Case No. 09-1830

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

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STATEMENT OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

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

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   No.

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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.

STATEMENT OF THE ISSUES FOR REVIEW

1. Whether the District Court abused its discretion or clearly erred in holding that claimants seeking settlement benefits under Dow Corning's Amended Joint Plan of Reorganization (the "Plan") may qualify for "Disability A" disease benefits by demonstrating that they are 100% disabled in "vocation *or* self-care," as the plain language of the Plan documents provide, but need not demonstrate 100% disability in both areas.

2. Whether the District Court was legally bound to defer to the decision of the Claims Administrator of the Settlement Facility-Dow Corning Trust ("SF-DCT") to apply Disability A criteria that would result in different claim outcomes than the RSP in view of the Plan's stated intention to process claims in the same manner as in the RSP.

3. Whether the District Court abused its discretion or clearly erred in accepting reliable and essentially undisputed evidence establishing the general point that most Disability A claims were processed in the RSP under the plain language "or" standard.

STATEMENT OF THE CASE

Dow Corning's appeal challenges the District Court's straightforward ruling — based on the plain language of the Plan documents and confirmed by the parties' understanding and expectations — that claimants may qualify for

Disability A disease benefits by demonstrating 100% disability in "vocation *or* self-care," but need not demonstrate 100% disability in *both* areas.[1]

The disease benefit standards for the Dow Corning settlement were expressly based on disease and disability language in the RSP. Claimants were told when they voted on the Plan that claims would be processed in substantially the same manner as they were in the RSP, and indeed that they could simply rely on their disease claim submissions from the 1994 Original Global Settlement. Virtually *all* Disability A claims in the RSP were processed under the "vocation *or* self-care" standard rather than the new "vocation *and* self-care" standard urged by Dow Corning, which would require a claimant to demonstrate that she is 100% disabled in self-care *in addition to* meeting the traditional disability definition of being 100% unable to work — in essence, totally helpless.

The District Court correctly found that the original "or" standard should govern here, relying primarily on the plain language of the Plan: Disability B and C expressly require a showing of partial disability in *both* vocation *and* self-care, but the language used in Disability A, in direct contrast, requires a claimant to show only that she can perform "none or only few of the usual duties or activities of vocation *or* self-care." Record Entry No. 701, Ex. D, Dow Corning Settlement

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

Program and Claims Resolution Procedures ("Annex A"), p. 94 (emphasis added). This accords with the plain meaning of "or" and is perfectly logical, since establishing 100% disability in *either* area is a rigorous standard. Moreover, applying the "and" standard would read "vocation" out of the criteria, because claimants totally disabled in self-care (*i.e.*, unable to bathe, dress, eat, groom or toilet without assistance), will also, in most cases, be unable to work.

Dow Corning argues for a different result based primarily on a one-page September 1997 ruling of the MDL judge — issued in an individual claimant administrative appeal *after* virtually all Disability A claims in the RSP had been processed. The MDL Claims Office did not immediately change its processing practices to conform to this ruling — and even when it eventually did, it did not communicate the change to claimants through letters or on the MDL-926 Court's official website, where important developments were routinely posted.

Years later, in the new Dow Corning facility, the initial Claims Administrator decided to adopt the new "and" standard without informing the parties, and claim forms with explanatory materials were mailed out in February 2003 with no mention of the change. The parties learned of the new, more rigorous Disability A standard only in June 2004, *after* the Plan went into effect and disease review letters were mailed enforcing the new standard for the first time. This led to serious inconsistencies and anomalies, as new claimants were

held to a stricter Disability A standard than had been applied in the RSP, while "pass-through" claimants — those who had been approved for a disease payment in the RSP based on another manufacturer's implant and also had a Dow Corning implant — continued to be approved based on the "or" standard.

In 2005, at the joint request of Dow Corning and the Claimants' Advisory Committee ("CAC"), the successor Claims Administrator, David Austern, a respected neutral working under the District Court's supervision, undertook an investigation to determine what standard the RSP had used to decide Disability A claims. He produced a detailed memorandum (the "Austern Memorandum") confirming that virtually all Disability A claims in the RSP were processed under the plain language "or" standard.

Unhappy with this result, Dow Corning objected to admission of the Austern Memorandum, but the key fact that the "or" standard was applied to most RSP claims is beyond reasonable dispute: it is confirmed by sworn statements from attorneys representing multiple RSP claimants, backed up by documentation of claims approved under the "or" standard; by SF-DCT statistics showing that Disability A claims have been approved at much lower rates in the Dow Corning settlement than under the RSP; and even by letters from the MDL Claims Administrator herself stating that the RSP had applied a different standard than was adopted by the SF-DCT. Dow Corning raised no objection to most of this

undisputed evidence until months after the hearing on the Disability A issue, and has *never* proffered *any* additional evidence showing that claims in the RSP were actually processed under the "and" standard.

Saddled with a weak plain language argument and unable to explain how it could be fair to change, without notice, disease criteria that were well-known to claimants when they voted to accept the settlement, Dow Corning constructs a highly misleading narrative — suggesting, incorrectly and without support, that the change to the "and" standard was publicly disclosed prior to the Plan vote. It then leans heavily on an untenable legal theory: that the District Court has no power to construe Plan qualification standards consistently with claimant expectations because the SF-DCT was free to apply whatever interpretive standards the RSP happened to have in place by 2003 — even if such standards violate the plain language of the Plan, were never publicly disclosed, and are inconsistent with how claims were *actually processed* in the RSP. Dow Corning bases this argument primarily on ministerial language added to the Plan documents *after* claimants voted in the Plan — language that cannot mean what Dow Corning says without constituting an illegal post-confirmation Plan modification. The District Court did not abuse its discretion or clearly err in rejecting these and other strained arguments and ordering that Disability A claims be processed as they were in the RSP, exactly as the parties bargained for in the Plan.

A. Statement of Facts

1. Overview of the RSP and Dow Corning Disease Settlements

The Disability A standard at issue in this appeal was part of the disease criteria in the Original Global Settlement offered by breast implant manufacturers, including Dow Corning, in MDL-926. That settlement collapsed in 1995 after the MDL-926 Court determined that the settlement was oversubscribed and could not pay the amounts promised. *See* Record Entry No. 701, Ex. A, Amended Joint Disclosure Statement With Respect to Amended Joint Plan of Reorganization ("Disclosure Statement"), p. 34.

The Original Global Settlement was replaced in January 1996 by the RSP, which adopted verbatim the same disease qualification standards but offered substantially lower benefits. For example, a claimant who qualified for Disability A , the highest disease standard in the Original Global Settlement, would have received a payment ranging up to $1.05 million, depending on age, for conditions governed by the relevant disability language. Breast Implant Settlement Notice at 6, *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. Sept. 16, 1994), *available at* http://www.tortcomm.org/downloads/mdlorder22_20091027142344.pdf. In the RSP, that amount was reduced to $50,000, a modest settlement for a totally disabled claimant. Record Entry No.

701, Ex. A, Disclosure Statement, p. 4. The RSP introduced a second, higher payment grid ranging up to $250,000 based on more stringent criteria. *Id.*

The Dow Corning Plan, in turn, was based directly on the RSP's two disease options. The Dow Corning settlement offered both the lower and higher disease benefit grids, now referred to as Disease Payment Options I and II, with medical criteria that tracked exactly those in the Original Global Settlement and RSP. *See* Record Entry No. 701, Ex. D, Annex A, pp. 13-14. Claimants were eligible to receive $50,000 for a Disease Option I, Disability A claim, plus a potential 20% premium, if sufficient funds were available, to compensate for the delays of the Dow Corning bankruptcy. *Id.* Claimants were specifically told in voting on the Plan that eligibility for Option I would be based on meeting "the Original Global Settlement disease and disability criteria." Record Entry No. 701, Ex. A, Disclosure Statement, p. 4. Option I was meant to be easier to qualify for than Option II, "which has more stringent criteria." *Id.*; *see also* Record Entry No. 701, Ex. D, Annex A, p. 10 (Option II criteria "much stricter" than Option I).

Dow Corning represented to claimants during the 1999 solicitation on the Plan that the criteria to qualify for payment and the procedures used to resolve breast implant claims were based on the RSP, the outcomes of which were familiar to many claimants. Record Entry No. 701, Ex. A, Disclosure Statement, pp. 1, 2. Indeed, 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*. Record Entry No. 701, Ex. C, SFA, § 4.03(a), p. 9. This was done specifically so that Dow Corning could extrapolate and project its liability by mirroring claims criteria and outcomes in the Plan, and thus the parties required that the SF-DCT provide monthly reports listing, among other things, a comparison of RSP and SF-DCT claims outcomes. *See id*., § 5.03(a), pp. 16-18.

With respect to disease claims, nothing in any Plan document or in any claimant communication stated or suggested that any important criteria would be or had been changed. To the contrary, claimants were told that, because the criteria were identical, they could simply rely on their existing 1994 claim and medical documentation from the Original Global Settlement without having to update or supplement the submissions. *See* Record Entry No. 76, Motion of CAC for the Disclosure of Substantive Criteria ("CAC Disclosure Motion"), Ex. 5, Excerpt from Disease Claimant Information Guide, p. 9; Record Entry No. 416, Reply of CAC to Response and Objection of Dow Corning to the Notice of Filing of Supplemental Exhibit ("CAC Response to Dow Corning Objection"), Ex. 15-A, Dow Corning website text.

Dow Corning highlights language in § 4.03 of the SFA stating that the SF-DCT is authorized to rely on interpretations contained in its own guidelines and claims processing system "as of February 2003 and is not required to change those procedures and interpretations." Record Entry No. 701, Ex. C, SFA, §4.03(a), p. 9. This language, however, was not part of the SFA in 1999 when it was provided to claimants in connection with Plan voting. The original version of the SFA, which was still posted on the District Court's website as late as 2003, *see* http://www.mied.uscourts.gov/Information/Dow/Main.cfm (posting of SFA dated February 25, 2003), merely represented that settling claims "shall be processed in substantially the same manner in which claims filed with the MDL 926 Claims Office under the Revised Settlement Program are processed." *See* SFA, § 4.03(a) *available at* http://www.mied.uscourts.gov/Information/Dow/pdf/whatsnew/00-00005DPH2.pdf.

The new language was added years after confirmation, when the Plan documents were updated and finalized in connection with the Plan's Effective Date. The quoted language was apparently added for the convenience of the initial Claims Administrator, to reflect that certain claims had been reviewed pre-Effective Date (*i.e.*, between February 2003, when claim forms were mailed, and the June 1, 2004 Effective Date), based on guidelines and interpretations received from the MDL Claims Office. The Claims Administrator therefore needed comfort

that she could issue notification letters and pay approved claims promptly following the Effective Date without having to update the processing guidelines. This language does not purport to authorize a dramatic *change* in the original disease criteria, and nothing else in the notices, claim forms, or other voluminous claimant information materials sent out before or after the Effective Date provided any notice that the familiar "or" standard had in fact been changed.

2. Treatment of Disability A Claims in the RSP

As noted above, the RSP adopted the disease criteria from the Original Global Settlement as the qualification standards for the lower of the two disease settlement grids. That grid offered three compensation levels based on the degree of disability. Disability "C" and "B" were based on 20% and 35% disability, respectively, caused by a compensable condition and measured by a claimant's inability to perform "some of her usual activities of vocation, avocation, *and* self-care." *See* Record Entry No. 76, CAC Disclosure Motion, Ex. 1, p. 13 (emphasis added). In contrast, Disability "A" required a showing of 100% disability, based on a claimant's ability to perform "only few or none of the usual duties or activities of vocation *or* self-care." *Id*. (emphasis added).

