Case No. 09-1827

In The United States Court of Appeals
for the Sixth Circuit

In re: SETTLEMENT FACILITY DOW CORNING TRUST

DOW CORNING CORPORATION,

Interested Party - Appellant,

v.

CLAIMANTS' ADVISORY COMMITTEE,

Interested Party - Appellee.

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

REPLY BRIEF OF APPELLANT DOW CORNING CORPORATION

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INTRODUCTION

There is no dispute that, under the express terms of the Plan, pre-petition personal injury claims based on a Dow Corning medical device must fit one of three options:

1. Breast Implant Settlement Option. This option, for which eligible disease claimants can recover up to $300,000, is limited to claimants who have "Breast Implants," defined in Section 1.17 of the Plan as "all silicone gel and saline-filled breast implants with silicone elastomer envelopes manufactured and either sold or otherwise distributed by the Debtor." These are the claims that overwhelmingly drove the Dow Corning bankruptcy and that constitute the vast majority of claims drawing against the capped, $1.95 billion settlement fund (net present value as of Effective Date).

2. Covered "Other Products." Although it focused primarily on breast implant liability, the Plan also addressed "Other Products," some of which were covered by a settlement option and some of which were not. Section 1.117 of the Plan defines "Other Products" as "metal, silicone or silicone-containing products" made by Dow Corning "for implant into humans, including but not limited to" five exemplary types of medical products and fluids, excluding only "Breast Implants" and raw materials supplied by Dow Corning to other manufacturers. "Other Products" claimants may recover up to $15,000 in settlement payments under the Plan, but only if they had one of 44 specified "Covered Other Products," a list that does not include tissue expanders.

3. Non-covered "Other Products." All remaining claims are for "Other Products" made by Dow Corning for human implantation that are neither Breast Implants nor one of the 44 enumerated Covered Other Products. Such products have no settlement option; their exclusive remedy is to sue the $400 million Dow Corning Litigation Facility created by the Plan.

The dispute in this appeal comes down to Dow Corning's contention that tissue expanders fall in the third category, versus the Claimants' Advisory Committee's ("CAC") contention that they are "Breast Implants." While the CAC

purports to ground its argument in the plain language of the Plan, in reality the CAC makes two end runs around that plain language. *First*, the CAC attempts to substitute different words into the definition, contending that tissue expanders qualify because they are a "medical product" intended for implantation in the breast (CAC Br. at 2, 15, 22, 27),[1] even though the Plan's controlling definition requires that a "Breast Implant" must in fact be a "breast implant," not merely a "medical product." *Second*, the CAC looks outside the Plan and invokes the MDL-926 Revised Settlement Program ("RSP"). But Section 4.03 of the Plan provides that the Plan's plain language governs over anything in the RSP. More fundamentally, as the district court specifically found, the RSP actually *supports* Dow Corning's contention that tissue expanders are not entitled to compensation as breast implants under the Plan. While certain other manufacturers' tissue expanders were designated "breast implants" under the RSP, it is undisputed that *Dow Corning* tissue expanders were treated differently and in fact were *not* considered breast implants under the RSP. As the district court acknowledged, "even under the RSP [Dow Corning] tissue expanders were not considered 'Breast Implants.'" (Op. at 9-10.)

[1] This brief abbreviates appellee CAC's Response Brief as "CAC Br."; Dow Corning's Opening Brief as "DCC Br."; the opinion below, Record Entry No. 673, 6/10/09 Opinion as "Op."; and Record Entry No. 700 Ex. B as the "Plan."

ARGUMENT

I. The Plan's Plain Language Defines Tissue Expanders As Non-Covered "Other Products" Excluded From Settlement Eligibility.

The CAC agrees that the plain language of Dow Corning's Plan should govern. (CAC Br. at 20.) But it fails to rebut Dow Corning's showing that the plain meaning of the term "breast implant" does not include "tissue expanders."

A. Claimants Have Not Refuted Dow Corning's Showing That The Plan Excludes Tissue Expanders From the Breast Implant Settlement Option.

The CAC agrees that the Plan limits eligibility for the breast implant settlement option to "Breast Implants," a defined term that turns on the meaning of the included term "breast implants" (lower case) and makes no specific reference to "tissue expanders." (DCC Br. at 11; Plan § 1.17.) The district court missed this fundamental point when it read the term "breast implant" out of this definition. Specifically, the court asserted that "there is no requirement that the product must be designated by DCC and others as [a] 'breast implant' in order to meet the 'Breast Implant' Plan definition"—before contradicting itself in the very next phrase by observing that the express language of the Plan's Breast Implant definition "does use the term 'breast implant.'" (Op. at 7; DCC Br. at 36-38.)

