

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

In re:

**SETTLEMENT FACILITY DOW
CORNING TRUST**



**Case No. 00-CV-00005
(Settlement Facility Matters)**

Hon. Denise Page Hood

**RESPONSE OF DOW SILICONES CORPORATION AND THE DEBTOR'S
REPRESENTATIVES TO MOTION OF CLAIMANT MAXINE LOUISE
SWAIM'S COUNSEL TO CLARIFY CLOSING ORDER 5'S DEADLINE FOR
QUALIFYING CLAIMANTS TO CONFIRM ADDRESSES AND SUBMIT
ESTATE DOCUMENTS (ECF NO. 1718)**

Dow Silicones Corporation (“Dow Silicones”) and the Debtor’s Representatives (the “DRs”) (collectively, “Respondents”) hereby respond to the Motion of Claimant Maxine Louise Swaim’s Counsel to Clarify Closing Order 5’s Deadline For Qualifying Claimants to Confirm Addresses And Submit Estate Documents (ECF No. 1718) (“Motion to Clarify”).

For the reasons set forth in the accompanying memorandum, Respondents respectfully submit that the Motion to Clarify should be denied.

Dated: June 13, 2023

Respectfully submitted,

/s/ Deborah E. Greenspan
Deborah E. Greenspan
BLANK ROME LLP
Michigan Bar # P33632
1825 Eye Street, N.W.
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
deborah.greenspan@blankrome.com

*Debtor's Representative and Attorney
for Dow Silicones Corporation*

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CORPORATION AND THE DEBTOR'S REPRESENTATIVES TO
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SUMMARY OF ISSUES PRESENTED

1. Should the Court allow the claimant to appeal a decision of the Claims Administrator in violation of the Plan's prohibition on appeals from decisions of the Claims Administrator?

Respondents' answer: No.

2. Should the Court alter the administrative deadline established by the Settlement Facility providing a 90 day period for address correction as specified in Closing Order 5 where the Court delegated to the Settlement Facility the authority to set the specific 90 day period and where the actual date of the deadline was clearly stated and communicated by the Settlement Facility on its website, and by the Claimant's Advisory Committee on its website and in its newsletters?

Respondents' answer: No.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

- Settlement Facility and Fund Distribution Agreement
- Dow Corning Settlement Program and Claims Resolution Procedures, Annex A to the Settlement Facility and Fund Distribution Agreement
- *Violette v. P.A. Days, Inc.*, 427 F.3d 1015 (6th Cir. 2005).

INTRODUCTION

Dow Silicones Corporation (“Dow Silicones”)¹ and the Debtor’s Representatives (the “DRs”) (collectively, “Respondents”) respectfully submit this Memorandum of Law in support of their Response to the Motion of Claimant Maxine Louise Swaim’s Counsel to Clarify Closing Order 5’s Deadline For Qualifying Claimants to Confirm Addresses And Submit Estate Documents (ECF No. 1718) (“Motion to Clarify”).

FACTUAL BACKGROUND

Dow Corning filed a petition for reorganization and bankruptcy under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Michigan on May 15, 1995. The Amended Joint Plan of Reorganization of Dow Corning Corporation (the “Plan”) (Exhibit A) was confirmed in 1999 and became effective on June 1, 2004. The Plan established an administrative process for the resolution of claims of individuals who assert that they suffered injury as a result of the use of certain implanted medical devices. Those individuals who elected to resolve their claims through this administrative process are Settling

¹ Dow Corning Corporation changed its name to Dow Silicones Corporation on February 1, 2018.

Personal Injury Claimants.² The procedures for the submission of claims for benefits and for the review and resolution of such claims are set forth in the Settlement Facility and Fund Distribution Agreement (“SFA”) (Exhibit B) and the Dow Corning Settlement Program and Claims Resolution Procedures, Annex A to the SFA (the “Claims Resolution Procedures”) (Exhibit C).

