**Case No. 13-2456**

# In the United States Court of Appeals
## for the Sixth Circuit

In re: SETTLEMENT FACILITY DOW CORNING TRUST

DOW CORNING CORPORATION,

*Interested Party - Appellant*,

v.

CLAIMANTS' ADVISORY COMMITTEE,

*Interested Party - Appellee.*

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

# BRIEF OF APPELLEE CLAIMANTS' ADVISORY COMMITTEE

Dianna Pendleton-Dominguez
LAW OFFICE OF
DIANNA PENDLETON
401 N. Main Street
St. Marys, OH 45885
(419) 394-0717

Ernest Hornsby
FARMER, PRICE, HORNSBY &
WEATHERFORD LLP
100 Adris Court
Dothan, AL 36303
(334) 793-2424

Jeffrey S. Trachtman
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100

*Counsel for the Claimants' Advisory Committee*

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-2456 Case Name: In re Settlement Facility Dow Corning

Name of counsel: Jeffrey S. Trachtman, Esq.

Pursuant to 6th Cir. R. 26.1, Claimants' Advisory Committee
*Name of Party*
makes the following disclosure:

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

No.

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

No.

CERTIFICATE OF SERVICE

I certify that on February 11, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Jeffrey S. Trachtman
1177 Avenue of the Americas
New York, NY 10036

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

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

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

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

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

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

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

# TABLE OF CONTENTS

**Page**

# TABLE OF AUTHORITIES

**Page**

## CASES

## TABLE OF AUTHORITIES (cont'd)



**STATUTE**

## STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is requested. Oral argument will allow the attorneys for the parties to address any outstanding factual or legal issues that the Court deems relevant and will assist the Court in its decision-making.

## STATEMENT OF THE ISSUE FOR REVIEW

Whether the District Court abused its discretion or clearly erred in determining on remand that the parties intended tissue expander breast implants to be treated as Breast Implants under Dow Corning's Amended Joint Plan of Reorganization (the "Plan") where: (1) such implants meet every element of the Plan's definition of "Breast Implant"; (2) such implants were treated as eligible breast implants in (a) the Original Global Settlement (in which Dow Corning participated), (b) the MDL 926 Revised Settlement Program ("RSP") (which claimants were told served as the model for the Dow Corning settlement), and (c) other contemporaneous breast implant bankruptcies and settlements; and (3) the Plan, Disclosure Statement, and other Plan documents emphasized only *improvements* over the RSP and contained no language suggesting that the Plan would depart from prior practice by denying tissue expander implants any settlement value whatsoever.

## STATEMENT OF THE CASE[1]

This Court already rejected in the prior appeal the central arguments Dow Corning reasserts now: (i) that the term "Breast Implant" can reasonably be read only to embrace the alleged "technical" industry definition of a prosthetic

[1] Abbreviated terms not otherwise defined have the same meanings defined in Dow Corning's opening brief ("DCC Br.") or the Plan.

device intended for permanent implantation for aesthetic purposes, and (ii) that the Plan's failure to list tissue expander implants among the products covered by the settlement means, by definition, that such implants were intended to be excluded. This Court held, to the contrary, that the generic term "breast implant," an element of the defined term "Breast Implant," "can reasonably be read to refer to any device specifically designed for implantation in the breast." *In re Settlement Facility Dow Corning Trust*, 628 F.3d 769, 773 (6th Cir. 2010). This Court rejected as "circular" Dow Corning's structural and plain-language arguments for supplanting this "ordinary sense" reading with a "technical meaning" excluding tissue expander implants. *Id.*

It was precisely because *both* the ordinary and technical readings were potentially supported in the record that this Court vacated (not reversed, as Dow Corning repeatedly states) the decision below and remanded to allow the District Court to assess extrinsic evidence of the parties' intent. This Court held that "[t]he choice between these different readings . . . lies with the district court," which is "far better equipped, not least in terms of background knowledge, to sort through that evidence and determine what is important." The Court stressed that, once the District Court reviewed the evidence on remand and determined the parties' intent, "we expect to defer to its decision." *Id.* at 772-73.

On remand, the District Court did precisely what this Court instructed. It reviewed the record and zeroed in on the most relevant and important evidence of the parties' intent: what they knew and understood about the treatment of tissue expander implants in prior breast implant settlements, including most crucially the RSP, which tort claimants were repeatedly told was the model for Dow Corning settlement benefits. In contrast, the District Court found less relevant and thus assigned less weight to the industry evidence on which Dow Corning relies.

Now, rehashing thrice-rejected arguments embraced in part in dissent by Judge Batchelder – who otherwise recognized that the majority opinion came "close to directing" the District Court to affirm its prior ruling (*id.* at 779 (Batchelder, C.J., concurring in part and dissenting in part)) – Dow Corning urges the Court to disregard the judgment of the District Court and impose its preferred reading based on its evidence of how Dow Corning marketers and others with no connection to the settlement most commonly use the phrase "breast implant." Dow Corning offers *no* evidence that this was the reading actually intended by the parties to the Plan. Yet, remarkably, it argues that the District Court committed "legal error" by "ignoring" such evidence. The cases Dow Corning cites for this proposition, however, concern *exclusion* of evidence, not assignment of relative weight to evidence in the record. It is precisely the District Court's function to decide which evidence is most relevant and helpful. In arguing that only *its*

evidence may be credited as a matter of law, Dow Corning essentially seeks belated rehearing of this Court's prior decision rejecting its plain language argument.

Despite Dow Corning's misleading presentation, the extrinsic evidence amply supports the District Court's conclusion. Breast-design tissue expander implants were, in fact, eligible for benefits both in the original 1994 settlement (the "Original Global Settlement") in which Dow Corning participated and in the subsequent RSP, as well as contemporaneous programs of three other breast implant manufacturers – Bioplasty, Mentor, and Inamed. Claimants were *repeatedly* told that the Dow Corning settlement was based on both the procedures *and* eligibility criteria of the RSP (with *enhancements*) – not merely the procedures, as Dow Corning now argues. Indeed, confirmation of the Plan depended on this being true: In establishing the adequacy of the Litigation Fund, Mr. Fred Dunbar, Dow Corning's estimation expert, projected opt-out rates lower than the RSP based on the assumption that Dow Corning benefits would mirror or improve upon the earlier settlement.

There is *no* evidence that the parties expressly agreed to depart from the RSP's model and exclude benefits for breast-implanted tissue expanders – much less that this was conveyed to claimants. And there is *no* evidence that tort claimants voting on the Plan would have embraced the technical industry

distinctions Dow Corning deems so central. For example, Dow Corning has never demonstrated that claimants would have inferred or assumed some categorical difference between "permanent" implants and tissue expander implants. Claimants were well aware that no breast implant is "permanent" – hence the need for and inclusion of the Rupture and Explantation Benefits in the Plan.

Dow Corning seeks to bolster its specious "plain language" reading with a series of misleading arguments.

First, it argues that the absence of explicit treatment of tissue expander implants at confirmation (including during claims estimation) proves the parties intended to exclude them from any settlement offer. But the miniscule potential impact of tissue expander implant claims amply explains why they were neither a focus at confirmation nor a necessary part of any estimation process. Indeed, since Mr. Dunbar's projections relied upon the RSP experience, information regarding tissue expander breast implant claims was necessarily embodied in the data. The District Court's acknowledgment that the confirmation record did not contain dispositive evidence on the treatment of tissue expander implants does *not*, as Dow Corning suggests, constitute a finding in favor of Dow Corning's reading of the Plan.

Second, Dow Corning argues that tissue expander implants were never associated with medical risks and thus it would be irrational to offer them

disease settlements. The premise is not only incorrect – all types of implants, including tissue expanders, gave rise to medical risks – but also irrelevant, because the entire premise of a broad, inclusive settlement like this one is to achieve global peace and a release from *all* potential claims, strong and weak, active or potential. Indeed, though saline implants generally were less frequently associated with medical risks and concerns than were silicone gel implants, no distinction is made between those types of implants (except with respect to rupture benefits, which are denied to *all* types of saline breast implants, including tissue expanders), or between implants removed after a few days and those left in a claimant's body for 20 years. The parties entering into the Plan knew and understood that the settlement was intended to be broad, inclusive, provide total closure, and closely track or improve upon the RSP – and thus would rationally include tissue expanders as breast implants.

Finally, Dow Corning propounds a series of disingenuous and baseless arguments attacking the weight assigned by the District Court to the parties' understanding of the treatment of tissue expanders in the RSP: (i) it rehashes the flatly incorrect assertion that the Dow Corning settlement adopted only the procedures, and not the substantive criteria, of the RSP; (ii) it argues various inferences from the fact that Dow Corning's tissue expander implants did not trigger a Multiple Manufacturer Reduction ("MMR") in the RSP, although in

that respect the RSP simply mirrors the structure of the Dow Corning settlement; (iii) it cites repeatedly to the District Court's observation in its first decision that the MMR issue lent some "credibility" to Dow Corning's arguments, trying futilely to build up this dictum into a "finding" inconsistent with the District Court's ultimate conclusion that the provision of affirmative disease benefits for tissue expanders in the RSP was a more important and persuasive fact; and (iv) it falsely claims that treating Dow Corning's tissue expanders as breast implants would require the Settlement Facility to apply an MMR in connection with other manufacturers' tissue expanders, ignoring that the Dow Corning Plan expressly imposes an MMR *only* for silicone *gel* breast implants, not *saline* implants of any kind.

In short, faced with a choice between two possible understandings – that tissue expander implants would be treated as they had been in the RSP or that they would instead silently be carved out from that prior treatment and, with no notice to claimants, offered no settlement of any kind under the Dow Corning Plan – the District Court reasonably concluded that the former choice better reflected the parties' actual intent. Dow Corning offers no good reason for this Court to upset that ruling.

## A. Statement of Facts

Dow Corning's statement that its bankruptcy "had nothing to do with tissue expanders" (DCC Br. 12) is false. Dow Corning's bankruptcy was triggered by the massive liability it faced for claims in the Original Global Settlement, which collapsed in 1995, and it is undisputed that the multi-district litigation ("MDL 926") and global settlement *included* tissue expander breast implants.[2] In any event, the purpose of Dow Corning's Plan was to resolve *all* claims against Dow Corning's Estate (including those based on implants that were part of the Original Global Settlement, *i.e.*, silicone gel *and* saline implants like the tissue expanders at issue here); other implanted medical products; and liability based on any other ground. *See* RE #700, Ex. A, Amended Joint Disclosure Statement with Respect to Amended Joint Plan of Reorganization ("Disclosure Statement"), Page ID #9960-63 (charts showing treatment of all classes of claims).[3]

---

[2] *See Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.*, Nos. CV 92-P-10000-S & CV94-P-11558-S, MDL No. 926, 1994 WL 114580, at *2 (N.D. Ala. Apr. 1, 1994) ("'Breast Implant' means *any mammary prosthesis* containing or consisting of silicone, silicone gel, or saline . . . .") (emphasis added).

