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

BRIEF OF APPELLANT DOW CORNING CORPORATION

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STATEMENT OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Dow Corning Corporation makes the following disclosure:

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

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   SEE ANSWER TO NO. 2 BELOW.

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

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

   > Dow Corning Corporation is 50% owned by Corning Incorporated, and 50% owned by Dow Holdings, Inc., a wholly owned subsidiary of The Dow Chemical Company. Further, various publicly-owned corporations may be creditors of Dow Corning's Chapter 11 bankruptcy estate, but Dow Corning believes their interests are too attenuated to present any conflict issues here.

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Dated: November 5, 2009

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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.

INTRODUCTION

The Dow Corning Amended Joint Plan of Reorganization resolved the massive and highly controversial litigation over the safety of Dow Corning breast implants by creating a $1.95 billion settlement trust to pay claims pursuant to well-defined eligibility criteria previously applied in the breast implant Multi-District Litigation in the U.S. District Court for the Northern District of Alabama (MDL-926). To qualify, claimants must not only satisfy specific medical criteria, but also establish the severity of their disability if any. The highest payments are reserved for the most severe category of disability, "death or total disability due to the compensable condition," referred to as Disability Level A. In contrast to lesser, and lower paid, categories of partial disability (Disability B for 35-to-99% disability and Disability C for 20% disability), the 100% disability level of Disability A has a "strict definition of total disability" that is "a difficult one to meet." (Record Entry No. 701 Ex. D, SFA Annex at A-89.)

Disability is determined by the "cumulative effect" of a claimant's symptoms on the whole spectrum of her vocational (work), avocational (hobbies), and self-care activities—as opposed to the impact of her disability on just one slice of life. (*Id.* at A-94, A-101.) Partial-disability levels B and C apply where the claimant can perform some of her usual activities, albeit with varying levels of restriction or pain. But the test for "total disability" under Disability Level A truly

is "strict," stating: "An individual shall be considered totally disabled if she demonstrates a functional capacity adequate to consistently perform *none* or only few of the usual duties or activities of vocation or of self care." (*Id.* (emphasis added).)

Appellee now contends, and Judge Hood found, that Disability A can be satisfied by showing just vocational disability without any self-care disability, or just self-care disability without any vocational disability. But since the Disability A definition was first adopted in related multi-district litigation in 1995, the plain language of the definition, and consistent record of court orders, claim appeal decisions, information provided to claimants in the form of Q&As, interpretations and Dow Corning Plan documents have made clear that Disability A requires both vocational disability *and* self-care disability. One without the other is insufficient.

The Dow Corning Plan's disability criteria were adopted verbatim from the criteria in the Revised Settlement Program approved in 1995 by the judge overseeing the breast implant Multi-District Litigation, Judge Sam C. Pointer Jr. As the Plan states, its criteria were "adopted from and . . . intended to be applied consistently with the Revised Settlement Program and interpretations thereof . . . ." (Record Entry No. 701 Ex. D, SFA Annex at A-87.) The Plan authorizes the Dow Corning settlement trust to rely on MDL Revised Settlement Program guidelines and interpretations, and specifically to rely on the guidelines that the Dow Corning

settlement trust adopted as of a particular date: February 2003, when the trust first published its claim forms and guidelines. (Record Entry No. 701 Ex. C, SFA § 4.03.) As of that date, an unbroken series of decisions and interpretations by the MDL Claims Office and MDL Court had construed the Disability A definition as requiring both vocational and self-care disability:

- In 1996, shortly after it began paying claims pursuant to the MDL-926 Revised Settlement Program, the MDL Claims Office published a claimant Q&A stating that Disability Level A is a "strict definition of total disability" and a "difficult one to meet," requiring a showing of "your daily life and limitations" and that the claimant is "unable to do any of your normal daily activities or only able to do a very few of them." (Record Entry No. 701 Ex. D, SFA Annex at A-89.)

- In 1997, MDL Judge Pointer issued an order finding that Disability A requires vocational disability *and* self-care disability, not vocational *or* self-care disability. Judge Pointer further found that the MDL Claims Office had consistently applied the same definition. (Record Entry No. 76-2, Ex. 7, 9/30/97 Order at 1.)

- In 1998, the MDL appeals judge issued a decision requiring both vocational and self-care disability for Disability A and finding that the MDL Court had "consistently ruled" the same. (Record Entry No. 76 Ex. 10, 11/29/04 Claims Administrator email, quoting MDL Appeals Judge's 1998 rulings.)

- In 2002, as the Dow Corning settlement trust was preparing to pay claims based on the Plan's verbatim adoption of the MDL's Disability A criteria, MDL Claims Office staff confirmed to Dow Corning trust staff that Disability A requires both vocational and self-care disabilities. (Record Entry No. 408, 6/09/06 Mem. at 6-7.)

- In February 2003, the Dow Corning settlement trust distributed a Claimant Information Guide reiterating that claimants must submit information regarding their " daily life and limitations" and demonstrate that they are "unable to do any of [their] normal activities or only able to do very few of them" in order to meet the "difficult" and "strict" definition of total

disability under Level A. (Record Entry No. 76-2 Ex. 5, Disease Claimant Information Guide Q1-10 (Dec. 2002).)

- In 2005, when certain claimants urged the MDL Court to change its criteria—on the express ground that the prior MDL rulings would deny claimants a Disability A recovery from the Dow Corning settlement trust if they cannot show both vocational and self-care disabilities—the MDL Court confirmed that both types of disability are required. (Record Entry No. 299 Ex. 1, MDL Order 27O, attachment at 4-5 (Nov. 8, 2005).)

Judge Hood's ruling that vocational or self-care disability alone will satisfy Disability Level A is contrary to these orders and interpretations and constitutes reversible error for several reasons. *First*, the district court failed to enforce the Plan as written, specifically the Plan provisions authorizing the Dow Corning settlement trust to "rely on procedures and interpretations contained in the Claims Administrator's guidelines and claims processing system as of February 2003." (Record Entry No. 701 SFA Annex A, § 4.03.) These provisions prohibited the court from directing the Claims Administrator to ignore the guidelines as of February 2003, as the Claims Administrator was expressly authorized to rely on those guidelines. The court then compounded the error by relying on extrinsic evidence suggesting that the MDL Claims Administrator had applied more lenient Disability A criteria back in 1996 and 1997—"evidence" that was immaterial (because the Plan specified that the guidelines as of 2003 govern), was hearsay, and was contradicted by the MDL Court's contemporaneous rulings stating that the Disability A definition consistently required both vocational and self-care

disabilities. Those MDL Court rulings interpreting its own criteria were entitled to, but were not given, great deference.

Second, the district court misread the plain language of the disability criteria by overlooking the use of the word "none" in the definition of Disability Level A; the use of that word makes the structure, syntax and meaning of the Disability A definition completely different from the definitions of Disability Levels B and C, which do not contain the word "none." The court erred by focusing, too narrowly, on a single phrase in the disability definitions—"vocation, avocation *and* self care" for Disability B and C, as compared to "vocation *or* self-care" for Disability A—as the basis for concluding that Disability A requires only vocational disability or self-care disability, but not both. While this "and vs. or" distinction might be significant if the definition of Disability A were otherwise identical to the definitions of Disability B and C, in fact the entire structure and syntax of the Disability A definition are reversed from those of Disability B and C because the Disability A definition starts with a negative: the word "none." When text begins with a negative such as "none," the use of the word "or" in an ensuing list of multiple items refers to all of those items conjunctively, not to just one of the items disjunctively. For example, if a doctor tells a gymnast who breaks her leg that she is allowed to perform "none of her usual activities of running or jumping," it means that the patient should not be running *and* she should not be jumping. The

district court's glossing over of the word "none," and the change of meaning that "none" makes in the definition of Disability A, was error.

Third, the district court's ruling would lead to the absurd result that claimants who make a lesser showing of disability—vocational disability without any self-care disability, and vice versa—can recover at the highest, and most severe level, Disability A. But the strict MDL guidelines for Disability A were adopted to make the most severe disability category *more* difficult to satisfy than the partial disability categories, not *less* difficult. Relaxing the standard now violates the district court's obligation to enforce a confirmed Plan as written and would allow one group of partially disabled claimants—those who can work full-time (but have some self-care impairment) or who can fully care for themselves at home (but can show a workplace impairment)—to recover at the highest disability level, which is reserved for those who truly are "totally" or "100%" disabled. Preservation of the Plan's capped settlement fund for the benefit of all claimants would be threatened if one subset of claimants could procure a relaxed eligibility standard for just themselves and thereby accrue to themselves potentially tens of millions of dollars, at the expense of the majority of claimants who do not benefit from the relaxed standard.

STATEMENT OF JURISDICTION

The district court exercised jurisdiction pursuant to 28 U.S.C. § 1334. This Court has jurisdiction to review the district court's June 10, 2009 final order pursuant to 28 U.S.C. § 1291. (*See* Record Entry No. 672, 6/10/09 Opinion.) Dow Corning filed a timely notice of appeal on June 19, 2009. (*See* Record Entry No. 675, 6/19/09 Notice of Appeal.)

STATEMENT OF THE ISSUES FOR REVIEW

1. Whether the district court exceeded its authority under the Plan by ordering the SF-DCT Claims Administrator to disregard the MDL Court's rulings requiring claimants to demonstrate both vocational and self-care disabilities, where the Plan specifically directs that MDL guidelines shall be applied and authorizes the Claims Administrator to rely upon guidelines in place as of 2003.

