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Slip Copy, 2011 WL 2974957 (Bankr.S.D.Tex.)

(Cite as: 2011 WL 2974957 (Bankr.S.D.Tex.))

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United States Bankruptcy Court,  
S.D. Texas,  
Corpus Christi Division.  
In re ASARCO LLC, et al., Debtors.  
**No. 05-21207.**

July 20, 2011.

[Charles A. Beckham, Jr.](#), Haynes & Boone, Houston, TX, [Robert J. Moore](#), Milbank, Tweed, Hadley & McCloy LLP, Los Angeles, CA, for Debtors.

***MEMORANDUM OPINION ON FINAL FEE APPLICATION of BAKER BOTTS L.L.P.***

[RICHARD S. SCHMIDT](#), Bankruptcy Judge.

I. INTRODUCTION

\*1 1. On this day came on for consideration the final fee application of Baker Botts L.L.P. filed on February 8, 2010, and supplemented on June 2 and July 7, 2010 (the "*Fee Application*"). [\[FN1\]](#) Baker Botts L.L.P. ("*Baker Botts*" or the "*Firm*") represented ASARCO LLC ("*ASARCO*" or the "*Company*") and its affiliated debtors (the "*Debtors*") in these chapter 11 cases during the period of August 9, 2005, through December 8, 2009 (the "*Application Period*"). The Court, having heard the evidence and arguments of counsel, makes the following findings of fact and conclusions of law.

[FN1](#). *Final Fee Application and Request for Fee Enhancement of Baker Botts L.L.P.*, Dkt. No. 13915 ("*Final Fee Application*"); *Mot. for Leave to Supplement Final Fee Application and Request for Enhancement of Baker Botts L.L.P.*, Dkt. No. 14838; *Second Supplement to Final Fee Application and Brief in Support* ("*Second Supplement*").

2. Baker Botts asks the Court to finally approve and allow \$135,870,714.58 in fees and \$6,046,135.06 in expenses for services performed and expenses incurred by the Firm during the Application Period. The \$135,870,714.58 in requested fees is comprised of (1) \$113,074,527.74 in fees approved by this Court on an interim basis under [section 331 of the Bankruptcy Code](#) and paid to Baker Botts; (2) *plus* \$263,994.74 in additional, unpaid fees incurred by Baker Botts for the period of November 1, 2009, through December 8, 2009; (3) *plus* \$22,645,119.10 in additional, unpaid fees to compensate Baker Botts for the difference between the hourly rates it charged during the Application Period and the proper hourly rates (20% higher than the rates Baker Botts charged) based on application of [section 330 of the Bankruptcy Code](#) and the

lodestar analysis; (4) *minus* \$112,927.00 in fees charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates. The \$6,046,135.06 in requested expenses is comprised of (1) \$6,065,598.58 in expenses approved by this Court on an interim basis under [section 331 of the Bankruptcy Code](#) and paid to Baker Botts; (2) *minus* \$19,463.52 in expenses charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates.

3. Baker Botts also asks the Court to finally approve and allow \$8,004,920.50 in fees and \$457,443.83 in expenses incurred by the Firm in preparing and defending the Fee Application through July 13, **2010**. These amounts are comprised of (1) \$5,042,001.50 in fees and \$199,900.60 in expenses incurred by Baker Botts through July 6, **2010**, defending the fees and expenses approved by this Court on an interim basis under [section 331 of the Bankruptcy Code](#) and the fees and expenses incurred by Baker Botts from November 1, **2009**, through December 8, **2009**; (2) \$2,684,243.50 in fees and \$252,883.23 in expenses incurred by Baker Botts through July 6 defending its request for a 20% increase; (3) \$42,845.50 in fees incurred by Baker Botts through July 6 for non-working travel time; and (4) \$235,830.00 in fees and \$4,660.00 in expenses that Baker Botts estimated it would incur from July 7 through closing argument on the Fee Application on July 13. In addition, Baker Botts asks the Court to include in its final order resolving the Fee Application a provision authorizing the Firm to submit supplemental applications for additional defense fees and expenses incurred after July 13, **2010**, upon resolution of any appeals or in connection with any subsequent proceedings in the event of a remand.