[3] Dow Corning gratuitously and misleadingly argues that its products have been proven not to cause disease (DCC Br. 7 n.1, 27 n.12), but it agreed to a multi-billion dollar settlement at arm's length based on a range of injuries and risks associated with its products, including rupture, product failure, localized injury, and a hotly contested dispute over systemic disease causation. The settlement reflects the parties' assessment of all of these risks and should be enforced fairly according to its terms. If anything, Dow Corning's argument in this regard

A key premise of the Plan, which was communicated prominently to personal injury claimants when Dow Corning and the Tort Claimants' Committee ("TCC") solicited their support for confirmation, was that the criteria to qualify for payment and the procedures used to resolve breast implant claims were based on the RSP. RE #700, Ex. A, Disclosure Statement, Page ID #9945 (Plan offers chance to settle "under a procedure, *including Claim payment levels and eligibility criteria*, modeled on the [RSP]") (emphasis added); *id.*, Page ID #9946 ("The settlement process for Breast Implant Claims is based largely on the criteria and procedures used to resolve breast implant claims in [MDL 926].").

Thus, the parties stated in the Settlement Facility Agreement ("SFA"): "It is expressly intended that the Settling Breast Implant Claims shall be processed in substantially the same manner in which claims filed in the MDL-926 Claims Office under the Revised Settlement Program were processed," *except as otherwise provided in the Dow Corning Plan documents*. RE #700, Ex. C, SFA, Page ID #10185, § 4.03. Presumptive conformance to the RSP was necessary, among other reasons, so that Dow Corning could extrapolate and project its liability by mirroring claims criteria and outcomes in the Plan, and thus the parties required

---

undercuts the purported irrationality of paying disease settlements for tissue expander implants: In Dow Corning's book, *none* of the claims are valid.

that the SF-DCT provide monthly reports listing, among other things, a comparison of RSP and SF-DCT claims outcomes. *See id.*, Page ID #10192-94, § 5.03(a).

Claimants were also told that most *deviations* from the RSP would be improvements: "The disease, explantation and rupture payment options in the Plan *all offer increased compensation and eligibility options* as compared to the [RSP]." RE #700, Ex. A, Disclosure Statement, Page ID #9947 (emphasis added). The most significant changes (all enhancements) – *e.g.*, the ability to qualify under the medical criteria of either the Original Global Settlement or the RSP; an increased explantation benefit; and a stand-alone rupture benefit – were spelled out in the Disclosure Statement (at Page ID #9946-47). Neither the Disclosure Statement nor the Plan documents state anywhere that tissue expander implant claims would be treated differently from, or less favorably than, similar claims in the RSP, and Dow Corning does not point to any such provision or communication.

The Plan offered a menu of settlement options to personal injury claimants with implanted medical products, including domestic and foreign Breast Implant recipients. The Plan, in turn, defines "Breast Implant" broadly: "*all* silicone gel and saline-filled breast implants with silicone elastomer envelopes manufactured and either sold or otherwise distributed by the Debtor." RE #700, Ex. B, Plan, Page ID #10479, § 1.17 (emphasis added). Within this broad definition, the Plan offers different settlement options to claimants with silicone

gel- versus saline-filled implants, and these different treatments largely track the treatment of corresponding claims in the RSP.

First, all Breast Implant claimants were offered a disease settlement option, with settlements ranging from $10,000 to $300,000 (including Premium Payments). *See* RE #700, Ex. D, Dow Corning Settlement Program and Claims Resolution Procedures ("Annex A"), Page ID #10239, § 6.02(d)(vi). The disease settlement option was a broad, inclusive resolution of a large number of claims that, consistent with the RSP, did not distinguish between saline- and gel-filled implants. *See* below at 49-50.

Second, a rupture benefit of $25,000 (including Premium Payments) was offered *only* to silicone *gel* Breast Implant recipients. *See* RE #700, Ex. D, Annex A, Page ID #10234, § 6.02(a)(iii). As was the case in the RSP, no rupture settlement was offered to recipients of any saline-filled implants, including tissue expander implants, because such claimants did not face the medical risks and injuries caused by the leakage of silicone gel into the body.

Third, Breast Implant recipients were offered a one-time "explantation" payment of $5,000 to cover medical expenses in connection with the removal of a Dow Corning Breast Implant between January 1, 1991 and the tenth anniversary of the Effective Date of the Plan. This benefit is available to all claimants who received a Breast Implant, except for those who thereafter received

a replacement silicone gel implant. *See id.*, Page ID #10234, § 6.02(c). In the RSP, claimants who had a tissue expander implanted in the breast removed during the applicable time frame were eligible for the Explantation Payment. *See* below at 13 n.5.

Dow Corning manufactured more than 250 different types of tissue expander implants, but only three were designed for use in the breast, and those are the only products at issue here. *See* RE #673, Mem. Op. & Order Regarding Tissue Expander Issue ("Original Opinion"), Page ID #8745. The record contains a product label for one of the three designs at issue that specifically refers to the product as a "Tissue Expander Implant, breast design." RE #40, Mot. of Claimants' Advisory Comm. to Interpret the Amended Joint Plan § 1.17 Regarding the Definition of "Breast Implant" ("CAC Mot."), Ex. 2, Page ID #134. It is undisputed that Dow Corning's tissue expanders, marketed under its SILASTIC brand name, consisted of silicone elastomer shells that were implanted into the body and then filled with saline solution. RE #673, Original Opinion, Page ID #8743-44; RE #40, CAC Mot., Ex. 1, Page ID #133.[4]

[4] The "SILASTIC" brand name, which Dow Corning used both for tissue expander implants and for other types of breast implants, is included in Schedule I to SFA Annex A, which lists eligible Breast Implant product and brand names. Thus, assuming that tissue expanders otherwise meet the definition of a Breast Implant, they will qualify for payment under the Breast Implant Settlement Option if a claimant can demonstrate that her implant was marketed under the "SILASTIC" brand name.

Dow Corning does not contest that other manufacturers' tissue expander implants were treated as breast implants in the RSP.[5] *See* RE #40, CAC Mot., Ex. 3, Page ID #135 (statement by RSP Claims Administrator to SF-DCT Claims Administrator that "[t]issue expanders were treated like implants for purposes of disease claims [in the RSP]"). Annex A of the SFA republishes Exhibit G to the RSP, which includes 15 types of "tissue expander" or "expander" implants among the list of eligible breast implants. *See* RE #700, Ex. D, Annex A, Page ID #10305-10. Since the RSP was solely a breast implant settlement, each of these implant products was of necessity treated as a breast implant for purposes of the RSP.

Three other breast implant mass tort resolutions contemporaneous with the RSP and also arising from MDL 926 similarly treated the settling manufacturers' tissue expander implants as breast implants. In the Mentor and

---

[5] The RSP materials are entitled "Breast Implant Litigation Notice" and repeatedly refer to all eligible implants as "breast implants." Exhibit G to the RSP lists eligible breast implants and includes 15 references to tissue expander implants made by other manufacturers, many containing saline, and all eligible for disease and explantation benefits. *See* Breast Implant Settlement Notice, *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.*) *(MDL 926)*, Case No. CV 94-P-11558-S, Master File No. CV 92-P-10000-S (N.D. Ala.), *available at* http://www.claimsoffice-926.com/pdf/mdl926_breast_implant_ litigation_ notice.pdf. *See also* Order No. 27, *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.*) *(MDL 926)*, Case No. CV 94-P-11558-S, Master File No. CV 92-P-10000-S (N.D. Ala. Dec. 22, 1995), *available at* http://www.fjc.gov/BREIMLIT/ORDERS/order27.rtf.

Bioplasty settlements, the MDL 926 court entered an order approving a notice that explained: "[T]he terms 'breast implant' and 'implant' include both silicone-gel and saline-filled breast implants, and also include 'tissue expanders.'" *See* Notice at 1 n.1, *Butler v. Mentor Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.) (MDL-926)*, Case No. 93-P-11433-S, Master File No. CV 92-P-10000-S (N.D. Ala. July 26, 1996), *available at* http://www.fjc.gov/BREIMLIT/ORDERS/notice33.rtf. Similarly, in the INAMED settlement, "Breast Implant" was defined to mean "any breast implant device containing or consisting of saline, silicone, silicone gel and/or elastomer made of silicone, including devices designed for temporary implantation in the breast (*i.e.*, tissue expanders)." *See* Order at 2, *Altrichter v. INAMED Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.) (MDL-926)*, Case No. 97-P-11441-S, Master File No. CV 92-P-10000-S (N.D. Ala. June 2, 1998), *available at* http://www.fjc.gov/BREIMLIT/ORDERS/inamed.rtf.

In addition to benefits for Breast Implant recipients, the Dow Corning Plan offers separate (and generally lower) settlement amounts for claimants with certain specific types of non-breast implants designed for various parts of the body. These "Other Products" are listed in specific detail by particular brand name, product name, and size. *See* RE #700, Ex. D, Annex A, Page ID #10289-301. The majority of these products were made of hard plastic silicone, and claimants who received these products are offered settlements only for implant failure or

inflammatory foreign body response and not systemic disease. A few covered other products (*e.g.*, testicular implants) contain silicone gel and are offered a settlement benefit based on rupture. *See id.*, Page ID #10249-51, 10255-56.[6]

Read together with the history of other settlements, these Plan provisions would lead a claimant to understand that breast-design tissue expander implants were included in the definition of "Breast Implant" and thus eligible for benefits. Nothing in the Plan or Plan documents communicated anything contrary or noted what would have been a major deviation from the RSP – about which claimants were entitled to be informed before casting their ballots lest the Disclosure Statement's affirmative representations be rendered materially misleading. Indeed, the only specific reference to tissue expander implants in the Dow Corning Plan documents expressly includes them as "breast implant products." *See* RE #700, Ex. D, Annex A, Page ID #10305 (stating that for purposes of Class 7 silicone material settlement, brand/manufacturer names listed on RSP Exhibit G, including 15 types of tissue expander implants, "shall identify a *breast implant product*") (emphasis added).

