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

REPLY BRIEF OF APPELLANT DOW CORNING CORPORATION

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INTRODUCTION

Appellee gives scant mention to the plain language of the Dow Corning Plan, instead emphasizing extrinsic evidence that would not change the result even if it were admissible, unilateral claimant "expectations" that are likewise immaterial, and the district court's purported (but nonexistent) power to rewrite Plan language pursuant to its "inherent supervisory authority." But the Plan states in clear, express language that the MDL definition governs. That definition, which was repeatedly confirmed by the MDL Court that approved it, requires the claimant to demonstrate both vocational and self-care disability to qualify for the most severe disability category, Level A "total disability." The Plan is clear that this is the definition that governs Disability A determinations made by the Dow Corning settlement facility ("SF-DCT")—*even if* it could be shown (which it cannot) that MDL claim processors temporarily followed a more lenient standard in the mid-1990s.

The plain language of the Plan is clear in three critical respects. *First*, the Plan's Settlement Facility and Fund Distribution Agreement ("SFA") directs that the SF-DCT shall follow the MDL-926 Revised Settlement Program as modified by subsequent MDL Court orders or MDL Claims Office procedures. Specifically, SFA section 4.03 states that the SF-DCT claims office "shall manage its operations to the extent feasible as they have been conducted under the Revised Settlement

Program," which is defined by SFA section 1.09 as the program established by MDL Judge Sam Pointer's December 22, 1995 order "and as modified or amended by the *subsequent Orders of the MDL 926 Court or procedures of the MDL 926 Claims Office*." (Record Entry 701, Ex. C, SFA §§ 4.03, 1.09, emphasis added.)[1] This language was overwhelmingly approved by claimants when the Plan was confirmed in 1999. The Claimants' Advisory Committee ("CAC") concedes that, by that date, Judge Pointer's 1997 order enforcing the vocational-*and*-self-care definition of Disability A had been in force for nearly two years, and that the MDL Claims Office procedures had followed the vocational-*and*-self-care definition since at least early 1998. This definition is clear, received overwhelming support from claimants in the 1999 Plan vote, and is binding today.

Second, various additional Plan provisions confirm that both vocational and self-care disability are needed for Disability A. For example, SFA Annex A, Schedule II-A directs the SF-DCT to act "consistently with the Revised Settlement Program *and interpretations thereof*," and SFA sections 5.04(d) and 5.05 authorize the SF-DCT Claims Administrator to follow eligibility interpretations as they have "been addressed" by the MDL Claims Office and to apply "all procedures and claims-processing protocols" of that Office. (SFA Annex A at A-87, emphasis

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[1] Cited hereafter as "SFA"; other abbreviated references are adopted from Dow Corning's opening brief ("DCC Br.") unless indicated otherwise.

added; SFA §§ 5.04(d), 5.05.) Consistent with these various provisions, the CAC and Dow Corning agreed—in connection with the start-up of SF-DCT claims processing in 2003-04—to a Plan clarification authorizing the SF-DCT Claims Administrator to follow procedures and interpretations in effect "as of February 2003." (*Id.* § 4.03, signature pages.)

Third, the plain language of the Disability A definition requires both self-care and vocational disability to establish "total disability." This was clear in 1995 when Judge Pointer approved the RSP definition, in 1997 when the MDL Claims Office denied the Disability A request of a claimant who showed only vocational disability, in September 1997 when Judge Pointer affirmed the denial of Disability A status for that claimant, and from May 1998 forward when MDL Appeals Judge Frank Andrews consistently required vocational and self-care disability. This consistent series of orders, procedures and interpretations of the Disability A definition remained in force through 1999, when claimants voted overwhelmingly for the Plan. They have remained in place since, including in 2005 when then-MDL Judge Clemon rejected the effort to overturn Judge Pointer's 1997 ruling—in the face of the CAC's concern that the court's ruling could have a "direct impact" on SF-DCT Disability A determinations—and reaffirmed that both self-care and vocational disability are required.

How does the CAC respond? Not by grounding its argument in Plan language. The CAC all but ignores the language of SFA sections 4.03 and 1.09 directing the SF-DCT Claims Administrator to follow the RSP "as modified or amended by the subsequent Orders of the MDL 926 Court or procedures of the MDL 926 Claims Office," relegating its discussion of section 1.09 to a single footnote. And the CAC shrinks even from using the key term "total disability," mentioning it only fleetingly. (CAC Br. at 18, 33.)

Instead, the CAC emphasizes points that are immaterial or groundless. *First*, the CAC makes much of extrinsic evidence purporting to show that most Disability A claims processed under the RSP in 1996 and 1997 required only the lesser showing of vocational *or* self-care disability. But even if this evidence were admissible and accurate (which it is not, *see* Section V below), it would make no difference because the controlling language of SFA sections 4.03 and 1.09 defines the RSP to include *subsequent* MDL orders and procedures, and it is undisputed that both vocational *and* self-care disability have been required pursuant to the 1997 MDL order, MDL Claims Office procedures since at least early 1998, and continuing rulings and interpretations in subsequent years.