2. Whether the district court erred in rejecting the MDL Court's interpretation of its own order and "total disability" definition made applicable by the Plan, thereby allowing claimants to satisfy Disability Level A even though they suffered disability with respect to vocational or self-care activities alone, where the plain language of the MDL "total disability" definition requires claimants to demonstrate that they can perform "none" (or only few) of their usual vocational or self-care activities.

3. Whether the district court's procedures and evidentiary rulings were in error because the court (a) considered immaterial and inadmissible extrinsic evidence in interpreting the MDL disability language, even though the district court specifically found that the MDL language was unambiguous and claimants acknowledged they were not submitting the extrinsic material for any evidentiary purpose; and (b) denied Dow Corning's request for an evidentiary hearing, despite relying on untimely extrinsic evidence submitted by claimants.

STATEMENT OF THE CASE AND THE FACTS

I. The MDL Claims Procedures And Guidelines.

Dow Corning's Amended Joint Plan of Reorganization (the "Plan") specifically authorizes and directs the Claims Administrator to rely upon the claims-processing guidelines and interpretations employed in MDL-926, the multidistrict breast implant litigation proceedings conducted since the early 1990s in the U.S. District Court for the Northern District of Alabama (the "MDL Court"). (*See* Record Entry No. 701 SFA Annex A, § 4.03.) Those guidelines, as consistently applied in the MDL at all relevant times, require claimants seeking to establish the most severe category of disability under the Plan, "total disability" under Disability Level A, to demonstrate disability with respect to their usual activities of both vocation and self-care.

A. The MDL Guidelines.

The MDL-926 proceedings consolidated thousands of cases brought against various breast implant manufacturers before Judge Sam C. Pointer, Jr. In 1994, the parties negotiated a proposed "global settlement," including payments that varied by disability level from Disability A (most severe) to Disability B (less severe) and Disability C (least severe).[1] In late 1995, the MDL Court authorized a Revised Settlement Program that adopted the "global settlement" criteria, including Disability Levels A, B and C. In turn, the disease and disability definitions governing settlement eligibility incorporated into the Dow Corning Plan several years later, including the definition of Disability Level A, were "adopted from and . . . intended to be applied consistently with the Revised Settlement Program and interpretations thereof . . . ." (Record Entry No. 701 Ex. D, SFA Annex at A-87.)

Under the MDL Revised Settlement Program criteria, Disability Levels A, B and C were determined based on the "cumulative effect of the symptoms on the individual's ability to perform her vocational, avocational, or usual self-care,

[1] The criteria for disability Level A under the 1994 MDL global "settlement" (which was not consummated) stated: "A claimant shall be eligible for category A compensation if she is totally disabled (100% disabled) due to the compensable condition or has died as a result of the compensable condition. A woman shall be deemed 100 percent disabled if she demonstrates a functional capacity adequate to consistently perform only few or none of the usual duties or activities of vocation or self-care." (Record Entry No. 76 Ex. 1, Excerpt at 13.)

activities." (*See id.* A-94 & A-101.)[2] No bright-line distinction was made between work and self-care activities. Rather, the totality or "cumulative effect" of all symptoms, whether at the workplace or at home, was the test.[3]

The lowest level of partial disability, corresponding to the lowest payment level, was Disability Level C for claimants at least "20 percent disabled due to the compensable condition." (*See id.*) "An individual shall be considered 20 percent disabled if she can perform some of her usual activities of vocation, avocation, and self-care only with regular or recurring moderate pain." (*Id.* at A-94 to A-95 & A-101.) Next came Disability Level B, for a claimant "35 percent disabled due to the

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[2] The MDL RSP guidelines are recited here as they were adopted—verbatim—in the Dow Corning Plan for the relevant disease category, Disease Option I. (*See* Record Entry No. 701 Ex. D, SFA Annex A at A-87 to A-101.) The Plan also includes a Disease Option II limited to certain diseases. (*Id.* Annex A part B at A-102 to A-107.)

[3] The "cumulative effect" requirement has been in the guidelines since the original 1994 MDL global settlement: "The disability under these guidelines will be based on the *cumulative effect* of the symptoms on the claimants' ability to perform her vocational, avocational, or usual self-care activities." (Record Entry No. 76 Ex. 1, Excerpt from MDL global settlement criteria at 5, emphasis added.) This term was also contained in the MDL's Revised Settlement Program applicable to all disability levels. (*See* RSP, Ex. D, Fixed Benefit Disease Schedule, *available at* http://www.claimsoffice-926.com/index.html ("The determination of disability under these guidelines will be based on the *cumulative effect* of the symptoms on the individual's ability to perform her vocational, avocational, or usual self-care activities.") (emphasis added).)

compensable condition,"[4] meaning she is "unable to perform some of her usual activities of vocation, avocation, and self-care," or "can only perform them only with regular or recurring severe pain." (*Id.*)

Disability Level A was the most severe and restrictive disability level. As made clear throughout Dow Corning's Plan, the Disability Level A definition adopted from the MDL guidelines is a "strict definition of total disability" and "a difficult one to meet." (*Id.* at A-89; *see also id.* § 7.06(d)(16), at A-50 to A-51 (same).) To qualify for "total disability" under Disability A, a claimant had to demonstrate that she could perform "none" (or "only [a] few") of her usual duties or activities of vocation or self-care:

> Death or total disability due to the compensable condition. An individual shall be considered totally disabled if she demonstrates a functional capacity adequate to consistently perform none or only few of the usual duties or activities of vocation or of self-care.

(*Id* at A-94, A-101.)

Qualification for Disability A was severely restricted because that disability level paid much more than a partial disability finding, both in the MDL settlement and in the relevant portion of the Dow Corning Plan modeled after it. Under the settlement grid of the Plan, for example, certain claimants can receive up to

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[4] As stated in a later MDL Court order, Disability Level B "includes the area between 35% and 99% disabled." (Record Entry No. 299 Ex. 1, MDL Order 27O, attachment at 4-5 (Nov. 8, 2005).)

$60,000 for Disability A, compared to $24,000 for Disability B and $12,000 for Disability C. (*See* Record Entry No. 701 Ex. D, SFA Annex A, § 6.02(d)(v), at A-13.)

Appellee is the Claimants' Advisory Committee ("CAC"), an entity created by the Plan to represent the interests of claimants after the Plan's Effective Date. Although the CAC urges a relaxed interpretation of Disability Level A, even the CAC has acknowledged that Disability A is considered "100% disability." (*See* Record Entry No. 299 Ex. 2, 1/19/06 CAC Amicus Curiae Submission at 2, 4; Record Entry No. 416 6/29/06 CAC Reply at 6-7 (describing "Level A (100%) disability" and "100% disability claims").) "Total disability" meant just that: the ability to perform *none* or only a few of the claimant's usual activities, assessed by the "cumulative effect" of the symptoms on her ability to perform her range of usual activities. (Record Entry No. 701 Ex. D, SFA Annex at A-94, A101.) There is only one, slight relaxation of the otherwise strict test: if the claimant can perform "only [a] few" of her normal activities, that limited ability will not be disqualifying. (*Id.*) But a disability that allows claimants to work or to go about most of the normal activities of daily life is not a "total disability." Such claimants are properly classified as partially disabled under Disability Level B or C.

This understanding was communicated in publications issued by the MDL Claims Office. For example, Questions and Answers published by the MDL

Office in July 1996, only a few months after it began processing claims, told claimants and their counsel that the "strict definition" of Disability Level A requires sufficient information about "daily life and limitations" (*i.e.*, not just information about disability in the workplace):

> If your physician assigned disability level "A," keep in mind that the settlement's definition of this disability level is a difficult one to meet. You must be unable to do any of your normal daily activities or only be able to do a very few of them. Read your claim documents carefully. Is there enough description of your daily life and limitations to allow a reader to know that you do indeed meet this strict definition of total disability? Remember, too, that it must be clear that the total disability is due to the symptoms of your applicable disease.

(Record Entry No. 137-2, Ex. A, RSP Def. Mem. at 10, quoting 7/3/96 Supplemental Q&A.)

B. The MDL Court's 1997 Ruling.

The MDL Court confirmed this understanding in rulings interpreting the MDL guidelines. In a 1997 appeal from a ruling by the MDL Claims Office rejecting a claimant's request for Disability Level A status (as opposed to Level C), Judge Pointer rejected the claimant's contention that she should be classified as Disability A "based solely on inability to perform vocational activities (*i.e.*, without regard to performing self-care activities)." (Record Entry No. 76-2, Ex. 7,

9/30/97 Order at 1.)[5] Acting under its "expressly reserved powers to interpret the settlement," the MDL Court refused to "dispense with the requirement that there be limitations with respect to both self-care activities and vocational activities." (*Id.*) Rather, Judge Pointer held that by requiring claimants to demonstrate that they could perform "none" (or few) of the enumerated activities, the MDL guidelines for Disability A required a showing of disability with respect to both vocational and self-care activities. (*Id.*)[6] Significantly, Judge Pointer found that the MDL Claims Administrator "has consistently applied the language respecting disability level A for other claimants" in the same manner. (*Id.*)

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[5] The Revised Settlement Program allows a claimant "dissatisfied" with the Claims Administrator's decision to "seek a further review" from the MDL Court, but "[n]o other appeals or reviews are permitted." (Record Entry No. 137, Ex. 1, MDL Defendants' Memorandum, at 7 (quoting RSP ¶ 34).) In contrast to the MDL RSP, which allows appeals to the MDL Court, Dow Corning's Plan allows only administrative appeals to the Claims Administrator and to the Appeals Judge (Record Entry No. 701, Ex. D, SFA Annex A, §§ 8.04, 8.05), with no right of appeal to the district court.