The Settlement Facility-Dow Corning Trust (“SF-DCT” or “Settlement Facility”), through the Claims Administrator, manages the Plan’s administrative settlement program. The Claims Administrator is charged with the task of establishing and managing the claims review process and evaluating claims based on the criteria in the Plan. The Claims Administrator has the general authority and obligation to determine and operate administrative procedures and routines as necessary to fulfill the claims administration function. Section 5.01 of the SFA provides: “The Claims Administrator shall have discretion to implement such additional procedures and routines as necessary to implement the Claims Resolution Procedures consistent with the terms of this Agreement and subject to the provisions of Section 5.05 of the Settlement Facility Agreement.”

² Capitalized terms have the meaning defined in the Plan and Plan Documents unless otherwise noted herein.

The decisions of the Settlement Facility are subject to an administrative appeal process. A claimant who disagrees with a decision of the Settlement Facility may seek a review by the Claims Administrator and then, if that appeal is denied, may appeal the decision to the Appeals Judge. Claims Resolution Procedures, at §§ 8.04, 8.05. The administrative appeal decision is final and binding. There is no right of appeal to this or any other Court. *See id.* at § 8.05.

On June 13, 2022, this Court entered Closing Order 5, Notice that Certain Claims Without a Confirmed Current Address Shall be Closed and Establishing Protocols for Addressing Payments for Claimants in Bankruptcy, ECF No. 1642 (“Closing Order 5”). Closing Order 5, which was stipulated and agreed to by the DRs and the Claimants’ Advisory Committee (“CAC”), provides that:

To further assure an orderly closing and to preserve assets, it is appropriate to establish a deadline by which the claims identified in paragraphs 8 and 9 above will be closed permanently. The Settlement Facility’s data shows that the vast majority of responses to the verification mailings are received within 4 weeks of the verification mailing. Accordingly, to facilitate closure and to preserve assets for distribution, the Settlement Facility is directed to employ the mechanism previously authorized by the Court in Closing Order 3. The Settlement Facility shall post on its website a list of the SID numbers (claimant identification numbers) for those claimants who have been identified as having a “bad address” and those who have not responded to the verification mailing on or before the date that is four weeks after the mailing to those claimants. The Settlement Facility shall maintain this list on its website for

90 days. If a claimant responds on or before the end of that 90-day period, the SID number shall be removed from the posted list and the Settlement Facility will proceed to finalize processing or payment of the claim as appropriate. If the claimant does not respond on or before the end of the 90-day period, the claim shall be permanently closed.

Closing Order 5 at PageID.28803-28804.

In compliance with Closing Order 5, the SF-DCT posted a list of the claimant identification numbers for those claimants who had been identified as having a “bad address” on its website on June 19, 2022. Declaration of Kimberly Smith-Mair, dated June 13, 2023, attached hereto as Exhibit D (“Smith-Mair Dec.”), at ¶10. The SF-DCT maintained the list on the website for the requisite 90-day period. That 90-day period ended on September 17, 2022. The Settlement Facility’s website clearly and prominently advised that the final day to submit an address verification was September 17, 2022. *Id.*, at ¶11, and Exh. 1. To comply with the terms of Closing Order 5 and submit a timely address verification, the claimant need only notify the Settlement Facility by telephone or email. *Id.*, at ¶12. The email address is of course available 24 hours a day, 7 days a week. The September 17, 2022 deadline was publicized by the Claimant’s Advisory Committee in their regular newsletter and on their website. *Id.*, at ¶13. The CAC June 21, 2022 newsletter stated:

APPROXIMATELY 12,600 CLAIMS HAVE A BAD ADDRESS AND WILL BE CLOSED PERMANENTLY UNLESS THEY CONTACT

THE SF-DCT ON OR BEFORE SEPTEMBER 17, 2022 ... For the persons on the SID list in Closing Order 5, failure to contact the SF-DCT on or before Sept. 17, 2022 will result in the permanent closure of that claim.