Consistent with the distinction built into the plain language, the RSP processed Disability A claims from its inception in January 1996 to at least sometime in 1998 and perhaps as late as 2000 under the "or" standard — *i.e.*, a

claimant would be found disabled by demonstrating 100% disability as to *either* vocation *or* self-care. Both were not required. This fact is not meaningfully contested in the record.

The June 9, 2006 Austern Memorandum (misdated 2005), prepared by the current Claims Administrator at the parties' joint request, summarizes the basic facts, focusing on processing of claims for Atypical Connective Tissue Disease ("ACTD"), the most common disease category implicating the disability levels. Mr. Austern explained that the MDL's claims processing guidelines were initially "based on oral history" and only gradually reduced to writing over the years. *See* Record Entry No. 416, Ex. 13, D. Austern Memo, p. 3. Mr. Austern interviewed *all* SF-DCT employees formerly employed by the MDL Claims Office; examined actual claim files; reviewed total claim processing statistics for Disability A; and confirmed that in fact the RSP had processed virtually all Disability A claims under the "or" standard. *Id*. at 4-6.

The processing rule was eventually changed to reflect a September 1997 ruling in an individual claimant appeal by Judge Pointer, the MDL-926 judge, but not until at least several months later, after virtually all claims had already been processed under the old standard. The ruling was issued by Judge Pointer acting in an administrative capacity to hear individual claim appeals, and he wrote a brief decision consisting of just several paragraphs that appeared to

require a showing of 100% disability in both vocation *and* self-care. The decision is difficult to understand fully without additional information concerning the claimant and her submission, which may explain in part why it did not have a more immediate impact on claim processing. *Id.* at 5.[2]

Mr. Austern summarized his findings:

- All SF-DCT employees who were formerly employed at the MDL state that prior to Judge Pointer's Order noted above, the MDL awarded Level A compensation to ACTD claims where the claimants' disabilities resulted in an inability to perform all or none of the activities of self-care *or* vocation. The MDL did not require a loss of vocation and self-care activities.

- A review of the MDL files the SF-DCT has been given supports the statement in the previous bullet point. Indeed, it is almost impossible to find an MDL claim processed prior to the Judge Pointer Order where a claimant was denied Level A compensation because the claimant did not have a loss of both vocation and self-care activities.

- So ingrained was the MDL practice of looking to *either* vocation *or* self-care in awarding Level A disability that even after Judge Pointer's Order, for a period of several months stretching well into the first quarter of 1998, the MDL continued to make Level A awards based on *either* vocation *or* self-care activity loss.

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[2] Appeals in the RSP consisted of sending the claimant's file to the supervising District Judge who then issued unpublished, claimant-specific decisions, without briefing, hearing, or the participation of any party, including the Plaintiffs' Steering Committee. However, the parties were supposed to be consulted if a novel substantive issue arose. The same procedures were adopted in the Dow Corning Plan. *See* Record Entry No. 701, Ex. D., Annex A, pp. 53-54.

Id. at 6 (omitting footnotes listing examples of claims paid under "or" standard).

The MDL Claims Office processed 23,339 Disability A claims in 1996 and 1997 and only 222 total in 1998 and 1999. *Id.* at 4. The processing of Disability A claims was accelerated because only "current claimants" — those who had a disease claim on file as of September 1994 — could apply for benefits under the grid based on the Original Global Settlement. As a result, by the time the MDL Claims Office formalized new guidelines imposing the "and" standard, it "had processed and approved approximately 99% of all of the ACTD Level A claims that the MDL has ever processed." *Id.* at 7.

Dow Corning objected to admission of the Austern Memorandum, but has never seriously contested the basic facts contained in it and itself affirmatively relies on the memo for factual assertions in its own brief. *See* DCC Br. 3, 16. Mr. Austern's plainly correct conclusions also are confirmed by a plethora of other evidence to which Dow Corning did *not* object at the time of the hearing:

First, an earlier memo from Mr. Austern to claimant lawyers in August 2005 reports the basic facts in straightforward and authoritative terms. The memo explains various discrepancies between RSP and SF-DCT claims processing and, with respect to Disability A, confirms that claims decided or even in progress at the time of Judge Pointer's late-1997 individual appeal ruling had been processed (as late as 2000) based on the "or" standard. Mr. Austern then describes

various processing guidelines developed by the MDL-926 Claims Administrator between 2001 and 2004 enforcing the "and" standard — none of which had previously been disclosed to claimants. *See* Record Entry No. 416, Ex. 18, pp. 5-6.

Second, claimant lawyers with personal experience in the RSP submitted sworn statements accompanied by actual claimant files demonstrating that doctor reports documenting only 100% *vocational* disability were routinely accepted as the basis for awarding Disability A benefits, while virtually identical claims have routinely been *denied* in the SF-DCT. Much of this material was presented on the record at the hearing on the Disability A issue without objection by Dow Corning. Record Entry No. 430, June 20, 2006 Hearing Tr., pp. 11-13.

For example, Leslie Bryan, one of the attorneys who negotiated the Original Global Settlement's disease criteria, the RSP, and the Dow Corning Plan, submitted a declaration and multiple claim files demonstrating that the "or" standard had governed in the RSP, while virtually identical claims were denied under the "and" standard in the SF-DCT. One claimant Ms. Bryan represented ("NB") had symptoms including "[d]ocumented anthralgias," "[c]hronic fatigue," and "Reynaud's phenomenon." Record Entry No. 327, Ex. 2, Declaration of Leslie J. Bryan ("Bryan Decl."), Ex. 5 (Documents pertaining to claim of "NB"). Her claim was approved at ACTD Level A in the RSP because her doctor found her to be "unable to continue working in a job requiring any physical force," even though

"[i]n regard to self-care she [was] not having any difficulty . . . other than certain grooming aspects such as her hair and so on." *Id.* An SF-DCT claimant, "MP," had the same symptoms of "[d]ocumented anthralgias," "[c]hronic fatigue," and "Reynaud's phenomenon." *Id.*, Ex. 9 (Documents pertaining to claim of "MP"). In denying her Level A benefits, the SF-DCT Claims Administrator quoted language from MP's physician letter stating that "she continues to maintain self-care but does so with some difficulty." *Id.* The Claims Administrator awarded MP Level B benefits even though her doctor recommended that she be "classified in category A" because she was "unable to work." *Id.*[3]

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[3] *Also compare id.*, Ex. 6 (RSP claimant approved at Level A because unable to work although maintaining all self-care needs); *id.*, Ex. 7 (RSP claimant approved at Level A because disabled from any kind of work even though she maintains all self-care); *id.*, Ex. 10 (RSP claimant approved at Level A because unable to perform any of her previous work); *and id.*, Ex. 19 (RSP claimant approved at Level A because unable to participate in vocational and avocational activities); *with id.*, Ex. 21 (SF-DCT claimant denied Level A benefits even though doctor's report from same physician as many previous examples used same language of inability to engage in vocational and avocational duties); *id.*, Ex. 22 (SF-DCT claimant denied Level A benefits even though doctor found her totally disabled and unable to perform any duties); *id.*, Ex. 24 (SF-DCT claimant denied Level A benefits even though unable to participate in any vocational or avocational activity); *id.*, Ex. 26 (same); *id.*, Ex. 29 (SF-DCT claimant denied Level A benefits even though totally disabled and unable to participate in any vocational or avocational activities); *id.*, Ex. 30 (SF-DCT claimant denied Level A benefits even though totally disabled, unable to work); *id.* at Ex 31 (SF-DCT claimant denied Level A benefits even though qualified for Social Security Disability and unable to perform any vocational or avocational duties); *id.*, Ex. 32 (SF-DCT claimant denied Level A benefits even though unable to participate in vocational or avocational activities and sometimes unable to self-care); *and id.*, Ex. 33 (SF-DCT

Additionally, attorneys Robert Strohmeyer, Jr. and Laura Conyers filed a motion to require the SF-DCT to apply the Disability A criteria as was done under the RSP and attached claim approval forms and supporting materials from physicians that demonstrated that claims were approved in the RSP for Disability A on a showing of vocational disability alone.[4]

Third, Disability A claims have been approved at *dramatically* lower levels in the SF-DCT than they were in the RSP. Disability A claims for ACTD were approved at a rate of 14.3% in the RSP compared to only 5% in the SF-DCT. *See* Record Entry No. 416, Ex. 13, pp. 4-5. Indeed, because the 5% total includes "pass-through" claims paid automatically based on approval in the RSP, *new* Disability A claims in the Dow Corning settlement have of necessity been approved at an even lower rate. In telling contrast, ACTD Disability B and C

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claimant denied Level A benefits even though totally disabled from participating in any vocational or avocational activities).

[4] *See* Record Entry No. 374, Reply Memorandum in Support of Motion for an Order Requiring SF-DCT to Apply Criteria for Level A Disability in Accordance with Language of Settlement Documents, Ex. A (RSP claimant approved for Level A because no longer capable of gainful employment); *id.*, Ex. B (RSP claimant approved for Level A because not able to be gainfully employed, even though capable of doing most of her own self-care); *id.*, Ex. D (RSP claimant awarded Level A benefits because no longer able to work); *id.*, Ex. E (RSP claimant awarded Level A benefits because fully disabled from her vocation even though only limited in *some* duties of self-care); *and id.*, Ex. F (RSP claimant awarded Level A benefits because unable to work, even though able to do self-care).

claims have been approved at roughly comparable rates under the RSP and Dow Corning settlements. *See* Record Entry No. 416, CAC Response to Dow Corning Objection, pp. 6-7.

Fourth, two separate 2005 letters from MDL-926 Claims Administrator Jean Eliason to Judge Clemon, the successor MDL-926 judge, both confirm that "[o]ver 95%" of Disability A claims were reviewed in the RSP under a different standard than was being applied by the SF-DCT. *See* Record Entry No. 416, Ex. 16.

Fifth, an outside audit of the SF-DCT confirmed that the MDL's Disability A standard changed as a result of Judge Pointer's ruling. *Id*., Ex. 17, § 7.9.

In response to all this evidence, Dow Corning has cited nothing in the record proving that the RSP actually applied the "and" standard to any significant number of Disability A claims — or even that a single such claim was decided under that standard prior to Judge Pointer's 1997 ruling. Dow Corning cites only the unsupported statement within Judge Pointer's decision itself that "the Claims Administrator has consistently applied the language respecting disability level A" to require "limitations with respect to both self-care activities and vocational activities." Record Entry No. 76, Ex. 7. But Judge Pointer cited nothing to

support this statement and it was, with all respect, plainly erroneous as a statement of the MDL Claims Office's past practices. Record Entry No. 416, Ex. 13, p.6.

3. Treatment of Disability A Claims in the SF-DCT

There is no dispute that, in contrast to the RSP, which began processing disease claims in 1996, the SF-DCT has consistently applied the "and" standard since the Effective Date in June 2004 — requiring Disability A claimants to establish total disability in *both* vocation *and* self-care. However, contrary to Dow Corning's elaborate litany of supposed notice to claimants (DCC Br. 3-4), this dramatic change in processing standards was *not* disclosed when claimants voted on the Plan in 1999 or even when they were sent claim forms in 2003. The only public source that Dow Corning cites, a 1996 claimant "Q&A", merely states that Disability A is "difficult" to meet and that "[y]ou must be unable to do any of your normal daily activities or only be able to do a very few of them." Record Entry No. 137-2, Ex. A, RSP Def. Mem. at 10, quoting 7/3/96 Supplemental Q&A. But this language does not clearly convey that a claimant must actually show 100% disability in *both* self-care and vocation, and indeed at the time this Q&A was issued, the RSP was requiring claimants to demonstrate only one or the other.