\*2 4. During the course of these cases, ASARCO, the Debtor in Possession, would from time to time raise questions or concerns regarding Baker Botts' invoices with the responsible attorneys. In each instance, Baker Botts addressed the concerns to the reasonable satisfaction of ASARCO. No party in these cases posed an objection to the interim allowance of Baker Botts' fees and expenses, and ASARCO paid the fees and expenses approved on an interim basis to Baker Botts. Nevertheless, Reorganized ASARCO LLC ("*Reorganized ASARCO* ") has now objected to the final approval and allowance of (1) the fees charged by Baker Botts to the estates during the Application Period, (2) any additional compensation over and above the fees charged by Baker Botts to the estates during the Application Period, and (3) the fees and expenses requested by Baker Botts for the preparation and defense of the Fee Application. [\[FN2\]](#) Reorganized ASARCO originally objected to the final approval and allowance of the expenses charged by Baker Botts to the estates during the Application Period, but withdrew that objection on June 1, **2010**. [\[FN3\]](#)

[FN2](#). *Reorganized ASARCO LLC's Response and Objection to Baker Botts L.L.P.'s Final Fee Application*, Dkt. No. 14118 ("*Original Objection to Final Fee Application*"); *Reorganized ASARCO LLC's Response and Objection to Preliminary and Final Requests for Fee Enhancement of Baker Botts L.L.P.*, Dkt. No. 14119 ("*Objection to Fee Enhancement*"); *Reorganized ASARCO LLC's First Amended Response and Objection to Baker Botts L.L.P.'s Final Fee Application*, Dkt. No. 14713 ("*Amended Objection to Final Fee Application* ").

[FN3](#). *Original Objection to Final Fee Application; Amended Objection to Final Fee Application*; Hr'g Tr. 143:20-24, June 1, **2010** (H.Novosad).

5. During the course of these cases, the United States Trustee (the "*U.S. Trustee* ") also would from time to time raise questions or concerns regarding Baker Botts' invoices with the responsible attorneys. In each instance, Baker Botts addressed the concerns to the reasonable satisfaction of the U.S. Trustee. The U.S. Trustee did not object to the final approval and allowance of either the fees and expenses charged by Baker Botts to the estates during the Application Period, or the fees and expenses requested by Baker Botts for the preparation and defense of the Fee Application. [FN4](#) However, the U.S. Trustee has objected to the final approval and allowance of the 20% increase requested by Baker Botts. [FN5](#) The U.S. Trustee contends that if the Court deems any increase proper, the increase should be limited to 5% of the amount of fees charged by Baker Botts to the estates during the Application Period. [FN6](#) No other party has objected to the Fee Application.

[FN4](#). *Original Objection to Final Fee Application; Amended Objection to Final Fee Application*; Hr'g Tr. 143:20-24, June 1, **2010** (H.Novosad).

[FN5](#). *Corrected Limited Objection of the United States Trustee to the Final Fee Application and Request for Fee Enhancement of Baker Botts L.L.P., Counsel to Debtors*, Dkt. No. 14137.

[FN6](#). *Corrected Limited Objection of the United States Trustee to the Final Fee Application and Request for Fee Enhancement of Baker Botts L.L.P., Counsel to Debtors*, Dkt. No. 14137.

6. Baker Botts provided adequate notice of the Fee Application and complied with the due process and service requirements of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the Parent's plan, and the order confirming the Parent's plan. The Court has considered all objections, briefs, arguments, testimony, and documentary evidence related to the Fee Application. The Court held a final hearing on the Fee Application on May 27 and 28, June 1 and 2, June 18, and July 13, **2010**. Baker Botts, Reorganized ASARCO, the U.S. Trustee, and all other interested parties had a full and complete opportunity to be heard by the Court at the final hearing.