[6] Judge Pointer observed that the only "ambiguity or inconsistency" in the language was the inclusion of the phrase "or only few," which was "intended to provide some relaxation from" the stringent standard "by enabling a determination of total disability even though the person might be able to perform a few of the vocational or self-care activities." (*Id.*)

C. The MDL's Consistent Interpretation That Disability A Requires Both Vocational and Self-Care Disability.

This guideline continued to be applied consistently throughout the MDL proceedings to require both vocational and self-care disabilities for Disability A. For example, beginning in 1998, Judge Pointer designated retired Judge Frank Andrews to hear appeals from MDL Claims Office determinations.[7] Judge Andrews reiterated Judge Pointer's 1997 ruling, holding that claimants must demonstrate disability as to both vocational and self-care activities to qualify for Disability Level A and noting that the court had consistently so ruled:

> Ms. XXXX argues that the language of the Disease Compensation schedule with regard to disability allows a finding of total disability where the claimant is unable to perform only one or the other of her vocational and self care activities. The Court has consistently ruled that this reading is incorrect; total disability requires disability in both categories of activity.

(Record Entry No. 76 Ex. 10, 11/29/04 Claims Administrator email, quoting MDL Appeals Judge's 1998 rulings.)

The MDL Claims Office conveyed the same interpretation to the Settlement Facility-Dow Corning Trust ("SF-DCT"), the settlement trust created to pay claims

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[7] Pursuant to Paragraph 34 of the Revised Settlement Program, Judge Pointer appointed Judge Andrews to decide appeals from MDL Claims Office decisions, effective May 13, 1998. (Record Entry No. 76, Ex. 3, MDL Order No. 27L.) Judge Andrews is the same judge whom the parties in the Dow Corning bankruptcy designated to play a similar role in SF-DCT, deciding appeals from decisions of the Claims Administrator. (Record Entry No. 701 Ex. C, SFA § 4.07,
(Continued…)

under the Dow Corning Plan, when the SF-DCT was gearing up to pay claims. According to the SF-DCT Claims Administrator, "[d]uring 2002, when the SF-DCT was formulating claim review procedures in accordance with the practices of the MDL," the MDL Claims Office "communicated to the SF-DCT" that "the '*and*' requirement of vocation *and* self-care with respect to ACTD Level A" was the standard. (Record Entry No. 408, 6/09/06 Mem. at 6-7.)

II. The Plan's Express Incorporation Of The MDL Guidelines And Interpretations As Of February 2003.

The Plan created a $1.95 billion settlement fund to be distributed by the SF-DCT for the benefit of more than 100,000 potential claimants, pursuant to detailed eligibility criteria.[8] The Plan specifically directs and authorizes the SF-DCT, in determining claims, to follow the MDL claims-processing procedures, guidelines, and interpretations. Section 4.03(a) of the Plan's Settlement Facility and Fund

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and Ex. D, SFA Annex A § 8.05)

[8] The $1.95 billion cap on the settlement fund was in Net Present Value terms as of Dow Corning's June 2004 Effective Date. Claimants also had the option under the Plan of pursuing litigation claims against a Litigation Facility subject to a separate, $400 million cap. Since the settlement memorialized in the Dow Corning Plan was negotiated with plaintiffs' counsel in the late 1990s, consensus epidemiological studies have shown and public health agencies have uniformly concluded that "no cause and effect relationship has been established between breast implants and these [disease] conditions." (FDA, Summary of Safety & Effectiveness Data, Mentor Implants 3 (Nov. 17, 2006), *available at* www.accessdata.fda.gov/cdrh_docs/pdf3/P030053b.pdf (last accessed November 4, 2009).)

Distribution Agreement ("SFA") provides, among other things, that "[i]t is expressly intended that the Settling Breast Implant Claims shall be processed in substantially the same manner in which claims filed with the MDL 926 Claims Office under the Revised Settlement Program were processed except to the extent criteria or processing guidelines are modified by this Settlement Facility Agreement or the Claims Resolution Procedures, or this Section 4.03, and that the [SF-DCT] Claims Office shall manage its operations to the extent feasible as they have been conducted under the Revised Settlement Program." (Record Entry No. 701, Ex. C, SFA § 4.03.) The Plan further states that its disease and disability guidelines were "adopted from and are intended to be applied consistently with the Revised Settlement Program and interpretations thereof." (Record Entry No. 701 Ex. D, SFA Annex A, Schedule II.A, at A-87.)

The Plan documents define the "Revised Settlement Program," in turn, as "the Program established under the jurisdiction of the MDL 926 Court in Order No. 27 (Civ. Act. No. CV 94-P-11558-S, December 22, 1995) *and as modified or amended by the subsequent Orders of the MDL 926 Court or procedures of the MDL 926 Claims Office*." (*Id.*, Ex. C, SFA § 1.09 (emphasis added).) Thus, Sections 4.03 and 1.09 express the clear directive that the SF-DCT Claims Administrator will follow MDL Court orders regarding the Revised Settlement Program that were entered after December 1995—including Judge Pointer's 1997

Order confirming the work-plus-self-care requirement of the Disability Level A guidelines. (*See also* discussion in Argument I.A. below of SFA §§ 5.04(d) and 5.05 directing use of criteria as of February 2003.)

The Plan goes on to provide a precise directive: it expressly authorizes the Claims Administrator to rely on the guidelines established and in effect "as of February 2003," stating:

> All Settling Personal Injury Claims shall be reviewed, processed and resolved by the Claims Office, which shall be administered by the Claims Administrator. As more specifically described herein, the Claims Office shall operate using the claims-processing procedures and quality control process applied by the Initial MDL Claims Administrator. The Claims Administrator has discretion to modify these procedures to conform to procedures or interpretations established by the MDL 926 Claims Office any time after the Confirmation Date. *The Claims Administrator is also 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.*

(Record Entry No. 701 Ex. C, SFA § 4.03(a), emphasis added.) Thus, the Plan expressly authorizes reliance on the guidelines adopted from the MDL as of February 2003 (and authorizes the Claims Administrator to modify procedures to conform to the MDL guidelines in effect after the Confirmation Date).[9] February

[9] The Plan was confirmed on November 30, 1999. *In re Dow Corning Corp.*, 244 B.R. 634 (Bankr. E.D. Mich. 1999)(Judge Spector's Nov. 30, 1999 confirmation order). During 2002 and 2003, the SF-DCT actively prepared for emergence and mailed the Claimant Information Guides as part of those preparations. Dow (Continued…)

2003 was selected for the "as of" date because that is when SF-DCT claim processing activities began in earnest, with the mailing to all claimants of SF-DCT claim forms and a Claimant Information Guide. There is no dispute that the Claims Administrator has applied the guidelines in effect as of February 2003.

III. The SF-DCT's Adherence To The MDL Guidelines.

In February 2003, the SF-DCT mailed all claimants a Claimant Information Guide that "adopted verbatim the RSP's Q&A booklet and materials" (Record Entry No. 672, 6/10/09 Opinion at 5) and told claimants they needed to provide "a sufficient description of daily life and limitations" (again, not just vocational limitations):

> In preparing a claim for a Level "A" disability be aware that the definition of this assigned disability level is a difficult one to meet. You must be unable to do any of your normal activities or only able to do very few of them. Disability Level "A" claims will be reviewed to determine if there is a sufficient description of your daily life and limitations to determine that you meet this strict definition of total disability . . . .

(*See* Record Entry No. 76-2 Ex. 5, Disease Claimant Information Guide Q1-10 (Dec. 2002).) In addition, the Information Guide echoed the MDL criteria's requirement that the disability determination will be based on the "cumulative

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Corning ultimately emerged from chapter 11 on June 1, 2004, and SF-DCT began paying claims after that Effective Date.

effect" of the symptoms on the claimant's ability to perform her various usual activities. (*Id.* Q1-9.)

Applying the settled understanding of the MDL guidelines established by the MDL Court and embodied in the Plan, the SF-DCT began issuing determinations with respect to claims in 2003. The SF-DCT consistently required that claimants demonstrate disability with respect to both "vocation and self-care" to qualify for "total disability" status under Disability Level A. (Record Entry No. 76-2, Ex. 6, Notice of Status Letter at 6; *see also, e.g.,* Record Entry No. 292, 1/12/06 Claimant Mot. Exs. A (notifying claimant of deficiency), D (denying claimant's appeal).)

In late 2004, the CAC raised the Disability A issue with the SF-DCT Claims Administrator for the first time. In response, the Claims Administrator communicated to the CAC and Dow Corning that "the requirement is vocation <u>and</u> self-care," quoting the MDL Court's and MDL appeals judge's decisions stating that under the MDL guidelines claimants could not establish "'total disability where the claimant is unable to perform only one or the other of her vocational and self care activities,'" and noting that "'[t]he [MDL] Court has consistently ruled that [the CAC's] reading is incorrect; total disability requires disability in both categories of activity.'" (Record Entry No. 76-2 Ex. 10, 11/29/04 Claims Administrator email.)