Second, the CAC mischaracterizes Dow Corning's argument by suggesting that it hinges primarily on section 4.03's authorization of the SF-DCT Claims Administrator to follow claim guidelines in effect "as of February 2003." But that

is only one of many Plan provisions that authorize the SF-DCT to follow subsequent MDL-926 orders, procedures and interpretations, albeit it is fully consistent with those various provisions. Moreover, the CAC neglects to mention that the CAC itself *agreed to* the "as of February 2003" language that it now mischaracterizes as a "sea change" and an "illegal post-confirmation Plan modification." (SFA § 4.03, signature pages.)

Third, the CAC argues that MDL procedures are binding only if they were publicized to, and actually known by, claimants. In the Plan, however, the parties agreed to abide by MDL-926 RSP determinations as modified by MDL Court orders, MDL Claims Office procedures, and interpretations—with no requirement or assurance that either Dow Corning or claimants would know what those modifications might be. Regardless, the CAC has not shown any difference in the amount of notice and publication associated with the MDL's claim determinations in 1996 and 1997 (when the CAC says the more lenient Disability A standard was used) as compared to MDL claim determinations from 1998 forward (when the stricter standard undisputedly was used). Since the same amount of publicity applied in both periods, the CAC cannot explain how claimants could have developed the expectation that MDL Claims Office rulings purportedly made in 1996-1997 would always apply, yet be completely unaware of MDL Claims Office rulings in 1998, 1999 and thereafter. The law is clear in any event (*see* Section III-

A below) that subjective, unilateral expectations claimed by one party after the fact are immaterial. The only legally enforceable expectations are those that were mutually agreed upon and memorialized in the Plan itself.

Finally, the CAC incorrectly (and without citation) asserts that Judge Hood has the "power to construe Plan qualification standards consistently with claimant expectations." (CAC Br. at 5.) In fact, the district court is obligated to enforce Plan terms as written, not to champion one side's unilateral, *post hoc* claims about their alleged expectations. *In re Dow Corning*, 456 F.3d 668, 676 (6th Cir. 2006). The Plan terms direct the SF-DCT Claims Administrator to follow subsequent MDL-926 orders and procedures, and the district court's role is to make sure that the Claims Administrator follows this directive, not to alter it as the CAC urges.

ARGUMENT

I. The CAC Disregards Plan Language Authorizing The Claims Administrator To Rely On MDL Orders And Interpretations.

The CAC's interpretation would require the Court to rewrite the Plan to eliminate multiple provisions that expressly authorize the SF-DCT Claims Administrator to rely upon the MDL Court's orders and interpretations, which were in effect when the Plan was confirmed (with overwhelming claimant approval), remained in effect as of 2003, and have remained in effect thereafter as shown by the MDL Court's 2005 order.

A. The Original Plan Language Authorized The SF-DCT Claims Administrator To Follow MDL Orders And Interpretations.

When the Plan was confirmed in 1999, SFA section 4.03 provided that the Claims Administrator should process claims in "substantially the same manner" as the "Revised Settlement Program," a term defined by SFA section 1.09 to include the program approved by the MDL Court (Judge Pointer) on December 22, 1995 "as modified or amended by the subsequent Orders of the MDL 926 Court or procedures of the MDL 926 Claims Office."[2] Section 1.09's grant of authority to the Claims Administrator to rely upon the RSP, as modified by any subsequent MDL orders, has never changed. It is clear, and it is dispositive of this appeal.

Yet the CAC does not even mention section 1.09 until a footnote on page 44 of its brief. There, the CAC merely asserts that Section 1.09 "adds nothing" and is "not operative language," without explaining why or citing any authority. (CAC Br. at 44 n.13.) The CAC thus is unable to articulate any reason or cite any authority rebutting Dow Corning's showing that section 1.09 controls.

Several other provisions in the original Plan similarly direct the SF-DCT Claims Administrator to follow the RSP as subsequently modified and interpreted in the MDL. Schedule II-A of SFA Annex A provides that the disease and disability guidelines used by the Claims Administrator were "adopted from and are

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[2] 1999 SFA §§ 4.03, 1.09, http://www.mied.uscourts.gov/Information/Dow/Main.cfm.

intended to be applied consistently with the Revised Settlement Program *and interpretations thereof*." (SFA Annex A at A-87, emphasis added.) SFA section 5.04(d) similarly directs the Claims Administrator to institute quality-control mechanisms to "assure that all *then-existing* procedures and claims-processing protocols applied by the MDL 926 Claims Office with respect to the Revised Settlement Program are applied by the Claims Office ...." (1999 SFA § 5.04(d), http://www.mied.uscourts.gov/Information/Dow/Main.cfm, emphasis added.) Finally, SFA section 5.05 provides that the Claims Administrator need not even consult with Dow Corning or the CAC regarding the interpretation of substantive eligibility criteria where such interpretations have "previously been addressed by the MDL 926 Claims Administrator." (*Id.* § 5.05.)

