Case No. 13-2456

In The United States Court of Appeals for the Sixth Circuit

In re: SETTLEMENT FACILITY DOW CORNING TRUST

DOW CORNING CORPORATION,

Interested Party - Appellant,

v.

CLAIMANTS' ADVISORY COMMITTEE,

Interested Party - Appellee.

On Appeal From The United States District Court For The Eastern District of Michigan

REPLY BRIEF OF APPELLANT DOW CORNING CORPORATION

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INTRODUCTION

The Claimants' Advisory Committee ("CAC") does not dispute the district court's finding that "'Breast Implant' and 'Tissue Expander' mean different things." (RE #924, 10/08/13 Opinion, Page ID #15732.) It does not dispute that the district court found that tissue expanders were *not* included in the jointly-sponsored confirmation hearing estimation of breast implant claims entitled to settlement compensation. (*Id.* at Page ID #15733-34.) Nor does it dispute that the only place the term "tissue expander" appears in that evidentiary record is under non-covered "Other Products" excluded from settlement compensation. (*Id.*)

The district court ignored this evidence, instead relying on the alleged practice under a *different* settlement to which Dow Corning was not a party (the RSP), even though nothing in the Plan states that the RSP governs the definition of "Breast Implant" and the court previously found that Dow Corning tissue expanders were *not* considered "breast implants" under the RSP. (RE #673, 6/10/09 Opinion, Page ID #8749-50.)

The district court's ruling is inconsistent with this Court's instructions and well-settled law. Only by ignoring four things—(1) extrinsic evidence this Court directed the district court to consider demonstrating that "breast implant" and "tissue expander" "mean different things," (2) the Plan's plain language making clear that the RSP is relevant only to certain *procedures* for processing claims, not

substantive determinations regarding which products receive settlement compensation, (3) the RSP language dictating that products must be expressly enumerated to receive settlement compensation, and (4) its own prior finding that Dow Corning tissue expanders were not considered "breast implants" under the RSP—could the district court conclude that tissue expanders are "breast implants."

Most of the CAC's response does not even attempt to defend the district court's reasoning. Instead, after asserting—inaccurately—that the district court "weighed" all the evidence, the CAC seeks to supplant the district court's actual reasoning with a series of new arguments about, *inter alia*, the practice under other settlements involving other manufacturers where tissue expanders were expressly included, an Original Global Settlement that "collapsed", and a disclosure statement issued before the confirmation proceedings that actually excluded tissue expanders from settlement compensation. The CAC argues all of this in support of a broad proposition—that "Dow Corning agreed to settle *all claims*…to achieve 'global peace'" (CAC Br. 6, 49 (emphasis added))—which the district court never adopted and which is flatly contrary to the Plan. The CAC itself acknowledges that this proposition is false, conceding in a footnote that the vast majority of Dow Corning products are "offered *no* settlement and can be resolved only through opt-out proceedings in the Litigation Facility." (CAC Br. 15 n.6 (emphasis added).) Indeed, there is no dispute that the vast majority of *tissue expanders* are not

entitled to settlement compensation: the CAC concedes that, of the 250 tissue expander products, the Plan gives 247 *no* settlement compensation. (*Id.* at 12.) While the CAC seeks to shoehorn the remaining three tissue expander products into the definition of "Breast Implant" on the ground that they are used to stretch skin in the breast, there is no basis for such differential treatment, and the record and the district court's own findings show that the parties never intended such a result.

As the party seeking compensation from a post-confirmation trust based on a non-standard interpretation of Plan language, and seeking to overturn the status quo under which the Claims Administrator has rejected its claims, the onus was on the CAC to come forward with evidence demonstrating that its idiosyncratic interpretation of the term "Breast Implant" should be adopted over the well-established ordinary and technical construction of that term. It did not do so. The district court committed multiple errors in adopting the CAC's unsupported construction.

ARGUMENT

I. The District Court Did Not "Weigh" The Evidence: It Ignored The Evidence It Found Demonstrated That "Tissue Expanders" and "Breast Implants" "Mean Different Things"

The district court's first legal error was ignoring the extrinsic evidence that it found showed that "'Breast Implant' and 'Tissue Expander' mean different

things." (RE #924, 10/08/13 Opinion, Page ID #15732.) The CAC concedes that this was the district court's finding and that it is "not in dispute." (CAC Br. 23.)

Nonetheless, the CAC argues that the district court did not really decline to consider this evidence and instead simply "assigned it less weight." (*Id.* at 26.) But, in its statement of facts, the CAC candidly acknowledges that the district court ruled "this evidence neither helpful nor relevant in determining the issue actually before it: 'whether *the parties intended* "Tissue Expander" claimants be given benefits under the "Breast Implant" provision.'" (*Id.* at 23 (emphasis in original), quoting RE #924, 10/08/13 Opinion, Page ID #15732.) This standard excluded all evidence of objective, ordinary meaning in favor of the subjective, idiosyncratic meaning urged by the CAC, which argued below: "The relevant extrinsic evidence is what was known to *these parties* at the time the Plan was adopted," and "not what understanding of the term 'breast implant' is most widely shared generally." (RE #783, 4/11/11 CAC Mem. 3, 7.)