IV. Claimants' Unsuccessful Effort To Urge The MDL Court To Change Its Guidelines.

Faced with the denial of Disability Level A status by SF-DCT, certain claimants filed a motion with the MDL Court in December 2004 seeking additional information regarding the Disability Level A criteria employed by the MDL Claims Office. (*See* Docket Entry 3453, MDL-926 (Dec. 9, 2004.) In response, Judge U.W. Clemon, who by then was presiding over MDL-926, held a status conference in June 2005 that was attended by numerous counsel nationwide including the CAC. At that conference, the MDL-926 Claims Administrator indicated that she would issue new Questions and Answers to assist claimants and their counsel with filing claims in the MDL settlement program. (Record Entry No. 299 Ex. 2, CAC Amicus Submission to the MDL Court at 3.) The MDL Court subsequently allowed claimants' attorneys, including the CAC, to comment on the proposed Q&A's given that "the Claims Resolution Procedures in the Amended Joint Plan of Dow Corning provide that disease claims shall be processed in substantially the same manner in which claims were processed in the MDL proceedings." (*See id.* (citing SFA § 4.03(a)); *see also* Record Entry No. 327-3 Ex. 2, Bryan Decl. at 2.). In its amicus submission to the MDL Court, the CAC acknowledged that the "proposed Q&A's . . . could have a direct impact on processing of disease claims in the Dow Corning case, specifically Q&A's

regarding the disputed Disability A issue . . . ." (Record Entry No. 299-3 Ex. 2, CAC Amicus Submission at 3-4.)

The MDL Court approved the proposed Q&A's on November 8, 2005, consistent with its 1997 ruling that Level A "total disability" applies to claimants who can "perform few or none of [their] duties of both vocation and self care":

> Q2-1 What is functional disability level "A"?
>
> A. The settlement defines "A" functional disability as follows: "Death or total disability resulting from the compensable condition. A claimant will be considered totally disabled if she demonstrates a functional capacity adequate to perform none or only a few of the usual duties or activities of vocation or self care."
>
> Q2-2 What does total disability mean?
>
> A. Total disability is an ability to perform few or none of your duties of both vocation and self care.
>
> * * *
>
> Q2-5 My doctor said I am totally disabled from my job, why didn't you approve me for "A" disability?
>
> A. Level "A" disability pertains to both vocation and self-care. To qualify for Level "A", you must demonstrate disability in both areas.

(Record Entry No. 299-2 Ex. 1, MDL Order 27O, attachment at 2-3 (Nov. 8, 2005).)

After this ruling, claimants' counsel asked the MDL Court to reconsider its decision, again arguing that either vocational "or" self-care disability alone should merit Disability Level A status and that Judge Pointer's 1997 order was "contrary to the plain language of the settlement agreement." (*See* Record Entry No. 327-2

Ex. 1, Claimants' Mot. for Reconsideration at 4.) Again, claimants recognized that the MDL Court's 1997 ruling was dispositive in the Dow Corning proceedings because "[i]f the MDL facility determines that a claim should be approved at disability Level 'A,' the Dow facility, generally, is to reach the same conclusion. . . . The MDL claims office is now, after 1997, requiring disability in vocation and self-care, so is the Dow Office." (*Id.* at 5-6, *see* Annex A § 7.01(a).) The MDL Court declined to reconsider its ruling, and the guidelines remained unchanged. (Docket Entry No. 3576, Order, MDL-926 (Sept. 19, 2006).)

V. The District Court's Ruling Rejecting The MDL Court's Articulation Of Its Own Guidelines.

Despite failing to persuade the MDL Court to amend its guidelines, claimants continued on a separate track to seek relief from the district court presiding over the Dow Corning proceedings. The CAC acknowledged that the MDL was requiring both vocational and self-care disability as of February 2003,[10] the date the Plan authorized the SF-DCT to rely on. Nevertheless, the CAC argued that the SF-DCT was required to apply the MDL-926 standards in place before the MDL Court's *1997* ruling, which the CAC alleged—contrary to the MDL Court's express finding—were different than those applied in later years. (*See* Record

[10] Record Entry No. 76, CAC Mot. for Disclosure of Substantive Criteria at 10 (acknowledging that the requirement of both vocational and self-care disability (Continued…)

Entry No. 299, CAC Supp. Mot. at 1.) Accordingly, the CAC asked Judge Hood to rule that claimants can satisfy Disability A if they are impaired in their vocational ability only, even if their normal daily activities are unaffected.

On June 20, 2006, the district court heard oral argument on various motions that had been filed regarding Disability Level A. Although the hearing had not been set as an evidentiary one and no discovery had been taken, the CAC filed supplemental pleadings the day before oral argument containing a June 9, 2006 memorandum[11] of the SF-DCT Claims Administrator purporting to transmit recollections of some non-decision-making MDL Claims Office employees regarding Disability A practices prior to Judge Pointer's 1997 ruling. Dow Corning objected to the memorandum and other extrinsic evidence as immaterial because there was no dispute that the Plan authorized the SF-DCT Claims Administrator to rely on the procedures and guidelines in place as of February 2003—not guidelines allegedly in effect prior to 1997—and the guidelines as of 2003 unquestionably required both vocational and self-care disability. Moreover, Dow Corning argued that the plain language of the guidelines governed, not unreliable hearsay generated for purposes of the litigation based on second- and

"apparently . . . applied to disease claims in the MDL Post 1998").

[11] A typographical error suggested the memo was dated June 9, 2005, but all parties agree that the actual date was June 9, 2006.

third-hand impressions years after the fact. (*See* Record Entry Nos. 408-410.) Dow Corning asked the district court to strike these and other improper submissions, or at least to hold an evidentiary hearing if the CAC's late "evidence" were allowed. (*See* Record Entry No. 434, DCC Motion to Strike at 6; Record Entry No. 458, DCC Reply; Record Entry No. 410, DCC Response at 2 & n.1; Record Entry No. 409, DCC Objection.) Nearly three years later, the district court denied Dow Corning's motion as "moot" and issued its ruling.

The district court acknowledged that under the Plan, the guidelines *as of February 2003* governed. Quoting the language of Section 4.03, the Court noted: "The Claims Administrator is . . . expressly authorized to rely on procedures and interpretation 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." (Record Entry No. 672, 6/10/09 Opinion at 6-7.) Likewise, the district court acknowledged that as early as 1997—nearly six years before the Plan's operative date of 2003—Judge Pointer had ruled that the MDL guidelines required claimants to demonstrate both vocational and self-care disability to establish "total disability" under Disability Level A. (*Id.* at 11-12.) Nonetheless, the district court ordered the SF-DCT Claims Administrator to disregard Judge Pointer's ruling, and various other MDL Court rulings and interpretations. The district court did not attempt to reconcile its holding with

Section 4.03's language expressly authorizing the Claims Administrator to rely on such rulings. (*See* Record Entry No. 701 Ex. C, SFA § 4.03(a).)

Having concluded that the MDL Court's consistent interpretations of its own guidelines were not binding, the district court proceeded to provide its own interpretation. While it found that the guidelines were "unambiguous" and that it "need not review the extrinsic evidence" submitted, the court nonetheless proceeded to cite such material in its opinion, including "various documents" that purportedly indicated that Judge Pointer's 1997 ruling was inconsistent with the way "disease claims had been processed in 1996 and 1997." (Record Entry No. 672, 6/10/09 Opinion at 11-12.)

The district court held that vocational and self-care disability are not both required to establish "total disability" under Disability Level A because the Disability A definition used the term "or" rather than "and." (*Id.* at 11.) It found that "[t]his language is contrasted to the language of Levels B and C which require an impact on vocation, avocation *and* self-care." (*Id.* at 5.) Thus, the court held that Levels B and C contain an additional requirement that is absent from the more stringent "total disability" of Level A—in other words, that claimants must demonstrate both vocational and self-care disability to qualify for partial disability Levels B and C, but do not need to make such a demonstration to qualify for the more stringent Level A status and larger Level A payments.

The district court did not reconcile its interpretation with Disability Level A's requirement that a claimant demonstrate that she is unable to perform "none" (or only a few) of the enumerated activities, "based on the cumulative effect of the symptoms" on her various activities. Nor did it reconcile its ruling with the three-tiered structure of the disability criteria, the highest of which, Disability Level A, is reserved for claimants who have died or suffered "total" or "100%" disability. (*See* Record Entry No. 701 Ex. D, SFA Annex A at A-94.)

STANDARD OF REVIEW

The standards for review of the issues raised in this appeal are as follows:

Whether the district court exceeded its authority under the Plan is reviewed *de novo*. While a bankruptcy court's order interpreting a confirmed plan is normally reviewed for an abuse of discretion,[12] this standard does not apply where, as here, the district court found that the Plan was unambiguous and the appeal relates to the lower court's legal conclusions. In such cases, this Court "review[s] 'the bankruptcy court's legal conclusions *de novo*.'" *In re Eagle-Picher Indus.,*

[12] *In re Dow Corning Corp.*, 456 F.3d 668, 675-76 (6th Cir. 2006). A court abuses its discretion when, among other things, it relies on clearly erroneous findings of fact, improperly applies the law, or uses an erroneous legal standard. *Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224, 237 (6th Cir. 2003); *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1378 (6th Cir. 1995). Accordingly, even if the Court concludes that the standard is abuse of discretion, the district court's ruling here would require reversal even under this more deferential standard. *See infra* Argument § I.