---

[6] Other Products that are not specifically listed are offered no settlement and can be resolved only through opt-out proceedings in the Litigation Facility. RE #700, Ex. D, Annex A, Page ID #10247, § 6.03(b). This category, which includes products like injectable silicone fluid with no history of having been compensated in prior settlements, is where Dow Corning implausibly contends the parties agreed to place tissue expander breast implants.

In addition, the Implant Proof of Claim Form used to register personal injury claimants in the Dow Corning bankruptcy did not distinguish between "breast implants" and "tissue expanders." *See* RE #57, Resp. of Claimants' Advisory Comm. to Mot. of Dow Corning Corporation ("CAC Resp."), Ex. 2, Page ID #250-51 (Proof of Claim Form). Question 10 of the Proof of Claim Form asked claimants to check a box to identify the type of implant they had, providing the following choices:

1. Breast Implant
2. Raw Materials supplied by Dow Corning and used in Implants made by other companies
3. TMJ – Silicone Temporomandibular Joint Corrective Surgery
4. Chin/Other Facial Implant
5. Testicular/Penile Implant
6. Silicone Fluid Injection
7. Contraceptives implanted in upper arm
8. Silicone Small Joint Orthopedic – Finger, Toe, Wrist, Other
9. Metal Large Joint Orthopedic – Hip, Knee, Other
10. Unknown
11. Other

*Id.*, Page ID #251. The Proof of Claim Form did not distinguish between tissue expander breast implants and other types of breast implants, and it contained no other category that could have included them. It therefore follows that many claimants with tissue expander breast implants checked the "breast implant" box

on the assumption that these implants were being treated in the same manner as such products were treated in the RSP. RE #57, CAC Resp., Page ID #243-44.

Finally, the direct modeling of the Dow Corning settlement on the substantive benefit provisions of the RSP was not just something communicated to tort claimants – it was crucial to Plan confirmation. Dow Corning established the adequacy of Plan funding through its estimation expert, Mr. Fred Dunbar, who projected the amounts necessary to pay all settled and litigated claims *based on extrapolations from the acceptance and opt out rates in the RSP*. He opined that the RSP set "market" values for breast implant claims that provided a basis for reliable projections. 6/29/1999 Conf. Hr'g Tr. at 59. In adopting Mr. Dunbar's conclusions, the Bankruptcy Court noted that "[t]he Plan was based largely on the RSP, but there were significant differences" – *i.e.*, "enhancements in the current plan from the RSP" that supported Mr. Dunbar's conclusions that "a greater percentage of the eligible population will elect to settle in the Settlement Facility than elected to settle in the RSP" and that "a smaller percentage of people entitled to do so will opt to litigate in the Litigation Facility." *See In re Dow Corning Corp.*, 244 B.R. 721, 730-31 (Bankr. E.D. Mich. 1999), *aff'd*, 255 B.R. 445 (E.D. Mich. 2000), *aff'd in relevant part, remanded on other grounds*, 280 F.3d 648 (6th Cir. 2002).

## B. Earlier Proceedings

In connection with Plan implementation, Dow Corning and the CAC stipulated to procedures for resolving disputes regarding interpretations of the Plan. *See* RE #53, Stipulation & Order Establishing Procedures for Resolution of Disputes Regarding Interpretation of the Amended Joint Plan ("Plan Interpretation Stipulation"). Section 2.01 of the Plan Interpretation Stipulation implements SFA § 5.05 by providing that disputes over the interpretation of the SFA or Annex A be submitted, first, to the Claims Administrator and then, after the Claims Administrator either rules or declines to rule, to the District Court. The parties expressly stipulated to limit the scope of any further appeal: "To the extent permissible, the parties agree that the standard of review for any findings of the District Court arising out of § 2.01 of this agreement shall be clearly erroneous." *See id.*, Ex. A, Page ID #123, § 2.01(d)(5).

The dispute over the treatment of tissue expander claims arose early in the process of establishing the Settlement Facility – rendering meaningless Dow Corning's observation (DCC Br. 18) that such claims were not mentioned in the training of the Settlement Facility staff. Pursuant to SFA § 5.05 and the stipulated procedures, the instant dispute was submitted first to the Claims Administrator, who held a hearing on the record but subsequently declined to rule, and then to the District Court for decision through cross-motions by Dow Corning and the CAC.

The District Court held in the Original Opinion that the Plan's broad definition of "Breast Implant" unambiguously embraced tissue expander implant products designed for implantation in the breast. Although this holding was vacated, aspects of the Original Opinion remain relevant, including the court's finding that there was no dispute as to several elements of the Breast Implant definition: The products at issue were produced by Dow Corning, have a silicone envelope, were implanted in the breast, and were filled with saline. *See* RE #673, Original Opinion, Page ID #8744. Dow Corning does not challenge these findings on this appeal.

The District Court also rejected Dow Corning's arguments that the structure of the Breast Implant and Other Product settlement categories inherently barred tissue expanders from being considered Breast Implants. The court noted that while "tissue expanders" were not expressly included in the definition of "Breast Implant," they also were not mentioned in the much more detailed definition of "Other Products," despite the parties' recitation in that definition of many other different types of implants used in other parts of the body. *Id.*, Page ID #8747-48. This Court similarly rejected Dow Corning's structural arguments based on the categorization of products in the Plan, and Dow Corning does not press them on this appeal.

The District Court went on to discuss and summarize the parties' arguments regarding extrinsic evidence – including Dow Corning's argument about the treatment of its own tissue expanders in the RSP – but ultimately made no findings about such evidence because it found the Plan language unambiguous: "[T]issue expander[s] specifically designed for implantation in the breasts meet the definition of 'Breast Implant' under Section 1.17 of the Plan." *Id.*, Page ID #8750-51. The court thus granted the CAC's motion, denied Dow Corning's motion, and ordered the SF-DCT Claims Administrator to treat as "Breast Implants" the three specific styles of tissue expanders designed to be implanted in the breast. *Id.*

On appeal, this Court first dealt with the question of what standard of review should apply in the unusual circumstances of the Dow Corning case, where the Plan was initially confirmed by Bankruptcy Judge Spector in 1999, but Judge Hood withdrew the reference, supervised implementation of the Plan and establishment of the Settlement Facility, and has served as the court of original jurisdiction since 2001. This Court concluded that a "measure of deference" is warranted in view of Judge Hood's greater familiarity with "this Plan and with the parties' expectations regarding it." 628 F.3d at 772.

This Court thus held that with respect to determining whether a Plan provision is ambiguous, it must be "mindful [of] our blind spots with respect to how one provision might interrelate with others," even though contract

construction "is not a point on which we substantially defer." *Id.* Importantly, the Court stressed that, once it has found a provision to be ambiguous, sifting through competing evidence to determine which side has more accurately stated "everyone's expectations as to what the Plan was supposed to mean" is the District Court's job:

> This is where we start to defer in earnest. The district court in this case, like the bankruptcy court in others, is far-better equipped, not least in terms of background knowledge, to sort through that evidence and determine what is important.

*Id.* This Court thus stated that "if the court assessed extrinsic evidence in choosing among reasonable interpretations of the Plan, *we will not disturb its choice*." *Id.* (emphasis added).

On the merits of the tissue expander issue, this Court agreed with much of the District Court's analysis, specifically holding that "[t]he term 'breast implant,' as used in the definition [of "Breast Implant"], can reasonably be read to refer to any device specifically designed for implantation in the breast." 628 F.3d at 773. This Court further noted (*id.*) that the District Court's adoption of a reading that included tissue expander breast implants was supported by the language of the definition itself, which refers to "*all* silicone gel and saline-filled breast implants." RE #700, Ex. B, Plan, Page ID #10479, § 1.17 (emphasis added).

The Court acknowledged Dow Corning's argument that the medical community has a more "technical" understanding of the term limited to devices intended for permanent implantation, but observed that this begged the question whether the parties *here* had intended to use the term "in a technical or more ordinary sense." 628 F.3d at 773. And the Court held that this question was not answered by Dow Corning's "circular" attempt to foreclose the ordinary sense reading through "structural" arguments based on Plan language. *Id.*

This Court therefore held that section 1.17 was ambiguous, requiring consideration of extrinsic evidence to determine whether the parties intended to include tissue expander implants within the scope of "Breast Implants" under the Plan. Because the District Court had found the language unambiguous and declined to consider the extrinsic evidence, the Court remanded to allow it to do so, while stressing that the choice between the two reasonable readings "lies with the district court." *Id.* Thus, the Court stated, once the district court has the opportunity "to assess the relevant extrinsic evidence . . . we expect to defer to its decision." *Id.*

On remand, the District Court did exactly what this Court directed, considering the parties' extrinsic evidence and deciding – in light of its detailed knowledge of the parties' purposes and expectations in connection with the Plan – that the parties intended to include tissue expander breast implants within the

definition of "Breast Implant" rather than exclude them from receiving any settlement offer under the Plan. *See* RE #924, Mem. Op. & Order Regarding Breast Tissue Expander Issue on Remand ("Remand Opinion"), Page ID #15736-37.

Contrary to Dow Corning's pejorative description, the District Court did not merely rubber-stamp its own prior ruling; it considered all of the parties' proffered evidence and arguments before reaching its conclusion – expressly acknowledging the record evidence on which Dow Corning mainly relies: the affidavit of its medical device operations manager setting forth the purported common understanding of the terms "breast implant" and "tissue expander" among medical, industry, and government authorities. Far from "ignoring" this evidence (DCC Br. 24), the Court considered it but concluded that it proved something not in dispute: that the terms "Breast Implant" and "Tissue Expander" generally mean different things. The Court found this evidence neither helpful nor relevant in determining the issue actually before it: "whether *the parties intended* 'Tissue Expander' claimants be given benefits under the 'Breast Implant' provision." RE #924, Remand Opinion, Page ID #15732.

The District Court also considered Dow Corning's evidence and arguments regarding Mr. Dunbar's report, his testimony, and the absence of any mention of tissue expanders in the context of the confirmation hearing. While the court found Mr. Dunbar's testimony relevant, it acknowledged that his reliance on

RSP claim experience (which included tissue expander implants) likely rendered it unnecessary for him to separately analyze this relatively minor category of claims. The District Court concluded that Mr. Dunbar's report "does not go to the ultimate question of what the parties *intended* to do with the Dow Corning breast tissue expanders," and the Court similarly discussed but drew no firm conclusions from the parties' conflicting arguments regarding the Plan's definitions of "Breast Implant" and "Other Products." *See id.*, Page ID #15733-35.