Claimants would have had no other way of discerning that the Dow Corning settlement would impose a significantly stricter standard for Disability A than had been applied in the RSP. Judge Pointer's decision was not publicized —

it was simply posted along with dozens of others in the docket of *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.) (MDL 926)*, Case No. CV 94-P-11558-S (N.D. Ala.), which was separate from the main MDL-926 docket under Master File No. CV 92-P-10000-S. The docket entry (No. 1062) indicates that it is "granting the appeal" and remanding for further consideration — certainly no indication that the decision is of any importance, much less that it changed the fundamental test for Disability A. Since this was before the days of electronic dockets, it is not surprising that, as a matter of fact, no one beyond the immediately affected parties was aware of Judge Pointer's ruling. It was not posted on the MDL Court's website, which listed all orders, news, and developments in the MDL-926 matter.

Nor is there any evidence that any outside parties received the similar individual decision by Judge Andrews, the successor appeals judge, that Dow Corning also cites. DCC Br. 15. Indeed, Judge Andrews' confidential decision applying the "and" standard exists in this record only in the text of an email from the SF-DCT Claims Administrator. Record Entry No. 76, Ex. 10.[5]

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[5] Dow Corning also references various submissions to the MDL-926 Court seeking clarification of existing Q&A documents with respect to the Disability A standard. *See* DCC Br. 21-23. The subsequent orders of the MDL-926 Court establish neither what standard was applied to the bulk of Disability A claims in the RSP nor what Dow Corning claimants reasonably expected in voting on the Plan in 1999. Moreover, the MDL-926 Court's order denying reconsideration of

It is thus not seriously disputed that claimants voted on the Dow Corning Plan based on the understanding that Disability A claims would be processed under the "or" standard with which claimants and their attorneys were quite familiar from the RSP. And the Dow Corning Plan proponents shared the same understanding. To implement the goal of consistent claim processing in the SF-DCT, the Tort Claimants' Committee and Dow Corning assembled all information from the Original Global Settlement and RSP that could potentially affect claim processing standards and protocols and used this to draft the language in the SFA and Annex A that was sent to Claimants in 1999. At no point during this process — and indeed not until 2004 — were the parties made aware of the 1997 claimant ruling, or any other document, that converted the Disability A standard from "or" to "and." If the parties had been aware of such a change, this would surely have been included explicitly in the Plan documents, Disclosure Statement, claim forms, and Claimant Information Guide. It is nowhere. It is

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its prior order on the Disability A standards was expressly issued "without prejudice pending clarification by the administrator re the fixed benefit schedule," suggesting the existence of ongoing discussions over how to process the tiny handful of claims still outstanding in the RSP by 2006. *See* Docket Entry No. 3576, *In re Silicone Gel Breast Implant Prods. Liab. Litig. (MDL 926)*, Master File No. CV 92-P-10000-S (N.D. Ala. Sept. 19, 2006).

readily apparent that none of the parties were aware of the change from an "or" to an "and" standard when the Plan documents were drafted or updated.[6]

Nevertheless, it appears that the initial SF-DCT Claims Administrator decided to adopt the "and" standard without informing the parties. Record Entry No. 416, Ex. 13, pp. 6-7. Claim forms had been mailed in February 2003, but letters informing claimants of the status of their claims were not permitted to be sent until the Effective Date. At that time, claimants received deficiency letters that included a deficiency code not listed in any Plan documents or in the 2003 claim form mailing. The newly identified deficiency stated that claimants had failed to submit medical records for both vocation *and* self-care.[7]

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[6] Contrary to Dow Corning's suggestion (DCC Br. 49), Dow Corning's 2001 memo answering certain questions posed by the original Claims Administrator did not identify the 1997 ruling or acknowledge any change in the processing standard, much less establish that any such change was known to the parties or disclosed to claimants in 1999.

[7] Section 7.06(d) of Annex A lists all 16 deficiency codes for disease claims that had been identified in the RSP. *See* Record Entry No. 701, Ex. D, pp. 46-51. The deficiency codes were also included in the Disease Claimant Information Guide sent with the claim form mailing, at Section 7, pp. 17-21, and, in fact, the Guide breaks down the types of deficiencies topically — including "Disability." Disease Claimant Information Guide, *available at* http://www.tortcomm.org/downloads/Disease%20CIG_ENG_5.pdf. Nowhere in Section 7.06(d) or in the Guide is there a deficiency listed for failing to document *both* vocation *and* self-care with regard to Disability A.

Simultaneously, claimants with implants from multiple manufacturers who indicated on the SF-DCT's Disease claim form that they intended to rely on documentation already approved for payment in the RSP were automatically approved for Disability A treatment in the SF-DCT — even though they had been approved under the original "or" standard. *See* SF-DCT FAQ 20-6, *available at* http://www.sfdct.com/_sfdct/index.cfm/how-to-file-a-claim-for-benefits/disease-frequently-asked-questions-faqs/faqs-detail-disease-questions/#faq94. This exacerbated the emerging inconsistency between RSP and SF-DCT claim processing by creating anomalous treatment for claimants *within* the SF-DCT. Overall, application of the new standard led to a "sea change" in how Disability A claims were processed in the SF-DCT as compared to the RSP. Record Entry No. 327, Ex. 2, Bryan Decl., ¶ 20.

B. Proceedings Below

The CAC initially presented the Disability A issue to the District Court in the form of a request, filed late in 2004, for disclosure of information about the processing standards being employed. *See* Record Entry No. 76, CAC Disclosure Motion. The CAC's initial motion was joined by several law firms representing groups of clients affected by the Disability A issue, seeking to require that the SF-DCT apply the same standard as was applied in the RSP. *See*, *e.g.*, Record Entry No. 89; Record Entry No. 191.

Following the CAC's initial motion, the parties consulted and were able to narrow considerably the informational issues involved. Among other things, they agreed that the new Claims Administrator, David Austern, should investigate and improve the disclosure to claimants of the criteria being applied. This process led to Mr. Austern's August 2005 memo disclosing the change in Disability A processing criteria, along with other issues of interest to claimant attorneys. *See* Record Entry No. 416, Ex. 18. Dow Corning never claimed that this memo was inaccurate or objected to it being provided to claimants and counsel.

The CAC filed a supplemental motion in January 2006, *see* Record Entry No. 299, and in anticipation of the June 2006 hearing, additional law firms joined in the CAC's motion and submitted supporting factual materials, *see, e.g.*, Record Entry No. 292; Record Entry No. 327. Mr. Austern's further memo documenting the RSP's treatment of the Disability A issue was provided to the parties on June 9, 2006 and filed by the CAC, along with additional evidence, prior to the June 20 hearing. *See* Record Entry No. 408; Record Entry No. 416.

Dow Corning objected to the filing of the Austern Memorandum, *see* Record Entry No. 409, and filed a letter prepared by Dow Corning and signed by Mr. Austern suggesting that the June 9 memo was not meant to reach authoritative evidentiary conclusions. *See* Record Entry No. 410, Ex. 1. At the June 20, 2006

hearing, Dow Corning repeated that objection, but did not otherwise object to any of the evidence offered by the CAC and other plaintiffs' attorneys. Several months later, Dow Corning filed a motion to "strike" certain of the evidence as inadmissible hearsay. *See* Record Entry No. 434. The District Court heard oral argument on this motion on October 18, 2007, *see* Record Entry No. 689, and issued a decision on the merits on June 10, 2009, *see* Record Entry No. 672, Memorandum Opinion.

The District Court's decision discusses the background and context of the Disability A issue, confirming much of the undisputed factual history recited above: that the carefully negotiated disease criteria of the Original Global Settlement were intended to "remain unchanged" in the RSP; that these criteria were then "adopted in full" in the settlement embodied in Dow Corning's Plan; and that claimants were specifically told that they could rely on their 1994 claims submissions based on the original disease criteria "without the need for further delay or expense in reprocessing or reevaluation." *Id.* at 5.

The District Court acknowledged Judge Pointer's 1997 single-page ruling reading the Disability A criteria to require 100% disability in both self-care and vocational activities. The court noted that Judge Pointer had not been requested by the RSP proponents to interpret these terms and failed to cite any other language from the RSP supporting the "and" reading. *Id.* at 12. The District

Court further found that, despite Judge Pointer's decision, any change in the processing of Disability A claims in the RSP from the "or" to the "and" standard "occurred after most of the disease claims had been processed in 1996 and 1997." *Id.*

The District Court ultimately held that the original interpretation applied in the RSP should govern, based on the Plan's plain language. The court observed that "[t]he words 'or' and 'and' are not ordinarily convertible and 'a court is never justified in substituting one for the other unless it is clear from the context that one has been mistakenly used for the other.'" *Id.* at 11 (citing *State Mut. Life Assur. Co. of Worcester, Mass. v. Heine*, 141 F.2d 741, 746 (6th Cir. 1994)). The District Court further observed that there was no basis to conclude "from the context of this phrase that the parties mistakenly used the word 'or' instead of 'and.'" *Id.* Rather, the court concluded, "[i]f the parties intended limitation of 'both' vocation and self-care, the parties would have used the term '*and* self-care' in the phrase." *Id.* The court then applied the familiar contract construction rule that different words used in parallel contexts should be accorded different meanings: "The parties are aware of the difference between the term 'or' and the term 'and', in light of the two sections, B. and C., following the section A. at issue. The parties used the phrase with the language 'and self-care' in both of the following sections." *Id.* The District Court thus concluded that the parties

intended to use the word "or" in the Disability A standard in its customary disjunctive sense and directed the SF-DCT to apply the "or" standard as written and as applied in the RSP. *Id.* at 15.

SUMMARY OF ARGUMENT

The District Court did not clearly err or abuse its discretion in finding that the Plan's qualification criteria for Disability A require a claimant to demonstrate 100% disability in either vocation or self-care, but not both. The plain language reading of the word "or" is disjunctive, and the parties' careful use of the word "and" in the parallel language defining Disability B and C gives rise to a strong presumption that "or" was intended to mean something different. Dow Corning's construction requiring claimants to demonstrate 100% disability in self-care would essentially write the "vocation" test out of the guidelines and would also lead to absurd results by creating disparities between the treatment of identical claimants in the RSP and the SF-DCT and even, with respect to "pass-through" claims, within the SF-DCT itself. Dow Corning's insistence that the "or" standard is too lenient ignores how difficult it is to establish 100% disability in *either* area and also distorts the structure of the settlement, because the Disability A standard is part of the more *lenient* of the two disease grids. Even if the Disability A standard were deemed to be ambiguous, the undisputed record evidence establishes that the parties in the RSP treated it as an "or" standard and that the Dow Corning

parties (including many of the same lawyers and claimants) understood that disease claims would be processed on the same basis in the SF-DCT.