Inc., 447 F.3d 461, 464 (6th Cir. 2006). *See also In re Shenango Group, Inc.*, 501 F.3d 338 (3d Cir. 2007) (review of plan interpretation decision is *de novo* "if the issue being reviewed presents only a question of law"); *In re Nat'l Gypsum Co.*, 219 F.3d 478, 484, 489 (5th Cir. 2000) (appellate court "review[s] *de novo* . . . purely legal issues" decided by bankruptcy court interpreting a plan, and accordingly court will "not defer to the bankruptcy court's interpretation of . . . unambiguous text [in plan and confirmation order]").[13]

More generally, the rationale for applying the abuse of discretion standard is inapplicable here. Judge Hood did not sit as the bankruptcy court during the Plan confirmation hearings and did not issue the confirmation order (Judge Spector did), thus the district court in this case was not interpreting its "own order." *In re Weber*, 25 F.3d 413, 416 (7th Cir. 1994). As this Court recently held, while a

[13] *See generally Performance Unlimited*, 52 F.3d at 1378 (in applying abuse of discretion standard "legal conclusions are given *de novo* review"); *Vision Info. Servs., LLC. v. C.I.R.*, 419 F.3d 554, 558 (6th Cir. 2005) (reviewing Tax Court's interpretation of agreement *de novo* where language found to be unambiguous); *Heights Driving School, Inc. v. Top Driver, Inc.*, 51 Fed. Appx. 932, 935 (6th Cir. 2002) (review of district court's interpretation of contract governed by New York law was "*de novo*, as long as the contract is 'plain and unambiguous'" because, under New York law, "'the construction of a plain and unambiguous contract is for the court to pass on,'" *quoting West, Weir & Bartel, Inc. v. Mary Carter Paint Co.*, 255 N.E.2d 709, 711 (N.Y. 1969)); *Bunch v. Hodel*, 793 F.2d 129, 132 (6th Cir. 1986) ("whether the terms of the lease are ambiguous is a question of law for this Court to determine . . . , and a *de novo* standard of review will apply to the district court's holding concerning the unambiguous nature of the lease").

bankruptcy court's interpretation of its own plan and confirmation order may be reviewed for an abuse of discretion, "[i]n a bankruptcy case on appeal from a district court, [the Court] owe[s] no special deference to the district court's decision." *See In re Eagle-Picher*, 447 F.3d at 463.

Whether the district court misinterpreted the MDL guidelines is likewise reviewed *de novo*. *See Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 373 (6th Cir. 1998) (district court's order interpreting another court's consent judgment reviewed *de novo*); *United States v. Spallone*, 399 F.3d 415, 423 (2d Cir. 2005) (same). Indeed, in discerning the correct interpretation of the guidelines, the Court should defer to the contrary interpretation adopted by the MDL Court, which was interpreting its own order. *See, e.g., Huguley v. General Motors Corp.*, 999 F.2d 142, 146 (6th Cir. 1993) ("Few persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it.").

Whether the district court erred in relying on extrinsic evidence in interpreting language it deemed unambiguous is a legal issue that is reviewed *de novo. See United States v. Donovan*, 348 F.3d 509, 510, 512 (6th Cir. 2003) (reviewing district court's decision *de novo* and finding that "it was error for [court] to go on and attempt to discern the intent of the parties" having "first found that the terms of the contract were clear and unambiguous"). Whether the district

court erred in relying on inadmissible and unreliable hearsay is also reviewed *de novo*. *Fisher v. City of Memphis*, 234 F.3d 312, 316 (6th Cir. 2000) (the court "generally reviews evidentiary rulings under an abuse of discretion standard" but reviews "de novo a district court's decision to admit or exclude evidence on hearsay grounds").

Finally, whether the district court erred in denying Dow Corning's request for an evidentiary hearing is reviewed for an abuse of discretion. *See Gonzales v. Galvin*, 151 F.3d 526, 534 (6th Cir. 1998).

SUMMARY OF ARGUMENT

The district court's order directing the SF-DCT Claims Administrator to disregard the MDL guidelines should be reversed on multiple grounds.

First, the district court had no authority legally or under Dow Corning's Plan, to require the SF-DCT Claims Administrator to disregard the MDL Court's articulation and interpretation of its own guidelines. Section 4.03 of the SFA specifically states that the Claims Administrator is authorized to rely on the guidelines as of February 2003 and need not change them. It is undisputed that as of February 2003 those guidelines required proof of both vocational and self-care disability to meet the stringent requirements of "total disability" under Disability Level A. The district court's order directing the SF-DCT Claims Administrator to

change its guidelines from the definitions in effect as of 2003 violates the Plan and the court's obligation to enforce the Plan as written.

Second, the district court misinterpreted the plain language of the Disability Level A definition set forth in the MDL Revised Settlement Program and the identical Plan terms adopting it. To qualify under that definition, a claimant must demonstrate that she can perform "none" (or only a few) of her usual activities of vocation or self-care. The plain meaning of the term "none" is "not one" or "not any." Accordingly, a Disability A claimant must demonstrate that she can perform none (or only a few) of her usual vocational activities and none (or only a few) of her usual self-care activities, *i.e.*, she must show total disability in both areas. The district court's more relaxed interpretation would allow a Disability A recovery for work disability alone or self-care disability alone—standing the Plan on its head by allowing claimants to recover under the most restrictive category, Disability A, on a claim that would be *denied* under the less stringent standards and lower compensation amounts for Disability Levels B and C. Such an interpretation makes no sense.

Third, the district court erred by relying on immaterial and inadmissible extrinsic evidence regarding the practice of the MDL Claims Office before Judge Pointer's 1997 ruling. Such evidence is immaterial because there is no dispute that as of February 2003—the date specified in the Plan as the relevant date for which

guidelines govern—the guidelines required both self-care and vocational disability. Any "evidence" purporting to show otherwise cannot countermand the express, contemporaneous ruling in 1997 by the MDL Court, which found that the MDL Claims Office had consistently required proof of both vocational and self-care disability.

ARGUMENT

I. The District Court Exceeded Its Authority When It Ordered The Claims Administrator To Change Its Guidelines And Disregard The MDL Court's Rulings.

The District Court erred when it ordered the Claims Administrator to disregard the MDL Court's rulings interpreting its own disability criteria, instead of enforcing the Plan as written. *See In re Dow Corning Corp.*, 456 F.3d 668, 676 (6th Cir. 2006) (in interpreting a confirmed plan, courts must enforce terms as written as it would with a contract, since the plan is effectively a contract between the debtor and its creditors).[14]

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[14] State law governs those interpretations. *In re Dow Corning*, 456 F.3d at 676. Here, the Plan and related documents "shall be governed by and construed in accordance with the laws of the State of New York and applicable federal law." (Record Entry No. 701 Ex. B, Plan § 6.13.)

A. The Plan Authorizes And Directs The Claims Administrator To Follow The Guidelines In Effect As Of February 2003.

Under Section 4.03(a) of the Plan's Settlement Facility Agreement (SFA), the SF-DCT is expressly authorized to rely on interpretations contained in its 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) (emphasis added).)

Section 4.03 further states that "[i]t is expressly intended that the Settling Breast Implant Claims shall be processed in substantially the same manner in which claims filed with the MDL 926 Claims Office under the Revised Settlement Program were processed . . . ." (*Id.* § 4.03) Critically, the Revised Settlement Program is defined by the Plan as including "*subsequent [i.e., post-December 1995] Orders of the MDL 926 Court* or procedures of the MDL 926 Claims Office" (*id.* § 1.09 (emphasis added)). Thus, the Plan mandates that claims "shall be processed" in substantially the same manner as under the MDL settlement program, *which by definition includes the post-1995 orders of the MDL Court* such as Judge Pointer's 1997 order.

Other provisions in the Plan documents reiterate this directive. For example, SFA § 5.04(d) directs the SF-DCT to rely on interpretations in effect "as of February 2003," and states that the SF-DCT Claims Administrator "shall institute mechanisms" to assure that the SF-DCT applies "all procedures and claims-

processing protocols applied by the MDL Claims Administrator as interpreted by the Settlement Facility as of February 2003 with respect to the Revised Settlement Program . . . ." (*Id.* § 5.04(d).)[15]

It is undisputed that "as of February 2003," the MDL guidelines and the SF-DCT Claims Administrator's guidelines adopted from the MDL required proof of disability with respect to both vocational and self-care activities to satisfy Disability Level A.[16] A consistent record of MDL Court orders and rulings, in effect as of 2003, so found. Most notably, this was made clear by Judge Pointer's 1997 order, which was reaffirmed by MDL Order 27O in 2005 and has continued to have the force of law at all times since 1997. So did the 1998 ruling of MDL appeals judge Frank Andrews, who observed that the MDL court had "consistently ruled" that both self-care and vocational disability were required. (Record Entry No. 76 Ex. 10, 11/29/04 Claims Administrator email.[17] In ordering the Claims Administrator to disregard these guidelines, and their consistent interpretations by

[15] *See also* SFA Annex A, Schedule II.A, stating that the MDL guidelines are "intended to be applied consistently with the Revised Settlement Program *and interpretations thereof*." (Record Entry No. 701 Ex. D, Annex A Schedule II.A, at A-87 (emphasis added).)