But as the authorities cited in Dow Corning's Opening Brief make clear, it is precisely such evidence of the ordinary meaning of plan language that courts *must* consider. They cannot disregard it as "unhelpful" or "irrelevant"—particularly where, as here, this Court specifically directed the district court to consider it. (DCC Br. 21.)

As this Court has repeatedly held, courts 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) (emphasis added). "'A signatory to a contract is bound by its ordinary meaning even if he gave it an idiosyncratic one.'" *Brown-Graves Co. v. Cent. States, Se. & Sw. Areas Pension Fund*, 206 F.3d 680, 684 (6th Cir. 2000) (citation omitted). "When interpreting the meaning of a contract, it is the objective intent of the parties that controls…. The secret or subjective intent of the parties is irrelevant." *Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 168 (2d Cir. 1997).

The cases the CAC cites (CAC Br. 38-39) are not to the contrary. They simply say that a contract should be interpreted consistently with the parties' purposes. But the parties' purposes are derived from the objective, ordinary meaning of the terms they used—not the subjective, after-the-fact interpretation of one party that contradicts the objective, ordinary meaning.

Nor was the extrinsic evidence submitted by Dow Corning limited to the "technical" meaning of the terms. (*See* CAC Br. 1, 3-4, 31.) That evidence demonstrated that tissue expanders are not "breast implants" under the ordinary meaning of these terms. (*See* RE #51, Jakubczak Aff., Page ID #180-81, ¶¶11-13.) Thus, under standard definitions, a breast implant is "an implant for cosmetic

purposes to replace a breast that has been surgically removed."[1] Tissue expanders are not implanted for "cosmetic purposes"; they contain metal fill valves and tubing protruding through the skin that make them anything but cosmetic. (RE #673, 6/10/09 Order, Page ID #8744.) Nor do they "replace a breast that has been surgically removed." They are altogether different, used on a temporary basis to "stretch the skin" for reconstructive surgery or to "repair skin defects or to facilitate wound closure." (*Id.* at Page ID #8746.) In sum, tissue expanders are not "temporary" saline breast implants (CAC Br. 37), but rather serve an entirely different function. The CAC offers no contrary evidence of ordinary meaning, and the district court found none.

Nonetheless, the district court's failure to consider evidence of "technical" meaning is error, given this Court's holding that, where trade practice, custom or usage has conferred such meaning, "findings should be made with regard to it," *Sault Ste. Marie Tribe of Chippewa Indians v. Granholm*, 475 F.3d 805, 815 (6th Cir. 2007). The CAC incorrectly argues that, under *Granholm*, technical meaning is irrelevant absent proof of a party's subjective, actual knowledge of such meaning. (CAC Br. 39.) But *Granholm* holds that "where an allegation is made that industry standards have given rise to the ambiguity"—as this Court found

[1] Webster's Dictionary, *available at* http://www.webster-dictionary.org/definition/breast%20implant (last accessed 2/26/14).

here—"evidence elucidating those industry standards is relevant and should be admitted." 475 F.3d at 815. And New York law, which specifically governs Plan interpretation here, holds that "the technical meaning is preferred over the common or ordinary meaning." *Madison Ave. Leasehold, LLC v. Madison Bentley Assocs. LLC*, 30 A.D.3d 1, 8 (N.Y.A.D. 1st Dep't 2006). Accordingly, this Court specifically directed the district court to consider such evidence. *In re Settlement Facility Dow Corning Trust*, 628 F.3d 769, 772-73 (6th Cir. 2010).

But even if the CAC were correct, Dow Corning submitted an affidavit establishing both its own understanding of the terms *and* the understanding that patients received from their doctors and FDA patient brochures. The CAC, in contrast, never submitted a single affidavit from a single claimant reflecting that she understood "tissue expander" to mean "breast implant."[2] Tellingly, the CAC had the opportunity to submit such evidence on remand, but failed to do so.

Contrary to the CAC's suggestion, Dow Corning is not arguing that the parties could not have agreed on some definition of the term "breast implant" that deviated from standard usage: they could have. Indeed, this is illustrated by the

[2] While the CAC argues that a single Dow Corning brochure suggests tissue expanders are "breast implants" because it uses the words "implant" and "breast design," the district court concluded the opposite, noting that "DCC did not refer to tissue expanders as breast implants in the product literature." (RE #673, 6/10/09 Order, Page ID #8746.) Dow Corning's product literature described the products as "tissue expanders" or "percutaneous skin expanders"–not breast implants. (RE #51, Jakubczak Aff., Page ID #180-81, ¶¶11-14.)