7. As detailed below, based upon the record before the Court, the Court finds and concludes that:

- \$6,046,135.06 in expenses incurred by Baker Botts during the Application Period were actual, necessary expenses;
- \*3 • The services summarized in the Fee Application and performed by Baker Botts during the Application Period were substantial and provided a tangible and material benefit to the estates;
- The fees sought by Baker Botts for the services it performed during the Application Period reflect the actual and reasonable billable time expended by Baker Botts during the Application Period in connection with these cases and do not reflect (1) any unnecessary duplication of services, or (2) services that were not (a) reasonably likely to benefit the estates or (b) necessary to the administration of the cases;

- \$457,443.83 in expenses incurred by Baker Botts in preparing and defending the Fee Application through July 13, **2010**, were actual, necessary expenses;
- The fees sought by Baker Botts for preparing and defending the Fee Application through July 13, **2010**, reflect the actual time expended by Baker Botts for preparing and defending the Fee Application. However, the Court finds that the reasonable compensation for the actual, necessary services performed by Baker Botts in preparing and defending the Fee Application through July 13, **2010**, is \$5,000,000 based on the level and skill reasonably required to prepare and defend the Fee Application.
- In addition to the \$113,225,595.48 in fees sought by Baker Botts in its original interim application, it is entitled to an enhancement of \$4,161,708.96 for the extraordinary efforts and results in litigating and obtaining a multi-billion dollar judgment against ASARCO's parent company in the SCC Litigation

8. The Court finally approves and allows \$117,613,158.44 in fees and \$6,046,135.06 in expenses for services performed and expenses incurred by Baker Botts during the Application Period. The \$117,613,158.44 fee award is comprised of (1) \$113,074,527.74 in fees approved by this Court on an interim basis under [section 331 of the Bankruptcy Code](#) and paid to Baker Botts; (2) *plus* \$263,994.74 in additional, unpaid fees incurred by Baker Botts for the period of November 1, **2009**, through December 8, **2009**; (3) *plus* 4,161,708.96 as an enhancement because there are rare and extraordinary circumstances in these cases and Baker Botts' services were instrumental in producing the exceptional results that were unanticipated at case commencement; (4) *minus* \$112,927.00 in fees charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates. The \$6,046,135.06 expense award is comprised of (1) \$6,065,598.58 in expenses approved by this Court on an interim basis under [section 331 of the Bankruptcy Code](#) and paid to Baker Botts; (2) *minus* \$19,463.52 in expenses charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates.

9. The Court finally approves and allows \$5,000,000.00 in fees and \$457,443.83 in expenses incurred by Baker Botts in preparing and defending the Fee Application through July 13, **2010**. In addition, the Court will include in its final order resolving the Fee Application a provision authorizing Baker Botts to submit supplemental applications for additional defense fees and expenses incurred after July 13, **2010**, upon resolution of any appeals or in connection with any subsequent proceedings in the event of a remand.

## **II. Background**

### **A. Summary**

\*4 10. Throughout these bankruptcy cases, Baker Botts lawyers conducted themselves with the utmost professionalism and commitment, addressing an array of challenging legal issues with sophistication, creativity, and skill. Few firms in the country have the breadth and depth of experience in different disciplines necessary to handle these cases with the skill demonstrated by Baker Botts. Baker Botts performed at an exemplary level in a wide spectrum of legal specialties.

11. The results obtained in these cases are nothing short of extraordinary. This Court has said that the ASARCO bankruptcy case "is probably the most successful Chapter 11 of any magnitude in the history of the Code." Baker Botts contributed significantly to the success of these cases. Baker Botts performed in an extraordinary fashion in numerous areas, but perhaps most notably in trying and obtaining a multi-billion-dollar judgment against ASARCO's parent company, Americas Mining Corporation ("AMC," and together with ASARCO Incorporated, a Delaware corporation controlled by AMC, the "Parent "). Creditors ultimately received payment in full of all claims, plus post-petition interest and allowed attorneys' fees. Such an extraordinary result would have seemed far fetched at the outset of these cases.