The CAC does not defend this erroneous reasoning; nor does it dispute Dow Corning's showing about the meaning and use of "breast implants" (lower case). Thus, the CAC does not dispute the district court's finding that the medical

community did not consider tissue expanders to be "breast implants." (DCC Br. at 7; Op. at 7.) It does not dispute that the FDA treated tissue expanders and breast implants as separate and distinct products, with separate designs, uses and functions. (DCC Br. at 3-4, 7-10, 21.) It does not dispute that Dow Corning never marketed its tissue expanders as "breast implants." (DCC Br. at 5, 7.) Nor does it dispute that no party ever asserted during Plan negotiations or the confirmation hearing that tissue expanders were "Breast Implants" entitled to compensation under the Plan's breast implant settlement option. (DCC Br. at 12.)

B. The Plan's Clear Terms Define Tissue Expanders As "Other Products" With No Settlement Option.

In contrast, the Plan's definition of "Other Products" specifically includes tissue expander products. The CAC's contention that tissue expanders must meet the Plan's definition of "Breast Implants" because tissue expanders are not included in the definition of "Other Products" (CAC Br. at 16, 24, 34) is refuted by the express terms of that definition:

> "Other Products" means metal, silicone or silicone-containing products, other than Breast Implants and raw materials used in the manufacture of a Non-Dow Corning Breast Implant or a Non-Dow Corning Implant, manufactured by the Debtor or any of its Joint Ventures or Subsidiaries for implant into humans, including, but not limited to: (a) reconstruction and aesthetic surgery products (including custom implants) such as facial components, nasal and chin implants, testicular and penile implants, or medical treatments, (b) orthopedic products such as for use in legs, hips, knees, ankles, wrists, hands, fingers, toes and wrists, (c) silicone temporomandibular joint (TMJ) implants using medical grade or HP sheeting, the Wilkes implant or Silastic Block, (d) medical products for use

> in the head, heart or eyes, and (e) fluids. The inclusion of fluids among Other Products is not an admission of any Dow Corning responsibility for, or the potential for Allowance of Claims relating to, silicone injections. (Plan § 1.117.)

Dow Corning tissue expanders meet all the elements of this definition: they are (1) "silicone-containing products," (2) "manufactured by the Debtor," (3) "for implant into humans," which do not fit the exclusions for Breast Implants or raw materials sold to other manufacturers.

The CAC's suggestion that tissue expanders are not "Other Products" because they are not one of the five exemplary Other Products (CAC Br. at 34) is meritless. The five examples cited in the "Other Products" definition are illustrative and non-exhaustive, as made clear by Section 1.117's statement that "Other Products" means Dow Corning silicone or metal implants "*including, but not limited to*" those examples. The "Other Products" exemplars, such as silicone TMJ jaw implants, small and large joint implants, and silicone fluid, were highlighted in the Plan confirmation process and Plan documents because, unlike tissue expanders, they had generated significant pre-petition lawsuits against Dow Corning (albeit not nearly as many as breast implants).

Nor are the scores of additional Dow Corning medical devices falling within the "Other Products" definition limited to "hard plastic silicone" products. (*See* CAC Br. at 10, 35.) Rather, they include a wide range of products made from Dow Corning silicone elastomer similar to that used in tissue expanders, such as brain

shunts and cranial implants, voice prostheses, gallbladder stents, spacer disks, fallopian implants, nerve caps/cuffs, shoulder and pectus implants, innumerable custom implants, scleral eye sponges, ear implants, as well as silicone fluids,[2] gel-filled testicular implants, and many other medical products. The definition of "Other Products" was expressly non-exhaustive because it was not necessary or desirable to identify tissue expanders and the multitude of additional "Other Products" by name.

In contrast, the subset of "Other Products" that are eligible for the settlement grid—"Covered Other Products"—is an exclusive list. It is limited to the 44 specific medical devices for which a "Covered Other Product" settlement option is expressly provided by the Plan. (DCC Br. at 30 n.16.) Tissue expanders are not on the "Covered Other Products" list; therefore they are a non-covered "Other Product." The CAC's suggestion that tissue expander claimants have no remedy under the Plan if they are a non-covered Other Product (CAC Br. at 35) is wrong. Their remedy under the Plan is the right to file suit against the DCC Litigation Facility, an entity created by the Plan and funded with up to $400 million to defend lawsuits brought by claimants who opted out of their settlement option or—as is

[2] The CAC's assertions about "illegal" silicone fluid injections are not germane to any issue before the Court. While some fluid injections may have been illegally administered, others were not. In any event, the Plan's treatment of this and other forms of silicone does not turn on the legality or illegality of the product's use, but rather on the Plan's definition and categorization of the silicone material or device.

the case for claimants who had tissue expanders, silicone fluid, custom pectoral implants, and myriad other Dow Corning non-covered "Other Products"—had no settlement option to begin with. (DCC Br. at 13 (citing *In re Dow Corning*, 244 B.R. 721, 730-31 (Bankr. E.D. Mich. 1999))).

In sum, the CAC's contention that the Plan and Implant Proof of Claim Form "contain[] no . . . category" that includes tissue expanders other than "breast implant" (CAC Br. at 11-12) is incorrect.[3] Both the Plan and the claim form provide an "Other Product" category applicable to tissue expanders and the host of additional "Other Products" that are not listed individually.