Ultimately, the District Court concluded that the most relevant and persuasive evidence was (1) that the parties knew that the RSP manufacturers treated their own tissue expanders as breast implants for purposes of disease and rupture benefits, and (2) that tort claimants were told that the Dow Corning benefits would be modeled on the RSP unless different treatment was specified.[7] While finding it "curious" that the parties did not expressly address the question in the Dow Corning Plan documents, the court concluded:

> It is reasonable to infer that such failure was based on the RSP experience and the other settlement programs,

[7] Dow Corning suggests that the District Court's findings about what tort claimants were told are based on "unspecified conversations documented nowhere in the record." DCC Br. 25. However, as noted above at 9, Dow Corning specifically told tort claimants on the first two pages of the Disclosure Statement that the Plan's "Claim payment levels and eligibility criteria" were "modeled on the [RSP]," and that its breast implant settlements were "based largely on the criteria and procedures used to resolve breast implant claims in [MDL 926]." RE #700, Ex. A, Disclosure Statement, Page ID #9945-46.

> wherein the tissue expanders implanted in the breasts were included as breast implants and so the parties intended for these breast tissue expanders to be included in the Plan's 'Breast Implant' provision.

*Id*., Page ID #15736.

As support for this inference, the District Court noted a variety of things known to the parties: (1) that the RSP and other contemporaneous breast implant settlements arising from MDL 926 "included the breast tissue expanders in the definition of 'Breast Implant'"; (2) that the Plan documents repeatedly instruct the Claims Administrator "to apply the protocols and procedures" developed in the RSP regarding proof of manufacturer and submission of claims (citing RE #700, Ex. D, Annex A, Page ID #10282, 10313); (3) that the SFA directed claims to be processed "in substantially the same manner" as the RSP except to the extent "criteria or processing guidelines are modified" by the Plan documents (citing RE #700, Ex. C, SFA, Page ID #10185, § 4.03(a)); and (4) that "in the RSP and related settlement programs, each manufacturer's breast tissue expanders were processed in the same manner as its own breast implants." RE #924, Remand Opinion, Page ID #15736-37. The court stressed that "Dow Corning has not submitted any evidence that breast tissue expanders were not considered breast implants in those programs." *Id.*, Page ID #15737.

In sum, the court found these factors to be "strong evidence that the parties intended to evaluate breast tissue expanders in the same manner as breast

implants," and, thus, "[d]rawing reasonable inferences from the submitted evidence," the court found that "the intent of the parties was to include the breast tissue expanders under the 'Breast Implant' provision." *Id.*

## SUMMARY OF ARGUMENT

The District Court did not clearly err or abuse its discretion in finding that the Plan's definition of "Breast Implant" included Dow Corning tissue expander implants intended for implantation in the breast. The court appropriately sifted through the extrinsic evidence and focused on what the parties to the settlement actually knew and were told in connection with its formation: that Dow Corning settlement benefits were intended to track the RSP except for specified improvements, and that the RSP manufacturers had treated their own tissue expander implants as breast implants for the purpose of disease and rupture benefits. The court acted within its discretion in assigning less weight to evidence of the general meanings of "breast implant" and "tissue expander" allegedly understood by medical and business actors. It was not "legal error," as Dow Corning argues, for the District Court not to rely on these putative industry definitions since the court did not *exclude* the evidence but rather admitted it, considered it, and assigned it less weight. Such weighing of competing evidence is classically within a trial court's purview.

Dow Corning's myriad additional arguments fail to justify overturning the District Court's assessment of the evidence. First, the lack of express focus on tissue expander implants at the confirmation hearing does not compel the conclusion that they were meant to be excluded from receiving any settlement offer. Dow Corning's claims estimation expert, Mr. Dunbar, correctly listed tissue expanders as excluded because only three of the approximately 250 models were designed for implantation in the breast and thus had been offered benefits in the RSP. Estimation was required at confirmation only to determine the adequacy of the Litigation Fund – not for claims allowance or Plan feasibility. Because Mr. Dunbar based his estimation on data from the RSP, experience with tissue expander implant claims was, of necessity, included in the projections he offered to establish a low opt out rate and, as a result, the adequacy of the Litigation Fund. In any event, tissue expander implant recipients represent such a small proportion of Dow Corning's overall claims liability (much less than one percent) that there was no necessity – either as a matter of bankruptcy law or practicality – to break them out for separate estimation.

Second, Dow Corning's argument that there is "no rational basis" to provide tissue expander implant recipients with a disease benefit ignores the fact that the RSP manufacturers did exactly that. While Dow Corning's bankruptcy was triggered by liability for silicone gel implants, its *Plan* was intended to provide

global closure for *all* claims against the company. Thus, the Plan settlement expressly includes *saline*-filled breast implants, which were not the focus of pre-bankruptcy litigation and epidemiology, and saline-filled tissue expander implants are logically included within that category. The settlement, like most mass tort settlements, ignores a number of other variables – including, among other things, length of implantation – that might make certain individual claims more or less valuable in the tort system, instead offering uniform benefits through a streamlined process that tends to "level" relatively stronger and weaker claims. It was hardly irrational to include a minimal number of tissue expander claims within the disease benefit as part of this overall approach, just as other manufacturers did in the RSP.

Third, Dow Corning's various attempts to undercut the District Court's reliance on what the parties understood about the RSP experience fail to establish any abuse of discretion. The Disclosure Statement expressly told claimants that the settlement benefits themselves – not just the procedures – were modeled on the RSP. Indeed, Mr. Dunbar's projections were expressly based on the assumption that the criteria for Dow Corning disease settlements were *identical* to the RSP. The District Court did not abuse its discretion in concluding that the RSP manufacturers' treatment of their *own* tissue expanders as breast implants was more relevant and persuasive than the fact that Dow Corning tissue expanders did not trigger an MMR in the RSP. The District Court's statement in the Original

Opinion that the latter fact lent some "credibility" to Dow Corning's position was not a finding and creates no conflict with the court's ultimate holding. The RSP structure in any event parallels the structure of the Dow Corning settlement, in which the parties also agreed to a narrower MMR provision – here, only silicone *gel* breast implants trigger the MMR.

## STANDARD OF REVIEW

This Court has traditionally reviewed decisions interpreting a confirmed plan under an "abuse of discretion" standard. *See In re Dow Corning Corp.*, 456 F.3d 668, 675-76 (6th Cir. 2006). Dow Corning itself has advocated for that standard of review in connection with appeals of earlier District Court decisions in this case. *See* Brief of Appellee at 12, *Clark-James v. Settlement Facility Dow Corning Trust*, No. 08-1633 (6th Cir. Dec. 23, 2008) ("The District Court's decision here was based on the plain language of Dow Corning's Amended Joint Plan of Reorganization. It is therefore reviewed for an abuse of discretion and must be accorded 'significant deference.'") (citation omitted).

As described above at 20-21, this Court adopted a slightly different standard in the earlier tissue expander appeal. *See In re Settlement Facility Dow Corning Trust*, 628 F.3d 769 (6th Cir. 2010). The Court acknowledged that, while Judge Hood was not the judge who confirmed the original Plan, she "has presided over this bankruptcy case continuously since 1995" in various capacities and has

"acted as the court of first resort" for nine (now twelve) years. *Id.* at 772. As a result, "[t]here is simply no denying that she is much more familiar with this Plan – and with the parties' expectations regarding it – than we are," leading the Court to accord her reading of the Plan documents "a measure of deference." *Id.* The Court concluded that it would accord relatively less deference to the District Court's interpretation of unambiguous Plan language and more, indeed almost complete, deference to its weighing of extrinsic evidence. *Id.* This appeal deals with precisely the same issues implicated in the 2010 appeal, and the Court thus should apply the standard of review it established then.[8]

Moreover, the parties themselves agreed that the District Court's Plan interpretation "findings" would be subject to review only on a "clearly erroneous" basis. *See* RE #53, Plan Interpretation Stipulation, Ex. A, Page ID #123, § 2.01(d)(5). Dow Corning has argued that "findings" should be limited to formal findings of fact, but that would be a nonsensical reading of the provision, since that deferential standard of review would apply to purely factual findings even in the

[8] Dow Corning argues that the Remand Opinion is entitled to no deference because the District Court made "findings relating to an entirely different proceeding" (DCC Br. 32) – but of course those findings related to what the parties in *this* proceeding knew about the RSP and what claimants in *this* proceeding were told about the source of the criteria for Dow Corning's settlement offers. Dow Corning's further argument for "no deference" (*id.* at 32) is just a rehash of its argument about the District Court's supposedly contradictory findings that conflates standard of review with a (meritless) merits argument. *See* below at 57-58.

absence of any agreement. Rather, the Stipulation reflects the parties' intention to assure greater predictability by creating a broader presumption in favor of the District Court's Plan interpretations than might otherwise apply.[9]

## ARGUMENT

### I.

### THE DISTRICT COURT'S FINDING THAT THE PLAN TERM "BREAST IMPLANT" WAS INTENDED TO INCLUDE TISSUE EXPANDER IMPLANTS DESIGNED FOR IMPLANTATION IN THE BREAST WAS NEITHER CLEARLY ERRONEOUS NOR AN ABUSE OF DISCRETION

The question on remand was not, as Dow Corning would have it, whether the term "breast implant" is commonly understood in the medical or business worlds to embrace tissue expander implants. Rather, the question was how that term was actually understood by the *parties to this contract* – the representatives who negotiated to model the Dow Corning settlement on the RSP – and the thousands of breast implant recipients (including those with tissue expander implants) who voted to accept Dow Corning's Plan and settle their claims. The relevant extrinsic evidence is what was known to *these parties* at the time the Plan was adopted. *See, e.g.*, *Winnett v. Caterpillar, Inc.*, 553 F.3d 1000,

[9] Dow Corning may argue that parties may not "stipulate" to the standard of review, citing *Regional Airport Authority v. LFG, LLC*, 460 F.3d 697, 712 n.10 (6th Cir. 2006), but that case holds only that parties may not bind the court merely by agreeing in their briefs to a particular standard of review. *Id.* It does *not* bar parties structuring a comprehensive settlement from setting standards to govern future dispute resolution.