12. When ASARCO filed its bankruptcy case on August 9, 2005, "the prospects of reorganization were slim." "[T]he [C]ompany had essentially run out of cash and was saddled with massive environmental liability, financial debt, potential asbestos-related liability, falling copper prices, and a striking workforce." [\[FN7\]](#) Creditors were expected to receive cents on the dollar, if anything, because ASARCO's assets were severely depleted and the claims against it were extraordinarily high. Environmental, asbestos, and toxic-tort claims alone were more than \$10 billion. The history of this case is well documented in this Court's Recommendation to the District Court on plan confirmation.

[FN7.](#) *Amended and Supplemental Report and Recommendation for Entry of Findings of Fact and Conclusions of Law on Plan Confirmation*, Dkt. No. 12844 ("*Amended Report and Recommendation* "), at 3.

13. Baker Botts faced significant hurdles from the outset of these cases. Following ASARCO's bankruptcy filing, all of the Company's prepetition directors and its chief executive officer were forced to resign. ASARCO had little cash, no debtor-in-possession financing, and no financial advisor. It also was in the midst of a labor strike. There was a significant possibility that these chapter 11 cases would be converted to chapter 7 cases and the Debtors would be forced to liquidate, placing professionals like Baker Botts at substantial risk of non-payment.

14. Baker Botts acted quickly to assist ASARCO in resolving its corporate governance issues, obtaining debtor-in-possession financing, retaining a financial advisor, and settling the strike. Each of these steps was critical to save ASARCO from liquidation and put it on the path toward reorganization.

15. Over the next four years, the Debtors and Baker Botts "continuously moved this case toward the confirmation of a plan that resulted in the best possible recovery for creditors--full payment." [\[FN8\]](#) Baker Botts' outstanding achievements are described below.

[FN8.](#) *Amended Report and Recommendation*, at 4.

\*5 16. First, Baker Botts obtained a multi-billion-dollar judgment against AMC relating to the sale of ASARCO's controlling ownership interest in Southern Copper Corporation ("SCC "). The judgment obtained by Baker Botts against AMC is likely the largest fraudulent transfer judgment in chapter 11 history.

17. Second, Baker Botts conceived, recommended, and commenced an innovative auction of the multi-billion-dollar judgment against AMC that, under the Debtors' unique plan structure, exposed the Parent to the possibility that it could both lose the Company and have to pay the judgment in full.

18. Third, Baker Botts worked closely with ASARCO and Barclays Capital Inc. ("*Barclays* ") to develop and implement a process to auction the Debtors' assets that resulted in the selection of a plan sponsor that vigorously competed with the Parent. When, as a result of the worldwide financial crisis in September and October of **2008**, that plan sponsor repudiated the parties' deal, Baker Botts worked closely with ASARCO and Barclays to renegotiate the parties' contract to maintain this critical competition for the Debtors' assets.

19. Fourth, in addition to obtaining a multi-billion-dollar judgment against AMC, Baker Botts litigated and reclaimed the Mission South Mill (the "*South Mill* "), a valuable and important component of ASARCO's mining operations, and prosecuted a complicated tax adversary proceeding, the result of which led to creditors receiving the benefit of an approximately \$60 million tax refund. These results increased ASARCO's profitability and made the Company far more attractive to potential buyers and ultimately more valuable to the Parent.

20. Fifth, Baker Botts significantly reduced the claims faced by the Debtors. The United States Department of Justice, Environment and Natural Resources Division (the "*DOJ* "), has described the ASARCO case in a press release as "the largest environmental bankruptcy in U.S. history." Baker Botts, through estimation and settlement resolved billions of dollars in environmental, asbestos, and toxic-tort claims, along with the claims related to the Mission Mine--all on terms favorable to the Debtors. These results liquidated the Debtors' liabilities in a substantially diminished amount and made ASARCO even more desirable to potential buyers. [\[FN9\]](#)

[FN9](#). The Debtors entered bankruptcy with over \$10 billion of asserted historical debts. They exited bankruptcy under a confirmed full-payment plan of reorganization with no historical debts other than a one-year \$280 million note to a section 524(g) asbestos trust, \$200 million of which Reorganized ASARCO prepaid in the first quarter of **2010**. Baker Botts Exhibit 71, Grupo Mexico First Quarter **2010** Results, at 5.