Section 5.05 also makes clear that the district court is not authorized to second-guess the MDL determination, stating that "[t]here shall be *no modification of any substantive eligibility criteria* specified herein or in Annex A through the appeals process or otherwise, except as expressly provided in Section 5.05 and in Section 10.06." (*Id.*, emphasis added.) The CAC has no real response to this language. Rather, it overstates the district court's power as including "inherent supervisory authority over the Settlement Facility" (CAC Br. at 48) and exaggerates Dow Corning's argument as seeking to make the Claims Administrator's decisions "absolute and unreviewable" (*id.* at 42). In fact, the

district court has no such vague inherent authority; it has only the express authority specifically articulated in the Plan including, most importantly, the obligation to enforce unambiguous Plan terms as written. *In re Dow Corning*, 456 F.3d at 676.

Thus, the Plan as confirmed specifically authorized the Claims Administrator to follow the MDL Court's orders issued either pre- or post-confirmation. It is undisputed that the MDL Court issued a pre-confirmation order requiring claimants to demonstrate both self-care and vocational disability to meet Disability A[3] and repeatedly reaffirmed that order. Notwithstanding the deference owed this order due to Judge Pointer's approval of the Disability A language in 1995 (DCC Br. at 38-39), the CAC denigrates it as a "one page, summary decision" (CAC Br. at 52)[4] that "cites nothing to support it" (*id.* at 47). In fact, Judge Pointer's order expressly addressed the definition's language and its requirement that claimants be able to perform "none" (or only a few) of their ordinary activities of vocation or self-care. There was no need for a lengthy opinion because this language was straightforward and familiar to Judge Pointer. There was likewise no need for a plenary hearing involving all parties because this

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[3]Record Entry No. 76, Ex. 7, 9/30/97 Order, hereafter cited as "1997 Order."

[4] The cases the CAC cites (CAC Br. at 46) are inapposite because neither involved the deference owed to a court interpreting language in its own order. *O'Neal v. Sabena*, 1997 WL 471334 (7th Cir. 1997) involved a decision by an appellate motions panel, and *Peoples Sec. Life Ins. v. Monumental Life Ins.*, 991 F.2d 141 (4th Cir. 1993) involved a decision by an arbitration panel in an unrelated matter.

was not a "novel substantive issue" (CAC Br. at 12 n.2), but a non-controversial affirmance of the MDL Claims Office's denial of "total disability" status for a claimant who demonstrated vocational but not self-care disability, consistent with the Plan's plain language that Judge Pointer had previously approved in the MDL.

Moreover, the CAC ignores that this ruling was repeatedly reaffirmed, initially by the MDL Appeals Judge (Judge Andrews, whom the parties designated as the SF-DCT Appeals Judge), and by the MDL Court (Clemon, J.) again in 2005 when it rejected the CAC's attempt to overturn Judge Pointer's order. (DCC Br. at 15-16, 21-23, 34.) Notably, in its unsuccessful opposition to the 2005 MDL order, the CAC argued that entry of that order could have a "direct impact on processing of disease claims in the Dow Corning case." (Record Entry No. 299 Ex. 2, CAC Amicus Submission, at 3.)

B. The Plan Language Added Consensually In 2004 Further Confirms That The Claims Administrator Is Authorized To Rely Upon MDL Orders.

Clarifying language was added to the Plan shortly before the effective date in 2004, authorizing the SF-DCT Claims Administrator to rely upon the guidelines it had in place "as of February 2003" (so that the SF-DCT could commence processing claim forms that were first circulated at that time). As directed by the Plan, the guidelines in place as of 2003 followed the 1997 MDL Court order and the then-existing MDL guidelines. Pursuant to a Plan provision permitting

consensual post-confirmation clarifications,[5] CAC members and Dow Corning agreed to the "as of February 2003" language in SFA section 4.03, the very language the CAC now contends—despite not having raised this argument below—is "an illegal post-confirmation Plan modification" (CAC Br. at 5). (Record Entry 701, Ex. C, SFA signature pages ("Claimants Advisory Committee has authorized this Settlement Facility Agreement by its duly authorized representatives").)

The "as of February 2003" language did not alter the meaning of section 4.03, but only *confirmed* that the SF-DCT Claims Administrator was authorized to rely upon MDL Court orders, interpretations and guidelines, with the addition of a specific date for such reliance. Accordingly, amended section 4.03 stated that the Claims Administrator is "expressly 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." (SFA § 4.03.) Section 4.03 was further clarified to give the Claims Administrator "discretion to modify [its] procedures to conform to procedures or interpretations established by the MDL 926 Claims Office any time after the Confirmation Date." (*Id.*)

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[5] SFA section 10.06 authorizes the Plan to be amended, *inter alia*, to "make clarifications" pursuant to an "instrument signed by the Reorganized Dow Corning and the Claimants' Advisory Committee."