Smith-Mair Dec. at Exh. 2, http://www.tortcomm.org/newsletter_220621.shtml (last accessed June 12, 2023) (emphasis in original). Similarly, the June 20, 2022 News on the CAC website stated:

Below is a link to a list of “**BAD ADDRESS**” SID numbers for claimants who have been identified as having a “**BAD ADDRESS**” and those who have **NOT RESPONDED** to the address verification mailing four (4) weeks after the address verification mailing to those claimants. ... **IF YOU DO NOT RESPOND by September 17, 2022, THE COURT HAS ORDERED your claim will be denied and closed without payment.**

Smith-Mair Dec. at Exh. 3, <http://www.tortcomm.org> (June 20, 2022 News section) (last accessed June 12, 2023) (emphasis in original).

On November 29, 2021, the SF-DCT sent an address verification letter to Movant Swaim and her counsel. Smith Mair Dec. at ¶19. Neither Swaim nor her counsel responded to the letter. *Id.* at ¶20. The SF-DCT, through its own address research procedures, learned that Movant Swaim had passed away on July 14, 2014. *Id.* at ¶21. Counsel did not advise the SF-DCT that Movant Swaim had passed away. *Id.*

Counsel for Movant Swaim was aware of the additional 90-day period granted to claimants under Closing Order 5 allowing them to submit address verifications

for a 90-day period set by the Settlement Facility. The SF-DCT reports that in the June 19, 2022 Closing Order 5 posting, there were 313 total claimants who were represented by counsel for Movant Swaim. Smith-Mair Dec. at ¶25. Counsel was able to submit timely responses with respect to virtually all of those claimants: counsel submitted 177 timely address verifications and 134 timely lien forms. *Id.*

Movant's Motion to Clarify was served via the ECF system on May 30, 2023,³ some 7 months after the expiration of the deadline established by the SF-DCT pursuant to Closing Order 5. In the Motion to Clarify, Movant states that counsel filed a timely lien to protect counsel's fee and expense interests in decedent's claim because of "the impending deadline" and because counsel had "previously conducted an internet search and learned of Claimants [sic] demise and that of her spouse as well" and then had "attempted to contact Ms. Swain's family on several occasions with no success." Motion to Clarify at PageID.33295-96. The Motion to

³ Counsel filed the motion via Federal Express, instead of using the ECF system as is required. Counsel did not include any proof of service in the filing and did not serve Dow Silicones, the Debtor's Representatives, or the Finance Committee when the Motion was filed. In fact, this Court issued a notice of non-compliance to counsel for Swaim. ECF No. 1719. The Court apparently docketed the Motion on the ECF system and thus the parties were served on May 30, 2023. Rule 7.1(e) specifies that a response to a motion is to be filed within 14 days after the date of *service*. See E. D. Mich. LR 7.1 (e)(1).

Clarify asserts that “in the eleventh hour the Claimant Decedent’s Estate Representative contacted Counsel and forwarded the necessary Address and Estate documents which we had been seeking.” *Id.* The Motion to Clarify makes clear that counsel did not contact the SF-DCT by the deadline. Instead, the Motion to Clarify states: “Counsel *assuming* that this Saturday deadline would be treated as expiring on the next business day, contacted the SF-DCT on Monday, September 19th, 2022.” *Id.* (emphasis added).

ARGUMENT

I. The Motion Should Be Denied Because It Is An Unauthorized Appeal Of A Decision Of The Claims Administrator Barred By The Plan.

The Motion to Clarify amounts to an appeal of a decision of the Claim Administrator, which is expressly prohibited by the Plan. A plan of reorganization is a governing court order and operates as a “contract between the debtor and its creditors.” *In re Dow Corning Corp.*, 456 F.3d 668, 676 (6th Cir. 2006). Accordingly, the provisions of a confirmed plan are binding on both the debtor and its creditors. *See* 11 U.S.C. § 1141(a); *Dow Corning*, 456 F.3d at 676.