[16] *See, e.g.,* Record Entry No. 76, CAC Mot. at 10 (acknowledging that Judge Pointer's ruling "apparently . . . applied to disease claims in the MDL Post 1998").

the MDL Claims Office and MDL Court through 2003 (and beyond), the district court failed to enforce the Plan as written and exceeded its legal authority.

B. The Plan's Dispute Resolution Provision Underscores That The District Court Cannot Overturn Eligibility Criteria In Existence As Of February 2003.

Section 5.05 of the SFA further underscores that the district court lacks authority to overturn interpretations in existence as of February 2003. That provision lays out the mechanism for the SF-DCT Claims Administrator to receive input from the parties regarding eligibility criteria, and the mechanism for obtaining a resolution from the district court if a dispute arises. Section 5.05 specifically states that the Claims Administrator "shall obtain the consent of the Debtor's Representatives and Claimants' Advisory Committee regarding the interpretation of substantive eligibility criteria and the designation of categories of deficiencies in Claim submissions (*to the extent such interpretations and designations have not previously been 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 § 5.05 (emphasis added).) In the event of a dispute, "the Claims Administrator may determine the issue or apply to the District Court for consideration of the matter." (*Id.*)

Where, however, as here the specific interpretation *has* "previously been addressed as of February 2003" by the MDL Court, the Claims Administrator does

not need to seek the input of the parties regarding that interpretation. Moreover, the district court is not authorized to second-guess the MDL determination. Section 5.05 specifically states 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 10.6 [which authorizes Plan amendments with the express written consent of Dow Corning and the CAC]." (*Id.*, emphasis added.)

These provisions were incorporated into the Plan documents so that the rights of Dow Corning and all interested claimants as of February 2003, when claim information was first disseminated, could not be modified by subsequent judicial interpretation. The district court's ruling here is in plain violation of this provision. By compelling the SF-DCT Claims Administrator to ignore the MDL Court's pre-2003 rulings and interpretations, the district court essentially made an impermissible Plan modification.[18]

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[18] The district court invoked a June 11, 2004 stipulation of the parties as a basis for its decision. However, nothing in that stipulation purports to amend or alter Section 5.05. To the contrary, it reiterates that "SFA § 5.05 provides that the Claims Administrator shall obtain the consent of the Debtor's Representatives and Claimants' Advisory Committee regarding the interpretation of substantive eligibility criteria and the designation of categories of deficiencies in Claim submissions (to the extent such interpretations and designations have not previously been addressed by the Initial MDL 926 Claims Administrator in connection with the Revised Settlement Program)." (Doc. No. 53 6/11/04 Stip. ¶ 1.01(a).) Moreover, it also reiterates that "[t]he provision prohibits the use of

(Continued…)

C. The Plan Also Gives The Claims Administrator Discretion To Follow MDL Court Interpretations Subsequent to Plan Confirmation.

In addition to authorizing the SF-DCT to rely on guidelines in effect as of 2003, the Plan further vests the SF-DCT in SFA § 4.03(a) with the "discretion to modify [its] procedures to conform to procedures or interpretations implemented by the MDL 926 Claims Office any time after the Confirmation Date"—which was November 30, 1999.[19] The record is clear that the MDL Claims Office consistently interpreted Disability A as requiring both vocational and self-care disability, from the November 30, 1999 Confirmation Date to the present (since Judge Pointer's 1997 order remained in effect throughout that time). Moreover, that interpretation was reaffirmed in the MDL Court's 2005 ruling approving Q&A's confirming that Level A requires that claimants "perform few or none of [their] duties of both vocation and self care." (Record Entry No. 299 Ex. 1, MDL Order 27O, attachment at 4-5 (Nov. 8, 2005).

The district court acknowledged that the MDL Court issued "subsequent Questions and Answers" in 2005 confirming that both vocational and self-care

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the appeals process or other processes to effect a modification of any substantive eligibility criteria specified in SFA or in Annex A, except as expressly provided in SFA §§ 5.05 and 5.06." (*Id.* ¶ 1.01(c).)

[19] Record Entry No. 701 Ex. C, SFA § 4.03; *see also id.* at § 1.09 and Record Entry No. 701, Ex. D, at A-87.

disability are required, but stated that "any subsequent Questions and Answers entered by the MDL-926 subsequent to February 2003 are not binding on the SF-DCT." (Record Entry No. 672, 6/10/09 Opinion at 12-13.) The district court never explained how its order *requiring* the SF-DCT Claims Administrator to ignore such subsequent interpretations was consistent with the Plan's express language in SFA Section 4.03(a) giving the Claims Administrator the discretion and authority to rely upon them.

D. The MDL Court's Rulings Were Not Shown The Deference They Deserve.

The district court erred by failing to give the MDL Court's interpretation of its own guidelines the "great deference" to which it was entitled. *Kendrick v. Bland*, 931 F.2d 421, 423 (6th Cir. 1991) ("The District Court's interpretation of its own order is certainly entitled to great deference."). The MDL Court approved the Revised Settlement Program terms and was charged with administering them and overseeing the MDL Claims Office. Judge Pointer's ruling about the meaning of the guidelines, and his finding that the MDL Claims Office had required both vocational and self-care disability before September 1997, were informed by his own experience with the guidelines and his contemporaneous observations. The MDL Court, not the district court here, was in the best position to know the meaning of the guidelines that the MDL Court itself had initially reviewed and approved. *See Huguley v. General Motors Corp.*, 999 F.2d 142, 146 (6th Cir.

1993) ("Few persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it."). Nevertheless, the district court gave the MDL Court rulings no deference, and indeed rejected them outright.

II. The Plain Language Of The Disability A Definition Requires Claimants To Demonstrate Total Disability With Respect To Both Vocation And Self-Care.

The Disability Level A guideline states: "An individual will be considered totally disabled if she demonstrates a functional capacity adequate to consistently perform none or only few of the usual duties or activities of vocation or self-care." (Record Entry No. 701 Ex. D, SFA Annex A, at A-94 & A-101.) "Total disability" cannot be established by focusing with blinders on just one type of activity, such as work disability alone. In accord with the prior MDL guidelines, disability in vocational and self-care activities both must be shown. This meaning is supported by the plain language of the MDL definition, by the interpretations and pronouncements of the MDL Claims Office, by the MDL Court's correct and continuous interpretations of the guidelines, and by the structure and fundamental purpose of the three-tiered disability criteria, of which Disability A is the most serious and strictly defined.

A. The Plain Language Of The Disability A Definition Demonstrates That The MDL Court's Interpretation Was Correct.

As Judge Pointer observed in his 1997 ruling, a classification of "total disability" under Disability Level A could not be "based solely on inability to perform vocational activities (i.e., without regard to performing self-care activities)." (Record Entry No. 76, Ex. 7, 9/30/97 Order at 1.) Rather, the language of that provision, and in particular the use of the term "none," required "that there be limitations with respect to both self-care activities and vocational activities." (*Id.*)[20]

The district court erred in this case by overlooking the significance of the word "none" and focusing too narrowly on the use of "and" vs. "or" in the phrase "vocation, avocation *and* self-care" from the definition of Disability B and C, as compared to the phrase "vocation *or* self-care" from the definition of Disability A. (Emphases added.) If the definitions of Disability A, B and C were otherwise identical, the "and" vs. "or" distinction might be significant. But the district court neglected that the entire syntax of the Disability A definition is the flipside of the

[20] As Judge Pointer found, inclusion of the phrase "or only a few" did not change this fundamental meaning. Rather, inclusion of that phrase was merely intended "to provide some relaxation from that standard, by enabling a determination of total disability even though the person might be able to perform a few of the vocation or self-care activities—and not . . . to dispense with the requirement that there be limitations with respect to both self-care activities and vocational activities." (*Id.*)

syntax of the Disability B and C definitions, because the Disability A definition is phrased in the negative—specifically, and critically, the Disability A definition starts with the word "none."

The term "none" has a well-settled plain meaning. It means "not one" or "not any": 1. No one; not one; nobody: None dared to do it. 2. Not any: None of my classmates survived the war. 3. No part; not any: none of your business. AMERICAN HERITAGE DICTIONARY (4th ed. 2000).[21] When text begins with the word "none" (or a similar word such as "neither"), the use of the word "or" in a subsequent list of multiple items refers to *all* of those items, in the conjunctive and not in the disjunctive. For example, if a doctor tells a gymnast with a broken leg that, in order to properly heal, she can perform "none of her usual activities of running or jumping," it means the patient should not run *and* should not jump. The doctor has imposed a "total" prohibition on both activities. It would be absurd to say that by using the word "or"—following the predicate "none" at the start of the sentence—the doctor intended to tell the patient that it is okay to run as long as she does not jump and likewise okay to jump as long as she does not run.

Various grammar and usage texts agree. For example:

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[21] *See also* MERRIAM-WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 804 (1989) (defining "none" as "not any," "not one," and "not any such thing or person."); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1130 (1987) (defining "none" as "not any," "not one," and "to no extent; in no way; not at all").

- Strunk & White points out that the phrase "He cannot eat or sleep" means he cannot eat *and* he cannot sleep. WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 53-54 (4th ed. 2000).

- Bernstein points out that the sentence "He would not testify nor even appear in court" means that he would not testify *and* he would not appear in court. THEODORE M. BERNSTEIN, THE CAREFUL WRITER 290 (1965).