Language added to § 4.03(a) of the SFA authorizing the Claims Administrator to rely on processing guidelines in place as of 2003 does not divest the District Court of its authority to construe the Plan documents as a whole to effectuate the parties' intention that disease claims be processed on the same basis as they were in the RSP. Because this language was not in the Plan documents at the time claimants voted on the Plan, Dow Corning's desired reading would constitute an illegal Plan modification without notice or required process. Nor was the District Court bound to defer to Judge Pointer's one-page administrative ruling in an individual claimant appeal. Among other things, Judge Pointer's summary decision appears to be based in part on his erroneous assumption that the MDL-926 Claims Office had consistently applied the "and" standard, when exactly the opposite is true. Contrary to Dow Corning's further argument, the District Court's decision constitutes only an interpretation, not a modification, of the Disability A criteria. Finally, affirmance of the District Court's ruling would not improperly "deplete" the Settlement Fund, which exists precisely for the purpose of paying valid claims.

The District Court did not err or abuse its discretion in accepting the essentially uncontested fact that most claims were processed in the RSP under the

plain language "or" standard. The court did not need to hold a formal evidentiary hearing, because Dow Corning has neither proffered any contrary evidence nor sought formal discovery to obtain any such evidence. Despite the disclaimers wrung from him by Dow Corning, Mr. Austern's information-gathering methods were reasonable, reliable, and consistent with how the parties went about reconstructing the MDL-926 guidelines in implementing the Dow Corning settlement. The Claims Administrator's memoranda are thus admissible either as business records or under the residual hearsay exception of Fed. R. Evid. 807. Among other indicia of reliability, the Claims Administrator is an experienced neutral working under the Court's supervision, and the basic fact at issue is confirmed by voluminous other evidence to which Dow Corning did not object until months after the hearing.

STANDARD OF REVIEW

As Dow Corning acknowledges, a decision interpreting a confirmed plan is reviewed under an "abuse of discretion" standard. *See In re Dow Corning Corp.*, 456 F.3d 668, 675-76 (6th Cir. 2006). Dow Corning argues, however, that this standard does not apply to appeals concerning a court's "legal conclusions" based on unambiguous plan language. DCC Br. 27. But this Court has expressly *rejected* this approach, which certain other courts have embraced, reviewing *de novo* only decisions interpreting legal authority like the Bankruptcy Code, not

those that merely interpret or apply plan language (ambiguous or not): "[I]f a bankruptcy court's interpretation of a plan does not require interpretation of the Bankruptcy Code, review for abuse of discretion is appropriate." *In re Dow Corning*, 456 F.3d at 675. In *In re Dow Corning*, this Court disagreed with the Bankruptcy Court's finding that the Plan language in question was unambiguous, but upheld the court's ultimate interpretation as not constituting an abuse of discretion, applying the standard of review urged by Dow Corning. *Id.*; *see also In re Terex*, 984 F.2d 170, 172 (6th Cir. 1993).[8]

Dow Corning itself advocated the correct standard in a brief filed last year: "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.'" Brief of Appellee at 12, *Clark-James v. Settlement Facility Dow Corning Trust*, No. 08-1633 (6th Cir. Dec. 23, 2008) (*citing In re Dow Corning Corp*. and *Terex*).

[8] Contrary to Dow Corning's mischaracterization of its holding (DCC Br. 27-28), *In re Eagle-Picher*, 447 F.3d 461 (6th Cir. 2006), assumed without deciding that deference was due to the bankruptcy court's interpretation of a confirmed plan. *See id.* at 463-64. The additional cases Dow Corning cites applying *de novo* review to evidentiary rulings in the context of ordinary contract construction (DCC Br. 29-30) are inapplicable in view of the rule of deference to construction of plan language.

Now that it is the appellant, Dow Corning argues that no deference is due because Bankruptcy Judge Spector, rather than Judge Hood, initially confirmed the Plan. Even if Dow Corning is not estopped from playing fast and loose with the Court on this point, Judge Hood's reading of the Plan language is entitled to deference. Judge Hood has been overseeing the Dow Corning bankruptcy since 1995. She sat on the bench with Judge Spector during portions of the 1999 confirmation hearing and, when Judge Spector's term expired in 2001, withdrew the reference and has sat as the court of original jurisdiction ever since — presiding over Plan implementation in 2004 and overseeing operation of the Settlement Facility. Her considerable familiarity with the parties, their goals and expectations, and the purposes of the Plan cannot be analogized to a district court sitting in an appellate capacity, which was the situation in *Eagle-Picher*, 447 F.3d at 463.

Moreover, in connection with implementing Dow Corning's Plan, Dow Corning and the CAC stipulated to procedures and standards for resolving disputes regarding interpretations of the Plan. *See* Record Entry No. 53, Stipulation and Order Establishing Procedures for Resolution of Disputes Regarding Interpretation of the Amended Joint Plan, dated June 10, 2004 ("Plan Interpretation Stipulation"). Among other things, the Plan Interpretation Stipulation preserves the parties' right to appeal from the District Court's

interpretation of the SFA and Annex A, but provides: "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, § 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 standard of review would apply in any event. 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 PLAIN LANGUAGE OF THE "DISABILITY A" STANDARD REQUIRES A CLAIMANT TO SHOW 100% DISABILITY ONLY IN VOCATION *OR* SELF-CARE WAS NEITHER CLEARLY ERRONEOUS NOR AN ABUSE OF DISCRETION

The District Court's decision represents a straightforward and reasonable reading of the disease criteria by the judge who oversaw

[9] Dow Corning has further argued 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 held only that parties may not bind a court merely by agreeing in their appellate 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, and Dow Corning cites no authority so holding.

implementation of the Plan, supervises the SF-DCT, and has lived with this case for nearly 15 years. The District Court's logical reading of the plain language of Annex A is consistent with how the same standard was read by the parties actually applying it in the RSP, and thus consistent with the expectation of claimants who voted for the Plan having been told that claims would be processed under the RSP's standards. The decision of the initial Dow Corning Claims Administrator to apply a different reading — one that was adopted only after virtually all RSP claims had been processed — has created confusion and unfairness.

A. The Plain Language of the "Disability A" Standard Supports the District Court's Decision

Although entitled to greater deference than in an ordinary contract case, the District Court correctly approached the issue as a matter of contract interpretation. *See In re Dow Corning Corp.*, 456 F.3d 668, 676 (6th Cir. 2006) (interpretation of confirmed plan "analogous in many respect to the construction of a contract," but court's application of those principles reviewed "with significant deference"). Here, the District Court's interpretation is consistent both with the plain language of the plan and with the understanding and purposes of the parties. *See Winnett v. Caterpillar, Inc.*, 553 F.3d 1000, 1008 (6th Cir. 2009) (contract interpreted consistently with relative positions and purposes of parties).

The starting point of the plain language analysis is, obviously, that the word "or" actually means "or." It is disjunctive, signifying two separate

alternatives: "the word 'or' is a disjunctive particle that marks an alternative, generally corresponding to 'either,' as 'either this or that,' a connective that marks an alternative, as, 'you may read or you may write — that is, you may do one of the things at your pleasure, but not both.'" *Ohio Fuel Supply Co. v. Paxton*, 1 F.2d 662, 664 (S.D. Ohio 1924) (citations omitted). Thus, the presumptive plain language reading of the definition in question is that the claimant must show *either* total disability in vocation *or* total disability in self-care.

This reading makes sense for the additional reason that the painstakingly negotiated Original Global Settlement criteria specifically used the word "and" to indicate, in the context of Disability B and C, when disability in *both* areas is required. Careful use of different terms in parallel positions within a contract is a strong indication that the parties meant something *different*. *See, e.g.*, *Great Am. Ins. Co. v. Norwinds Sch. Dist.*, 544 F.3d 229, 246 (3d Cir. 2008) ("The use of different language to address the same or similar issue . . . strongly implies that a different meaning was intended."); *Penncro Assocs. v. Sprint Spectrum L.P.*, 499 F.3d 1151, 1156-57 (10th Cir. 2007) ("When a contract uses different language in proximate and similar provisions, we commonly understand the provisions to illuminate one another and assume that the parties' use of different language was intended to convey different meanings.").

Dow Corning argues that because the Disability A definition uses the word "none," it necessarily follows that "or" in the subsequent phrase must be read as "and." DCC Br. 41-43. But most of Dow Corning's illustrations on this point are facially inapplicable because they involve the simple construction of "none" followed by a list — *e.g.*, "none of the unpaid suppliers or subcontractors"; "none of seller's covenants, representations, warranties or other obligations." *Id.* at 42. In the Disability A definition "none" clearly refers to *all* of the claimant's "activities" — but that begs the question whether that means all of the activities of vocation, all of the activities of self-care, or all of the activities in both of those categories. And none of Dow Corning's examples is dispositive, because the meaning of a word or phrase depends on the context in which it is used. *See Craft Mach. Works, Inc. v. United States*, 926 F.2d 1110, 1113 (Fed. Cir. 1991) (plain meaning of contract term may depend on context).

Dow Corning misleadingly cites Williston on Contracts § 30:12, at 143 (4th ed. 1999),[10] as supposedly endorsing the substitution of "and" for "or," but leaves out this crucial qualification: "[T]his will not be done where such an interpretation would be inconsistent with any intent which can be reasonably gathered from the connection in which the word is used, from the whole

[10] Dow Corning erroneously cites it as § 32.12. DCC Br. 42 n.22.

undertaking, or from the light of the surrounding circumstances." *Id.* Moreover, "the words 'and' and 'or' should not be considered interchangeable in construing a contract, absent strong supporting reasons." *Id.*

As Dow Corning itself recognizes (DCC Br. 43), a contract should be read as a coherent and consistent whole that gives meaning to all terms. *See Diversified Energy, Inc. v. TVA*, 223 F.3d 328, 339 (6th Cir. 2000). Here, reading the Disability A standard to require a claimant to show that she is 100% disabled in *both* vocation *and* self-care would write the vocation requirement out of the guidelines. A claimant who is 100% disabled as to self-care is unable to dress, feed, bathe, groom, or toilet without assistance. *See* Record Entry No. 701, Ex. D, Annex A, p. 101 n.6. Exceedingly few claimants, if any, will be able to meet this standard but not *also* be 100% disabled from working. Reading the disability standard as requiring 100% disability in both areas would render the primary criterion (ability to work) irrelevant.

Dow Corning's construction would also lead to absurd results, violating another canon of contract construction. *See Kellogg Co. v. Sablok*, 471 F.3d 629, 636 (6th Cir. 2006). Applying a different standard in the SF-DCT leads to the bizarre result that claimants with identical medical and claim files receive completely different results based on whether their claims are processed anew

(under the "and" standard) or passed through from the RSP based on the multiple manufacturer reduction (under the "or" standard).

Dow Corning offers several other specious arguments in support of its "plain language" analysis. First, Dow Corning argues that the plain language reading of "or" would "simply read[] the word 'none' out of the guidelines." DCC Br. 43. But the word "none" operates under the "or" reading to require that a claimant show 100% disability (or very close to it) in at least one of the two areas of functioning.

Dow Corning also argues that "or" must mean "and" because Annex A requires that disability determinations "be based on the cumulative effect of the symptoms on the individual's ability to perform her vocational, avocational, or usual self-care activities." Record Entry No. 701, Ex. D, Annex A, p. 101. Once again Dow Corning ignores the crucial word "or." This sentence simply requires (for the *benefit* of claimants) that the cumulative effect of all *symptoms* be considered together in determining the claimant's capacity within whichever area of functioning is being evaluated. This provision mirrors the basic principle of disability law that a claimant must be viewed as a whole person, not as a basket of isolated ailments or symptoms. *See* 42 U.S.C. § 1382c(a)(3)(g) (2006) (requiring that "the combined effect of all of the individuals impairments" be considered

throughout the process of determining eligibility for Social Security disability benefits).