The Plan specifically, unequivocally, and unambiguously bars appeals of the decisions of the Claims Administrator to this or any other court. *See Claims Resolution Procedures*, at Article VIII, § 8.05. This Court and the United States

Court of Appeals for the Sixth Circuit have explicitly and repeatedly held that the Plan does not permit individual claimants to appeal determinations of the Claims Administrator (or Appeals Judge). *See In re Clark-James*, 08-1633, 2009 WL 9532581 at **2, 3 (6th Cir. Aug. 6, 2009) (holding that the district court properly dismissed plaintiff's complaint as she was "essentially seek[ing] a review of the SF-DCT's determination that she has not submitted sufficient proof to show that her implants had ruptured. But the Plan provides no right of appeal to the district court, except to resolve controversies regarding the interpretation and implementation of the Plan and associated documents."), *aff'g* No. 07-CV-10191 (E.D. Mich. Mar. 31, 2008).

As this Court has previously explained:

The Plan establishes administrative claim review and appeals processes for Settling Personal Injury claimants. Any claimant who does not agree with the decision of the SF-DCT may seek review of the claim through the error correction and appeal process. (SFA, Annex A, Art. 8.) A claimant may thereafter obtain review by the Appeals Judge. (SFA, Annex A, Art. 8.) The Plan provides that "[t]he decision of the Appeals Judge will be final and binding on the Claimant." (SFA, Annex A, § 8.05.) Claimants who seek review under the Individual Review Process also have a right to appeal directly to the Appeals Judge. The Plan provides that "[t]he decision of the Appeals Judge is final and binding on both Reorganized Dow Coming and the claimant." (SFA, Annex A, § 6.02(vi).)

In re Settlement Facility Dow Corning Tr., No. 00-00005, 2017 WL 7660597, at *3 (E.D. Mich. Dec. 28, 2017), *aff'd*, 760 F. App'x 406 (6th Cir. 2019). *See also Hawkins v. Claims Adm'r of Settlement Facility*, No. J:21-CV-10764, 2021 WL 8343045, at *1 (E.D. Mich. Oct. 19, 2021) (“The Court has held on several occasions that the Plan provides no right of appeal to the Court by claimants who do not agree with the decisions of the SF-DCT, the Claims Administrator and/or the Appeals Judge.”); *In re Settlement Facility Dow Corning Trust*, 760 Fed. Appx. 406, 412 (6th Cir. 2019) (“The Plan provides no right of appeal to the Court.”) (quoting *In re Settlement Facility Dow Corning Tr.*, No. 12-10314, 2012 WL 4476647, at *2 (E.D. Mich. Sept. 28, 2012)). Movant’s disagreement with decisions regarding claims “are decisions for the Claims Administrator and the Appeals Judge selected under the terms of the plan, and not the district court” and thus her effort to “seek review of substantive decisions regarding particular claims . . . is contrary to the terms of the plan.” *In re Settlement Facility Dow Corning Trust*, 760 Fed. Appx. at 412. *See also In re Settlement Facility Dow Corning Tr.*, No. 08-CV-10510, 2008 WL 4427513, at *2 (E.D. Mich. Sept. 30, 2008) (“The Plan provides no right to appeal to the Court..”); *In re Settlement Facility Dow Corning Trust, Dale Reardon*, No. 07-CV-14898, 2008 WL 4427520, at *2 (E.D. Mich. Sept. 30, 2008) (“The Plan provides no right to appeal to the Court..”); *In re Settlement Facility Dow Corning*

Trust, Mary O'Neil, No. 00-00005, 2008 WL 907433, at *3 (E.D. Mich. Mar. 31, 2008) (“The Plan provides no right to appeal to the Court...”).

Here the Claims Administrator determined that the submission was late, and therefore not in compliance. The Claims Administrator’s authority and obligations include setting deadlines and determinations about timeliness. The Claims Administrator has exercised that authority throughout the operation of the Plan to establish and determine compliance with deadlines. *See, e.g.*, Stipulation and Order Approving Notice of Closing and Final Deadline for Claims, Exhibit A, ECF No. 1342-1, PageID.21547 (“You may receive or may have previously received a letter from the Settlement Facility giving you a deadline to cure deficiencies in a claim. The June 3, 2019 final deadline DOES NOT CHANGE any deadline in a letter from the Settlement Facility. If you have any questions about your deadline, contact the Settlement Facility. If you do not comply with your deadline, your claim will be denied.”).