C. The Confirmation Proceedings Confirm That Tissue Expanders Are "Other Products"—Not "Breast Implants."

The CAC has misstated the record of the confirmation hearing, during which Dow Corning and the Tort Claimants Committee as co-Plan Proponents jointly introduced evidence that tissue expanders are non-covered "Other Products." While the CAC does not dispute that Dr. Dunbar's analysis expressly included tissue expanders among the "Other Products" that would not be covered under the Plan's Settlement Option for Breast Implants, and thus would be addressed only through the litigation option, it incorrectly asserts that the report was not admitted into evidence. (CAC Br. at 37.) The transcript of the confirmation hearings

[3] Moreover, the Proof of Claim form is of questionable relevance because it was used in connection with the claims bar date in 1997, prior to Plan approval in 1999.

confirms that it was. (6/29/99 Tr. at 150, 160-61, Record Entry No. 19685, *In re Dow Corning*, No. 95-20512 (admitting Dr. Dunbar's entire expert notebook); *see also* Record Entry No. 51 Ex. A., F. Dunbar, Analysis of Other Product Claims (June 23, 1999); DCC Br. at 33-34.)[4]

The CAC's suggestion that the Tort Claimants Committee had nothing to do with Dr. Dunbar's testimony (CAC Br. at 36) is likewise wrong. The bankruptcy court's decisions confirming the Plan specifically note that he was the *Plan Proponents'* expert; thus, his evidence was sponsored jointly by the Tort Claimants Committee and Dow Corning in support of the Joint Plan. *See In re Dow Corning Corp.*, 237 B.R. 364, 369 n.4 (Bankr. E.D. Mich. 1999) (Dunbar "was called to testify *by the Proponents* to establish that the $400 million Litigation Facility would be adequate." (emphasis added).); *In re Dow Corning Corp.*, 255 B.R. 445, 502 (Bankr. E.D. Mich. 2000) ("The Bankruptcy Court was very impressed by *the Proponents' witness* on this issue—Mr. Dunbar." (emphasis added)).

Moreover, the CAC acknowledges (and the district court found) that tissue expanders were not included in Dr. Dunbar's estimation of funds needed to fund the settlement program. (CAC Br. at 36; Op. at 10-11) Thus, the estimates used to

[4] The fact that the report had a boilerplate header stating "preliminary and unchecked" (*see* CAC Br. at 37) is irrelevant. Every page of Dr. Dunbar's final report that was jointly offered into evidence without objection contained this boilerplate legend.

establish the feasibility of the Plan expressly *excluded* tissue expanders from the "Breast Implant" category and expressly *included* them in the "Other Products" category. Contrary to the CAC's assertions, tissue expanders were specifically understood *not* to be breast implants.

D. The CAC Seeks To Import New Terms And Definitions In Lieu Of The Actual Definition Set Forth In The Plan.

Although purporting to base its arguments on the plain language of the Plan, the CAC in fact tries to evade the express terms of the Plan by coining new terms, attempting to substitute a new definition in place of the one actually found in the Plan, and otherwise rewriting the Plan's plain language.

First, the CAC coined a new term for tissue expanders: "tissue expander breast implants." But the term "tissue expander breast implants" does not appear in the definition of settlement-eligible "Breast Implants" in the Plan. Nor does it appear anywhere in the Plan documents, the Disclosure Statement, the confirmation hearing record, or any other record in the Dow Corning case. To Dow Corning's knowledge, the first and only time the new term "tissue expander breast implants" was ever used was in the CAC's response here, where it was used more than a dozen times. (*See*, *e.g.*, CAC Br. at 3-4, 6, 8, 12, 35, 38.) But simply calling a "tissue expander" a "tissue expander breast implant" over and over again in a brief does not transform a "tissue expander" into a "breast implant,"

particularly where the literal language of the Plan and the established common usage of those terms are to the contrary.[5]

Second, throughout its brief the CAC seeks to replace the key language of the definition—the requirement that a claimant must have a "breast implant"—with the broader and more general term, "medical product." (CAC Br. at 2, 15, 22, 27.) For example, the CAC asserts that "in a nutshell," the Plan's definition of "Breast Implant" means "all *medical products* manufactured by Dow Corning and intended for implantation in the breast consisting of a silicone elastomer filled with silicone gel or (like tissue expanders) saline solution." (CAC Br. at 2, emphasis added.) This is not a "nutshell"; it is a rewrite. Section 1.17 uses the term "breast implants" and makes no reference to the broader category of "medical products." (Plan § 1.17.) The term "medical products" is indeed used in the Plan—but in the definition of "Other Products" in Section 1.117, not in the Section 1.17 definition of "Breast Implants."