other settlements the CAC cites. For example, the Mentor and Bioplasty settlements contained the following express definition: "The terms 'breast implant' and 'implant' *include* both silicone-gel and saline-filled breast implants, and *also include 'tissue expanders.'*" (CAC Br. 14 (emphasis added).) The INAMED settlement likewise defined "Breast Implant" to mean "any breast implant device containing or consisting of saline, silicone, silicone gel and/or elastomer made of silicone, *including devices designed for temporary implantation in the breast (i.e., tissue expanders)*." (*Id.* (emphasis added).) And, the RSP's express enumeration of products that would receive compensation included certain tissue expander products. Thus, as the CAC acknowledges in a footnote, where parties intended to provide tissue expanders settlement compensation, "the other contemporaneous breast implant settlements *expressly* include tissue expander implants (and, indeed, listed specific product models that qualified for benefits)." (CAC Br. 36 n.12 (emphasis in original).)[3]

The parties to the Dow Corning Plan could have done something similar but did not. They did not redefine the term "Breast Implant" to specifically include

[3] Moreover, even when they expressly redefined "breast implant" to include tissue expanders, the other settlements continued to treat the products as distinct—requiring, for example, that eligible claimants be "implanted with one or more Mentor breast implants (*or tissue expanders*)" and make "reasonable efforts to identify the manufacturer of each breast implant (*and tissue expander*) with which [they have] been implanted." (Mentor Notice §2A, available at http://www.fjc.gov/BREIMLIT/ORDERS/notice33.rtf (emphasis added).)

tissue expander products as in the other settlements. Nor did they enumerate tissue expanders expressly. While the Dow Corning Plan enumerates 119 "Covered Other Products" as eligible for settlement compensation, tissue expander products are not among them. (DCC Br. 14-15.) Absent any such express agreement, the ordinary meaning of the term "Breast Implant"—which excludes tissue expanders—governs.

II. The District Court Erred By Ignoring The Undisputed Evidence From The Plan Confirmation Hearing Excluding Tissue Expanders From Settlement Eligibility

The district court similarly erred by refusing to consider the direct evidence presented during the confirmation hearing—by the parties' joint witness, Dr. Dunbar (CAC Br. 42 n.15)—that the parties intended to exclude tissue expanders from settlement compensation. After first finding Dr. Dunbar's report "relevant and credible," the district court immediately found it irrelevant on the ground that it allegedly "does not go to the ultimate question of what the parties *intended* to do with Dow Corning breast tissue expanders." (RE #924, 10/08/13 Opinion Page ID #15734 (emphasis in original).) It is error to refuse to consider evidence the court itself concluded is relevant. Indeed, it is difficult to see what evidence would be *more* relevant to the parties' intent than the testimony of the witness they jointly sponsored on this issue.

As a threshold matter, there can be no dispute that Dr. Dunbar excluded tissue expanders from his claims estimation. As the CAC acknowledged below, "Dr. Dunbar did not specifically estimate the cost of paying tissue expander implant claims." (RE #783, 4/11/11 CAC Mem. 8.) Likewise, the district court acknowledged that tissue expanders were *excluded* from the estimation of tort claims that would receive settlement compensation. (RE #924, 10/08/13 Opinion, Page ID #15734.) In contrast to Breast Implants and Covered Other Products—both of which are settlement-eligible under the Plan—the 1,041 tissue expander claims Dr. Dunbar identified were all treated as non-covered "Other Products" entitled to no settlement option, just the litigation option. (*Id.*; RE #783, 4/11/11 CAC Mem. 8-9.)

The CAC does not dispute that such direct evidence of the parties' intent must be considered. Instead, it attempts to reargue the evidence and the district court's findings. While the CAC now suggests that the 1,041 "tissue expander" claims in Dr. Dunbar's analysis are all based on the 247 expander products not specifically designed for use in the breast (CAC Br. 27, 42-43), the joint evidence was to the contrary. As the CAC concedes, Dr. Dunbar "listed 'tissue expanders' *generally* as non-covered Other Products on a chart in his materials." (CAC Br. 42 (emphasis added).) Indeed, the *only* place tissue expander claims are mentioned is in the non-covered "Other Product" category.

The CAC's suggestion that Dr. Dunbar did not really exclude tissue expander claims because he based his analysis on "the RSP experience" (CAC Br. 47) is wrong. As is evident from his analysis, Dr. Dunbar used claim data directly from the proofs of claim filed by Dow Corning claimants to create his estimates—not the RSP—placing all of the tissue expander claims that had been filed in the non-covered "Other Products" category. (RE #51, Ex. A, Dunbar Analysis, Page ID #176.) Significantly, the CAC points to no evidence from the confirmation hearing—comprising thousands of pages of testimony over 13 days—contradicting Dr. Dunbar's conclusion that tissue expanders are not settlement-eligible "breast implants." The district court's decision to ignore the uncontroverted evidence violates settled principles of Plan interpretation.