21. Finally, Baker Botts played a significant role in repairing the severed relationship ASARCO had with its workforce when it assisted the Company in settling the **2005** strike, negotiating a new collective bargaining agreement with the unions, and resolving a number of problems that had arisen in connection with employee benefit and pension plans.

22. During the course of these cases, ASARCO was transformed from a broke and broken company to a reorganized ASARCO, cleansed of its historical liabilities and well-positioned to compete effectively in the world of commerce. Under the guidance of Baker Botts, the Company reformed its corporate governance, dramatically improved its operations, and substantially reduced its liabilities.

\*6 23. Baker Botts' expert, retired bankruptcy lawyer Paul Wickes, explained that he is "not aware of a case in which the ultimate result was so much better than what would have been expected at commencement." The Court agrees. ASARCO's bankruptcy is truly a rags-to-riches story.

### **B. Synopsis of Services Performed by Baker Botts During the Application Period**

24. Although the Court will not attempt to describe all the tasks Baker Botts performed during these cases, the Court nonetheless finds it appropriate to highlight some of the significant services that Baker Botts performed during these cases and the extraordinary results achieved in this case.

25. The Baker Botts Fee Application contains a detailed narrative summary of the tasks Baker Botts performed for the Debtors, organized by task code. These tasks were further described by Baker Botts' witnesses. The Court finds that the witnesses that Baker Botts presented at trial were credible, and the Court gives significant weight to their testimony.

26. In the first four months of these bankruptcy cases ASARCO fought its way through a free-fall and precipitous bankruptcy filing, a perilous financial situation, a labor strike, and the perception that the Company was being managed for the benefit of Grupo Mexico rather than in the best interests of the estates. With the advice and assistance of Baker Botts, ASARCO avoided liquidation, and instead laid the ground work for a successful reorganization.

27. Baker Botts successfully negotiated and documented the debtor-in-possession financing notwithstanding the labor strike and the fact that the Company had experienced severe financial distress for several years.

28. On October 15, **2005**, after negotiations among the Debtors, lenders, and creditor constituents, the Debtors moved for and obtained court approval, on an interim basis, of a debtor-in-possession facility for up to \$20 million provided by CIT. [\[FN10\]](#) The Court finds that Baker Botts' work in negotiating the debtor-in-possession financing provided a tangible benefit to the estate.

[FN10.](#) *Interim Order Authorizing Post-Petition Financing, Granting Senior Liens and Priority Administrative Expense Status, and Modifying the Automatic Stay*, Dkt. No. 648. This Court approved the financing on a final basis on December 15, **2005**. *Final Order Authorizing Post-Petition Financing, Granting Senior Liens and Priority Administrative Expense Status, and Modifying the Automatic Stay*, Dkt. No. 1224.

29. With the Court's guidance and the concurrence of Mr. Ruiz--who at that time was ASARCO's only director--Baker Botts negotiated an interim agreement with the USW, which put ASARCO's employees back to work.

30. On December 9, **2005**, Baker Botts obtained a Court order mandating the appointment of two independent directors. Ultimately Edward R. Caine and H. Malcolm Lovett, Jr. were appointed to serve as independent directors.

31. In sum, Baker Botts played an important role in the Debtors' resolution of the major obstacles facing them during the first four months of these cases. Baker Botts assisted ASARCO in retaining a financial advisor, obtaining debtor-in-possession financing, settling the strike, and resolving the Company's corporate governance issues.