[5] Even the term "tissue expander" is absent from the Plan's provisions governing the breast implant settlement option for "Breast Implant" claimants in Classes 5, 6.1 and 6.2. While the CAC notes that the term is used in SFA Annex A (CAC Br. at 8, 11 n.5), it is only used in conjunction with "Exhibit G to the RSP," which lists various product designations for another manufacturer's products (CUI) "for purposes of the Revised Settlement Program." (SFA Annex A, at A-79; CAC Br. at 3 n.2.) Moreover, that discussion applies to a different, lower-paying settlement option, the Silicone Material Claimant Settlement Option for Class 7 claims, which relates to Dow Corning's supply of raw materials to other breast implant manufacturers.

Third, the CAC asserts without citation that tissue expanders are simply "a type of saline breast implant." (CAC Br. at 4; *see also id.* at 16, 28-29, 31.) But there is simply no place in the Plan documents, history of use, regulatory treatment or common understanding of terms' meanings where tissue expanders have ever been considered to be saline breast implants. A breast implant, whether gel- or saline-filled, is commonly understood to be "[a]n implant for cosmetic purposes to replace a breast that has been surgically removed." (WEBSTER'S DICTIONARY, *available at* http://www.websters-online-dictionary.org/br/breast_implant.html.) Tissue expanders are not implanted for "cosmetic purposes." Nor do they "replace a breast that has been surgically removed." They are altogether different, used on a temporary basis to "stretch the skin" for reconstructive surgery or to "repair skin defects or to facilitate wound closure." (*See* Op. at 7.)[6]

There are many distinctions between saline breast implants and tissue expanders. For example, the Plan's explantation benefit makes sense for breast implant recipients (including those with saline implants) because a certain number

[6] The CAC's repeated contention that Dow Corning's argument turns solely or primarily on the temporary nature of tissue expanders (CAC Br. at 2-4, 15, 20, 25-26) is wrong. Tissue expanders are fundamentally different from breast implants in a host of respects, only one of which is their transient presence in the body and their routine, expected removal after a few weeks. In any event, the fact that tissue expanders were always used on a short-term basis does not transform them into "Breast Implants," any more than the short-term use of any other Dow Corning medical device would turn that device into a "Breast Implant."

of such recipients may elect to have their implants removed—whether because a rupture occurs during daily living activities (causing either leakage or deflation), due to health concerns relating to silicone gel or elastomer, or for any other reason. In contrast, *all* tissue expander recipients get explantation as part and parcel of the procedure. It would make no sense to pay an explantation benefit for a device where explantation is an expected, intended, and routine procedure for every recipient.

E. The CAC's Remaining Arguments Are Contrary To The Plan's Plain Language.

The CAC's remaining arguments about the Plan likewise fail.

First, contrary to the CAC's assertion that the term "breast implant" must be given a "broad definition" because the Plan definition is "circular," the cases it cites do not so hold. (*See* CAC Br. at 21-22.) Rather, they hold that such terms must be interpreted according to their "ordinary meaning" (DCC Br. at 22), and as the district court acknowledged, the plain meaning of the term breast implant does not include "tissue expanders." (Op. at 7.)

Second, while the CAC makes much of the term "SILASTIC," that term is merely a brand name applied to myriad Dow Corning medical products, such as silicone tubing and drains, the vast majority of which were not breast implants. (*See* DCC Br. at 26-27, 38-39.) Use of the trade name SILASTIC thus confirms little more than that the product was made by Dow Corning.

The CAC uses backwards logic when it suggests that, because tissue expanders were marketed under the SILASTIC brand name, they were not "excluded" from the list of product identification requirements for eligible Breast Implants in Schedule I of SFA Annex A. (CAC Br. at 8, 16, 24, 33.) The CAC does not dispute that tissue expanders are not expressly *included* in that list of eligible products, which identifies several SILASTIC breast implant models, but does not include any SILASTIC tissue expanders. Indeed, as the district court found, "[i]n preparation for use in Annex A, Schedule I, DCC was not asked to provide such product identifiers for tissue expanders." (Op. at 8.)[7]

Third, the CAC does not seriously dispute that it would be irrational for Dow Corning to agree to pay the same amounts to tissue expander claimants as to breast implant claimants. The CAC does not dispute, for example, that tissue expander claims did not and would never approach the settlement values associated with breast implant claims in the litigation system. Instead, they simply assert with no record support that tissue expanders were grouped with breast implants because the Plan was a "settlement intended to resolve a large range of claims" and that "[s]uch grouping of claims is typical, and often necessary, to administer mass tort

[7] Although the CAC does not dispute that tissue expanders were absent from the settlement facility training materials (DCC Br. at 27 n.13), the CAC's assertion that this was by agreement of the parties (CAC Br. at 34 n.9) has no record support and simply never happened.

settlements." (CAC Br. at 29-30.) Not only is such a statement contrary to the record evidence in the Dunbar report and, indeed, the experience of mass tort settlements, but the CAC offers no evidence or explanation why tissue expander claimants would be singled out to receive windfall payments of up to $300,000 awardable to Breasts Implant disease claimants,[8] while covered "Other Products" claimants would receive maximum settlements of just $15,000,[9] even with regard to claims, such as those arising from TMJ jaw implants, that were the subject of significant litigation, and scores of other Non-Covered Other Products would receive absolutely no settlement payments. *See In re TMJ Litig.*, 844 F. Supp. 1553 (J.P.M.L. 1994).