It also violates fundamental principles of bankruptcy law. While the CAC now suggests that claims estimation was unnecessary "for allowance" and even "statutorily barred" (CAC Br. 45),[4] in fact the bankruptcy court held, and the parties agreed, that estimation was *required.* As Judge Spector observed in the confirmation hearing transcript the CAC cites, Dr. Dunbar's estimation testimony on behalf of the Tort Claimants' Committee and Dow Corning was required to

[4] As the disclosure statement notes, both Dow Corning and the Tort Claimants' Committee sought estimation, and 28 U.S.C. § 1411 does not bar such procedures. (RE #700-3, Disclosure, Page ID #9990-91.)

demonstrate Plan *feasibility—i.e.*, that the Plan had adequate funding to ensure that Dow Corning would not be forced back into bankruptcy:

> THE COURT: 1129(a)(11) is the feasibility section. The feasibility element for confirmation of the plan. The proponents have to show that confirmation of the plan is not likely to be followed by the liquidation or the need for further financial reorganization of the debtor on any successor to the debtor under the plan.
>
> The plan says we're going to pay all claims in full. As I understand it this witness [Dr. Dunbar] is being called to testify about evidence which will tend to prove from the proponents' point of view that it will do just that, pay all claims in full.

(6/29/99 Tr. at 16.) The cases the CAC cites are not to the contrary: While courts have discretion in "designing the procedures for a claim estimation proceeding" (CAC Br. 45), they do not have discretion to refuse to estimate claims where the Bankruptcy Code requires it. (DCC Br. 42-43; 11 U.S.C. § 1129(a)(11).) And, in this case, an estimation *was* indisputably performed, as the bankruptcy court noted, to establish the feasibility of the Plan's payment of *all* claims in full.[5]

Finally, while the CAC suggests that Plan proponents could simply ignore tissue expander claims because they represented a comparatively small percentage

[5] The estimation thus was not done solely to assess the adequacy of funds placed in the Litigation Facility, as the CAC asserts. (CAC Br. 27, 46.) At the confirmation hearing, "[s]everal witnesses testified generally that, in their opinion, the Plan (and more specifically the *Settlement and* Litigation Facilities) provide for the full payment of all personal injury claims against the estate." *In re Dow Corning Corp.*, 244 B.R. 721, 728 (Bankr. E.D. Mich. 1999) (emphasis added).

of the potential liability (CAC Br. 47-48), it cites no law in support of this assertion—and, of course, Dr. Dunbar did *not* disregard them. He specifically accounted for the 1,041 tissue expander claims that had been filed (*id.* at 48) as well as other categories of non-covered claims that were far fewer in number (such as 11 catheter claims). (RE #51, Ex. A, Dunbar Analysis, Page ID #176.)[6]

III. The District Court Erred By Relying On The RSP

The district court compounded its error by relying on the alleged practice under the RSP. Both the Plan's plain language and structure make clear that the RSP does not control the definition of "Breast Implant" here. While the CAC repeatedly asserts that the Dow Corning Plan adopts the substantive provisions of the RSP, that is not what the Plan says. As the Bankruptcy Court found at confirmation, there are "significant differences" between the Dow Corning Plan and the RSP. (CAC Br. 17, quoting *In re Dow Corning Corp.*, 244 B.R. 721, 730-31 (Bankr. E.D. Mich. 1999).)

First, the Plan's breast implant definition does not reference the RSP at all. (RE # 700, Ex. B, Plan §1.17.) Instead, the CAC points to a provision in a separate

[6] With more than 1,000 tissue expander claims on file, it is illogical to think that the Plan proponents would ignore altogether this sizable group of claims, and the record shows they did address these claims, as stated in Dr. Dunbar's report. Had the Plan proponents intended to make provision for paying tissue expander claims, they would have done so expressly, just as parties to other settlements had done. They would not have left it to the courts, many years later, to infer that coverage based on the express language used in other settlements.

Plan document—the Settlement Facility Agreement ("SFA")—that, as the district court acknowledged, relates solely to "the protocols and procedures developed in connection with the Revised Settlement Program"—*not* substantive determinations about which products receive settlement compensation. (RE #924, 10/08/13 Opinion, Page ID #15736.) While the CAC tries to rewrite it into a substantive provision, SFA §4.03 merely provides that "the Claims Office shall operate using the claims-processing *procedures* and quality control *process* applied by the Initial MDL Claims Administrator." (RE #700, Ex. C, SFA §4.03(a), Page ID #10185 (emphasis added).)

Second, the SFA makes clear that even the RSP *procedures* do not apply where "criteria or processing guidelines are modified" by Plan documents. (RE #700, Ex. C, SFA, Page ID #10185, §4.03(a).) Thus, to the extent there are differences, the Plan—not the RSP—governs. And, as evidenced at the confirmation hearing, the Plan provides *no* settlement eligibility for tissue expander claims.

Third, the CAC's interpretation is inconsistent with other provisions in the Plan. For example, the additional payment afforded claimants who elected to undergo surgery to remove their breast implants makes no sense for tissue expanders, which are used temporarily before reconstructive surgery and thus are designed always to be removed. (*See* CAC Br. 12; RE # 700-6, Ex. D, SFA Annex

A, Page ID #10233-36, §§6.02(a)(i), (c).) Indeed, this explantation provision demonstrates that the parties did not contemplate settlement payments for *any* products specifically designed to be placed in the body on a temporary basis.[7]

Fourth, the CAC points to no evidence in the record—and certainly cited none on remand—that any claimant thought the RSP was relevant to the tissue expander issue. The CAC likewise has no answer to the sworn testimony of Dow Corning's medical device operations manager that, when the Plan was drafted, no one asked Dow Corning to "provide any unique identifiers for tissue expander products," which would have been necessary to establish eligibility for a settlement payment under the Plan. (RE #51, Jakubczak Aff. ¶15, Page ID #182.)