Two other provisions received similar clarifications. SFA section 5.04(d), which already directed the SF-DCT Claims Administrator to implement quality-control procedures to ensure that MDL procedures and protocols "with respect to the Revised Settlement Program" were followed, was clarified to authorize the SF-DCT to follow procedures and protocols "as interpreted by the Settlement Facility as of February 2003." (*Compare* 1999 SFA, http://www.mied.uscourts.gov/Information/Dow/Main.cfm, *with* SFA § 5.04(d).) Section 5.05, which already provided that the Claims Administrator need not consult with Dow Corning or the CAC regarding interpretations of substantive eligibility criteria that have "previously been addressed by the MDL 926 Claims Administrator," was clarified to state that such consultations were not needed for interpretations already "addressed as of February 2003." (*Id.* § 5.05.)

In sum, the CAC's characterization of the parties' consensual addition of "as of February 2003" language as an attempt by Dow Corning to illegally modify the Plan post-confirmation is a gross distortion. The CAC agreed to this language pursuant to Plan provisions allowing such consensual post-confirmation clarifications, and it is completely consistent with existing Plan provisions authorizing the SF-DCT Claims Administrator to rely on MDL-926 orders and interpretations. The clarifications merely identified a particular date, February 2003, that the Claims Administrator could rely on.

II. The CAC Disregards The Plain Language Of The Disability A Definition Requiring Both Vocational And Self-Care Disability.

The CAC does not dispute the authorities cited in Dow Corning's opening brief making clear that "none" means "not one" or "not any" and that "or" has a conjunctive meaning when it follows "none" or "neither." (DCC Br. at 40-43.) The CAC's sole response is to call these authorities "inapplicable because they involve the simple construction of 'none' followed by a list" conjoined with the term "or." (CAC Br. at 34.) But that is precisely the situation in the Disability A definition, where the term "none" precedes a list of items that are conjoined by the term "or."

The CAC's contention that so-called "parallel language" among the three disability definitions gives rise to a presumption that the word "or" in the Disability A definition must mean something different from the word "and" in the B and C definitions (*id.* at 26) is invalid because the language of the Disability A provision is *not* parallel to that of B and C. Unlike B and C, the language in A is prefaced by the negative term "none," changing the meaning of the word "or" in the ensuing Disability A definition.

Moreover, the CAC asserts without citation that the "total disability" language is limited to either "total disability" with respect to self-care or "total disability" with respect to vocation (*id.* at 33), the definition contains no such limitation. Indeed, the language requiring claimants to demonstrate "total

disability" based on the "cumulative" effect of all their symptoms is to the contrary. (SFA Annex A at A-94, 101.) So is the language of the Plan and the Claimant Information Guide stating that claimants must provide "enough description of daily life and limitations to allow a reader to know that she does indeed meet this strict definition of total disability" and "must be unable to do any of her normal activities or only be able to do very few of them." (DCC Br. at 19.)

III. The CAC's Arguments About "Notice" Fail.

A. The Plan's Plain Language Overrides Any Unilateral Expectations Alleged After-The-Fact By Claimants.

Under well-settled law, the district court had no authority to ignore this plain language in favor of the CAC's after-the-fact assertion that claimants subjectively believed that Disability Level A would only require proof of disability for vocation or self-care. The law is clear that a Plan is a binding contract whose objective, express terms control. *In re Dow Corning*, 456 F.3d at 676. One party's subjective "expectations" carry no weight. *Di Giulio v. City of Buffalo*, 655 N.Y.S.2d 215, 217 (N.Y. App. Div. 1997) (one party's post-contractual subjective understanding "not probative" in interpreting a contract). "A signatory to a contract is bound by its ordinary meaning even if he gave it an idiosyncratic one; private intent counts only if it is conveyed to the other party and shared." *Brown-*

Graves Co. v. Central States, Southeast and Southwest Areas Pension Fund, 206 F.3d 680, 684 (6th Cir. 2000).[6]

Nor does the district court have "fundamental" (CAC Br. at 43) or "inherent" (*id*. at 48) power to supervise settlement eligibility under the Plan or the "power to construe Plan qualification standards consistently with claimant expectations." (*Id.* at 5.) Rather, the court must "interpret the Plan's provisions according to their plain meaning, in an ordinary and popular sense." *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 556 (6th Cir. 1998).

The only expectations that are enforceable are those manifested in the objective, express terms of the Plan. In attempting to replace that plain language with the unilateral, alleged expectations of a minority of claimants, the CAC ignores the legitimate expectations that Dow Corning and other claimants developed based on the Plan's plain language. All parties, for example, expected that the SF-DCT Claims Administrator would have authority to rely on subsequent MDL Court orders. And claimants generally had a reasonable expectation that their premium payments would not be threatened by an order directing the Claims

[6] The cases the CAC cites (CAC Br. at 32, 40) are not to the contrary. They simply stand for the proposition that a contract should be interpreted consistently with the joint purpose of the parties. *Winnett v. Caterpillar*, 553 F.3d 1000, 1008 (6th Cir. 2009); *BONY v. Janowick*, 470 F.3d 264, 270-71 (6th Cir. 2006).