Fourth, the CAC's contention that tissue expander claims should be allowed because they are "relatively few" and will have a "negligible" effect on the limited

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[8] The CAC's attempt to link tissue expanders to disease claims by citing a single article (CAC Br. at 31) fails. The article is in the record, apparently did not involve Dow Corning expanders but rather tissue expanders with a different design ("McGhan expanders" with a "textured-walled" design), and addressed only inflammatory reactions as opposed to serious claims of disease. *See* Copeland et al., *Silicone Breakdown and Capsular Synovial Metaplasia in Textured-Wall Saline Breast Prostheses*, 94 JPRS 628, 635 (1994) ("the conclusions can be considered valid only for McGhan expanders" and not other products).

[9] A few claimants eligible for an enhanced TMJ payment later received additional compensation pursuant to unique and limited circumstances addressed in a consent order. (*See* Record Entry No. 605, 12/12/07 Consent Order (establishing "Additional Payments" and "Premium Payments" pursuant to § 6.03(i)(ii) of Annex A).)

settlement funds (CAC Br. at 17, 28, 38) is not a basis for ignoring the Plan's plain language. It also contradicts the experience with mass torts, where "[i]f you build a super-highway, there will be a traffic jam." Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1870 (2000). If the district court's ruling stands, one can expect that the Dow Corning settlement facility will be inundated with claims filed by tissue expander claimants seeking breast implant settlement payments. As the CAC concedes, such an outcome was never contemplated during the confirmation proceedings; the estimates used to determine plan feasibility and settlement facility funding never included tissue expanders. (*See* CAC Br. at 36-38.) The confirmation record showed that potentially 1,041 tissue expander claims would be filed *absent* the incentive created by the windfall payment of up to $300,000 under the district court's ruling (Record Entry No. 51 Ex. A, Dunbar Analysis (June 23, 1999)); even if the number of claims were so limited and they were only to recover a modest $20,000 apiece, the roughly $20 million impact on the limited funds of the Dow Corning settlement trust would be substantial.

II. The RSP Confirms That Tissue Expanders Are Not "Breast Implants."

The CAC argues that tissue expanders are entitled to settlement funds because the Plan is based on the MDL-926 Revised Settlement Program, and claimants purportedly had an "expectation" based on the RSP that tissue expanders

would be treated as breast implants. (*See* CAC Br. at 2, 3-5, 23.) However, the provision upon which the CAC relies—Section 4.03 of the Plan's Settlement Facility Agreement ("SFA")—expressly provides that Plan terms govern over anything in the RSP. More fundamentally, it is undisputed (CAC Br. at 32 n.8)—and the district court specifically found—that "under the RSP [Dow Corning] tissue expanders were not considered 'Breast Implants.'" (Op. at 9-10 (emphasis added.) Accordingly, the RSP simply *confirms* that Dow Corning tissue expanders are not breast implants.

A. The Plan Language Excluding Tissue Expanders From The "Breast Implant" Definition Governs Over Anything In The RSP.

As the CAC itself acknowledges, SFA § 4.03 states that it was the intent of the parties that the claims administrator would attempt to employ the claims processing practices under the RSP, *except where they conflict with the terms of the Plan*. (CAC Br. at 5; Record Entry No. 700, Ex. C, SFA § 4.03.) Accordingly, the Plan's plain language governs over anything in the RSP.

The CAC concedes that the Plan is only "based largely" on the MDL-926 criteria and procedures (CAC Br. at 5), but not entirely. Indeed, it would have made no sense to bind the Plan to all terms of the RSP, since the RSP dealt primarily with a range of non-Dow Corning breast implants and products. Accordingly, many of the heavily negotiated Dow Corning Plan terms diverge from the RSP. One example is the absence of a stand-alone rupture benefit in the

RSP. In other words, claimants who had ruptured breast implants but no disease showing received no rupture recovery under the RSP, in contrast to the Dow Corning Plan where they receive a $20,000 stand-alone rupture payment. (Record Entry No. 700, Ex. C, SFA § 6.02(a)(iii).)[10] No one would argue that Dow Corning claimants should be denied this rupture benefit simply because the RSP did not provide one.

As shown above, Section 1.17 of Dow Corning's Plan provides that Dow Corning tissue expanders are not "Breast Implants" and Section 1.117 provides that they are non-covered "Other Products" not entitled to any settlement option. Section 4.03 of the Plan's SFA makes clear that these Plan provisions govern over anything contained in the RSP.

B. In Any Event, The RSP Further Confirms That Dow Corning Tissue Expanders Were Not Considered Breast Implants.

Although the CAC suggests at one point that "claimants understood that tissue expander implants were treated as breast implants under the RSP" (CAC Br.