Fifth, the CAC concedes that its interpretation would result in windfall recoveries. (CAC Br. 57; DCC Br. 50-51.) Under the CAC's interpretation, an individual with a Dow Corning tissue expander and another manufacturer's breast implant could recover twice with no MMR—100% from the RSP (with no

[7] Similarly, the CAC cannot and does not dispute that tissue expanders do *not* trigger the Plan's Multiple Manufacturer Reduction. (DCC Br. 48-49.) Instead, it skirts the issue by arguing that tissue expanders do not trigger the MMR because "the Dow Corning Plan expressly imposes an MMR *only* for silicone *gel* breast implants, not *saline* implants of any kind" and that all tissue expanders contain only saline. (CAC Br. 7 (emphasis in original).) However, the CAC has contradicted itself elsewhere, including in the record designations accompanying its brief, which list what the CAC calls a "Mentor tissue expander product pamphlet," and a "CUI tissue expander product pamphlet," both of which are "hybrid" products that contain both saline and silicone gel fillers. (RE #51, Ex. 1 & 2.)

reduction, because Dow Corning tissue expanders were not considered breast implants under the RSP) and an additional 50% from the Dow Corning Settlement Facility. In contrast, a claimant with the exact same medical conditions who was implanted with a Dow Corning breast implant and another manufacturer's breast implant would only take the reduced 50% recovery from each settlement facility. In other words, the claimant with short-term exposure to a Dow Corning tissue expander would receive *more* in total from both programs than the claimant who had two different sets of breast implants and would receive a *more than 100% recovery*. The CAC's contention that such inequitable windfalls were intended (CAC Br. 57) is irrational and inconsistent with the language and structure of both the Plan and the RSP.

Finally, the CAC does not dispute that its interpretation would provide a disease settlement option for tissue expanders identical to that received by Class 5, 6.1 and 6.2 claimants who received breast implants. But providing equivalent monetary awards to recipients of temporary surgical prep devices, which were not associated with any plausible disease allegations,[8] would make no sense and conflict with the whole structure and purpose of the Plan. While the CAC *asserts*

[8] The two articles cited by the CAC fail to link tissue expanders to the types of serious disease allegedly associated with breast implants. (CAC Br. 51-52.) One article (Poblete at 1706) merely mentions an anecdote about a bacterial infection following tissue expander surgery, while the other (Copeland at 629) limits its findings to a specific model of McGhan tissue expander.

that "[s]uch grouping and leveling of claims is typical, and often necessary, to administer mass tort settlements" (CAC Br. 50), it provides no supporting evidence from other mass torts. Nor does it explain why, in *this* Plan, three of the 250 tissue expander products would be singled out to receive windfall settlement payments of up to $300,000 awardable to Breast Implant disease claimants, while Covered Other Products claimants would receive maximum settlements of just $15,000 (for example, claims arising from TMJ jaw implants, which were the subject of significant pre-bankruptcy litigation), and claimants exposed to one of the other 247 tissue expander products would receive no settlement payment.

IV. The District Court's Ruling Is Inconsistent With The RSP's Plain Language And The District Court's Prior Findings

Even if the RSP had any relevance, it would only *confirm* that Dow Corning tissue expanders are not breast implants. As discussed above, the rule under the RSP was that products must be specifically enumerated to receive settlement compensation. The Dow Corning Plan enumerates 119 settlement-eligible "Other Products" in "specific detail by particular brand name, product name, and size" (CAC Br. 14), but tissue expanders are not included. Thus, if the RSP rule applied, tissue expanders would not be eligible for settlement compensation under the Plan.

In fact, far from establishing a blanket rule that all tissue expanders receive settlement compensation (much less receive compensation as "breast implants"), the RSP's enumeration included only a handful of such products. Indeed, by the

CAC's count, the RSP enumerates only 15 products designated "tissue expanders" or "expanders," which were made by a single, minor manufacturer, CUI (CAC Br. 13), refuting the CAC's suggestion that all "other manufacturers' tissue expander implants were treated as breast implants in the RSP" (CAC Br. 13).[9]

Moreover, most of the 15 products are not even "breast design" tissue expanders. Rather, the list includes a grab-bag of disparate products that the parties to the RSP chose to cover, for reasons unique to that particular settlement, including: a "man facelift expander" (for facelifts), an "ear shaped tissue expander" (to reconstruct the ear), "rectangular" tissue expanders, several "intraoperative" tissue expanders (only used during surgery), and various generic "crescent," "round," "wedge" and "oval" expanders that could be used in many parts of the body. (RE #700-6, Ex. D, Page ID #10306-10, SFA Annex A.) This express enumeration refutes, rather than supports, the CAC's contention that the RSP equated "breast design" tissue expanders with "breast implants." In essence, the CAC argues the Dow Corning Plan adopted a unique, unexpressed rule—