Dow Corning quotes language from various plan documents supposedly highlighting the strictness of the Disability A definition. DCC Br. 1, 11, 44. But establishing 100% disability in *either* area is a demanding and strict standard, as has been recognized in other settings. "[I]t is difficult to qualify for Social Security Disability benefits. The standard is stringent: The claimant must lack the functional capacity to perform *any* jobs existing in significant numbers in the national economy." *Force v. Ameritech Corp.*, 452 F. Supp. 2d 744, 751 (E.D. Mich. 2006).

Nor does language indicating that the Disability A standard implicates the claimant's ability to do "her normal activities" and that submissions must include a description of "daily life and limitations" change the meaning of "or" to "and." DCC Br. 44. That language simply indicates that the claimant's submission should give the fullest account of limitations on her daily activities in both areas, so that she will have the best chance of satisfying the 100% disability standard in at least one of them.

In any event, Dow Corning overstates the intended "strictness" of the Disability A standard in the larger context of the Dow Corning settlement. As noted above (at 7), Disability A provides the highest level of benefits only in the

lower of two disease settlement grids. Claimants were told that the *second* grid, which provides much higher benefits (up to $250,000 plus a potential $50,000 premium payment) was based on more rigorous medical criteria. Indeed, these Option II disease categories do not themselves all require an affirmative showing of disability. For example, Option II offers a base payment of $150,000 for lupus (SLE) based solely on a diagnosis of lupus with no showing of resulting disability. Record Entry No. 701, Ex. D, Annex A, pp. 14, 104. Similarly, Option II awards a base payment of $75,000 for General Connective Tissue Symptoms (GCTS), at compensation Level B, based merely on such symptoms as dry eyes and polyarthritis. *Id.* at 14, 105-06. In contrast, to obtain the lower $50,000 settlement offered under Disease Option I, Disability A, claimants must show total inability either to work or perform self-care. *Id.* at 13, 105-06. To require further that the claimant essentially demonstrate complete helplessness to qualify for this more modest settlement is illogical, unfair, and inconsistent with the overall structure and purpose of the settlement.

Nor is requiring a showing of 100% disability only in one area somehow a more lenient standard than is imposed by Disability B or C. Twenty to 35% disability reflects a person who is still functional at home and at work but somewhat limited in the range of activities she can undertake (or perform without undue pain). The 100% disability required by Disability A is a much more

rigorous standard, even limited only to one area or the other. Thus, the plain language construction of "or" does not render disability levels B and C "meaningless." DCC Br. 45.

While it may strictly be possible for a claimant to qualify for Disability A by demonstrating vocational disability and *not* qualify for levels B or C because she is able to perform more than 80% of self-care activities (*id.*), such a claimant would still be more disabled overall — by virtue of not being able to work and earn a living — than a claimant who is merely 20 to 35 percent disabled in both areas. Moreover, Dow Corning's hypothetical of a claimant who is 100% disabled in self-care but nevertheless can work full time can represent, at most, a small handful of extraordinary cases in which it would hardly be irrational to award the relatively modest benefits offered under Option I, Disability A.

B. Undisputed Extrinsic Evidence of the Parties' Expressed Understanding Further Supports the District Court's Holding

As demonstrated above, a rational reading of the overall Plan supports the District Court's plain language reading of the Disability A standard, not Dow Corning's. But even if the standard were to be considered ambiguous, requiring consideration of extrinsic evidence of intent to establish its meaning, the parties' actual, real world understanding of the meaning of the Disability A standard would

lead to the same result.[11] *See 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). Moreover, contemporaneous evidence of the parties' understanding in actually performing the contract is highly persuasive in establishing its intended meaning. *See, e.g.*, *Roger Miller Music, Inc. v. SONY/ATV Publ'g LLC*, 477 F.3d 382, 392 (6th Cir. 2007) (court will adopt interpretation of contract placed on it by parties' acts); *A.L. Pickens & Co. v. Youngstown Sheet & Tube Co.*, 650 F.2d 118, 120 (6th Cir. 1987) (parties' construction of contract "best evidenced by their conduct").

Here the evidence is powerful and undisputed that the logical, plain reading of "or" as "or" reflects the actual expressed understanding of the parties in the RSP who *applied* that language. Doctors submitting reports, attorneys incorporating those reports into claim filings (both in the Original Global Settlement and in the RSP), and MDL-926 Claims Office staff interpreting the original global criteria and processing claim files *all* read the plain language as requiring 100% disability only in one of the two areas — vocation *or* self-care.

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[11] The Court may affirm on this alternative ground. *See Dixon v. Clem*, 492 F.3d 665, 673 (6th Cir. 2000) (district court decision may be affirmed on any ground presented in the record); *see also In re Dow Corning*, 456 F.3d at 677 (rejecting Bankruptcy Court's holding that plain language was unambiguous but upholding its construction as reasonable, while remanding on other issues).

And obviously, claimants and their lawyers in the Dow Corning settlement continued to believe that the original reading applied — and were shocked to learn that the rule had changed without any public disclosure after claimants were induced to vote for a settlement that would provide the same disease claim outcomes as the RSP. Nor is there any evidence that Dow Corning had a different understanding of the meaning of Disability A at the time the Plan documents were drafted. Thus, considering the extrinsic evidence of the parties' actual conduct and expressed understanding of the contract only supports the District Court's conclusion that "or" means "or."

II.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION OR CLEARLY ERR IN REJECTING DOW CORNING'S ARGUMENTS DESIGNED TO DEPRIVE THE DISTRICT COURT OF THE POWER TO CONSTRUE THE "DISABILITY A" STANDARD

Implicitly recognizing that its weak plain language argument is torpedoed by the actual understanding of the parties and the unfairness of applying a different standard to Dow Corning claims than was applied in the RSP, Dow Corning constructs a series of baseless arguments intended to deprive the District Court of its power to interpret the Dow Corning disease criteria.

A. The Plan Documents Do Not Give The Claims Administrator Unreviewable Discretion to Adopt Changed Disease Criteria

Dow Corning first argues that the District Court has no power to interpret the Disability A standard because § 4.03 of the SFA purportedly vests in the Claims Administrator absolute and unreviewable discretion to determine the governing criteria. Dow Corning bases this dubious proposition on language added to the SFA years after claimants voted on the Plan, when the Plan documents were updated in connection with the June 1, 2004 Effective Date.

At the time claimants *voted* on the plan, § 4.03(a) simply said that Dow Corning claims would be processed in substantially the same manner as claims were processed in the RSP. As described above at 9-10, § 4.03 was amended in 2004 to assure that the Claims Administrator would be able to rely on the standards in place when claim forms were mailed in 2003 and would not have to update her procedures and re-process claims before being able to pay them promptly after the June 1, 2004 Effective Date. Thus, the Claims Administrator was authorized "to rely on procedures and interpretations contained in the Claims Administrator's guidelines and claims-processing system as of February 2003 and is not required to change those procedures and interpretations." The new language also gave the Claims Administrator "discretion to modify those procedures to conform to procedures or interpretations established by the MDL 926 Claims

Office any time after the confirmation date." Record Entry No. 701, Ex. C, SFA, p. 9.[12]

The SFA was amended to give the Claims Administrator comfort in moving forward with claims processing, not to deprive the District Court of its fundamental power to oversee operation of the Settlement Facility and interpret the Plan and Plan documents: "The District Court shall have the authority to act in the event of disputes or questions regarding the interpretation of Claim eligibility criteria, management of the Claims Office or the investment of funds by the trust." Record Entry No. 701, Ex. C, SFA, p. 5. Section 5.05 of the SFA further specifically authorizes the District Court to resolve disputes over the Annex A disease criteria. *Id.* at 20.

The language Dow Corning cites must be read as a whole with this provision and with the other language in § 4.03 itself, so that the entire contract is construed to achieve its intended purpose. *See Lindsay v. Covenant Mgmt. Group, LLC*, 561 F.3d 601, 603 (6th Cir. 2009) (agreements should be interpreted to "carry out the intent of the parties") (citation omitted). The primary thrust of § 4.03 —

[12] SFA § 5.04(d) was similarly amended at the Effective Date to direct the Claims Administrator to adopt quality control procedures applied by the MDL-926 Claims Administrator "as interpreted by the Settlement Facility as of February 2003." Record Entry No. 701, Ex. C, SFA, p. 19. The version voted on by claimants simply recited that the Claims Administrator would adopt the processing protocols of the MDL-926 Claims Office.

and the controlling language that was in the document when claimants voted on it — requires that claims be *processed* as they were in the RSP. The language about relying on the 2003 interpretations must be harmonized with that overarching goal and read as fostering administrative convenience and continuity and preventing undue second-guessing of the Claims Administrator with respect to the details of claims processing. This language cannot be read to insulate from any judicial review a wholesale change in plan criteria never transmitted to claimants and inconsistent with the basic representation made to induce their support for the Plan.[13]

On Dow Corning's reading, the 2004 amendments to the SFA would have constituted material modifications of the Plan — changing a fundamental term (that disease claims, including those under Disability A, would be processed on the same basis as like claims in the RSP) without providing affected claimants with the opportunity to appear, object, and possibly change their votes on the Plan. This would violate the Bankruptcy Code and Rules. *See* 11 U.S.C. § 1127 (2006)

[13] Dow Corning's citation of the SFA's definition of "Revised Settlement Program" (DCC Br. 17) adds nothing. Defining the RSP as consisting of the MDL-926 Court's Order No. 27 "as modified or amended" by subsequent orders (Record Entry No. 701, Ex. C, SFA, § 1.09, p. 2) is simply meant to identify accurately the overall RSP program. It is not operative language commanding the District Court to defer to all interpretations and orders emanating from the MDL-926 claim process.

(plan may be modified after confirmation only upon notice and hearing, disclosure of adequate information regarding modification, and opportunity for affected creditors to revoke previous acceptance of plan); Fed. R. Bankr. P. 3019(a) (permitting modification of accepted plan even *before* confirmation only after hearing on notice to Trustee and official committees and upon finding that no creditor's claim is adversely affected); *see also LPP Mortgage, Ltd. v. Park Bowl, Inc.*, No. 02-CV-10278-BC, 2003 WL 22995011, at *6-*7 (E.D. Mich. Dec. 4, 2003) (post-confirmation agreements affecting creditor rights must be approved by court as plan amendment under § 1127(b)). As a matter of law, the language added in 2004 must be read *not* to materially modify the rights of any creditor. But Dow Corning's reading would do just that.

B. The District Court Was Not Bound To Defer To Judge Pointer's Interpretation of the Disability A Criteria

Dow Corning next argues that the District Court was required to defer to Judge Pointer's one-page order interpreting "or" to mean "and," based on the principle that a court should defer to another court's interpretation of its own order. DCC Br. 38-39. There are several things wrong with Dow Corning's argument.

First, the District Court here was not, at bottom, interpreting Judge Pointer's "order" (*i.e.*, the order establishing the RSP). Rather, it was interpreting the orders governing the Dow Corning settlement itself, which is under the District Court's own supervision and jurisdiction. The District Court, rather than any other

court, is entitled to deference in its interpretation and enforcement of the orders implementing the Plan and governing the conduct of the Settlement Facility.