[10] The CAC's argument that "no rupture settlement was offered to recipients of saline-filled implants, including tissue expander implants" under the RSP (CAC Br. at 6-7) is a red herring. The RSP did not provide a stand-alone rupture benefit for *any* breast implants, including silicone gel implants. Moreover, it is faulty logic to say that a tissue expander is a type of saline breast implant merely because both do not qualify for a rupture benefit under Dow Corning's Plan. There are an almost unlimited number of Dow Corning medical devices that, like saline breast implants, have no rupture benefit—but that does not transform them into saline breast implants.

at 35), in fact, the RSP did *not* treat Dow Corning tissue expanders as breast implants. While certain types of tissue expanders made by other manufacturers were deemed "breast implants" under the RSP (*see* CAC Br. at 8, 15, 23), that only occurred where they were expressly designated as such. (*See* SFA Annex A, at A-79; DCC Br. at 35 n.18.) Absent the required, express designation—a designation that was lacking for Dow Corning tissue expanders, among others[11]—the term "breast implant" did not include tissue expanders under the RSP. Consequently, it is undisputed that Dow Corning's tissue expanders were not treated as breast implants in the RSP. (*See* CAC Br. at 32 n.8 (conceding that Dow Corning's tissue expanders were "treat[ed] … differently"); DCC Br. at 35.) As the district court found in its opinion, "even under the RSP [Dow Corning] tissue expanders were not considered 'Breast Implants.'" (Op. at 10.)[12] Accordingly, under the CAC's own argument, reversal would be required by the undisputed record and the district court's finding.

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[11] Such designations were only made with respect to certain tissue expanders. For example, the RSP did not accept tissue expanders that contained only saline (certain McGhan products and Dow Corning tissue expanders).

[12] Dow Corning breast implants were not covered by the RSP, but both the Dow Corning Plan and the RSP applied a "multiple manufacturer reduction" of 50% to payments made to claimants who had breast implants made both by Dow Corning and an RSP-eligible manufacturer. (*See* Record Entry No. 700, Ex. D, at A-12.) The RSP did not treat Dow Corning tissue expanders as "breast implants" when applying this 50% reduction. (*See* Op. at 9-10; Record Entry No. 40 Ex. 3, 1/25/02 SF-DCT email.)

The district court's ruling is flatly inconsistent with the RSP and, moreover, would result in an unwarranted windfall that is inconsistent with both the RSP and the Plan. Under that ruling, claimants who have a Dow Corning tissue expander and a breast implant made by another manufacturer would not only receive a 100% payment under the RSP, but would also be entitled to an additional "50 percent" payment for their Dow Corning tissue expanders from the SF-DCT. (*See* CAC Br. at 32 n.8 (conceding that "the RSP manufacturers chose not to impose an MMR [*i.e.*, multiple manufacturer reduction] where a breast implant claimant also had a Dow Corning tissue expander"); Op. at 9-10 (recognizing that Dow Corning tissue expanders, unlike Dow Corning breast implants, did not trigger reduction in benefits under RSP); DCC Br. at 31-32.) By this formula, a Dow Corning tissue expander recipient who received another manufacturer's breast implants would receive more in total payments from the RSP and the Plan, than a claimant with the same exact medical conditions who had two sets of breast implants—one made by Dow Corning and one made by one of the RSP companies—who would only take the reduced 50% recovery from each settlement fund. Such a windfall would be obviously illogical and flatly inconsistent with the intent and structure of both the RSP and the Plan.

The Bioplasty/Mentor and Inamed settlements cited by the CAC further demonstrate that tissue expanders were not considered breast implants. (*See* CAC

Br. at 3, 9.) As a threshold matter, there is nothing in the record about these settlements and the CAC never raised them below. In stark contrast to Dow Corning, in those settlements the parties deemed "tissue expanders" to be "Breast Implants" by express designation; for example, the Inamed settlement's definition of "Breast Implants" "includ[es] devices designed for temporary implantation in the breast (*i.e.*, tissue expanders)." (*See* CAC Br. at 9-10.) Significantly, these settlements were executed in 1996 and 1997, well before the Dow Corning Plan was negotiated and confirmed in 1999, and the Plan proponents (Dow Corning and the Tort Claimants Committee) and their counsel were familiar with their terms. The omission of a similar definition deeming tissue expanders to be "Breast Implants" in the Dow Corning Plan confirms that tissue expanders were not intended to be covered.