Administrator to ignore that Plan language in favor of the purported expectations of a minority of claimants concerning Disability A.

However, the CAC essentially concedes that, if the district court's ruling is affirmed, it is likely that an additional "$50-60 million" in Disability A payments could jeopardize all claimants' premiums. (Record Entry No. 681, CAC Resp. at 5; DCC Br. at 54.) The CAC now shrugs off this prospect as "perfectly appropriate under the Plan," casually noting that it would not "jeopardize payment of the *entire* $200 million in premiums." (CAC Br. at 50, emphasis added.) Regardless of how many millions are affected, however, the district court's ruling *does* violate the Plan's terms and, if upheld, would adversely impact not only Dow Corning, but the majority of claimants who do not seek Disability A.

B. In Any Event, The CAC Had Notice Of The Provisions Authorizing The Claims Administrator To Rely Upon MDL Court Rulings.

More fundamentally, any alleged lack of notice of Judge Pointer's 1997 opinion is immaterial under the Plan because the CAC and claimants *had* notice of the Plan provisions authorizing the Claims Administrator to rely upon MDL Court orders and interpretations. The provisions discussed above, including SFA sections 1.09 and 4.03, broadly authorized the Claims Administrator to rely upon all "Orders of the MDL 926 Court" issued after the MDL Order approving the RSP in December 1995. (*See* Section I, above).

Those Plan provisions did not say that the Claims Administrator could rely only upon MDL Court orders that were posted on the MDL Court's "official website" or orders of which the CAC (or Dow Corning) was aware. Rather, they provided that the Claims Administrator could rely upon MDL Court orders and interpretations and all subsequent interpretations—period. The Plan thus recognized, and the parties agreed, that MDL Court orders and interpretations of the RSP guidelines could change over time, and authorized the SF-DCT Claims Administrator to follow subsequent interpretations and orders, whatever they might be. Accordingly, whether or not the CAC received actual notice of Judge Pointer's ruling is simply irrelevant.[7]

And there is no dispute that the MDL Claims Office was applying that ruling by 1998, the year before Plan voting and confirmation. While the CAC suggested at one point in its brief that the MDL Claims Office may not have started following the 1997 ruling until "perhaps as late as 2000" (CAC Br. at 10), the CAC

[7] In any event, the CAC acknowledges that Judge Pointer's order was docketed in the main MDL class action, *Lindsey* (CAC Br. at 19), and apparently does not dispute that it was served upon all counsel of record. (DCC Br. at 49 n.24.) More fundamentally, the assertion that claimants developed any "expectations" based on MDL claims office practice is simply inaccurate. In reality, the vast majority of SF-DCT claimants did not have a claim processed by the MDL claims office—because they did not have implants eligible for resolution under the RSP, which applied predominantly to other manufacturers' implants—and thus the vast majority of SF-DCT claimants could not have had any familiarity with the practices of the MDL claims office.

conceded below that the strict standard "applied to disease claims in the MDL Post 1998." (Record Entry No. 76, CAC Mot. at 10.) Indeed, when the Plan was approved the following year, its express language made clear that Disability A had a "strict definition of total disability" that required claimants to document total disability with respect to all their daily activities. (DCC Br. at 19.)

IV. The Plan's Strict Definition Of Disability A Is Rational.

Contrary to the CAC's arguments, the strict requirements for Disability A make sense.

A. Strict Disability Criteria For Disease Option I Are Necessary.

The fact that the MDL disability definition applies only to "the lower of two disease settlement grids" (CAC Br. at 37-38) does not mean that the disability test should be lax. Just the opposite: strict disability criteria are needed to maintain the integrity of the lower disease category precisely because the threshold for qualifying disease symptoms in that category is so low.

Both the RSP and the Dow Corning Plan have two disease grids. The higher-paying grid contains strict, specific and objective disease and symptom criteria that clearly define severe and disabling medical conditions and diagnostic standards, thus making a separate disability showing unnecessary. In contrast, the vast majority of claims made in the breast implant litigation asserted novel and atypical conditions characterized by subjective symptoms such as aches and

fatigue that are widely experienced from a variety of causes. Such claims were defined in the RSP and Dow Corning settlement as Atypical Connective Tissue Disease ("ACTD"), and constitute the majority of claims submitted under Disease Option I. These claims were controversial and often rejected on *Daubert* grounds in the litigation system. *See, e.g., Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1402 (D. Or. 1996) ("ACTD is at best an untested hypothesis" with "no scientific basis"). Because the criteria for ACTD and other Disease Option I claims are relatively vague and lax, it was rational for the Plan to add strict disability criteria, in addition to disease criteria, for Disease Option I.