1008 (6th Cir. 2009) (contract construed consistently with "relative positions and purposes of the parties" (citation omitted)); *Bank of N.Y. v. Janowick*, 470 F.3d 264, 270-71 (6th Cir. 2006) (contract construed to effectuate intent of parties in light of circumstances and object of contract).[10]

Here, all of the extrinsic evidence must be viewed through one lens: the parties' agreement that the criteria to qualify for payment under the Dow Corning settlement were to be based on the RSP. *See* RE #700, Ex. A, Disclosure Statement, Page ID #9945, 9946 (Plan based on RSP claim payment levels, eligibility criteria, and procedures). Indeed, the SFA specifically told Claimants: "It is expressly intended that the Settling Breast Implant Claims shall be processed in substantially the same manner in which claims filed in the MDL-926 Claims Office under the Revised Settlement Program were processed," *except as otherwise provided in the Dow Corning Plan documents*. RE #700, Ex. C, SFA, Page ID #10185, § 4.03(a). Crucially, the Plan documents do not contain any provisions

[10] The cases Dow Corning cites are consistent with this rule. For example, *Construction Interior Systems, Inc. v. Marriott Family Restaurants, Inc.*, 984 F.2d 749, 756 (6th Cir. 1993), instructs that the "plain, ordinary" meaning of contract language controls absent evidence of a different intent – and here, as this Court recognized (*see* 628 F.3d at 773), the "ordinary sense" of the phrase "breast implant" as a generic element in the defined term "Breast Implant" is simply a medical product designed to be implanted in the breast. Dow Corning's attempt to portray this reading as "idiosyncratic" (DCC Br. 36) ignores that ruling. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798 (6th Cir. 2005), was not even a contract case – it simply adopted the most "commonly accepted" meaning of the term "digital sampling" for purposes of copyright analysis.

stating that claims based on tissue expander breast implants would be treated differently from similar claims in the RSP, and Dow Corning does not point to any such provision.[11]

Against this backdrop, the universe of information available to Claimants voting on the Plan strongly suggested a common understanding that breast-design tissue expander implants *would* be included as Breast Implants:

- Tissue expander implants intended for implantation in the breast were treated as breast implants eligible for disease payments in the RSP as well as in three other contemporaneous breast implant claim programs. *See* above at 13-14.

- The original Dow Corning proof of claim form specifically listed breast implants and several other types of implants, but contained no separate listing for breast-design tissue expander implants, giving rise to a

[11] Dow Corning tries to confuse the issue by stressing that *Dow Corning* tissue expander implants were not themselves treated as breast implants in the RSP for purposes of the MMR. DCC Br. 46-48. But this misses the point. The manufacturers participating in the RSP treated their *own* saline-filled tissue expander implants as breast implants for purposes of offering settlements. That created a presumption that, unless the Dow Corning Plan documents provided to the contrary, the Dow Corning Plan would offer mirror-image benefits: treating Dow Corning's own tissue expander implants as Breast Implants for purposes of basic settlement offers, but *not* including other manufacturers' similar products among those triggering the Dow Corning MMR.

reasonable inference that these products were being treated as breast implants. *Id.* at 16-17.

- When the Plan was announced, Claimants were specifically told that the Dow Corning settlement was being modeled on the substantive provisions of the RSP, with certain significant improvements. *Id.* at 9.

- The definition of "Breast Implant" in the Plan was facially broad and inclusive: "all silicone gel and saline-filled breast implants with silicone elastomer envelopes manufactured and either sold or otherwise distributed by the Debtor." RE #700, Ex. B, Plan, Page ID #10479, § 1.17.

- Product identification eligibility for breast implants was based not on an exhaustive index of specific products (as in the RSP and other settlements) but on a list of general brand names, including "SILASTIC" – the brand under which Dow Corning's tissue expander breast implants were marketed. *See* above at 12.

- Tissue expander implants were not included in either the long list of products defined as "Other Products" under the Plan or the subcategory of "Other Products" offered specific settlements. *See id.* at 14-15.

- The tissue expander implants included in the RSP product list published in Annex A to the SFA were specifically referred to as "breast

implants" for purposes of the Class 7 silicone material settlement. *See id.* at 15-16.

- Nothing contained in the Plan or any of the Plan documents stated or even suggested that tissue expander implants were being broken out from other medical products designed for implantation in the breast to receive different or lesser treatment than they had been accorded in the RSP. *See id*. at 15.

In these circumstances, Claimants voting on the Plan would reasonably have assumed that tissue expander implants were included within the definition of "Breast Implants." At minimum, it was neither clear error nor an abuse of discretion for the District Court to so conclude. This holding is further supported by other contract construction principles.

First, because tissue expander implants were considered breast implants in the RSP (which was expressly referenced in the Dow Corning Plan documents as the source of benefit criteria), and because the only mention of these products in Annex A itself treats them as breast implants, the inclusive reading of the definition is further supported by the contract construction principle that the same term should give the same meaning in different parts of a contract. *See State v. R.J. Reynolds Tobacco Co.*, 761 N.Y.S.2d 596, 597 (N.Y. App. Div. 2003).

Indeed, by informing claimants that the Dow Corning settlement would follow the RSP, Dow Corning communicated an inclusive definition of "Breast Implant" based on the parties' common understanding from prior settlements, which in many cases involved the same claimants if they had multiple implants. *See Sault Ste. Marie Tribe of Chippewa Indians v. Granholm*, 475 F.3d 805, 815 (6th Cir. 2007) (meaning of contract terms established by parties' understanding from prior dealings); *see also Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC*, 477 F.3d 383, 393 (6th Cir. 2007) (course of dealing may inform meaning of contract terms).[12]

In this setting, the District Court appropriately assigned less weight to the medical and industry evidence offered by Dow Corning. It is of limited

---

[12] Arguing for a different weighing of the extrinsic evidence, Dow Corning adopts an argument made by Judge Batchelder *in dissent*: that because the other contemporaneous breast implant settlements *expressly* included tissue expander implants (and, indeed, listed specific product models that qualified for benefits), the absence of such specific references in the Dow Corning Plan documents reflects an intent to exclude tissue expander implants from the settlement. DCC Br. 40-41 n.16. But this argument ignores two crucial facts. First, claimants were specifically told that the Plan's offers would be *the same* as those in the RSP, except where the Dow Corning Plan documents specified different treatment. Thus, it was not necessary to recite that tissue expander implants were included; since they were included in the RSP, they were presumptively included under the Dow Corning Plan. Second, unlike the other settlements, the Dow Corning Plan did not recite each specific product model that qualified for coverage, but rather included only a general list of qualifying brand names. Thus, the failure to list specific products by name reveals nothing about the parties' intent. In any event, the SILASTIC brand under which Dow Corning marketed its breast-design tissue expander implants was expressly *included* as a qualifying brand.

relevance that certain third parties might understand "Breast Implant" to refer only to permanent implants intended to achieve aesthetic results, because there is no evidence that this limitation was expressed among the parties or communicated to claimants. As the District Court originally concluded and this Court agreed, there is nothing inherent in the definition of "Breast Implant" limiting the term only to implants intended for permanent implantation or implantation for a particular purpose. Nor does eligibility for benefits under the Plan turn on the length of time implants were actually in the body.

Claimants were never informed of any bright line difference between "temporary" and "permanent" breast implants, and their experience was to the contrary. "Permanent" implants regularly fail and must be removed, which is why the Dow Corning settlement has paid hundreds of millions of dollars in explantation and rupture benefits. Moreover, such implants may need to be removed for medical reasons after a short period of time. There are numerous instances – both in the reported literature and in actual claimant experience – where saline and silicone gel implants were removed within days or weeks of implantation because of a problem with or reaction to the implant. *See, e.g.*, RE #57, CAC Resp., Ex. 1, *Augmentation Mammaplasty Associated with a Severe Systemic Illness*, Page ID #247-49 (reporting case of woman who experienced systemic, near fatal illness within 24 hours after implantation of silicone gel breast

implant resulting in its removal 11 days later). Tissue expander implants, in turn, may be implanted only for a few days or for as long as several months or longer. *See* DCC Br. 7-9.

Dow Corning ignores all of the foregoing and stakes its appeal mainly on a restatement of its main argument from the *last* appeal: that there is only one possible "plain meaning" of the term "breast implant" – the meaning allegedly assigned by the medical and business communities. But this Court has already *rejected* that argument, expressly holding that the Plan language in question could be read to embrace the "technical" meaning Dow Corning asserts (a permanent implant designed to achieve aesthetic results) or the simpler "ordinary" meaning (a medical product intended for implantation in the breast). *See* above at 21-22. Dow Corning's argument that the District Court committed "legal error" by declining to adopt its preferred definition is merely a belated attempt to reargue this Court's prior ruling. The cases Dow Corning cites for the general proposition that "plain language" controls, *e.g.*, *Constr. Interior Sys.*, 984 F.2d at 756, do not advance the analysis at this stage.[13]

[13] Similarly, *Fathauer v. United States*, 566 F.3d 1352 (Fed. Cir. 2009), hardly supports Dow Corning in light of this Court's prior ruling. That case stands for the proposition that when a defined term is included as part of its own definition, it should be accorded the broadest, most generic meaning. *See id.* at 1355-56. Here, the broader meaning (and the *ordinary* meaning as read by this Court) would embrace tissue expander implants.

The principal case Dow Corning cites to support its "legal error" argument actually dictates the opposite result. *Granholm*, discussed above, holds that it is error to exclude extrinsic evidence relevant to construing an ambiguous contract provision. 475 F.3d at 814-15. But to be relevant and admissible, extrinsic evidence "must shed some light on the circumstances surrounding the contract formation," and if the evidence is offered to establish a trade practice, custom, or usage, it must be shown that "both parties bargained with reference to" that special meaning. *Id.* Here, Dow Corning offered *no* evidence that the parties negotiating the Plan or the claimants voting on it bargained with reference to the more "technical" as opposed to "ordinary" meaning of "breast implant."[14]

More fundamentally, the District Court never *excluded* Dow Corning's extrinsic evidence – it admitted it, considered it, and found it to be less relevant to the question of the parties' actual intent than the evidence offered by the CAC. This distinction makes all the difference. As *Granholm* explains, while "the *admissibility* of extrinsic evidence is a question of law" within an appellate court's province, "the amount of *weight* to accord extrinsic evidence is a question

[14] For the same reason, Dow Corning's cause is not advanced by its lengthy exegesis on the black letter rule that it is the objective, expressed intent of the parties that controls over any secret or idiosyncratic meanings. DCC Br. 37-38. The record evidence shows that the parties knew that the RSP treated settling manufacturers' tissue expander implants as breast implants for purposes of disease and explantation benefits, and agreed that the Dow Corning settlement would closely track the RSP, with certain improvements. The record does *not* show that the parties negotiated with reference to the purported technical or industry definition of "breast implant."

of fact and must be determined by the trier of fact." *Id.* at 816 (emphasis added). Far from committing "legal error,' the District Court did precisely what it was instructed to do on remand. Dow Corning just doesn't like the result.