III. The CAC's Contract Interpretation Arguments Misstate Applicable Law.

The CAC's argument fails for an additional, independent reason: the law is clear in this circuit and elsewhere that the parties' subjective "expectations" do not govern plan interpretation. Rather, this Court "interpret[s] the Plan's provisions according to their plain meaning, in an ordinary and popular sense." *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 556 (6th Cir. 1998). "A signatory to a contract is bound by its ordinary meaning even if he gave it an idiosyncratic one; private intent counts only if it is conveyed to the other party and shared." *Brown-Graves*

Co. v. Central States, Southeast and Southwest Areas Pension Fund, 206 F.3d 680, 684 (6th Cir. 2000). The cases the CAC cites (CAC Br. at 23) are not to the contrary. They simply stand for the proposition that a contract should be interpreted consistently with the purposes of the parties. *See Winnett v. Caterpillar, Inc.*, 553 F.3d 1000, 1008 (6th Cir. 2009); *Bank of N.Y. v. Janowick*, 470 F.3d 264, 270-71 (6th Cir. 2006). The purposes of the parties are derived from the plain meaning of the terms they used—not the subjective, after-the-fact interpretation of one party to the contract that is inconsistent with the plain language.

Nor should "uncertainty" in the meaning of the Plan "be charged against Dow Corning." (*See* CAC Br. at 25.) Claimants rely solely upon a Ninth Circuit case that is distinguishable. In *Miller v. United States*, 363 F.3d 999, 1106 (9th Cir. 2004), unlike here, the plan of reorganization was not a "joint" plan created as a result of a lengthy, arms-length negotiation among the parties, but rather was drafted solely by the debtor. Also, that case turned on the lack of an express IRS waiver, a fact not germane here.

To the extent there are ambiguities in a contract—which is not the case here—any such ambiguities cannot be construed against one party where, as here, both parties participated in the negotiation. *See Citibank, N.A. v. 666 Fifth Ave. Ltd. Partnership*, 769 N.Y.S.2d 268, 269 (N.Y. App. Div. 2003) ("The ambiguities

are not, however, to be construed against defendant by reason of its having drafted the initial version of the leases, since the lease agreements ultimately entered into resulted from extensive negotiations in which both parties, each a commercially sophisticated entity, were represented by counsel, and plaintiff failed to show that it 'had no voice in the selection of [the leases'] language.'").

The same rule applies to a confirmed bankruptcy plan, which results from the active participation of all parties in a thorough judicial process. *See, e.g., In re Harvey*, 213 F.3d 318, 322 (7th Cir. 2000) ("[I]t is perfectly reasonable to expect interested creditors to review the terms of a proposed plan and object if the terms are unacceptable, vague, or ambiguous"; to the extent terms are ambiguous, parties must "raise concerns about the meaning" during the confirmation proceedings.).

The CAC asserts here—years after the fact and with no citation to the record—that claimants had a unilateral "expectation" that tissue expanders would qualify for the large dollar amounts of the Breast Implant settlement option. However, there is no contemporaneous record of any such "expectation," and the Dunbar report jointly introduced by the Plan proponents and admitted into evidence is to the contrary. Moreover, the CAC is silent concerning the expectations of legitimate Breast Implant claimants whose right to recover from the capped Dow Corning settlement fund could be threatened if millions of dollars of improper tissue expander claims were allowed. This is why the cases state that

express Plan terms control—not the subjective claims of one party, asserted in hindsight, about its own "expectations."

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

While the district court's ruling constitutes reversible error under any standard, the appropriate standard of review is *de novo*. Contrary to the CAC's assertion, this Court has not "rejected" *de novo* review in cases such as this. (*See* CAC Br. at 17.) While a bankruptcy court's order interpreting a confirmed plan is normally reviewed for an abuse of discretion (*see* DCC Br. at 17), that standard of review does not apply here for two reasons.

First, the abuse of discretion standard does not apply in reviewing fundamental errors of law or plan language that is unambiguous: In cases raising plan interpretation issues, this Court has made clear that it will "review 'the bankruptcy court's legal conclusions *de novo*.'" *In re Eagle-Picher Indus.*, 447 F.3d 461, 463 (6th Cir. 2006). Other circuits agree, holding that orders involving plan interpretation are reviewed *de novo* if the plan language is unambiguous or "if the issue being reviewed presents only a question of law." *In re Shenango Group, Inc.*, 501 F.3d 338, 346 (3d Cir. 2007). (*See* DCC Br. at 18.)

The CAC ignores these rulings, and instead relies upon this Court's statement in *In re Dow Corning Corp.* that "[i]f a bankruptcy court's interpretation of a plan does not require interpretation of the Bankruptcy Code, review for abuse

of discretion is appropriate." 456 F.3d 668, 675 (6th Cir. 2006) (CAC Br. at 17-18). However, the *Dow Corning* Court never indicated that this was the *only* situation in which *de novo* review would apply. To the contrary, the Court was merely applying the general rule it recognized in *Eagle-Picher* in a different context—*i.e.*, that purely legal issues remain subject to *de novo* review even in cases involving issues of plan interpretation.[13] Accordingly, *Dow Corning* actually supports *de novo* review here given that, like matters of statutory interpretation, the district court's ruling turns upon purely legal issues that this Court typically reviews without according the district court any deference.[14]

Second, the order under review here was issued by the district court—not the bankruptcy court that approved Dow Corning's Plan. Accordingly, the fundamental basis for the abuse of discretion standard—*i.e.*, a bankruptcy court interpreting its own order—is absent. (*See* DCC Br. at 18.) While the CAC argues that the abuse of discretion standard should nonetheless apply because "Judge

[13] Indeed, the Court has repeatedly so held in a variety of decisions which the CAC ignores. (*See* DCC Br. at 18 n.9 (collecting cases holding that, in applying the abuse of discretion standard, legal conclusions are reviewed *de novo* and that a court's decision construing contract language is reviewed *de novo* where the language is unambiguous).)