[9] As the CAC acknowledged below, these CUI products are not even "part of the RSP." (RE #57, 08/09/2004 CAC Resp., Page ID #245.) CUI products were included on the RSP list solely because the RSP provided compensation for certain McGhan silicone-gel breast implants where a claimant was implanted with McGhan implants or McGhan implants "and Bioplasty, Cox Uphoff/CUI or Mentor" products. CUI products received compensation under a separate settlement agreement by INAMED that the CAC quotes in its brief. (CAC Br. 14; INAMED Settlement ¶¶1-2, available at http://www.fjc.gov/BREIMLIT/ORDERS/inamed.rtf.)

adopted in no other settlement—singling out so-called "breast design" tissue expanders for settlement compensation while simultaneously denying settlement compensation for all other tissue expander products. The record evidence belies any such unusual intent of the parties.

The district court correctly found that the practice under the RSP "len[t] credibility to DCC's claim that even under the RSP tissue expanders were not considered 'Breast Implants.'" (RE #673, 6/10/09 Opinion, Page ID #8749.) Not "*some* credibility" as the CAC tries to modify the district court's words (CAC Br. 29, 57)—but "credibility," period.[10] The record supports this finding. (DCC Br. 46-48.) Moreover, the CAC concedes that Dow Corning tissue expanders "did not trigger a Multiple Manufacturer reduction" (CAC Br. 6, 28), even though the RSP applied a multiple manufacturer discount where a claimant received more than one set of "breast implants" from different manufacturers.

The CAC attempts to explain away this evidence by arguing for the first time that the RSP's MMR provision simply "mirrors the structure of the Dow Corning Settlement" by excluding all *saline* breast implants. (CAC Br. 54-55.) But the record demonstrates that the MMR did not apply to *tissue expander* claims

[10] While the CAC calls this "dictum" (CAC Br. 7, 58), the district court in fact found that the practice under the RSP supported Dow Corning; it simply ruled that that practice could not override what it deemed—erroneously—to be unambiguous Plan language. Indeed, the CAC itself relies upon what it calls "findings" in this same Order. (CAC Br. 19.)

because no one thought they were "breast implants"—not because the RSP allegedly excluded all saline-filled products: "tissue expanders did not trigger the 50% reduction in benefits that the breast implants did." (RE #40, Ex. 3, 1/25/02 SF-DCT email; DCC Br. 20-21.)

V. Instead Of Attempting To Defend The District Court's Reasoning, The CAC Tries To Shore It Up With A Host of New Arguments

The CAC spends much of its brief attempting to provide alternative grounds for affirmance—grounds that the district court did not adopt and, in many cases, are not even in the record. The CAC's attempts to bolster the district court's opinion are meritless, and only further demonstrate that the district court erred.

First, while the CAC argues that "three other contemporaneous breast implant claim programs" support its position (CAC Br. 33), the settlements are nowhere in the record and the district court relied almost exclusively on the RSP, not these three programs. Moreover, as noted above, these programs actually undermine the CAC's position because they demonstrate that, where tissue expanders were designated for settlement compensation, the parties to the particular agreement did so *expressly*. There is no such express designation in the Dow Corning Plan.

Second, while the CAC argues that it is "beyond good faith dispute" that claimants were "specifically told" that the Dow Corning settlement "was modeled on the procedure *and* substance of the RSP" (CAC Br. 52), its reliance on the

disclosure statement issued before the Plan confirmation proceedings in support of this point is misplaced. In fact, the disclosure statement—which the district court did not cite or rely on—says nothing about the "substantive" provisions of the Plan and the RSP being the same and, as the CAC concedes, the bankruptcy court found that the Plan differed "significant[ly]" from the RSP. (CAC Br. 17.) Indeed, the disclosure statement suggested only that the Plan contained "a *procedure*, including Claim payment levels and eligibility criteria, modeled on the Revised Settlement Program." (RE #700-3, Ex. A, Disclosure, Page ID #9945 (emphasis added).) Those payment levels and eligibility criteria are set out in the Plan's SFA Annex A, entitled "Dow Corning Settlement Program and Claims Resolution *Procedures*" (RE #700-6, Ex. D, SFA Annex A, Page ID #10218), which provide detailed procedures and documentation requirements that claimants must follow to prove, among other things: they were actually injured; their current disability level; their exposure to a Dow Corning (as opposed to some other manufacturer's) product; whether they had filed a valid proof of claim; whether they had released their claim or elected to pursue litigation; and whether they received compensation from other settlements. (RE #700-5, Ex. C, SFA §6.04, Page ID #10198.)[11]