Second, Judge Pointer's decision is not of a type that would in any event be entitled to much deference. It is a one-page, summary order entered in his role as the "appeals judge" handling administrative appeals by settling claimants as to which the parties had no notice or opportunity to participate. The parties did not ask Judge Pointer to interpret the language in question, and he did not have the benefit of briefing or argument on the merits or the potential impact of his decision. The decision was posted on the docket along with dozens of others but never publicized, and in fact the Dow Corning parties were not even aware that it existed until 2004. This type of summary, non-reviewable alternative dispute resolution decision is more akin to a private arbitration award and is inherently entitled to less deference and precedential weight than a decision (like the one below) that was the subject of a traditional adversary process. *See, e.g.*, *O'Neal v. Sabena Belgian World Airlines*, No. 97-1046, 1997 WL 471334, at *1 (7th Cir. Aug. 12, 1997) (motion panel decision "summary in character, made often on a scanty record, and not entitled to the weight of a decision made after plenary submission" (citation omitted)); *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 147 (4th Cir. 1993) (arbitration awards "have no precedential value").

Finally, Judge Pointer's decision is entitled to little weight on its own merits. The operative portion of the decision consists of a couple of sentences in which Judge Pointer simply states his conclusion but cites nothing to support it. Moreover, Judge Pointer makes the plainly erroneous statement that the MDL-926 Claims Office had *always* read the Disability A standard as requiring a showing of both types of disability. Had Judge Pointer understood that virtually all claims in the RSP had already been processed under a *different* standard, that might well have affected his ruling. There is no way to know on this limited record, underscoring why the ruling is entitled to scant deference.

The similar summary decision of the successor appeals judge is entitled to no greater weight than the decision of the MDL-926 judge himself. And subsequent interpretations by the MDL-926 Claims Office based on Judge Pointer's decision — including those embodied in subsequently published claimant "Q&As" — also cannot override the authority of the District Court here to interpret the Dow Corning Plan documents.

C. The Decision Below Does Not Constitute An Unauthorized "Plan Modification"

Dow Corning tries to cobble together another "legal" argument to trump the District Court's authority based, ironically, on one of the very provisions that grants the District Court authority to interpret the disease criteria — SFA § 5.05. Section 5.05 directs the Claims Administrator to obtain input from the

parties regarding the interpretation of substantive eligibility criteria "to the extent such interpretations and designations have not been previously addressed as of February 2003 by the Initial MDL 926 Claims Administrator in connection with the Revised Settlement Program." Record Entry No. 701, Ex. C, SFA, p. 20. Thus, Dow Corning argues, when an issue *has* already been addressed by the MDL-926 Claims Administrator, the Dow Corning Claims Administrator is not empowered to seek input from the parties and the District Court is somehow divested of jurisdiction to address interpretive disputes. *See* DCC Br. 35-36. Because § 5.05 also bars "modification of any substantive eligibility criteria," Dow Corning argues that the District Court lacks the power even to *interpret* any guideline already considered by the MDL-926 Claims Administrator. *Id.* at 36.

This is nonsense. The issue here is not the Claims Administrator's authority to seek input from the parties, because the initial Claims Administrator simply adopted the erroneous interpretation of Disability A without any consultation. This dispute was brought before the District Court based on its inherent supervisory authority over the Settlement Facility, memorialized in SFA § 4.01. And of course, the decision below does not constitute a "modification" of the eligibility criteria but, rather, an interpretation thereof. Dow Corning's argument to the contrary merely rehashes its attempt to give absolute primacy to the MDL-926 Claims Office standards existing in 2003.

D. The District Court Decision Does Not Improperly "Threaten" To "Deplete" Funds Set Aside For Other Claimants

Finally, Dow Corning remarkably seeks to invoke the interests of its personal injury claimant adversaries in arguing for reversal on the ground that the decision below improperly "threatens to deplete" funds that should be set aside for other, presumably more deserving, claimants. DCC Br. 53.

Dow Corning's argument is totally circular. It laments the prospect of "paying tens of millions of dollars of ineligible claims" (*id.* at 54), but of course if the District Court decision is affirmed the claims in question are not "ineligible" at all. The Settlement Fund was established for the very purpose of paying all eligible claims — it exists to be "depleted."

Dow Corning's further suggestion that the SF-DCT's ability to pay the base claims of other claimants "could be threatened" as a result of the District Court decision (*id.*) is simply false. The structure of the SFA itself precludes this risk: Premium Payments will not be paid until the District Court finds that adequate provision has been made to pay *all* base claims. *See* Record Entry No. 701, Ex. C, SFA, § 7.01(c)(iv), p. 24. The marginal cost of paying properly processed Disability A claims will potentially impact only a very small percentage of the Settlement Fund's resources. There is no basis in the record to conclude that this would threaten the payment of base claims. And if the payment of Disability A benefits to injured claimants delays or prevents the payment of *Premium*

Payments (a threat supported by no actual data in the record, just lawyers' assertions), that is a priority for which the parties bargained and perfectly appropriate under the Plan. In fact, the SFA has built-in mechanisms for delaying, reducing, or dividing into installments any payments as necessary to ensure the solvency of the fund while maximizing payments to claimants. *See*, *e.g.*, *id.* at §§ 7.01(c)(i), 7.02(d), 7.03(a), pp. 24, 26, 28. The suggestion that the marginal effect of this specific issue could jeopardize payment of the entire $200 million in premiums is false and in any event completely irrelevant.

III.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION OR CLEARLY ERR IN ACCEPTING RELIABLE AND ESSENTIALLY UNDISPUTED EVIDENCE ESTABLISHING THE GENERAL POINT THAT "DISABILITY A" CLAIMS WERE PROCESSED IN THE RSP USING THE "OR" STANDARD

Finally, Dow Corning argues that the District Court erred in not excluding the evidence establishing that virtually all claims in the RSP were decided under a Disability A standard that required claimants to demonstrate 100% disability in vocation *or* self-care, but not both. Of course, this Court need not reach these issues if it simply affirms the District Court's holding based on the plain language of the Disability A definition.

While the District Court relied on the plain language of the Disability A standard, it did not affirmatively exclude the CAC's evidence and gave as one of

its reasons for declining to defer to the "and" construction eventually adopted in the RSP the fact that most claims in the RSP had already been processed before that new standard was adopted. *See* Record Entry No. 672, Memorandum Opinion, p. 12.

Dow Corning argues first that the proffered evidence is "immaterial" (DCC Br. 46-48), again rehashing its assertion that the language added to SFA § 4.03(a) in 2004 vested the Claims Administrator with absolute, unreviewable discretion to rely on whatever processing standards the MDL-926 Claims Facility had in place in 2003. As demonstrated above (at 42-45), the ministerial language added to § 4.03(a) in connection with the Plan Effective Date does not deprive the District Court of its fundamental authority to interpret the Plan.

Dow Corning's evidentiary objections to the materials submitted to the District Court (DCC Br. 50-53), including its argument that the court could not rely on such evidence without granting Dow Corning an evidentiary hearing (*id.* at 53) are entitled to little weight. Dow Corning did not object to the bulk of the evidence proffered at the June 2006 hearing until months later, when it belatedly moved to "strike" it. *See* Record Entry No. 434, Motion to Strike. Moreover, Dow Corning does not seriously dispute the basic fact that virtually all claims were, in fact, processed in the RSP under an "or" standard. Dow Corning has never proffered *any* evidence directly establishing that *any* claims were processed under

a different standard prior to Judge Pointer's 1997 ruling. Nor did Dow Corning ever seek formal discovery on this issue.

In such circumstances, the District Court did not abuse its discretion by accepting the effectively undisputed evidence without holding an evidentiary hearing. The very case on which Dow Corning relies explains that an evidentiary hearing is required when facts are "bitterly contested and credibility determinations must be made," but that "where material facts are not in dispute" the court is not obligated to hold a hearing. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 553 (6th Cir. 2007) (citation omitted); *see also, e.g.*, *United States v. Giacalone*, 853 F.2d 470, 483 (6th Cir. 1988) (party "must make at least some initial showing of contested facts" to be entitled to evidentiary hearing); *NLRB v. Tenn. Packers, Inc.*, 379 F. 2d 172, 178 (6th Cir. 1967) (party seeking hearing must "clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing" and must "state the specific findings that are controverted and must show what evidence will be presented to support a contrary finding or conclusion").

Here, the only proof that Dow Corning has *ever* offered on this point is Judge Pointer's one page, summary decision stating (without support) that the MDL Claims Administrator had consistently required both vocational and self-care disability. *See* DCC Br. 48. But as demonstrated above (at 10-18), Judge Pointer's

observation was clearly incorrect in light of the overwhelming evidence that, in fact, claims were processed in the RSP using the "or" standard. And right or wrong, Judge Pointer's ruling was already before the District Court. Dow Corning does not identify any *other* evidence that it would offer at an evidentiary hearing, and thus its demand for one is a red herring.

In any event, all of the evidence was reliable and appropriately admitted. Both the June 2006 Austern Memorandum and Mr. Austern's earlier 2005 memo were prepared at the request of the parties by a respected and experienced neutral and are, on their face, credible and reliable documentation of the basic fact that claims in the RSP were processed under the "or" standard.

Dow Corning attacks Mr. Austern's method of gathering information through interviews with former MDL-926 Claims Office employees, but that is exactly how much of the documentation on which the SF-DCT operates was created. As Dow Corning itself stated in a submission in connection with the allocation of costs between the two claims facilities, the MDL-926 Claims Office was unable to provide the SF-DCT with well-organized claims processing materials. Instead, the materials and standards had to be recreated from disorganized documentation and — crucially — the SF-DCT relied upon extensive *oral interviews* with formal MDL-926 Claims Office employees to reconstruct how the RSP had processed claims and to develop protocols to govern claim processing

in the Dow Corning facility. *See* Record Entry No. 416, CAC Reply to Dow Corning Objection, Ex. 21.

Thus, Mr. Austern gathered information through a method commonly employed and relied upon by the parties. This is a strong indication of the reliability of his work product. Indeed, Dow Corning itself relies on the Austern Memorandum to establish facts that *it* wants to show regarding the history of claims processing. *See* DCC Br. 3, 16. And Dow Corning cites other material in the record reflecting informal communications from Settlement Facility personnel, such as an e-mail from the SF-DCT Claims Administrator quoting an unpublished decision of the MDL-926 Appeals Judge. *See id.* at 15.

Mr. Austern submitted a declaration confirming that he prepares reports like the memoranda in question as a part of his regular duties as Claims Administrator, and in the course of preparing such reports routinely gathers information from employees with knowledge of relevant matters. He further confirmed (1) that he undertook the investigation as to the processing of Disability A claims in the RSP at the request of both parties and (2) that the report contained in the June 9, 2006 memo is a record of a regularly conducted business activity within the scope of his duties. *See* Record Entry No. 416, Ex. 22.[14]

[14] As noted above (at 23-24), Dow Corning thereafter induced Mr. Austern to counter-sign a letter distancing himself from certain aspects of his June 9

Overall, Mr. Austern's memoranda, supported by his authenticating declaration, have sufficient neutrality and indicia of reliability to be admitted under the business records exception to the hearsay rule codified in Fed. R. Evid. 803(6), which is applied liberally. The District Court is entitled to "great latitude" in determining whether the indicia of trustworthiness warrant admission under this rule. *See United States v. Duncan*, 919 F.2d 981, 986-87 (5th Cir. 1990).