The Plan prohibits appeals of all decisions of the Claims Administrator regarding the resolution of claims to the district court. In fact, were this Court to permit such an appeal, it would constitute an unauthorized and impermissible modification of the Plan. *See, e.g., In re Settlement Facility Dow Corning Trust, Jodi Iseman*, No. 09-CV-10799, 2010 WL 1247910, at *2 (E.D. Mich. Mar. 25,

2010) (“The Plan provides no right to appeal to the Court. Allowing the appeal to go forward. . . would be a modification of the Plan language. The Court has no authority to modify this language.”).

II. Neither Annex A Nor The Claimant Information Guides Apply To The Deadline Established By The SF-DCT.

Movant seeks to excuse the late filing by arguing that Annex A, the Plan Document governing claims resolution, requires the extension of any deadline that falls on a Saturday, Sunday or holiday. The Motion to Clarify cites as an example Annex A’s provision on the Election Deadline, Section 3.02(c)(i). Section 3.02(c)(i) states: “If the Election Deadline or any deadline in the Claims Resolution Procedures falls on a Saturday, Sunday or federal holiday, the next business day shall be the applicable Deadline.” Annex A § 3.02(c)(i); Motion to Clarify, at PageID.33297. The examples cited in the Motion to Clarify have no application here. The deadline at issue was not established or required by the Claims Resolution Procedures. It was established by the SF-DCT in compliance with the Court’s order to establish a 90-day period (effectively an additional period of time) for claimants who had failed previously to comply with the Court’s requirement to submit their address information. Movant incorrectly asserts that there is some general “time calculation rule” in Annex A. Motion to Clarify, at PageID.33297. That is not the case. In fact,

to the contrary: the deadline language in Annex A that requires extension to the next business day applies to specific identified situations. Had the parties intended such a time computation rule to apply to all administrative determinations – regardless of whether they address a specific provision of the Claims Resolution Procedures – Annex A would have so stated. *See Ashwood Capital, Inc. v. OTG Mgt., Inc.*, 948 N.Y.S.2d 292, 298 (1st Dept. 2012) (contractual references to “Terminal 6” could not reasonably be construed to include a different terminal, since “(i)f these commercially sophisticated and counseled parties had intended their agreement to apply to any JetBlue terminal at JFK, they could easily have expressed this intent in the language of the agreement”); *Bazin v. Walsam 240 Owner, LLC*, 894 N.Y.S.2d 411, 414-15 (1st Dept. 2010) (“Nor is it appropriate to find implicit in the lease a provision that the parties could have included, but did not. ‘[C]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include... Hence, courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing’”) (quoting *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004)).

Movant also cites to the Claimant Information Guide (“CIG”)’s reference to certain deadlines under the Claims Resolution Procedures. The CIG “summarize[s] the information *contained in the Plan Documents.*” Smith-Mair Dec., at Exh. 9, CIG at p.3 (emphasis added). The CIG and the CIG provision relied on by Movant has no relevance to the administrative deadline of a date certain established by the SF-DCT; rather, the CIG references only very specific deadlines for submission of participation forms and claim forms. *See id.*, CIG Section 9, Part C (“Deadline to Apply for Settlement Payments”), at Q9-12. This language – applicable in those very specific circumstances – cannot be extended beyond its terms to apply to a deadline set by the SF-DCT in accordance with a Court Order allowing claimants an additional period of time to submit address verifications required by Closing Order 2. *Closing Order 2 (Regarding Additional Procedures for Incomplete and Late Claims; Protocols for Issuing Payments; Audits of Attorney Distributions of Payments; Protocols for Return of Undistributed Claimant Payment Funds; Guidelines for Uncashed Checks and Reissuance of Checks; Restrictions of Attorney Withdrawals)*, ECF No. 1482. The Motion to Clarify’s reference to a letter regarding the deadline to submit NOI claims similarly has no bearing on the issue here. The Plan Proponents could, of course, agree on a particular deadline (such as with respect to the NOI submissions). Significantly, here, the Plan Proponents were informed of