[11] While the CAC cites Dr. Dunbar's testimony (which is not in the record) as suggesting the "qualifying criteria" in the Plan and RSP are the same (CAC Br. 53-54), the portion of the testimony just before the excerpt the CAC quotes makes clear that the "qualifying criteria" deal with the "proof" claimants must submit to show they have a particular disease or a ruptured implant—not whether the product

These SFA procedures have nothing to do with the issue here—whether tissue expanders are "Breast Implants"—which is governed by provisions contained in the Plan, not the SFA. (RE #700, Ex. B, Plan, Page ID #10073, §1.17.) As discussed above, the Plan's definition of "Breast Implants" excludes tissue expanders. But, to the extent the CAC believes that the disclosure statement says otherwise (it does not), there is an express disclaimer in the disclosure statement that makes clear that "*THE PLAN AND THE PLAN DOCUMENTS SHALL CONTROL*." (RE #700-3, Disclosure, Page ID #9993 (emphasis added).)

Third, the CAC repeats the mantra that the Dow Corning Plan contained only "improvements over the RSP" and thus must provide settlement compensation for tissue expanders. (CAC Br. 1, 6, 26.) This is a non-sequitur that the CAC never raised below and thus the district court never adopted. The only thing the CAC cites in support of this assertion is a statement in the disclosure statement indicating that certain features of the Plan—specifically, the disease, explantation and rupture settlement options—offered increased compensation and eligibility options. (CAC Br. 10; RE #700-3, Ex. A, Disclosure, Page ID #9947.) The disclosure statement says nothing about so-called across-the-board "improvements."

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they had (*e.g.,* a tissue expander) was eligible for a disease or rupture settlement option in the first instance. (6/29/99 Tr. at 76.)

Fourth, the CAC argues that the "Original Global Settlement" allegedly treated tissue expanders as breast implants. (CAC Br. 4, 8.) But the CAC has not provided a single affidavit from any member of the Original Global class saying that she understood that "tissue expanders" are "breast implants"—much less an affidavit from a Dow Corning claimant so attesting. The only reference the CAC cites (for the first time in its brief here) is an MDL class certification notice that defines a "breast implant" as a "mammary prosthesis." (CAC Br. 8 n.2.) But a tissue expander is not a "mammary prosthesis" any more than it is a "breast implant." A "prosthesis" is "an artificial device to *replace or augment* a missing or impaired part of the body."[12] Tissue expanders do not "replace or augment" the breast. Just the opposite: by their very nature, tissue expanders are used temporarily to stretch the skin, then are *replaced by* breast implants.

Fifth, while the CAC suggests that the "Breast Implant" definition is "facially broad and inclusive" because it covers "all" "breast implants" (CAC Br. 10, 34), this merely begs the question of whether tissue expanders are in fact "breast implants."[13] On this point, the CAC repeats its argument from the prior

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[12] Merriam-Webster Dictionary, *available at* http://www.merriam-webster.com/dictionary/prosthesis (emphasis added).

[13] In its brief, the CAC coins a new term for tissue expanders: "tissue expander implants." But that term does not appear in the definition of settlement-eligible "Breast Implants." Nor does it appear anywhere in the other Plan documents or the Disclosure Statement the CAC cites. Calling a "tissue expander" a "tissue

appeal that tissue expanders "meet every element of the Plan's definition of 'Breast Implant'" because they are saline-filled and have a silicone elastomer shell. (CAC Br. 1.) However, in order to fit within the definition, a product must also be a "breast implant" in the first place; tissue expanders are not.[14] Nor does the circular nature of the Breast Implant definition imply that it must be construed "broad[ly]." (CAC Br. 38 n.13.) Rather, the cases hold that the use of such circular definitions indicates that the "ordinary meaning" applies because more specific definitions are not needed for well-understood terms. (DCC Br. 34-35 n.14.)

Sixth, while the CAC asserts that SFA Annex A references "breast implants" (CAC Br. 34-35) when discussing the list of other manufacturers' products copied from the RSP, the RSP does *not* say that all tissue expanders are "breast implants" and indeed refers to them as what they are: "tissue expanders" or "expander" products. (RE #700-6, Ex. D, SFA Annex A, Page ID #10305-10.) The fact that

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expander implant" over and over again does not transform a "tissue expander" into a "breast implant," particularly where the Plan's plain language and the established common usage of those terms are to the contrary.

[14] The CAC notes that tissue expanders were marketed under the name "SILASTIC," a brand that appears on a list of general brand names contained in Plan documents. (CAC. Br. 34, 36 n.12.) But as the CAC's counsel acknowledged during oral argument in the prior appeal, the fact that products had the brand name SILASTIC does not make them breast implants. Myriad products were marketed under the name "SILASTIC," including silicone tubing and drains, the vast majority of which were not breast implants and were not eligible for settlement compensation.

the term "breast implant" is referenced in conjunction with the RSP list does not mean that anyone thought *all* products on the list—including products such as "ear shaped" expanders and "face lift" expanders—were "breast implants." Indeed, such products do not even fit within the CAC's definition, under which only "breast design" tissue expanders are "breast implants."[15]