Moreover, the differing payments for Disability Levels A, B and C are rational. The highest payments are reserved for claimants who can satisfy the "stringent" standard for Disability Level A, thus ensuring that only the most severe cases of "total disability" or death receive the highest settlement amount allowed within Disease Option I. The CAC's interpretation would turn this scheme upside down, since even the CAC concedes there would be individuals who would "qualify for Disability Level A by demonstrating vocational disability and *not* qualify for levels B or C." (CAC Br. at 39.)

B. The Vocational Disability Requirement Is Not Read Out Of The Guidelines.

The CAC incorrectly contends that requiring both vocational and self-care disability would "write the vocation requirement out of the guidelines." (CAC Br.

at 35.) By the CAC's own admission, there are individuals who suffer total disability under the MDL definition who nonetheless are able to work (*id.* at 3, 35)—an example would be telecommuters who are able to work from home despite their self-care disabilities.

Requiring both vocational and self-care disability provides an important double-check to ensure that only valid claims are paid. Vocational disability determinations alone are not always accurate, for a variety of reasons, including their subjective component. *See, e.g., Wical v. Int'l Paper Long-Term Disability Plan*, 191 Fed. App'x 360, 372 (6th Cir. 2006) (rejecting subjective vocational disability finding in Social Security case). Requiring a showing of self-care disability as well as vocational disability is rational because it imposes another level of verification that the claimant is truly "totally disabled."

C. The Agreed (And Minor) Exception For Pass-Through Claims Does Not Change The Standard For All Other Claims.

While the CAC questions the denial of Disability A claims while certain other claims were "passed through from the RSP based on the multiple manufacturer reduction" (CAC Br. at 36), the RSP itself contemplated that claimants who filed claims at different times might be reviewed under different standards based on MDL orders or interpretations. By authorizing the Claims Administrator (in SFA section 1.09) to rely upon MDL orders, the Plan likewise contemplated that claims processed at different times might be subjected to

different standards. Moreover, while the parties agreed in the SFA to a limited and exceptional circumstance whereby a distinct minority of multiple-manufacturer claimants whose claims were previously approved under the RSP could be presumptively approved by the SF-DCT without further review, the CAC provides no basis to determine the MDL disability standard that was actually applied to such claims, and there was never any change in the basic rule set forth elsewhere in the SFA (including sections 4.03 and 1.09) stating that the SF-DCT could rely on MDL orders and interpretations (including the definition of Disability A).

V. The CAC's Contentions Based On Extrinsic Evidence Are Immaterial And Inaccurate.

The CAC relies heavily on extrinsic evidence purporting to show that, before 1998, the MDL Claims Office approved most Disability A claims based on a showing of only vocational or self-care disability. The CAC's reliance on such "evidence" is misplaced.

A. The CAC's Extrinsic Evidence Is Immaterial.

The CAC's proffered evidence regarding pre-1998 practice is neither accurate nor admissible. But even if it were, it would make no difference because the Plan specifically authorizes the Claims Administrator to rely upon the MDL Court's subsequent rulings, including those made in 1997 and thereafter, which consistently required both self-care and vocational disability. SFA sections 1.09, 4.03, 5.05 and Annex A all make clear that the Claims Administrator may rely

upon the MDL Court's Orders issued pre- or post-confirmation, and that the district court may not direct the Claims Administrator otherwise. Indeed, the primary piece of extrinsic evidence upon which the CAC relies—SF-DCT Claims Administrator David Austern's memorandum—recognizes that the plain language of the Plan authorizes the Claims Administrator to rely on such MDL orders and interpretations, regardless of any alleged prior practice. (DCC Br. at 47.)

Nor could this extrinsic evidence override the plain language of the MDL Disability Level A definition, which requires that a claimant demonstrate "total disability," showing that she can perform "none" of the ordinary activities of vocation or self-care. That language is clear, and even if it could be shown that the MDL Claims Office disregarded it during 1996-1997, that would only mean that office was temporarily mistaken about Disability A's meaning before it corrected itself and was subsequently, and permanently, affirmed by the MDL Court.

B. The CAC's Interpretation Of The Extrinsic Evidence Is Contradicted By The MDL Court's Contemporaneous Findings.

The extrinsic evidence regarding pre-1998 Claims Office procedures is not "undisputed" (CAC Br. at 5), and indeed much of it contradicts the CAC's assertions. Specifically, the CAC's interpretation of that "evidence" was rejected by Judge Pointer in his 1997 ruling, which found that the MDL Claims Office had "consistently" required proof of total disability with respect to both vocation and self-care. (1997 Order at 1.) This was not an "unsupported statement" (CAC Br.

at 17), but rather a contemporaneous finding made by the judge who oversaw the MDL Claims Office. Refuting the CAC's assertion that "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" (*id.* at 12), the very case that spawned Judge Pointer's 1997 ruling involved the MDL Claims Office's *denial* of Disability A status to a claimant because she could not demonstrate both vocational and self-care disability. (1997 Order at 1.) The MDL's contemporaneous 1996 Q&A also reflects that both vocational and self-care disability were required. (Record Entry No. 137-2, Ex. A, RSP Def. Mem. at 10, quoting 7/3/96 Supplemental Q&A; DCC Br. at 13.) Thus, the documentary record of the MDL Claims Office and the contemporaneous findings of the MDL judge who supervised that office both show that the strict definition of Disability A was correct and was followed.