the September 17 deadline in multiple meetings and reports made by the Claims Administrator. Smith-Mair Dec., at ¶14. At no time did the Plan Proponents (either the CAC or the DRs) object to the deadline or suggest that it should be extended. *Id.* The deadline was publicized prominently by the CAC in their own newsletter – without any suggestion that it was somehow incorrect. Under these circumstances, the only reasonable conclusion is that the Plan Proponents effectively acquiesced to the September 17 deadline.

III. Fed. R. Civ. P. 6(a) Does Not Apply To The Deadline That Was Established In Accordance With The Court’s Directive As A Fixed Date.

Movant argues that Rule 6(a) should govern the deadline that was established by the SF-DCT. Rule 6(a) states, in relevant part:

In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

Fed.R.Civ.P. 6(a). Rule 6(a) applies only when litigants are required to file papers within a given number of days following a particular event or order. *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1017 (6th Cir. 2005). “Rule 6(a)’s plain language limits it to situations where periods of time must be computed.” *Id.*, at 1019. Conversely, “[t]he language of Rule 6(a) does not address situations where litigants are required to file papers on a particular, stated, calendar date. *Id.*, at 1018; *see also In re Squire*, 282 F. App’x 413, 416 (6th Cir. 2008) (“... Fed.R.Civ.P. 6(a) ‘applies only to situations where parties must compute deadlines based on the passage of a fixed number of days and therefore, the Rule does not apply to situations where the court has established a specific calendar day as the deadline.’”) (quoting *Violette*, 427 F.3d 1015).

Rule 6(a) has no application here. The order at issue, Closing Order 5, did not prescribe a deadline of 90 days from the date of the Court’s order. Rather, it directed the SF-DCT to post a list of the SID numbers on its website, maintain the list on its website for 90 days, and, “[i]f the claimant does not respond on or before the end of the 90-day period,” to close the claim. The SF-DCT, as an administrative function and matter of its discretion and following the Court’s directive, posted the list and established a deadline of 90 days after posting *by setting a specific fixed calendar date of September 17, 2022 as the deadline.* See Rule 6 Practice Commentary

(“Practitioners should watch out” for the situation “when a fixed-date deadline ends on a weekend or holiday. While Rule 6(a)(1)(C) would extend the deadline for a computed period, it will not apply to the fixed-date deadline. That means that lawyers presented with fixed-date deadlines should think about how they intend to meet those deadlines and plan accordingly. One option, of course, is to make plans to file early during the preceding week. Registered CM/ECF users also have the option of filing electronically on the actual weekend or holiday due date”).

Counsel’s “assumption” that the date would be other than the specified fixed date established by the SF-DCT has no basis in Rule 6(a) or the Plan Documents.

CONCLUSION

For the reasons stated herein, Dow Silicones Corporation and the Debtor’s Representatives respectfully request that the Court deny the Motion to Clarify.

Respectfully submitted,

Dated: June 13, 2023

/s/ Deborah E. Greenspan
Deborah E. Greenspan

BLANK ROME LLP
Michigan Bar # P33632
1825 Eye Street, N.W.
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
deborah.greenspan@blankrome.com

*Debtor's Representative and Attorney for
Dow Silicones Corporation*

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**SETTLEMENT FACILITY DOW
CORNING TRUST**



**Case No. 00-CV-00005
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Hon. Denise Page Hood

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2023, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notification of such filing to all registered counsel in this case.

Respectfully submitted,

Dated: June 13, 2023

/s/ Deborah E. Greenspan
Deborah E. Greenspan

BLANK ROME LLP
Michigan Bar # P33632
1825 Eye Street, N. W.
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
deborah.greenspan@blankrome.com

*Debtor's Representative and
Attorney for Dow Silicones
Corporation*