Seventh, while the CAC argues that tissue expanders were not one of the five non-covered Other Products identified in the Plan (CAC Br. 34), that list is non-exclusive: Section 1.117 provides that non-covered "Other Products" are Dow Corning silicone or metal implants "including, *but not limited to*" the five examples. (RE #700-4, Ex. B, Plan, Page ID #10089-90 (emphasis added).) The fact that expanders are not mentioned on this short, non-exhaustive list—along with hundreds of other products that also are not eligible for settlement

[15] Moreover, the CAC provides only a partial quotation of the Annex A language, which discusses "breast implant product[s] covered under the Silicone Material Claimant Settlement Program" (*i.e.*, Class 7 claims). That program provided compensation where Dow Corning silicone gel was used in other manufacturers' "*silicone gel breast implant[s]* identified as a Bristol, Baxter, Bioplasty, Cox-Uphoff, or Mentor *breast implant[s]* on Exhibit G to the Revised Settlement Program." (RE # 700-6, Ex. D, SFA Annex A, §6.04, Page ID #10258 (emphasis added).) Thus, a "breast implant product covered" under that program would not include tissue expanders, both because such products were identified as "tissue expanders" or "expanders" (not "breast implants") on Exhibit G and because they did *not* contain silicone gel. Accordingly, tissue expanders were *not* "specifically referred to as 'breast implants' for purposes of the Class 7 silicone material settlement" (CAC Br. 34-35)—just the opposite, they were excluded from that definition.

compensation and also are not mentioned—proves nothing.[16] And while the CAC finds it "implausibl[e]" to include the three tissue expander products at issue here in the non-covered "Other Products" category (CAC Br. 15 n.6), that is precisely where all 247 other unenumerated tissue expander products fall.

Eighth, the CAC claims that the Dow Corning proof of claim form drafted years before the Plan "contain[s] no ... category" that includes tissue expanders other than "breast implant." (CAC Br. 16, 33.) In fact, however, box no. 10 on the form gave claimants the choice to select the "other" product category in which Dr. Dunbar placed tissue expander claims and in which the 247 tissue expander products that are not at issue here indisputably fall. (RE #57, Ex. 2, Proof of Claim, Page ID #251.) Moreover, while the CAC asserts that "many claimants with tissue expander[s]" checked the "breast implant" box (CAC Br. 16), there is nothing in the record supporting this contention: the CAC cites only lawyer assertion contained in its own brief.

[16] Nor are the scores of additional Dow Corning products falling within the "Other Products" definition limited to "hard plastic silicone" products. (CAC Br. 14.) Rather, they include a wide range of products made from Dow Corning silicone elastomer similar to that used in tissue expanders, such as silicone fluids, gel-filled testicular implants, pectus implants, brain shunts, various custom implants and many others.

VI. The District Court's Ruling Should Be Accorded No Deference

The district court's ruling should be reversed under any standard of review. Even under the most lenient abuse of discretion standard, the court's wholesale rejection of relevant extrinsic evidence and misapplication of law constitutes an abuse of discretion. (*See* DCC Br. 31 n.13.) Nonetheless, given the specific basis of the district court's ruling and the issues raised on appeal, the court should apply *de novo* review. The CAC does not dispute that the district court's opinion was premised on the alleged practice in proceedings before another court in which the district court played no role. (*Id.* at 4-5.) Accordingly, the district court's decision is entitled to no deference. Moreover, because Dow Corning largely agrees with the district court's findings, the particular issues raised on appeal (with the exception of the district court's inconsistent finding regarding the RSP) concern purely legal questions, which are reviewed *de novo*. (*Id.*)

At a minimum, however, the district court's decision is subject to the intermediate standard this Court articulated previously, which accords only a "measure of deference." *In re Settlement Facility*, 628 F.3d at 771-72. This Court already rejected the abuse of discretion standard of *In re Dow Corning Corp.* because the decision here is by the district court, not the bankruptcy court that approved the Plan. *Id.* It likewise rejected the CAC's contention that the parties stipulated to a "clearly erroneous" standard because the stipulation merely

recognizes the standard for assessing factual "findings" and "the parties may not stipulate to the standard of review." *Reg'l Airport Auth. v. LFG, LLC*, 460 F.3d 697, 712 n.10 (6th Cir. 2006).[17] Finally, it rejected the CAC's contention that Dow Corning's position here is inconsistent with its position in *Clark-James* because there, Dow Corning argued only *in the alternative* for abuse of discretion, and this Court rejected that argument, applying *de novo* review. (*See* 11/30/09 DCC Reply, 6th Cir. Case No. 09-1827, 25-26.) The Court should apply the same standard here.

[17] The fact that the stipulation in *LFG* occurred in the parties' briefs, rather than a separate stipulation (CAC Br. 31 n.9), is irrelevant.

CONCLUSION

For the foregoing reasons, Dow Corning requests that the Court reverse the district court's order, hold that tissue expanders are not "Breast Implants", and enter judgment in favor of Dow Corning.

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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 6,928 words.

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CERTIFICATE OF SERVICE

I certify that on February 28, 2014, 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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