount to be paid to the Settlement Facility is invalid. *Id.* The draft memorandum's lump-sum settlement proposal would potentially increase the payment obligations of Dow.

D.

Korean Claimants argue that even if the Finance Committee members lacked the actual authority to mediate and resolve claims, they could nevertheless bind the Settlement Facility to an agreement under the doctrine of apparent authority. Korean Claimants put forth various arguments to support this claim, several of which were never raised in the district court. Ultimately, the district court correctly found that apparent authority did not exist.

Even when an agent's scope of authority is expressly limited, as it was here, a principal can still be bound by the agent's unauthorized actions in certain circumstances. Under New York law,[4] an agent can "bind his principal to a contract if the principal has created the appearance of authority, leading the other contracting party to reasonably believe that actual authority exists." *Highland Capital Mgmt. LP v. Schneider*, 607 F.3d 322, 328 (2d Cir. 2010). However, "[t]he mere creation of an agency for some purpose does not automatically invest the agent with 'apparent authority' to bind the principal without limitation." *Ford v. Unity Hospital*, 299 N.E.2d 659, 664 (N.Y. 1973). Rather, apparent authority exists when the 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." *Highland Capital*, 607 F. 3d at 328 (brackets in original) (quoting *Peltz v. SHB Commodities, Inc.*, 115 F.3d 1082, 1088 (2d Cir. 1997)). But a party cannot claim that an agent acted with apparent authority when it "knew, or should have known, that [the agent] was exceeding the scope of its authority." *Sphere Drake Ins. Ltd. v. Clarendon Nat'l Ins. Co.*, 263 F.3d 26, 33 (2d Cir. 2001).

The Korean Claimants point to various actions taken by the Finance Committee members (the agents) to show that Kim was led to believe the mediation agreement could be effectuated.

[4] The Plan is governed by New York law and applicable federal law. (Plan, § 6.13).

However, the Finance Committe communicated its lack of authority to Kim following the purported mediation, explaining that it was seeking the approval of the Settlement Facility before taking further action. Korean Claimants have presented no evidence that the Settlement Facility had prior notice of the mediation, let alone that it had authorized the Finance Committee to unilaterally reach an agreement. Nor have Korean Claimants shown that the district court, whose approval was required to distribute Settlement Fund assets, had knowledge of the mediation.

Under the doctrine of apparent authority, there is a duty to inquire into the status of an agent's authority when "(1) the facts and circumstances are such as to put the third party on inquiry [notice], (2) the transaction is extraordinary, or (3) the novelty of the transaction alerts the third party to a danger of fraud." *F.D.I.C. v. Providence Coll.*, 115 F.3d 136, 141 (2d Cir. 1997). Kim has presented no evidence that he inquired about the authority of the Finance Committee members to enter into a settlement agreement. Moreover, the district court correctly found that due to Kim's many years of involvement in the Dow breast implant litigation, he "knew or should have known that although the actions by the Claims Administrator and Special Master were well-intentioned in order to resolve ongoing claims by the Korean Claimants, such actions exceeded the scope of their authority."

Korean Claimants raise—for the first time—three additional arguments regarding the district court's apparent authority determination: (1) as counsel for the Settlement Facility, Austern 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, which Korean Claimants detrimentally relied on; and (3) the Settlement Facility ratified the draft proposed settlement agreement by continuing to discuss the draft document after the mediation.

The Korean Claimants failed to raise any of these issues for the district court to consider, thereby waiving them. *See St. Marys Foundry, Inc. v. Employers' 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)). These arguments do not present an exceptional case, and thus need not be addressed by this Court.

E.

Even if the draft memorandum was not prohibited for the reasons discussed, we would still need to find that it constituted a valid, enforceable agreement in order to grant Korean Claimants' requested relief. Korean Claimants claim that the district court "determined a 'contract' [sic] made by the SF-DCT." This is patently incorrect. The district court left the question of its enforceability open, holding only that "it could be construed that there may have existed an agreed to Memorandum of Understanding and Release between the Korean Claimants and the Finance Committee."

The district court analyzed the evidence related to the mediation and opined—without deciding—that it was possible that an agreement could exist under these facts. However, the correspondence between the parties indicates that the Finance Committee and Austern did not objectively manifest any intent to be bound by the draft memorandum. Moreover, the document itself is marked conspicuously on the first page with the word "**DRAFT**" in bold, underlined, and all capital letters. Further, Austern's cover email to Kim cautioned that the document had "NOT BEEN APPROVED IN FINAL FORM." To find that an enforceable agreement was made under these circumstances would be contrary to established principles. *Prospect St. Ventures I, LLC v. Eclipsys Sols. Corp.*, 804 N.Y.S.2d 301, 302 (N.Y. App. Div. 1st Dept. 2005) (holding that a letter

agreement was not an enforceable contract because "[t]he intent not to be bound is also manifested in the references in the letter to a 'proposed' commitment and a 'proposed' transaction.").

F.

As of 2016, all but 11 of the 2,547 claims to be resolved by the draft memorandum were processed, and if eligible, paid. Appellees argue that the payment of $2 million to Korean Claimants at this stage would be inappropriate, and in violation of the Plan and the Bankruptcy Code. Specifically, they argue that such a distribution could only be used for the following improper purposes, all of which violate the Plan: (1) paying the 11 remaining claims that are still in the review process – which would far exceed the amount authorized in the Plan; (2) providing additional payment to claimants who have already received their allowed compensation; (3) paying claims deemed ineligible under the Plan; and (4) paying claims that were never fully submitted for evaluation. We agree. The Settlement Fund has limited assets, and the Plan is designed to afford equal treatment to similarly situated claimants. And under the Bankruptcy Code a plan must "provide the same treatment for each claim or interest of a particular class." *See* 11 U.S.C. § 1123(a)(4). A lump sum payment would provide an inequitable distribution, one that benefits the Korean Claimants at the expense of other claimants.

IV.

For all the foregoing reasons, the district court's denial of the Korean Claimants' mediation motion is **AFFIRMED**.