Many cases illustrate this accepted English usage. For example:

- In *Daly v. Kochanowicz*, 884 N.Y.S.2d 144, 149 (N.Y. App. Div. 2009), a contract stated that "[e]xcept as otherwise expressly set forth in this contract, *none* of Seller's covenants, representations, warranties *or* other obligations contained in this Contract shall survive Closing." (emphasis added.) It was clear that the Seller's covenants, representations, warranties *and* other obligations all did not survive closing.[22]

- In *In re Construction Alternatives, Inc.*, 2 F.3d 670, 676 (6th Cir. 1993) the court found that "*none* of the unpaid suppliers *or* subcontractors filed a mechanics lien" (emphases added)—meaning that the unpaid suppliers *and* the unpaid subcontractors had both failed to file mechanics liens.

- In *Hollenbach v. Barnhart*, 71 F. App'x 813, 817-818 (10th Cir. 2003) the court found that "*none* of claimant's x-rays, CT scans, *or* MRI findings demonstrated multiple herniations" (emphases added)—meaning that the x-ray, CT scans *and* MRI findings had all failed to demonstrate herniations.

- In *Cromeens, Holloman, Sibert, Inc. v. AB Volvo*, 349 F.3d 376, 391 (7th Cir. 2003), the court found that "*none* of the plaintiffs *or* defendants are citizens of Illinois" (emphases added)—meaning that the plaintiffs *and* the defendants were both citizens of other states.

Here, the Disability Level A standard requires a claimant to demonstrate that she can perform "none" of the enumerated activities. In other words, the claimant

[22] *See also* WILLISTON ON CONTRACTS § 32:12 (4th ed.) (the word "or" is frequently construed to read "and" where such a construction is "necessary in context.")

must demonstrate that she cannot perform vocational activities *and* cannot perform self-care activities (or can perform only a few such activities). The district court's ruling to the contrary simply reads the word "none" out of the guidelines. In doing so, the court violated settled principles of construction that require that the court construe Plan terms as a whole and give every term meaning. *See, e.g., In re Celotex Corp.*, 487 F.3d 1320, 1333-34 (11th Cir. 2007) (holding that "Plan Documents must be construed as a whole, with each provision given reasonable meaning and effect," and rejecting interpretation that would be "inconsistent" with other provisions); *Diversified Energy, Inc. v. TVA*, 223 F.3d 328, 339 (6th Cir. 2000) ("Under settled principles of construction, this contract must be read as a whole so as to give meaning and effect to all of its provisions.").

The district court also ignored the immediately preceding language in the disability definition, which makes clear that the disability level classification is 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, SFA Annex at A-94 & A-101, emphasis added.) The requirement that disability must be shown by the *cumulative* effect of symptoms across multiple activities, as opposed to the effect on one activity in isolation, confirms that both vocational *and* self-care disability are needed. But the district court completely ignored the "cumulative" language despite its obligation to construe Plan terms as

a whole. *See In re Celotex Corp.*, 487 F.3d at 1333-34; *Diversified Energy*, 223 F.3d at 339.

B. Additional Plan Provisions Confirm That "Disability A" Claimants Must Demonstrate Total Disability With Respect To Both Vocation And Self-Care.

In addition to the Disability Level A definition itself, various Plan provisions further demonstrate that the district court misinterpreted the applicable MDL guidelines. Schedule II to Annex A of the SFA contains the "general guidelines" that were "adopted from and are intended to be applied consistently with the Revised Settlement Program and interpretations thereof." (Record Entry No. 701-6 Ex. D, SFA Annex A, Schedule II.A, at A-87.) Schedule II describes Disability Level A definition as a "strict definition of total disability" and "a difficult one to meet." (*Id.* at A-89; *see also id.* § 7.06(d)(16), at A-50 to A-51 (same).) Schedule II further states that, to qualify for Disability Level A, "[a] Claimant must be unable to do any of her normal activities or only be able to do a very few of them." (*Id.* at A-51 and A-89.) The insufficiency of showing vocational disability alone is demonstrated by the further statement that submissions must contain "enough description of [claimant's] *daily life and limitations* to allow a reader to know that she does indeed meet this strict definition of total disability." (*Id.* (emphasis added); *see also id.* § 7.06(d)(16), at A-50 to A-51 (same).)

C. The District Court's Ruling Is Inconsistent With The Entire Structure Of The MDL Criteria And Simply Makes No Sense.

Under the district court's interpretation, a claimant who works full time, but shows self-care disabilities, would be deemed "totally disabled" and eligible for Disability Level A status (and a person who can perform all self-care activities but shows a work disability would likewise qualify). Such a construct would render Disability Levels B and C meaningless. If claimants could satisfy Disability Level A by demonstrating vocational disability or self-care disability alone, a claimant could be classified in Disability Level A despite failing to qualify for Disability Level B or C because she does not suffer impairment with respect to both areas of activity. (*See* Record Entry No. 701 Ex. D, SFA Annex A Schedule II.A, at A-94 & A-101.)

Such an outcome is inconsistent with established principles of construction, which require that that the guidelines be read "as a whole" and that each provision be given meaning. *See, e.g., In re Celotex Corp.*, 487 F.3d at 1333-34. It is also inconsistent with the rule of construction that a contract should be interpreted to have a rational and reasonable meaning, and not in a way that would produce absurd results. *See Kellogg Co. v. Sabhlok*, 471 F.3d 629, 636 (6th Cir. 2006) ("Contracts must be construed consistent with common sense and in a manner that avoids absurd results."); *In re Lipper Holdings, LLC*, 766 N.Y.S.2d 561, 562 (N.Y.

App. Div. 2003) ("A contract should not be interpreted to produce a result that is absurd . . .").

III. The District Court Made Procedural Errors, Including Relying On Immaterial And Inadmissible Extrinsic Evidence.

The district court rejected the MDL Court's express ruling and the plain language of the MDL guidelines, citing "various documents" submitted at the eleventh hour by claimants' counsel regarding alleged practices of the MDL Claims Office prior to Judge Pointer's 1997 ruling. (*See* Record Entry No. 672, 6/10/09 Opinion at 12.)[23] The court's reliance on this "evidence" and failure to conduct an evidentiary hearing that would have completed the record, *if* extrinsic evidence were to be considered, is reversible error.

A. The Extrinsic Evidence Is Immaterial.

While claimants sought to introduce this evidence to suggest that the MDL Claims Office did not require proof of vocational and self-care disability before Judge Pointer's 1997 ruling, the pre-1997 practice of the MDL Claims Office is immaterial. First, the Plan expressly authorizes the use of the guidelines *as of*

[23] While it is not entirely clear which documents the district court relied upon, the CAC submitted: 1) unsworn statements of counsel regarding the practices of the SF-DCT and MDL-926 Claims Office; 2) memoranda of the SF-DCT Claims Administrator containing hearsay statements regarding the MDL claims-processing practices of a decade earlier; 3) self-selected excerpts from a handful of claims processed by the SF-DCT; and 4) unsworn letters from the current MDL Claims Office. (*See* Record Entry 416, 6/29/06 CAC Reply.)

February 2003, and it is undisputed that the guidelines at that time required both demonstrations. Second, the Plan expressly adopts all orders interpreting the MDL Revised Settlement Program language. Thus, the Plan requires the application of the standard set forth in the MDL Court's 1997 order.

Indeed, the extrinsic evidence itself demonstrates that the pre-1997 practice is not germane. For example, the memoranda from the Claims Administrator confirm Dow Corning's understanding that the Plan requires the Claims Administrator to use the MDL guidelines as of February 2003: "[Section 4.03(a)] mandates the [SF-DCT] Claims Administrator to rely on the processing guidelines compiled by the MDL Claims Administrator *as of 2003*, and gives the SF-DCT Claims Administrator the discretion to modify SF-DCT claims processing procedures or interpretations to conform to such MDL modifications after 2003." (Record Entry No. 408, 6/09/06 Mem. at 1, emphasis added.) Likewise, the Claims Administrator confirmed that, by "the first quarter of 1998," the MDL Claims Office required disability with respect to both vocational and self-care activities and that in 2002, "when the SF-DCT was formulating claim review procedures in accordance with the practices of the MDL," this was the standard "that was communicated to the SF-DCT." (*Id.* at 6-7.) Accordingly, any information regarding earlier MDL Claims Office practice is immaterial.

The court's reliance on this extrinsic evidence is particularly egregious given its express finding that the MDL guidelines were "unambiguous." (*See* Record Entry No. 672, 6/10/09 Opinion at 11.) Extrinsic evidence "cannot be considered" to overturn language that is "unambiguous." *See Winnett v. Caterpillar, Inc.*, 553 F.3d 1000, 1008 (6th Cir. 2009); *see also Sault Ste. Marie Tribe of Chippewa Indians v. Granholm*, 475 F.3d 805, 812 (6th Cir. 2007) ("Where a contract is unambiguous on its face, extrinsic evidence is inadmissible because no outside evidence can better evince the intent of the parties than the writing itself."). The district court's reliance upon such "evidence" constitutes reversible error.

B. The Extrinsic "Evidence" Regarding Pre-1997 MDL Claims Office Practice Is Refuted By Judge Pointer's Express, Contemporaneous Finding.