C. The Austern Memos Are Not Evidence.

The CAC's assertions, in contrast, are based entirely on extrinsic reports generated years after the fact in conjunction with litigation by individuals who did not participate in the relevant events and whose analyses are unreliable. With regard to Mr. Austern's memoranda, for example, "it was not [his] purpose or intention to examine precisely how the Claims Office processed claims," he did not conduct "a rigorous or due diligence review of the Claims Office practices"

(Record Entry No. 434 Ex. B, Austern Aff. ¶ 5), and his memos were not "suitable for introduction into evidence." (Record Entry No. 410 Ex. 1, 6/19/06 Austern Statement at 1.)[8] He did not interview decision-makers (Record Entry No. 410 Ex. 1, 6/19/06 Austern Confirmation at 1-2), only those low-level employees from the MDL Claims Office who happened to later work at the SF-DCT. As the CAC acknowledged, Mr. Austern was unable to reach any "authoritative evidentiary conclusions" regarding early MDL Claims Office practices. (CAC Br. at 23.)

Mr. Austern further made clear that his approval rate statistics (*id.* at 16) do not reliably indicate any disparity between interpretations of the Disability A definition because a "number of other" factors explain the differing percentages. Nor did he even attempt to use a random or statistically significant sample of MDL claims. (Record Entry No. 410-2 Ex. 1, 6/19/09 Austern Confirmation at 1; DCC Br. at 52-53.)[9]

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[8] The CAC's assertion that his memos were commissioned "at the joint request of Dow Corning and the Claimants' Advisory Committee" (CAC Br. at 4) is wrong. In fact, Mr. Austern "did not have an assignment from the Parties to do this" (Record Entry No. 434 Ex. B, Austern Aff. ¶ 5) and was simply attempting to help resolve the parties' dispute. (*Id.* ¶ 4.)

[9] The "outside audit" the CAC cites likewise did not "confirm" that the MDL standard had changed with Judge Pointer's ruling. (CAC Br. at 17, 57.) The fragment of the Audit the CAC submitted did not discuss early Claims Office practice, but rather simply noted that "[i]n 1997 at the MDL, Judge Pointer indicated that the claimant must demonstrate total disability in both areas." (Record Entry No. 416 Ex. 17, at 33.)

In any event, Mr. Austern's memoranda are not business records and rely heavily on hearsay-within-hearsay that cannot be rendered admissible under Rule 807's residual hearsay exception. (DCC Br. at 50–52; CAC Br. at 55-56.) That rule is "sparingly" used and requires that there be no more probative evidence on the topic (there is here) and sufficient prior disclosure (lacking here). *Clifton v. Gusto Records, Inc.*, 1988 WL 79432, at *5 (6th Cir. 1988); FRE 807. The CAC does not cite a single case in which documents written years after the fact, containing multiple levels of hearsay, written in conjunction with litigation by authors conceding they are "not suitable for introduction into evidence" have ever been admitted under this exception. (*See* Record Entry No. 410 Ex. 1, 6/19/06 Austern Statement at 1.)

Worse, the CAC selectively cites only those portions of the Austern memo that favor the CAC. For example, the CAC omitted Mr. Austern's confirmation that the Plan authorizes the Claims Administrator to rely upon the MDL Court's orders (DCC Br. at 47), which completely undermines the CAC's position here. The CAC also omitted Mr. Austern's affirmation that, since "the first quarter of 1998," the MDL Claims Office required disability with respect to both vocational and self-care activities. (Record Entry No. 408, 6/09/06 Mem. at 6-7; DCC Br. at 47.)

The CAC further ignores that Mr. Austern determined that many of the self-serving statements by claimant lawyers upon which the CAC relies (CAC Br. at 14) were false. Mr. Austern reviewed the self-selected sample of 33 claims the lawyers identified and confirmed that a number of these claims were deemed deficient for reasons other than the MDL definition—*e.g.,* "because the claimant's medical records contradicted the disability level cited by the claimant's Qualified Medical Doctor (QMD)," "disability statements were not provided by the QMD or the treating physician as required by the SF-DCT guidelines," "the claimant did not have symptoms required by the SF-DCT guidelines," or there was a "lack of documentation." (Record Entry No. 434 Ex. B, Austern Aff. at 11.) In addition, several claims "had been assigned a Level B or Level C disability by the claimant's own physician" or had been "approved and paid at the disability level requested," contrary to the claimants' assertion. (*Id.*)

D. The CAC Overlooks The District Court's Procedural Errors.

Although no evidence whatsoever is necessary to decide the Disability A issue, once the district court decided to accept one side's "evidence" and then relied on it, it was error to deny Dow Corning the opportunity to complete the record with contrary evidence and cross-examination. The CAC largely ignores these and other procedural errors.