Mr. Austern's memoranda are also admissible under the residual hearsay exception contained in Fed. R. Evid. 807. *See United States v. Jamieson*, 427 F.3d 394, 411-12 (6th Cir. 2005) (memoranda otherwise constituting hearsay may be admitted based on circumstantial guarantees of trustworthiness equivalent to traditional hearsay exceptions, where more probative than other reasonably available evidence, and where admission is consistent with general purposes of rules of evidence and interests of justice); *see also Taulbee v. Wal-Mart Stores, Inc.*, 5 F. App'x 361, 364 (6th Cir. 2001) (letter containing hearsay information about disability claim admissible under Rule 807 where context suggested little

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memorandum. Mr. Austern later submitted a declaration in support of Dow Corning's motion to strike in which he further disclaimed any attempt to have functioned as a rigorous "historian" and regretted having been caught in the middle of the parties' dispute. *See* Record Entry No. 434, Motion to Strike, Ex. 2. However, none of these submissions undercut the facial reliability of Mr. Austern's memoranda or suggest that he was incorrect in concluding that the vast majority of RSP claims were processed under the "or" standard before the standard was changed sometime after Judge Pointer's 1997 ruling.

motivation to exaggerate and document had high indications of reliability). Communications gathered in a "professional setting" and in the context of "an ongoing professional relationship" between parties serving the same client and pursuing the same goals display "circumstantial guarantees of trustworthiness" supporting admission under the residual hearsay exception. *Alexander v. FBI*, 198 F.R.D. 306, 320 (D.D.C. 2000).

Moreover, the basic thrust of Mr. Austern's memoranda is supported by several independent sources of evidence, underscoring these other indicia of reliability. *See, e.g., Green v. Baca*, 226 F.R.D. 624, 639 (C.D. Cal. 2005) (corroborating sources may bolster admissibility under Rule 807); *Cooper v. Miami-Dade County*, No. 01-976-CIV-JORDAN, 2004 WL 2044288, at *8 (S.D. Fla. July 9, 2004) (portions of hearsay statement admissible under Rule 807 based on "independent guarantees of trustworthiness" even though declarant had recanted her statement under oath). Here, the verifying evidence included affidavits from attorneys closely familiar with RSP claim processing establishing that their clients were approved based on vocational disability alone, backed up by numerous actual claim files; claims processing statistics demonstrating that Disability A claims, unlike Disability B and C claims, have been approved at dramatically *lower* rates in the SF-DCT than they were in the RSP; and statements by an outside auditor and the MDL Claims Administrator herself confirming that the MDL-926 Claims

Office changed its Disability A criteria only *after* most claims had been processed under the original "or" standard. *See* above at 14-18.[15]

Mr. Austern's status as a neutral and his obvious eagerness to avoid being seen as an advocate for either side in fact enhance the reliability of all of his work product. Even crediting all of Mr. Austern's disclaimers, his two memoranda are still a reliable indication of the only fact of any consequence here: that most claims in the RSP were processed under the "or" standard. If anything turned on the more particularized question whether 99% or only 95% of claims were processed under that standard, closer evidentiary scrutiny might be warranted, but nothing does. At the end of the day, Dow Corning cannot and does not seriously dispute the basic proposition, and the District Court did not abuse its discretion or clearing err in relying on it.

[15] Dow Corning separately attacks the reliability of the statistical comparison described above, suggesting that the MDL "sample" may not be the same group of claimants as the SF-DCT "sample" and that claims may have been denied in the SF-DCT for reasons other than the stricter disability standard. DCC Br. 52. Such considerations go only to the weight of the claims processing statistics, not their admissibility, and Dow Corning does not offer any reason to think that the populations in the two facilities were so starkly different as to explain the disparity of 14% versus less than 5% approval rates on any ground other than the obvious: the two facilities applied different standards.

CONCLUSION

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

Dated: December 8, 2009

Respectfully submitted,

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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 13,941 words.

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CERTIFICATE OF SERVICE

I certify that on December 8, 2009, 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.

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

Documents

Doc 76 12/15/04 MOTION for the Disclosure of Substantive Criteria Created, Adopted and/or Being Applied by the Settlement Facility and Request for Expedited Consideration by Claimants' Advisory Committee

- EXHIBIT 1 – Global Settlement Disease and Disability Criteria, 1994
- EXHIBIT 2 – Revised Settlement Program Notice, 1996
- EXHIBIT 3 – MDL Order 27L, Appointing Andrews as Appeals Judge
- EXHIBIT 4 – Option 1 Disease Schedule in Annex A, the Claims Resolution Procedures
- EXHIBIT 5 – Excerpt from Class 5 Disease Information Guide
- EXHIBIT 6 – Redacted Claimant Notification of Status letter from SF-DCT
- EXHIBIT 7 – MDL Order , Sept. 30, 1997
- EXHIBIT 8 – Email Dated 11/24/04 from D. Pendleton-Dominguez to W. Trachte-Huber and others
- EXHIBIT 9 – Email dated 11/24/04 from W. Trachte-Huber to the CAC, Debtor's Representatives and Finance Committee
- EXHIBIT 10 – Email dated 11/24/04 from W. Trachte-Huber to the CAC, Debtor's Representatives and Finance Committee
- EXHIBIT 11 – Excerpt from SF-DCT Monthly Claims Report for the Period Ending October 31, 2004]3
- EXHIBIT 12 – Memo from D. Greenspan to W. Trachte-Huber dated November 19, 2001

Doc 89 1/7/05 MOTION by Claimant Dawn Barrios with Brief adopting Motion of the Claimants Advisory Committee for the Disclosure of Substantive Criteria Created, adopted and/or being applied by the Settlement Facility and request for expedited consideration by Dow Corning Settlement Facility A Disability Claimants

- EXHIBITS NOT NUMBERED – Barrios Medical Reports

Doc 100 1/21/05 RESPONSE to MOTION filed by Dow Corning Corporation
EXHIBIT A – MDL and MIED (DCC) Joint Order re Settlement Facilities, Dated June 26, 2000

Doc 111 2/8/05 REPLY to Response re MOTION for the Disclosure of Substantive Criteria Created, Adopted and/or Being Applied by the Settlement Facility and Request for Expedited Consideration filed by Claimants' Advisory Committee
EXHIBIT 1 – Email From Claimant Attorney to CAC re Claimant Who Applied for Disability A

Doc 112 2/8/05 REPLY to Response re MOTION for the Disclosure of Substantive Criteria Created, Adopted and/or Being Applied by the Settlement Facility and Request for Expedited Consideration filed by Spitzfaden Claimants

Doc 137 4/5/05 MOTION for leave to File Sur-Reply in Further Response to Motion of Claimants' Advisory Committee for Disclosure of Substantive Criteria Created, Adopted and/or Being Applied By the Settlement Facility and Request for Expedited Consideration and to Motion and Brief Adopting the Motion of the CAC for the Disclosure of Substantive Criteria Created, Adopted and/or Being applied By the Settlement Facility and Request for Expedited Consideration by Dow Corning Corporation
EXHIBIT 1 – Sur-Reply in Further Response to Motion of Claimants' Advisory Committee for Disclosure of Substantive Criteria Created, Adopted and/or Being applied By the Settlement Facility and Request for Expedited Consideration and to Motion and Brief Adopting the Motion of the CAC for the Disclosure of Substantive Criteria Created, Adopted and/or Being applied By the Settlement Facility and Request for Expedited Consideration
EXHIBIT A – RSP Defendants' Memorandum in Opposition to Plaintiffs' Motion for Disclosure of Substantive Criteria Adopted

and/or Being Applied By the MDL-926 Claims Office
EXHIBIT B – Order Approving Trachte-Huber as Successor Claims Administrator Pursuant to the SFA
EXHIBIT 2 – Proposed Order Granting Motion

Doc 191 7/18/05 MOTION to evaluate all Level A Disabilities, Tolling the one year deadline for curing disease claim deficiencies by Helen Bolstorff
EXHIBIT 1 – Letter from Dr. James Barker, Qualifying Claimant at Level A Disability
EXHIBIT 2 – POM, Explant, Rupture and Disease Claim Forms
EXHIBIT 3 – Notification of Status Letter, 6/11/04
EXHIBIT 4 – 10/28/04 Disability Cure Letter with Dr. Foley Letter
EXHIBIT 5 – Notice of Failure of Attempt to Cure Disability, 11/16/04
EXHIBIT 6 – Request for Extension to Lucy Malone
EXHIBIT 7 – Request to Extend Disease Cure Deadline, 6/8/05
EXHIBIT 8 – Annex A, Page 48, #5 and #6
EXHIBIT 9 – Annex A, page 52, #6, paragraph 5
EXHIBIT 10 – Annex A, Page 88, paragraph 3
EXHIBIT 11 – Disease Claimant Information Guide, page 6, Question1-10
EXHIBIT 12 – Disease Claimant Information Guide, Tab 1, Disability Compensation Category Disability A

Doc 199 8/8/05 RESPONSE to MOTION evaluate all Level A Disabilities: Response to Out of Time Motion and Memorandum In Support of Immediately Ordering the Dow Corning Settlement to Evaluate All Level A Disabilities According to the Language Found in the Settlement Document Which Allows A QMD to Apply the Definitions of Either Vocation or Self-Care; Tolling the One Year Deadline for Curing Disease Claim Deficiencies for Helen Bolstorff Until Decision is Made filed by Dow Corning Corporation

Doc 206 8/25/05 REPLY to Response re Motion in Support of Immediately Ordering the Dow Corning Settlement to Evaluate all Level A Disabilities According to the Language Found in the Settlement Document

Doc 292 1/12/06 MOTION for Order Requiring the Settlement Facility—Dow Corning Trust to Apply the Criteria for Level A Disability in Accordance with the Language of the Settlement Documents and Tolling the Deadline to Cure Disease Claim Deficiencies for One Year Following the Court's Ruling on this Motion by Clients of Mitchell Hurst Jacobs and Dick Jacobs

EXHIBIT A – Claimant Notification of Status Letter
EXHIBIT B – Excerpt From Claimant Information Guide
EXHIBIT C – Claimant Appeal to Claims Administrator
EXHIBIT D – Decision of Claims Administrator
EXHIBIT E – MDL Order re Claimant Appeal, Dated 9/30/97

Doc 299 1/19/06 MOTION for the Disclosure of Substantive Criteria Created, Adopted and/or Being Applied by the Settlement Facility and Request for Expedited Consideration Requesting the Court to Authorize Sharing of Certain Information with MDL 926 by Claimants' Advisory Committee

EXHIBIT 1 – MDL 926 Order 27O re Q&A
EXHIBIT 2 – Amicus Curiae Submission in the MDL 926 case (94-11558) of CAC in the Dow Corning Corp. Bankruptcy Requesting to Be Heard on the Motion for Disclosure of Substantive Criteria Created, Adopted, and/or Being Applied by the MDL 926 Claims Office
EXHIBIT 3 – Proposed Order

Doc 303 2/3/06 RESPONSE to MOTION for Order Requiring the Settlement Facility—Dow Corning Trust to Apply the Criteria For Level A Disability in Accordance with the Language of the Settlement Documents and Tolling the Deadline to Cure Disease Claim Deficiencies for One Year Following the Court's Ruling on this Motion filed by Claimants' Advisory Committee

Doc 304 2/3/06 RESPONSE to MOTION for Order: Response of Dow Corning Corp. to Motion for an Order Requiring the Settlement Facility—Dow

Corning Trust to Apply the Criteria For Level A Disability in Accordance with the Language of the Settlement Documents and Tolling the Deadline to Cure Disease Claim Deficiencies for One Year Following the Court's Ruling on this Motion by Dow Corning Company