The CAC's contention that Judge Pointer's 1997 ruling effected a change in the MDL guidelines is refuted by the ruling itself, which expressly found that the MDL claims administrator had "consistently applied language respecting disability Level A" to require both vocational and self-care disability. (Record Entry No. 76, Ex. 7, 9/30/97 Order at 1.) That finding is supported by the guidance Q&A the MDL Claims Office issued in 1996, stating that to meet the "strict definition of total disability," claimants must submit evidence demonstrating disability in their "daily life and limitations" (*i.e.*, not just vocational disability). (Record Entry No.

137-2, Ex. A, RSP Def. Mem. at 10, quoting 7/3/96 Supplemental Questions and Answers.)

Claimants' counsel's contention that they had no knowledge of Judge Pointer's ruling is simply irrelevant. The Plan authorizes the SF-DCT Claims Administrator to rely on the MDL guidelines "as of February 2003," *regardless* of whether claimants or the CAC were aware of them. In any event, the record shows that Judge Pointer's ruling appeared contemporaneously on the MDL Court's docket and was served on all counsel of record in the MDL (including claimants' counsel),[24] and that in 2001 Dow Corning specifically communicated to both the Claims Administrator and the CAC its understanding that Judge Pointer's 1997 order governed and required disability with respect to both "vocation and self care." (Record Entry No. 434-3 Ex. A, Greenspan Memo to Claims Administrator (Nov. 19, 2001) at 1.)

[24] *See* Record Entry No. 137-2 Ex. A, RSP Defendants' Mem. at 2 ("Judge Pointer's Order of September 30, 1997 . . . was never a secret . . . . It was included in a group of appeal decisions by Judge Pointer, which state on their face that they were served by the Court on all parties on the Service List, plus the Claims Administrator, and the individual appellant or her attorney. We believe the Order has always been in the Court's docket."); *id.* at 11 (noting that the order "was entered in the docket on September 30, 1997, for case number CV-94-1158 and given the index number 1062" and anyone "could have read it at any time after it was entered in 1997").

C. The Extrinsic "Evidence" Regarding Pre-1997 MDL Claims Office Practice Was Inadmissible Hearsay.

In contrast to Judge Pointer's express finding, the "evidence" claimants submitted to the district court was inadmissible and unreliable hearsay generated for purposes of this litigation. Indeed, claimants themselves conceded that the key report they submitted on the eve of the hearing was *not* for evidentiary purposes. (Record Entry No. 430, 6/20/06 Tr. at 67 (acknowledgement of CAC that the June 9, 2006 Claims Administrator's memorandum "was never meant to be an evidentiary report").) That report was created by the SF-DCT Claims Administrator as a result of the current controversy and contained his "impressions" concerning historical MDL Claims Office practices almost a decade earlier based on after-the-fact conversations with MDL Claims Office personnel. (*See* Record Entry No. 434 Ex. B, Austern Aff. at 2.) This report is hearsay and the decade-old statements included within it are hearsay within hearsay. *See United States v. Payne*, 437 F.3d 540, 547 (6th Cir. 2006) ("In order to admit an out-of-court statement that is nested within another, Rule 805 requires that both statements be admissible."); *Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073, 1081 (6th Cir. 1999) ("Each level of hearsay must fall within an exception to Rule 801 to be admissible."); FED. R. EVID. 805 (hearsay within hearsay admissible only if "each part of the combined statements conforms with an exception to the hearsay rule").

The CAC's contention that the documents were "business records" fails because they were created as part of the present dispute,[25] not at or near the time of the events they purport to address (*i.e.,* the historical practices of the MDL Claims Office). *See United States v. Lemire*, 720 F.2d 1327, 1350 (D.C. Cir. 1983) (document prepared over a year after events occurred inadmissible as business record).[26]

The SF-DCT Claims Administrator acknowledged that his statements regarding MDL Claims Office past practice are not "suitable for introduction into

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[25] (*See* Record Entry No. 408, 6/9/06 Mem. at 1; Record Entry No. 434 Ex. B, Austern Aff. at 1-2.) Records prepared for use in litigation are generally not admissible under the business records exception because they are not made in the ordinary course of business. *See* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 803.08[1] (2006).

[26] In addition, the business records exception requires the "testimony of the custodian or other qualified witness" and expressly excludes any records where "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." FED. R. EVID. 803(6). No such testimony from anyone at the MDL Claims Office was provided. *See United States v. Brika*, 416 F.3d 514, 528-29 (6th Cir. 2005) (affirming exclusion of alleged business record for lack of foundation); *United States v. Laster*, 258 F.3d 525, 529 (6th Cir. 2001) (district court erred in admitting purported business records where testifying witness's only familiarity with recordkeeping system was few conversations with author of records). In any event, business record status cannot cure the problem of hearsay within hearsay regarding the alleged practices of the MDL Claims Office. The letters from claimants' counsel and the MDL Claims Office suffer from the same defects, containing unsworn statements regarding historical MDL practice that were generated for purpose of the current litigation. In addition, the law is clear that "[l]awyer[] statements and arguments are not evidence." *See Abela v. Martin*, 380 F.3d 915, 930 (6th Cir. 2004).

evidence." (Record Entry No. 410 Ex. 1, 6/19/06 Austern Statement at 1.) Rather, he merely sought to offer certain "impressions", recognizing that hearsay statements regarding events that occurred years ago are not the "best evidence of the Claims Office practices and guidelines." (Record Entry No. 434 Ex. B, Austern Aff. at 2-3.)[27]

The CAC's extrinsic "evidence" of alleged disparities in the rate of successful Disability A claims between the MDL Claims Office and the SF-DCT is not only hearsay but highly unreliable. There has been no showing that the MDL sample is the same group of claimants as the SF-DCT sample. Moreover, as the SF-DCT Claims Administrator observed, there are many reasons other than the particular issue in dispute here that a claim might be denied Disability Level A status: "with respect to the claims where one facility paid at a higher level than the other, comparisons are not simple, idiosyncratic guidelines sometimes come into play, and the raw data can be misleading." (*See* Record Entry No. 434 Ex. B,

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[27] This is particularly true given the SF-DCT Claims Administrator's acknowledgement that "it was not [my] purpose or intention to examine precisely how the [MDL] Claims Office processed claims, or for what reason" and he made "no attempt . . . to establish the empirical history of the Claims Office processing practices," much less conduct a "rigorous or due diligence review." (Record Entry No. 434 Ex. B, Austern Aff. at 2-3.) In particular, he did not have an opportunity to interview the initial MDL Claims Administrator, Ann Cochran, and the individuals he did speak to were offering "recollections of events 10 years ago" and "did not necessarily have the authority to issue final decisions." (Record Entry No. 410-2 Ex. 1, 6/19/06 Austern Confirmation at 1-2.)

Austern Aff. at 4.) The Claims Administrator also acknowledged that the figures he reported were not based on "a statistically significant sample of MDL Claims or a random sample of MDL Claims" and that any disparity was "not solely, or even primarily, attributable to different Disability Level A processing guidelines in the two facilities but, rather, reflects a number of other issues." (Record Entry No. 410-2 Ex. 1, 6/19/09 Austern Confirmation at 1.)

D. The District Court Improperly Accepted the CAC's Evidence Without Holding an Evidentiary Hearing.

Dow Corning believes no extrinsic evidence was necessary or appropriate to decide the issue before the district court. But once the court decided to accept the CAC's extrinsic evidence, it was error not to conduct an evidentiary hearing and thereby develop a full record. *See Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 552-53 (6th Cir. 2007) (evidentiary hearing required when there are disputed questions of fact).[28]

IV. The District Court's Ruling Threatens To Deplete Funds Available To Pay Other Claimants.

The issue raised here is significant, not only for Dow Corning but for thousands of other claimants who do not benefit from the district court's ruling and

[28] Nor was Dow Corning permitted any discovery. For example, Dow Corning did not have "the opportunity to depose the Claims Administrator" to further examine the basis for the statements in his memoranda. (Record Entry No. 409, Dow Corning Objection, at 2.)

would, Dow Corning believes, be prejudiced by it. Allowing the district court's order to stand would allow "total disability" payments to go to potentially thousands of claimants who suffer only vocational disability, but no disability in their normal daily activities of self-care, and would result in the SF-DCT making "tens of millions of dollars" of additional payments in the CAC's view. (*See* Record Entry No. 416, 6/29/06 CAC Reply at 16.) The amount is "likely to total $50-60 million" according to the CAC. (Record Entry No. 681, CAC Resp. at 5). The SF-DCT's ability to pay in full all Base Payments, which are ongoing and scheduled to continue until 2019, could be threatened. (Record Entry No. 676 Ex. A, Greenspan Aff. ¶ 29.) An estimated $200 million in Premium Payments, payable provided there are sufficient assets to make such payments after assuring payment of Base Payments and other obligations of the SF-DCT, could also be threatened. (Record Entry No. 676 Ex. A, Greenspan Aff. ¶¶ 26-29.)

Paying tens of millions of dollars of ineligible claims at Disability A rates could jeopardize all these payments, to the detriment of the majority of SF-DCT beneficiaries. Moreover, the court's ruling may lead other individuals to file new claims seeking Disability Level A payments. Such payments would further reduce the finite and capped amount of SF-DCT assets available to pay settlements.

CONCLUSION

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

November 5, 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 13,568 words.

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CERTIFICATE OF SERVICE

I certify that on November 5, 2009, I electronically filed a copy of the foregoing 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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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