First, the CAC seeks to justify the district court's refusal to conduct an evidentiary hearing by arguing that the "evidence" regarding pre-1997 practice is "undisputed." (CAC Br. at 52.) However, as demonstrated above, that evidence is disputed,[10] and the CAC does not contest that where such issues are in dispute, the court must hold a hearing to allow cross-examination of each party's evidence.

Second, the CAC incorrectly suggests that Dow Corning "did not object" to this "evidence." (*Id.* at 51.) However, the hearing was set as an oral argument without evidentiary submissions, the CAC's extrinsic material was presented in the form of unsworn lawyers' arguments without any witness on the stand, and when Dow Corning counsel objected anyway, the district court admonished counsel to "just be seated until they're all done." (Record Entry No. 430, 6/20/06 Tr. at 71.) Once the hearing transcript became available, Dow Corning timely moved to strike all the material the CAC submitted. (Record Entry No. 434, Mot. to Strike at 4, 7.) The district court erroneously denied this motion as "moot" even though the court relied on this "evidence".

Finally, the CAC concedes that the district court cited this extrinsic material "as one of its reasons" for its decision. (CAC Br. at 50-51.) Yet, it cannot dispute

[10] In addition to objecting to its introduction on evidentiary grounds, Dow Corning demonstrated below that the CAC's "evidence" was inaccurate and unreliable. (*See, e.g.,* Record Entry No. 434, Mot. to Strike.)

that reliance upon such material was error given the district court's finding that the MDL definition was "unambiguous." (DCC Br. at 48.)

VI. The Appropriate Standard Of Review Is *De Novo*, But The District Court's Ruling Constitutes Reversible Error Under Any Standard.

While the district court's ruling constitutes reversible error under any standard, the appropriate standard of review is *de novo*. Contrary to the CAC's assertion (CAC Br. at 28), this Court has not "rejected" *de novo* review in cases such as this. As a threshold matter, while SFA Annex A reprints the MDL Disability A definition, at bottom the district court's interpretation of that definition is not an interpretation of "the Plan," but of the orders issued by the MDL Court originally approving and subsequently interpreting that language. With respect to the remaining issues, the standard is *de novo* for two reasons.

First, in cases raising plan interpretation issues, this and other courts have made clear that they continue to "review 'the bankruptcy court's legal conclusions *de novo*.'" *In re Eagle-Picher Indus.*, 447 F.3d 461, 463 (6th Cir. 2006) (DCC Br. at 28). *In re Dow Corning Corp.* (CAC Br. at 29) is not to the contrary. The Court there did not hold that "interpretation of the Bankruptcy Code" was the *only* situation in which *de novo* review applied; rather, it is merely one example of a "legal conclusion" subject to that standard.[11]

[11] Indeed, the Court has repeatedly so held in a variety of contexts that the CAC

Second, the order under review was issued by the district court—not the bankruptcy court—and "[the Court] owe[s] *no special deference* to the district court's decision." *Eagle-Picher*, 447 F.3d at 463 (emphasis added). The fact that the district court was "overseeing" the proceedings (CAC Br. at 30) is irrelevant; that is true in every bankruptcy case. Moreover, Judge Hood was present for only two days of a 13-day confirmation proceeding and did not issue any rulings in connection with those proceedings. *See In re Dow Corning Corp.*, 244 B.R. 634 (Bankr. E.D. Mich. 1999).

The CAC's remaining arguments fail. This Court in *Clark-James* applied *de novo* review in a case involving plan interpretation; Dow Corning argued there for abuse of discretion unsuccessfully and only in the alternative. Order, *In re Clark-James*, No. 08-1633 (6th Cir. Aug. 6, 2009) at 3. Nor did Dow Corning stipulate to a more deferential standard. As the CAC acknowledges (CAC Br. at 31 n.9), "the parties may not 'stipulate' to the standard of review." *Regional Airport Authority v. LFG, LLC*, 460 F.3d 697, 712 n.10 (6th Cir. 2006). Moreover, the stipulation simply states that the "clearly erroneous" standard applies to the "extent permissible" to review of "findings," not to *legal* conclusions, and further states

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simply asserts are "inapplicable" without citing any authority. (CAC Br. at 29 n.8; DCC Br. at 28 n.13.)

that "[n]othing in these procedures shall affect the appellate rights of the parties." (Record Entry No. 53, Ex. A, Stipulation § 2.10(d)(5).)

CONCLUSION

For the foregoing reasons, Dow Corning respectfully requests that the Court reverse the district court's order.

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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 6,984 words.

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CERTIFICATE OF SERVICE

I certify that on December 28, 2009, I electronically filed a copy of the foregoing Reply Brief of Appellant Dow Corning Corporation with the Clerk of Court through the Court's electronic filing system, which will send notice and a copy of this brief to all registered counsel in this case.

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