In short, since breast-design tissue expander implants were not expressly listed as Other Products, or offered a settlement in that category, any ambiguity in the presentation to tort claimants may be resolved in only one of two ways: either such implants were intended to be treated as Breast Implants (as they had been in the RSP and other recent settlements) or they were to be excluded entirely from receiving any settlement offer under the Dow Corning Plan – lumped with other products too obscure to warrant mention or treatment in the Plan, including off-label applications like injected silicone. Total exclusion would have been unexpected and unusual in light of recent history of which the parties were aware, and thus not the logical inference that Claimants would have drawn in reviewing the Dow Corning Plan materials and deciding how to vote on the Plan or whether to elect to settle their claims. The District Court did not abuse its discretion or commit clear error in concluding that the former reading more closely conformed to the parties' expectations and that tissue expander implants intended for implantation in the breast should be treated the same as other saline-filled breast implants under the Plan.

## II.

## DOW CORNING'S ADDITIONAL ARGUMENTS DO NOT UNDERMINE THE BASIS FOR THE DISTRICT COURT'S RULING

Dow Corning advances a series of other arguments purportedly showing that the definition of "Breast Implants" cannot include tissue expander implants, based on the lack of explicit treatment of tissue expanders at confirmation; the alleged irrationality of paying disease benefits for tissue expander implants; and various reasons why it asserts the District Court was barred, in determining the parties' intent, from relying on what the parties had been told about the RSP and other prior settlements. None of these arguments suggests – much less proves – that the District Court abused its discretion or clearly erred in its reading of the Plan definition.

### A. The Lack of Explicit Treatment of Tissue Expander Implants at the Time of Plan Confirmation Does Not Mandate Their Exclusion from the Definition of "Breast Implant"

Further rehashing its rejected plain language argument, Dow Corning argues that the lack of explicit treatment of tissue expander breast implants at the confirmation hearing compels the conclusion that the parties intended to adopt the supposed technical industry/medical definition of "breast implant." DCC Br. 39-40. Dow Corning tries to infer this intent from the fact that its expert witness Mr. Dunbar (1) did not assign tissue expander claims any specific, separate value

in his claims estimation testimony and (2) listed "tissue expanders" generally as non-covered Other Products on a chart in his materials. *Id.* at 40, 43.[15]

The District Court did not abuse its discretion or clearly err in finding these facts non-dispositive. Mr. Dunbar's general characterization was correct: All but three of the more than 250 Dow Corning tissue expander products were not intended for breast implantation, were not offered any settlement, and are not at issue here. But this single, general reference in Mr. Dunbar's chart does not establish that the parties intended to sweep into the uncovered Other Products category the limited universe of *breast-design* tissue expander implants that had generally been treated as breast implants in other settlements – much less that such an intention was communicated to claimants voting on the Plan. As the District Court noted, the parties' silence on this point at confirmation is consistent with the assumption that these limited tissue expanders were simply included as breast implants, just as they had been in the RSP. RE #924, Remand Opinion, Page ID #15734-35.

Dow Corning labors unsuccessfully to manufacture legal error in this connection – starting with a point heading claiming that the District Court "found" that the confirmation hearing evidence "demonstrated that tissue expanders were

[15] Although Mr. Dunbar was formally presented as a witness for both Plan Proponents (*see* DCC Br. 16), the TCC had no role in preparing or presenting his analysis.

not considered breast implants." DCC Br. 39. This conclusion is nowhere supported in the text of Dow Corning's argument – except to the extent it refers to Mr. Dunbar's general characterization applicable to the approximately 247 tissue expander products that are not at issue.

Dow Corning also states, irrelevantly, that the "entire purpose" of its bankruptcy was to resolve its large-scale silicone gel breast implant liability, not its liability for tissue expanders. *See* DCC Br. 41. Once again, while Dow Corning's *bankruptcy* may have been caused primarily by its silicone gel breast implant claim liability, its *Plan* was crafted to provide complete closure for *all* claims. That is why Dow Corning offered settlements to recipients of saline-filled implants, Other Products, and those who had implant products from other manufacturers containing Dow Corning silicone material – to achieve total closure on all claims, including those that may not have contributed immediately to its bankruptcy filing.

Next, Dow Corning argues that tissue expander implants cannot be breast implants based on the Bankruptcy Court's statements, in the very different context of upholding the Plan's classification system from a challenge by foreign claimants, that all breast implant claims are substantially similar because they relate to Dow Corning's silicone gel breast implants, which are all used in the same manner. DCC Br. 41 (citing *In re Dow Corning Corp.*, 244 B.R. 634, 658 (Bankr. E.D. Mich. 1999)). This statement is not accurate even on its own terms, since

Dow Corning included *saline* implants within the Breast Implant classes. And there is no reason those classes could not similarly embrace tissue expander breast implants, which are also silicone elastomers filled with saline and implanted in the breast. The Other Products classes, for example, contain a far wider range of products with different designs and uses – linked only by the commonality of being implantable medical products containing silicone.

Finally, in a novel argument raised for the first time on this appeal, Dow Corning suggests that under Section 502(c) of the Bankruptcy Code, tissue expander claims were required to be separately estimated *for allowance* if they were intended to be paid as Breast Implant claims.[16] This argument fails on multiple levels; it ignores and distorts basic bankruptcy law as well as what actually happened in the Dow Corning case.

Estimation is a flexible tool used by bankruptcy courts not just for claims allowance, as specified in Section 502(c), but also for such additional purposes as determining plan feasibility or temporarily allowing claims for plan voting purposes. *See, e.g.*, *In re Farley, Inc.*, 146 B.R. 748, 753 (Bankr. N.D. Ill. 1992) (employing estimation for voting purposes and determining plan feasibility);

[16] Section 502(c) provides: "There shall be estimated for purpose of allowance under this section— (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case . . . ." 11 U.S.C. § 502(c)(1) (2012).

*In re Fed. Press Co.*, 116 B.R. 650, 653 (Bankr. N.D. Ind. 1989) (using estimation for voting but not claim distribution). Courts have broad discretion both in determining the methods to be employed for estimation and the scope of claims and situations where estimation would prove most useful. *In re FV Steel & Wire Co.*, 372 B.R. 446, 453 (Bankr. E.D. Wis. 2007) ("[C]ourts are given a great deal of judicial discretion in designing the procedures for a claim estimation proceeding, such that a judge can elect to use 'whatever method is best suited to the circumstances.'") (citing *Addison v. Langston (In re Brints Cotton Mktg. Inc.)*, 737 F.2d 1338, 1341 (5th Cir. 1984) (internal citations omitted)).

Estimation for *allowance* was not required in this case for *any* claims. Dow Corning remarkably fails to disclose that Judge Spector held in 1997 that mandatory estimation for claims allowance purposes under Section 502(c) was *not* appropriate or required in the Dow Corning case, because no party could show that actual liquidation of claims would unduly delay the bankruptcy process. *See In re Dow Corning Corp.*, 211 B.R. 545, 573-74 (Bankr. E.D. Mich. 1997). Even more remarkably, Dow Corning ignores that this type of estimation is statutorily *barred* for personal injury claims. Judge Spector recognized in the same decision that, under 28 U.S.C. § 1411(a), personal injury claims "must be liquidated via a jury trial if the claimant requests one, and they cannot be estimated by a bankruptcy judge for purposes of distribution unless all parties consent." *Id.* at 569. In any

event, the eventual, confirmed Plan obviated any need to estimate for *allowance* by providing a mechanism to liquidate each individual claim post-confirmation – either in a Settlement Facility or, for opt-out claimants, a Litigation Facility that would preserve their right to a jury trial absent settlement.

Nor was estimation necessary at confirmation to establish Plan *feasibility*. The Plan did not guarantee payment of all claims, but merely required Dow Corning to pay a capped amount of money that was *expected* to be adequate to pay all claims. Settling claimants assumed the risk of having their recoveries reduced if the Settlement Fund proved inadequate, and Dow Corning's ability to pay the $2.35 billion settlement amount was not in question. Thus, no issue of feasibility (*i.e.*, a risk that the debtor would return to bankruptcy) was presented. *See In re Dow Corning Corp.*, 244 B.R. 721, 732 (Bankr. E.D. Mich. 1999), *aff'd*, 255 B.R. 445 (E.D. Mich. 2000), *aff'd in relevant part, remanded on other grounds*, 280 F.3d 648 (6th Cir. 2002).

Estimation was therefore necessary at Plan confirmation only for a narrow purpose: to establish the adequacy of the *Litigation Fund* and thereby protect the rights of claimants choosing not to settle. Thus, Mr. Dunbar's testimony focused on projecting opt-out rates and the amount needed to resolve all claims in the Litigation Facility. Based on testimony by Mr. Dunbar that Judge Spector found to be "thorough, logical, well-documented, and credible," the

Bankruptcy Court concluded that "the $400 million net present value funding of the Litigation Facility is almost five times what will be necessary to satisfy all claims funneled to it." *Id.* at 731.

In this context, it was not necessary for Mr. Dunbar to separately estimate a value for breast-design tissue expander implant claims, for two separate reasons. First, since the RSP paid disease benefits for tissue expander implants, the data on which Mr. Dunbar relied of necessity took into account claims experience with other manufacturers' tissue expanders. The District Court acknowledged the CAC's argument in this regard (RE #924, Remand Order, Page ID #15733) and concluded that the absence of a separate estimate for tissue expander claims in Mr. Dunbar's report might well mean simply that the parties understood the estimation data to include tissue expanders as part of "the RSP experience" (*id.*, Page ID #15734-35). Thus, it is simply not correct, as Dow Corning argues (DCC Br. 43) that the District Court found that tissue expanders were affirmatively *excluded* from estimation.