Doc 308 2/9/06 RESPONSE to MOTION for the Disclosure of Substantive Criteria Created, Adopted and/or Being Applied by the Settlement Facility and Request for Expedited Consideration Requesting the Court to Authorize Sharing of Certain Information with MDL 926: Summary Response to Supplement to Motion of CAC for the Disclosure of Substantive Criteria Created, Adopted and/or Being Applied By the Settlement Facility and Request for Expedited Consideration requesting the Court to Authorize Sharing of Certain information with the MDL-926 filed By Dow Corning Corporation

EXHIBIT A – MOTION for leave to File Statement of Dow Corning and Debtor's Representatives Regarding Amicus Curiae Submission in the MDL 926 case (94-11558) of CAC in the Dow Corning Corp. Bankruptcy Requesting to Be Heard on the Motion for Disclosure of Substantive Criteria Created, Adopted, and/or Being Applied by the MDL 926 Claims Office

EXHIBIT 1 – Statement of Dow Corning and Debtor's Representatives Regarding Amicus Curiae Submission in the MDL 926 case (94-11558) of CAC

EXHIBIT 2 – Proposed Order Granting Motion

Doc 327 3/14/06 MOTION Joinder of Clients of Doffermy re Shields in Various Motions Related to the Disability "A" Issue by Clients of Doffermyre Shields Law Firm

EXHIBIT 1 – Motion for Reconsideration in MDL 926

EXHIBIT 2 – Declaration of Leslie Bryan in MDL 926

EXHIBIT 1 – Breast Implant Settlement Notice, dated 9/16/04

EXHIBIT 2 – Breast implant Settlement Notice attached to Order 27, Dated 12/22/95
EXHIBIT 3 – DCC Settlement Program and CRP, Annex A to SFA, pages 40 and 101
EXHIBIT 4 – Order of Judge Pointer, dated 9/30/97 re Patricia Jean Stone
EXHIBIT 5 – Documents Pertaining to NB
EXHIBIT 6 – Documents Pertaining to CMB
EXHIBIT 7 – Documents Pertaining to JO
EXHIBIT 8 – Documents Pertaining to JM
EXHIBIT 9 – Documents Pertaining to MP
EXHIBIT 10 – Documents Pertaining to BB
EXHIBIT 11 – Documents Pertaining to PC
EXHIBIT 12 – Documents Pertaining to MF
EXHIBIT 13 – Documents Pertaining to SF
EXHIBIT 14 – Documents Pertaining to SG
EXHIBIT 15 – Documents Pertaining to PJ
EXHIBIT 16 – Documents Pertaining to SM
EXHIBIT 17 – Documents Pertaining to AB
EXHIBIT 18 – Documents Pertaining to MW
EXHIBIT 19 – Documents Pertaining to KY
EXHIBIT 20 – Documents Pertaining to LB
EXHIBIT 21 – Documents Pertaining to VC
EXHIBIT 22 – Documents Pertaining to CC
EXHIBIT 23 – Documents Pertaining to RD
EXHIBIT 24 – Documents Pertaining to GG
EXHIBIT 25 – Documents Pertaining to DJ
EXHIBIT 26 – Documents Pertaining to GK
EXHIBIT 27 – Documents Pertaining to GM
EXHIBIT 28 – Documents Pertaining to JN-C
EXHIBIT 29 – Documents Pertaining to MN
EXHIBIT 30 – Documents Pertaining to LGH
EXHIBIT 31 – Documents Pertaining to GP
EXHIBIT 32 – Documents Pertaining to HS
EXHIBIT 33 – Documents Pertaining to GSB
EXHIBIT 34 – Documents Pertaining to BH
EXHIBIT 35 – Documents Pertaining to GTH
EXHIBIT 36 – Documents Pertaining to AW

EXHIBIT 37 – Documents Pertaining to DW

Doc 364 4/4/06 RESPONSE to MOTION Joinder of Clients of Doffermyre Shields in Various Motions Related to the Disability "A" Issue filed by Dow Corning Corporation

Doc 374 4/17/06 REPLY to Response re MOTION for Order Requiring the Settlement Facility—Dow Corning Trust to Apply the Criteria for Level A Disability in Accordance with the Language of the Settlement Documents and Tolling the Deadline to Cure Disease Claim Deficiencies for One Year Following the Court's Ruling on this Motion filed by Clients of Mitchell Hurst Jacobs and Dick Jacobs

EXHIBIT A – MDL 926 Redacted Release Showing Approval of Disability A with Medical Records
EXHIBIT B – MDL 926 Redacted Release Showing Approval of Disability B with Medical Records
EXHIBIT C – Redacted Medical Records
EXHIBIT D – MDL 926 Redacted Release Showing Approval of Disability A with Medical Records
EXHIBIT E – MDL 926 Redacted Release Showing Approval of Disability with Medical Records
EXHIBIT F – MDL 926 Redacted Release Showing Approval of Disability A with Medical Records

Doc 385 4/26/06 SUR-REPLY re MOTION to evaluate all Level A Disabilities filed by Helen Bolstorff

EXHIBITS – RSP Settlement Letter, Dated 7/21/97 and Medical Records

Doc 408 6/19/06 SUPPLEMENTAL BRIEF re MOTION Notice of Supplemental Exhibit filed by Claimants' Advisory Committee

EXHIBIT – Claims Administrator D. Austern Memo.

Doc 409 6/20/06 OBJECTION to Supplemental Brief by Dow Corning Corporation

Doc 410 6/20/06 RESPONSE to Supplemental Brief by Dow Corning Corporation

EXHIBIT 1 – Letter Signed by D. Greenspan and D. Austern Clarifying Remarks

Doc 416 6/29/06 SUPPLEMENTAL BRIEF re Supplemental Brief, Response, Objection Reply to The Response and Objection of Dow Corning To the Notice of Filing Supplemental Exhibit to Motion of CAC For The Disclosure of Criteria Created, Adopted and/or Being Applied By The Settlement Facility filed by Claimants' Advisory Committee

EXHIBIT 13 – D. Austern Memo to Parties, dated 6/9/06
EXHIBIT 14 – L. Bryan Letter to Finance Committee 6/9/06
EXHIBIT 15 – Declaration of Dianna Pendleton-Dominguez
EXHIBIT 15A – Printout of DCC website as of 3/4/99
EXHIBIT 16 – J. Eliason Letters to Hon. Clemon, dated 4/19/05 and 9/7/05
EXHIBIT 17 – Excerpts form ARPC Audit, July 2005
EXHIBIT 18 – Austern Memo to Parties, dated 8/31/05
EXHIBIT 19 – Excerpts from Materials Prepared by Dunbar, 1999
EXHIBIT 20 – Excerpt from Webster's Dictionary
EXHIBIT 21 – Excerpts Joint Statement of DCC and TCC, 11/1/02
EXHIBIT 22 – Declaration of David Austern
EXHIBIT 23 – Draft #4, 2/7/01, Comparison of RSP and SFDCT Settlement Plans
EXHIBIT 24 – Disability Submissions and NOS for Claimant (Name Redacted)
EXHIBIT 25 – Disability Submissions and NOS for Claimant (Name Redacted)

Doc 434 9/14/06 MOTION to Strike Certain Submissions and Arguments of the Claimants Advisory Committee and Plaintiffs Counsel from the Record in Connection with the Disability Level A Proceedings by Dow Corning Corporation

EXHIBIT A – Memorandum from Deborah Greenspan to Claims Administrator dated November 19, 2001
EXHIBIT B – Affidavit of David Austern (Exhibit 1 to Affidavit filed under seal)
EXHIBIT C – Excerpts of transcript of hearing held on June 20, 2006, filed under seal
EXHIBIT D – Excerpts from Annex A of Settlement Facility and Fund Distribution Agreement

EXHIBIT E(1) – Excerpt from MDL 926 Settlement Fund Management Report, dated March 3, 2006, filed under seal
EXHIBIT E(2) – Excerpt from SF-DCT Claims Processing Report for Period Ending June 30, 2006, filed under seal

Doc 435 9/14/06 Ex Parte MOTION to Seal Ex Parte Motion for Leave to File Certain Exhibits Under Seal by Dow Corning Corporation
EXHIBIT – Proposed Order

Doc 445 9/1/06 Letter from Claimants in Support of CAC Disability Level
EXHIBIT 1 – Article re Definition of Disability
EXHIBIT 2 – Listing of Plan Documents
EXHIBIT 3 – Excerpt from SSA Online with 2 of 5 questions SSA asks to determine disability
EXHIBIT 4 – SSA Function Report, Form SSA-3373-BK
EXHIBIT 5 – Webster's Diction definition of disability
EXHIBIT 6 – SSA Program Rules – shows website source of the Law, Regulations and Rulings

Doc 456 10/24/06 RESPONSE to MOTION to Strike Certain Submissions and Arguments of the Claimants Advisory Committee and Plaintiffs Counsel from the Record in Connection with the Disability Level A Proceedings filed by Claimants' Advisory Committee

Doc 458 10/31/06 REPLY to Response re MOTION to Strike Certain Submissions and Arguments of the Claimants Advisory Committee and Plaintiffs Counsel from the Record in Connection with the Disability Level A Proceedings filed by Dow Corning Corporation

Doc 484 1/12/07 Letter from S. Joyce Attis, claimant, re substantive criteria disclosure motion

Doc 544 7/11/07 SUPPLEMENTAL BRIEF re Response to Motion, filed by Claimants' Advisory Committee
EXHIBIT 1 – Floyd v. Burt
EXHIBIT 2 – Anderson v. USA
EXHIBIT 3 – Lombard v. MCI

Doc 548 7/20/07 RESPONSE to Supplemental Brief by Dow Corning Corporation

Doc 672 6/10/09 Memorandum Opinion and Order Regarding Disability Level A Issue

Doc 675 6/19/09 NOTICE OF APPEAL by Dow Corning Corporation re Disability Level A Order

EXHIBIT A – Memorandum and Opinion dated 6/10/09

Doc 676 6/19/09 MOTION to Stay the Court's Rulings on the Disability Level A and Tissue Expander Issues Pending Appeal by Dow Corning Corporation

EXHIBIT A – Affidavit of Deborah Greenspan

Doc 681 6/30/09 RESPONSE to Motion to Stay the Court's Rulings on the Disability Level A and Tissue Expander Issues Pending Appeal filed by Claimants' Advisory Committee

Doc 682 7/10/09 REPLY to Response re Motion to Stay the Court's Rulings on the Disability Level A and Tissue Expander Issues Pending Appeal filed by Dow Corning Corporation

EXHIBIT A – IOM Report
EXHIBIT B – FDA Notice

Doc 683 7/10/09 MOTION for Leave to File Excess Pages by Dow Corning Corporation

Doc 701 10/13/09 STIPULATED MOTION to Supplement the Record for the Disability A Appeal by Dow Corning Corporation

EXHIBIT A – Amended Joint Disclosure Statement with Respect to the Amended Joint Plan of Reorganization
EXHIBIT B – Amended Joint Plan of Reorganization
EXHIBIT C – Settlement Facility and Fund Distribution Agreement
EXHIBIT D – Annex A to the SFA

Doc 704 10/22/09 ORDER Regarding Stipulated Motion to Supplement and Clarify the Record.

Doc 705 10/27/09 STIPULATED AND AGREED ORDER Extending Stay Pending Appeal

Hearing Transcripts

Doc 690 Hearing held April 7, 2005

Doc 691 Hearing held on July 21, 2005

Doc 430 Hearing held on June 20, 2006

Doc 689 Hearing held on Oct 18, 2007