### **1. Obtaining a \$6 Billion Judgment Against AMC**

32. The pivotal event in these cases was Baker Botts' successful prosecution of an action to recover ASARCO's crown jewel--its controlling ownership interest in SCC. When AMC directed ASARCO to transfer the SCC shares to AMC in March 2003, ASARCO was in financial distress and the transfer added insurmountable momentum to ASARCO's spiral into bankruptcy. By the time the SCC lawsuit (the "*SCC Litigation* ") went to trial in May **2008**, the stock and dividends Baker Botts fought to recover from AMC were worth more than \$10 billion.

\*7 33. Through its creativity, tenacity, and legal talent, Baker Botts was able quickly and efficiently to prosecute the SCC Litigation, prevail at trial, and obtain and secure a judgment ordering AMC to return to ASARCO stock, dividends, and interest valued in excess of \$6 billion at the time of the judgment. The Court finds that the results obtained by Baker Botts in the SCC Litigation are rare and extraordinary and unquestionably provided a tangible and material benefit to the estates. The Court further finds that the extraordinary results achieved by Baker Botts were due to Baker Botts' performance and not to inferior performance by opposing counsel, unanticipated defense concessions, unexpectedly favorable rulings, a sympathetic fact-finder, or simple luck. The Baker Botts trial team won the SCC Litigation by deciphering millions of pages of documents and using those documents to tell a compelling story primarily out of the mouths of adverse witnesses at depositions and in the courtroom. The SCC Litigation is described in detail in the District Court's opinions. [\[FN11\]](#)

[FN11](#). See generally [ASARCO LLC v. Americas Mining Corp.](#), 382 B.R. 49 (S.D.Tex.2007); [ASARCO LLC v. Americas Mining Corp.](#), 396 B.R. 278 (S.D.Tex.2008); [ASARCO LLC v. Americas Mining Corp.](#), 404 B.R. 150 (S.D.Tex.2009); [ASARCO LLC v. Americas Mining Corp.](#), No. 1:07-CV-00018, 2009 WL 2168778 (S.D.Tex. July 20, 2009).

34. On April 1, **2009**, the District Court issued its opinion on damages. [\[FN12\]](#) The opinion was later amended on April 14, **2009**, to correct a clerical error. The District Court ordered AMC to return to ASARCO stock worth approximately \$5.48 billion at that time. The District Court also ordered AMC to pay ASARCO money damages of approximately \$1.38 billion. The monetary award was comprised of dividends AMC received on the SCC shares of \$1.94 billion and prejudgment interest on those dividends of \$329

million, less the \$747 million that AMC paid for the SCC shares, together with interest on that payment of \$164 million.

[FN12](#). *Amended Report and Recommendation*, ¶ 50.

35. The District Court issued its Final Judgment on April 15, **2009**, implementing its liability and damages opinions (the "*SCC Judgment*"). The SCC Judgment obtained by Baker Botts most likely is the largest fraudulent transfer verdict in United States history. Mr. Wickes testified that, based on his experience, "the results obtained in the SCC case are nothing short of remarkable." Reorganized ASARCO's Senior Associate General Counsel Ruth Kern, who testified at the final hearing on the Fee Application on behalf of Reorganized ASARCO, admitted that a \$6 billion judgment is a rare result. Reorganized ASARCO's expert witness, Mr. Meckler, similarly testified that the SCC Litigation was "rare" and "extraordinary." [\[FN13\]](#) The Court agrees. The results achieved by Baker Botts in the SCC Litigation are, without question, rare and extraordinary measured by any possible standard.

[FN13](#). Reorganized ASARCO's expert on fee enhancement, Judge Monroe, does not contest this. Judge Monroe testified that he was not offering an opinion as to whether the result of the SCC Litigation, or Baker Botts' work on these cases as a whole, were rare and exceptional.

36. The Court finds that, as a result of Baker Botts' efforts before, during, and after the trial in the SCC Litigation, ASARCO's creditors and the bankruptcy estates received perhaps the greatest benefit of these bankruptcy cases in at least two respects. First, the prospect of the return of billions of dollars of value to the estates promised a far more meaningful recovery for creditors than originally anticipated. In fact, this Court found that, given that ASARCO's enterprise value was between \$950 million and \$1.25 billion at the time of the confirmation hearing in August **2009**, the Parent ultimately paid "in excess of \$1 billion ... for the release [of the SCC Judgment]." [\[FN14\]](#) The Court reaffirms and reiterates that finding.