Second, even assuming that Mr. Dunbar's overall projections did *not* include tissue expander data, there was no need to separately estimate the value of such claims, for a simple reason: there are so few potentially qualifying tissue expander breast implant claims that their quantification could have had no conceivable impact on the viability of the Litigation Fund. Mr. Dunbar identified

1,041 potential tissue expander claims (RE #51, Mot. of Dow Corning Corp. for Determination That Tissue Expanders Do Not Constitute Breast Implants, Ex. A, Page ID #176), but discounting for non-breast tissue expanders and products produced by other manufacturers, only a few hundred were likely to be Dow Corning tissue expander breast implant claims, and the potential impact on the Settlement Fund was only a few million dollars.[17] And few if any such claimants could have been expected to *reject* Breast Implant settlement benefits in favor of litigation. The potential impact of these claims on the adequacy of the Litigation Fund was obviously negligible, particularly in view of the huge cushion projected by Mr. Dunbar and validated by the Bankruptcy Court.

In short, nothing can be inferred from the lack of specific focus on tissue expanders in connection with confirmation. Certainly this point provides no basis to conclude that the District Court's decision was clearly erroneous or represents an abuse of discretion.

---

[17] The Independent Assessor, the neutral advisor charged under the Plan with making projections to help determine the timing of various categories of claim payments, has projected that including tissue expander implants as breast implants would have a net present value impact of far less than one percent of the $1.95 billion Settlement Fund. RE #814, Ex. L, Report of Independent Assessor, Page ID #12572 (filed under seal).

### B. Treating Tissue Expander Implants as Breast Implants Does Not Render the Plan's Disease Settlements Irrational or Anomalous

Dow Corning argues that the parties must have intended to carve out tissue expander breast implants to receive no settlement offer because "there is no rational basis to provide a disease settlement option to individuals with tissue expanders" absent evidence that those products caused systemic disease. DCC Br. 51. But there is no irrationality here – tissue expander implants are simply being included along with all other saline-filled breast implants under a settlement intended to resolve a large range of claims. And while Dow Corning argues that "there is no reliable scientific evidence that Dow Corning's tissue expander products can even cause any disease" (DCC Br. 27), it also argues that scientific evidence since the 1990s proves that even *silicone gel* breast implants do not cause disease (*id.* at 7 n.1, 27 n.12). Even if those propositions were true, they are entirely irrelevant. What matters is only that Dow Corning agreed to settle all claims for a wide range of injuries and conditions, and, as is typical in mass tort resolutions, grouped together a wide range of relatively weaker and stronger claims in order to achieve global peace.

Thus, though the focus of the pre-bankruptcy litigation and epidemiology was on gel-filled implants (based on the risk of systemic illness if silicone gel leaked from the implant and migrated through the body), the Plan's

disease settlement option also included saline implants in order to obtain complete closure as to *all* of Dow Corning's breast implant exposure. A claimant demonstrating product identification and meeting the criteria for a particular disease is entitled to the same disease benefit regardless of whether her implant was filled with silicone gel or saline, and regardless of whether her implant was in her body for one day or 20 years – even though these and other variables of which the settlement does not take account could affect the risk and severity of disease and the potential real-world litigation value of a particular claim.

Such grouping and leveling of claims is typical, and often necessary, to administer mass tort settlements. For example, in this case, the same $20,000 base rupture payment is offered to all silicone gel breast implant claimants, whether a claimant had only one or multiple ruptures, and whether or not serious complications and disfigurement followed the rupture. These variations did not render it improper as a matter of bankruptcy law to classify the claims together or provide a basis for rejecting the single, uniform rupture settlement option. *See In re Dow Corning Corp.*, 244 B.R. at 655-56 (rejecting classification objection and noting, *inter alia*, practical difficulty of identifying claimants with single versus multiple ruptures).

It is therefore not anomalous but perfectly logical that Dow Corning included *all* breast implants, including tissue expanders, in its settlement – just as other manufacturers included their *own* tissue expanders as breast implants in the

RSP. Nor is it significant that the FDA moratorium did not include tissue expander implants (DCC Br. 12, 41); it also did not include other saline breast implants, but Dow Corning does not argue that this requires excluding saline-filled implants from the Plan definition of "Breast Implant."[18]

In any event, it is simply not true that tissue expanders were never implicated in causing disease. DCC Br. 41, 51. Concern over possible disease caused by breast implants included study of whether the silicone elastomers of saline-filled implants could cause or contribute to local and systemic inflammatory disease, and tissue expanders were studied along with other saline breast implants in this regard. *See* Michelle Copeland et al., *Silicone Breakdown and Capsular Synovial Metaplasia in Textured-Wall Saline Breast Prostheses*, 94 Plastic & Reconstructive Surgery 628, 629 (1994) (study of 191 implants removed from 139 patients with implants in place from six weeks to several years, including 49 saline-filled tissue expander implants, suggesting that textured-walled implants may create risk of inflammatory reaction); *see also* J. Vicente P. Poblete et al.,

[18] For the same reasons, it is not "nonsensical" that in certain cases individuals with short-term exposure to tissue expanders might receive larger settlements than claimants with longer-term exposure to products such as hip or knee joint, chin, nose, or other types of non-breast products. DCC Br. 51. As noted above (at 37-38) every kind of implant may be in the body for relatively longer or shorter times, but the settlement does not make distinctions on this ground – rather it lumps together and resolves a large number of variable claims with comparatively modest standardized payments.

*Toxic Shock Syndrome as a Complication of Breast Prostheses*, 95 Plastic & Reconstructive Surgery 1702, 1706 (1995) (summarizing instances of toxic shock syndrome amongst breast implant recipients, including woman who received saline-filled tissue expander).

### C. Dow Corning's Arguments Against the Relevance of the RSP Ignore and Distort the Parties' Actual Understanding and Intent in Connection with the Plan

Dow Corning's brief concludes with a grab bag of repetitious and overlapping arguments disparaging the District Court for relying on the parties' knowledge of and express adoption of the benefit scheme of the RSP as the most relevant and persuasive evidence of their intent with respect to the treatment of tissue expander breast implants. Each of these arguments fails for the basic reasons explained above: It is beyond good faith dispute that (1) the parties knew that the RSP defendants had treated their own breast-design, saline-filled tissue expander implants as breast implants for purposes of disease settlement payments, and (2) claimants were specifically told at the very front of the Disclosure Statement that the settlement was modeled on the procedure *and* substance of the RSP, except for a series of negotiated *improvements*. *See* above at 9-10.

Thus, Dow Corning's argument that the parties intended to adopt only the *procedures* of the RSP but not its substantive standards or outcomes (DCC Br. 45) is simply false. Dow Corning suggests that reference to the substance of the

RSP "makes no sense" because the RSP involved different manufacturers and products and different negotiating dynamics (*id.* at 46), but this ignores that the parties indeed expressly stated an intention to model the Dow Corning settlement on the RSP. This made perfect sense because, as Mr. Dunbar testified, the widely accepted RSP set "market" values for breast implant claims, which is precisely what allowed him to project opt out rates and opine on the adequacy of the Settlement and Litigation Funds. *See* above at 17.

Specifically with respect to the disease claims that are the main issue here, Mr. Dunbar testified in response to questions from Dow Corning's counsel that he relied on the two settlements having *identical* criteria:

> Q: Okay. How do you determine how many people would qualify for disease benefits in the Dow Corning plan?
>
> A: We'd take the percentages from the RSP of the women who qualified and we simply apply them to the Dow Corning plan.
>
> Q: Okay, now doesn't that assume that the qualifying criteria between the two plans are the same?
>
> A: Yes, it does.
>
> Q: And are they in fact the same?
>
> A: Yes.

6/29/99 Conf. Hr'g Tr. at 76. Mr. Dunbar later explained that his estimates could be viewed as "relatively precise" because "it's the same population, same facility, same product, same proof of claim . . . [and] same criteria." *Id.* at 79-80.

To be sure, the different dynamics of the Dow Corning settlement permitted the TCC to negotiate a series of specific *improvements* over the RSP, including the stand-alone rupture benefit that Dow Corning cites. DCC Br. 45-46. But these specific differences are disclosed and described in the Plan documents. *See* above at 10-12. And Mr. Dunbar took these variations into account to project that the opt out rates would be even *lower* for the Dow Corning settlement than had been the experience in the RSP. *See* above at 17. Nowhere in his testimony or any of the Plan documents is there any suggestion that an entire category of products that received disease benefits in the RSP was being *eliminated* from the settlement entirely.

Next, Dow Corning points out one respect in which the RSP distinguished between Dow Corning's silicone gel breast implants and tissue expander implants: the former triggered the MMR and the latter did not. In other words, claimants with RSP-manufacturer silicone gel breast implants and Dow Corning tissue expander implants did *not* have their disease benefits reduced by half. DCC Br. 47-48. But this proves nothing by itself; it merely mirrors the structure of the Dow Corning settlement, where the silicone gel breast implants of

other manufacturers trigger the MMR, but saline implants (including tissue expander implants) do not.

This distinction makes perfect sense. Settling manufacturers in each case would want to be inclusive in offering affirmative disease benefits (and thus treat their own tissue expanders as breast implants) to maximize the degree of closure, but perhaps create a narrower MMR in order to make the settlement more attractive. Indeed, the limitation of the Dow Corning MMR to silicone *gel* breast implants was specifically negotiated and embodied in the Plan documents. *See* RE #700, Ex. D, Annex A, Page ID #10238-39, § 6.02(d)(v). This parallel treatment hardly put claimants on notice that Dow Corning's tissue expanders would not be treated as breast implants *for the purposes of affirmative benefits* – to the contrary, it suggested they *would* be included, since that is exactly how the manufacturers in the RSP treated *their own* tissue expander implants.

Understanding this parallel structure also puts the lie to Dow Corning's specious claim that claimants are somehow trying to have it both ways – arguing that tissue expanders are breast implants in order to receive certain benefits, but claiming that they are *not* breast implants in order to avoid the MMR. DCC Br. 48-49. As noted above, the plain language of the Dow Corning settlement imposes an MMR only where a breast implant recipient has a *silicone gel* breast implant made by another manufacturer. Thus, claimants have argued

(and Dow Corning has *agreed*) that other manufacturers' tissue expander implants do not trigger the MMR – *not* because such products are "not breast implants," but because they are not *silicone gel* breast implants.