[14] In *Dow Corning*, the Court addressed an issue that required application of a 2001 order issued by Bankruptcy Judge Spector interpreting Plan language that Judge Spector had found unambiguous, but this Court found ambiguous. 456 F.3d at 677.

Hood has been overseeing the Dow Corning bankruptcy since 1995" and "sat on the bench with Judge Spector during the 1999 confirmation hearing" (CAC Br. at 18), if that were the case, then the abuse of discretion standard would *always* apply to an appellate ruling by a district court that was "overseeing" a bankruptcy case by virtue of its original jurisdiction over all bankruptcy cases (*see* 28 U.S.C. § 1334(a)). This Court's holding in *Eagle-Picher* is to the contrary: "in a bankruptcy case on appeal from a district court, [the Court] owe[s] *no special deference* to the district court's decision." 447 F.3d at 463 (emphasis added). Moreover, the CAC's assertion that Judge Hood "sat on the bench" with Judge Spector during the confirmation hearings (CAC Br. at 18) is misleading; Judge Hood was present for only two days of a 13-day confirmation proceeding, did not issue any rulings, and did not co-sign the order or multiple opinions confirming the Plan. *See generally In re Dow Corning Corp.*, 244 B.R. 634 (Bankr. E.D. Mich. 1999) (confirmation order signed by Bankruptcy Judge Spector).

The CAC's contention that Dow Corning is bound by its argument for an abuse of discretion standard in the *Clark-James* appeal (CAC Br. at 18) is likewise incorrect. Dow Corning argued for such a standard in the alternative (DCC Br., *In re Clark-James*, No. 08-1633, at 12 n.3 (6th Cir. Dec. 23, 2008)), and the Panel ultimately concluded that the proper standard of review was *de novo*. Order, *In re Clark-James*, No. 08-1633 (6th Cir. Aug. 6, 2009) at 3 (affirming dismissal of

claim for benefits under *de novo* standard where "the Plan is clear as to the requirement to show rupture"). Accordingly, as with the Court's prior decisions, *Clark-James* recognizes that *de novo* review may be appropriate in cases involving plan interpretation issues.

Nor did Dow Corning stipulate to a more deferential standard or "limit the scope" of this Court's review. (CAC Br. at 12, 19.) As the CAC acknowledges in a footnote (*id.* at 19 n.7), this Court has held that "the parties may not stipulate to the standard of review." *Regional Airport Authority v. LFG, LLC*, 460 F.3d 697, 712 n.10 (6th Cir. 2006) (citing *K&T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir. 1996)). Such a stipulation would usurp the proper role of this Court. And there is no exception for stipulations contained in "a comprehensive settlement" that governs "future dispute resolution" (tellingly, the CAC has cited no authority for such an exception). (*See* CAC Br. at 19 n.7.)

Worse, the CAC misrepresents the nature of the stipulation itself. The stipulation simply states that the "clearly erroneous" standard will apply to the "extent permissible" to appellate review of "findings," not to the Court's *legal* conclusions. (Record Entry No. 53, Ex. A, Stipulation § 2.01(d)(5).) It goes on to state that "[n]othing in these procedures shall affect the appellate rights of the parties." (*Id.*) The plain language of the stipulation thus makes clear that the parties did not agree to a less stringent standard of appellate review.

In any event, as Dow Corning observed in its opening brief, the district court's decision should be overturned under any standard because it was clearly and demonstrably wrong. The district court acknowledged that medical practitioners do not consider "tissue expanders" to be "breast implants"; that Dow Corning marketed tissue expanders as unique products with designs, functions and uses distinct from breast implants; and that the FDA classifies and regulates tissue expanders as distinct products. (Op. at 7-8.) Moreover, the district court specifically found that "under the RSP [Dow Corning] tissue expanders were not considered 'Breast Implants.'" (*Id.* at 9-10.) The district court ruled that tissue expanders were breast implants under Dow Corning's Plan only because it refused to consider this evidence and instead relied upon a flawed legal analysis that the CAC does not even attempt to defend on appeal.

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). According to the word processing program used to prepare this brief (Microsoft Word), this brief contains 6,997 words.

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CERTIFICATE OF SERVICE

I certify that on November 30, 2009, I electronically filed a copy of the foregoing Reply Brief of Appellant Dow Corning Corporation with the Clerk of Court through the Court's electronic filing system, which will send notice and a copy of this brief to all registered counsel in this case.

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