Dow Corning nevertheless argues that if the District Court's interpretation is affirmed, and Dow Corning's tissue expander implants are deemed a type of saline breast implant, "the recoveries received by many actual breast implant claimants would be reduced by half." DCC Br. 49. Dow Corning even claims that in this circumstance it would be entitled to "a refund of overpayments from potentially thousands of claimants." *Id.* at 49 n.17. All of this is false, and Dow Corning knows it, because the limitation of the Dow Corning MMR to *silicone gel* breast implants was specifically negotiated and unambiguously embodied in Annex A, and because it made the same argument in its prior opening brief (at 31-32) and the CAC pointed out the error in its responsive brief (at 31-32). Repeating this blatant misstatement of the settlement terms – whether intended only to make the District Court's holding seem anomalous or also to rewrite the Plan in Dow Corning's favor – exceeds the bounds of responsible advocacy.[19]

---

[19] The distinction between "breast implants" (which include saline implants and receive disease benefits) and "silicone gel breast implants" (a sub-category of breast implants that the parties agreed would trigger the MMR) renders irrelevant Dow Corning's invocation of the principle that terms used in different places within a contract should presumptively be given the same meaning. *See* DCC Br. 49. Here, different effect is given to *different* terms. As noted above, the only use of the term "tissue expander" in the Plan documents (in connection with the list of

Dow Corning argues that treating its tissue expanders as breast implants would lead to "windfall recoveries" because claimants with other manufacturers' breast implants may have received full recovery in the RSP with no MMR, and then receive a 50 percent recovery in the Dow Corning bankruptcy. *See* DCC Br. 49-50. But the parties knowingly bargained to effect a similar result in the mirror image situation: a claimant with a Dow Corning silicone gel breast implant and another manufacturer's tissue expander would have recovered 50 percent in the RSP (with the tissue expander treated as a breast implant and the Dow Corning implant triggering the MMR) and would still recover 100 percent in this settlement (since the MMR is not triggered by saline implants, including tissue expanders). In any event, whatever anomalies might flow from the interaction of the two settlements, it would be much more anomalous to deny *any* settlement to products that were treated as breast implants in the RSP.

Finally, Dow Corning repeatedly harps on the District Court's supposed "finding" in the Original Opinion that Dow Corning's arguments were lent some "credibility" by the fact that the RSP did not provide an MMR where a claimant had a prior Dow Corning tissue expander implant. But as noted above (at

---

other manufacturers' products eligible for the silicone material benefit) refers to them as "breast implant products." *See* above at 15-16. Thus, this rule of construction actually cuts in favor of uniformly viewing "tissue expanders" as a type of "breast implant."

6-7), this stray dictum was hardly a "finding" – the District Court ultimately made *no* findings with respect to extrinsic evidence in the Original Opinion, but rather held that the definition of "Breast Implant" was unambiguous. Only on remand did the District Court fully consider all the extrinsic evidence and conclude, reasonably, that the RSP manufacturers' treatment of their *own* tissue expander implants as breast implants for purposes of affirmative benefits was a more relevant and persuasive fact than their treatment of *other* manufacturers' tissue expanders for purposes of the MMR: "All parties agree that in the RSP and related settlement programs, each manufacturer's breast tissue expanders were processed in the same manner as its own breast implants." RE #924, Remand Opinion, Page ID #15737. Unlike *United States v. City of Warren, Michigan*, 138 F.3d 1083, 1092-93 (6th Cir. 1998), in which a district court's holding was inconsistent with its actual findings and holdings in earlier stages of the same litigation, the District Court here made only one set of "findings" with respect to the extrinsic evidence, and those findings were neither clearly erroneous nor an abuse of discretion.

As this Court held in the prior appeal, the choice between competing readings of the extrinsic evidence "lies with the district court." *In re Settlement Facility Dow Corning Trust*, 628 F.3d 769, 773 (6th Cir. 2010). That choice was reasonable, well-grounded in the record, and should not be disturbed.

## CONCLUSION

For the foregoing reasons, the CAC respectfully requests that the Court affirm the District Court's order.

Dated: February 11, 2014

Respectfully submitted,

/s/ Jeffrey S. Trachtman
Jeffrey S. Trachtman
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100
jtrachtman@kramerlevin.com

Dianna Pendleton-Dominguez
LAW OFFICE OF DIANNA PENDLETON
401 N. Main Street
St. Marys, OH 45885
(419) 394-0717

Ernest Hornsby
FARMER, PRICE, HORNSBY & WEATHERFORD LLP
100 Adris Court
Dothan, AL 36303
(334) 793-2424

*Counsel for the Claimants' Advisory Committee*

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). According to the word processing program used to prepare this brief (Microsoft Word) this brief contains 13,990 words.

/s/ Jeffrey S. Trachtman
Jeffrey S. Trachtman
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100

## CERTIFICATE OF SERVICE

I certify that on February 11, 2014, I electronically filed a copy of the foregoing Brief of Appellee Claimants' Advisory Committee with the Clerk of the Court through the Court's electronic filing system, which will send notice and a copy of this brief to all registered counsel in this case.

/s/ Jeffrey S. Trachtman
Jeffrey S. Trachtman
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100 (telephone)
(212) 715-8000 (fax)
jtrachtman@kramerlevin.com

# ADDENDUM DESIGNATING RELEVANT DOCUMENTS IN THE DISTRICT COURT DOCKET (00-0005)

| Record Entry | Filing Date | Description | Page ID |
|---|---|---|---|
| 40 | 7/19/2004 | MOTION of Claimants' Advisory Committee to Interpret the Amended Joint Plan § 1.17 Regarding the Definition of "Breast Implant" | 127 - 132 |
| 40 (Ex. 1) | -- | DCC Wright Silastic Tissue Expander Pamphlet | 133 |
| 40 (Ex. 2) | -- | Tissue Expander product label | 134 |
| 40 (Ex. 3) | -- | E-mail from V. Willard at SF-DTC to D. Greenspan and D. Pendleton | 135 |
| 51 | 7/19/2004 | MOTION of Dow Corning Corporation for a Determination that Tissue Expanders Do Not Constitute Breast Implants for Purposes of Eligibility for Settlement Benefits with Attachments | 166 - 174 |
| 51 (Ex. A) | -- | Dunbar Chart | 175 - 176 |
| 51 (Ex. B) | -- | Affidavit of Gene Jakubczak | 177 - 183 |
| 51 (Ex. 1 to Ex. B) | -- | Mentor tissue expander product pamphlet | 184 – 185 |
| 51 (Ex. 2 to Ex. B) | -- | CUI tissue expander product pamphlet | 186 - 187 |
| 53 | 06/10/2004 | STIPULATION AND ORDER Establishing Procedures for Resolution of Disputes Regarding Interpretation of the Amended Joint Plan | 119 - 120 |

| Record Entry | Filing Date | Description | Page ID |
|---|---|---|---|
| 53 (Ex. A) | -- | Procedures for Resolution of Disputes Under Section 5.05 of the Settlement Facility Agreement and for Other Disputes Regarding the Dow Corning Plan of Reorganization | 121-123 |
| 55 | 8/9/2004 | RESPONSE of Dow Corning Corporation to Doc 40 | 225-228 |
| 57 | 2/8/2005 | RESPONSE of Claimants' Advisory Committee to Doc 51 | 237-246 |
| 57 (Ex. 1) | -- | Article "Augmentation Mammaplasty Associated with a Severe Systemic Illness" | 247-249 |
| 57 (Ex. 2) | -- | DCC Proof of Claim Form | 250-251 |
| 673 | 6/10/2009 | Memorandum Opinion and Order Regarding Tissue Expander Issue | 8740-8751 |
| 674 | 6/19/2009 | NOTICE OF APPEAL by Dow Corning Corporation re Doc 673 Order | 8752-8753 |
| 674 (Ex. A) | -- | Memorandum and Opinion dated 6/10/2009 | 8754-8766 |
| 676 | 6/19/2009 | MOTION of Dow Corning Corporation to Stay the Court's Ruling on the Disability Level A and Tissue Expander Issues Pending Appeal | 8788-8796 |
| 676 (Ex. A) | 6/19/2009 | Affidavit of Deborah Greenspan | 8797-8802 |
| 681 | 6/30/2009 | RESPONSE of Claimants' Advisory Committee to Motion to Stay the Court's Rulings on the Disability Level A and Tissue Expander Issues Pending Appeal | 8813-8822 |

| Record Entry | Filing Date | Description | Page ID |
|---|---|---|---|
| 682 | 7/10/2009 | REPLY of Dow Corning Corporation to Response re Motion to Stay the Court's Ruling on the Disability Level A and Tissue Expander Issues Pending Appeal | 8823-8828 |
| 682 (Ex. A) | -- | IOM Report | 8830-8833 |
| 682 (Ex. B) | -- | FDA Notice | 8834-8837 |
| 683 | 7/10/2009 | MOTION of Dow Corning Corporation for Leave to File Excess Pages | 8838-8840 |
| 687 | 8/3/2009 | Hearing held on 9/9/2004 before District Court | 8844-8921 |
| 688 | 8/3/2009 | Hearing held on 6/22/2004 before Claims Administrator | 8922-8988 |
| 700 | 10/13/2009 | Expedited Stipulated MOTION to Supplement and Clarify the Record | 9929-9932 |
| 700 (Ex. A) | -- | Amended Joint Disclosure Statement with Respect to Amended Joint Plan of Reorganization | 9934-10058 |
| 700 (Ex. B) | -- | Amended Joint Plan of Reorganization | 10465-10576 |
| 700 (Ex. C) | -- | Settlement Facility and Fund Distribution Agreement | 10171-10216 |
| 700 (Ex. D) | -- | Annex A to the Settlement Facility and Fund Distribution Agreement ("Annex A") | 10217-10334 |
| 777 | 02/17/2011 | Briefing Schedule | 11853 |
| 781 | 03/15/2011 | NOTICE by Claimants' Advisory Committee, Dow Corning Corporation of Filing Attached Agreed Joint Index of Materials Relating to Tissue Expander Remand | 11857-11862 |

| Record Entry | Filing Date | Description | Page ID |
|---|---|---|---|
| 782 | 03/29/2011 | SUPPLEMENTAL BRIEF of Dow Corning Corporation re Doc 774 | 11863-11878 |
| 783 | 04/11/2011 | RESPONSE of Claimants' Advisory Committee to Doc 782 | 11879-11890 |
| 924 | 10/08/2013 | MEMORANDUM OPINION and ORDER Regarding Breast Tissue Expander Issue on Remand | 15729-15738 |