[FN14](#). *Amended Report and Recommendation*, ¶ 193; *see also* Hr'g Tr. 188:20-189:14, June 1, **2010** (J. Lazalde) (admitting that ASARCO was worth around \$1 billion in July **2009** and that the Parent paid in excess of \$2.4 billion for the Company).

\***8** 37. The Court finds that the initiation of the SCC Litigation, the pursuit of the SCC Judgment, and the SCC Judgment itself brought tangible and material benefit to the estates.

## **2. Recovering the South Mill at ASARCO's Mission Mine**

38. Baker Botts also was instrumental in obtaining the return of what became one of ASARCO's important operating assets: the South Mill.

39. The South Mill is one of two mills at ASARCO's Mission Mine in Sahuarita, Pima County, Arizona. The other mill is the Mission North Mill. The South Mill is a wholly functional, fully engineered mill in excellent condition for its intended use. ASARCO had spent \$40 million in capital improvements to the mill in 1990 and 1991 to expand its milling capacity to 20,000 tons of ore per day. ASARCO operated the South Mill successfully from 1991 to 2001 in a copper price environment of \$0.74 to \$1.36 per pound (from 1992 to 2001), but took it out of production when copper prices dropped to \$0.65 per pound as of December 31, 2001.

40. Strapped for cash, on July 19, **2005**--just three weeks before the bankruptcy filing--ASARCO closed the sale of the South Mill and related equipment, parts, and supplies to Mineral Park. The total sales price was \$6 million.

41. The decision to sell the South Mill to Mineral Park was directed by the Parent. Before agreeing to sell the South Mill to Mineral Park, ASARCO conducted no analysis of what the South Mill was worth to ASARCO's ongoing business or how the South Mill could increase ASARCO's cash flow if brought back into production.

42. In September **2006**, Mineral Park started dismantling the South Mill. Baker Botts quickly investigated the matter and filed a lawsuit on September 21, **2006**, to avoid the sale of the South Mill as a fraudulent transfer and to enjoin further dismantling of the mill. [\[FN15\]](#)

[FN15.](#) *See ASARCO's Complaint*, Adv. No. 06-02069, Dkt. No. 1.

43. Baker Botts sought and obtained from this Court a temporary restraining order and, after a hearing, a preliminary injunction.

44. The key issue in the case was whether Mineral Park had paid reasonably equivalent value for the South Mill at the time of sale. That question turned on whether the income approach could be used to value an asset that was not in operation--a matter of first impression.

45. Baker Botts' successfully defended the injunction in an appeal to the District Court. [\[FN16\]](#) Shortly thereafter, a settlement was reached and ASARCO retained the South Mill.

[FN16.](#) *Order Affirming Bankruptcy Court Order Granting Preliminary Injunction Dated February 5, 2007*, Case No. 2:06-cv-524, Dkt. No. 21.

46. As a consequence of Baker Botts' efforts, ASARCO avoided spending \$40 to \$50 million to rebuild the South Mill, and ASARCO was able to retain an income-generating asset that increased revenues and profits for ASARCO. The restarting of the South Mill also lowered the cost per pound of production at the Mission Mine, the Hayden Smelter, and the Amarillo refinery, thereby increasing ASARCO's profitability.

### **3. Recovering Millions of Dollars of Tax Attributes**

47. These cases involved some of the most complex and contentious tax issues of any bankruptcy case in this Court's experience. Despite this, Baker Botts effectively prosecuted a complicated tax adversary proceeding against the Parent, the result of which led to creditors receiving the benefit of an approximately \$60 million tax refund.

### **4. Reducing the Liabilities of the Estates**

\*9 48. The Court finds that Baker Botts' approach to these cases as a structured, court-supervised negotiation, rather than a platform for protracted litigation of the countless issues that can arise in any bankruptcy case, contributed substantially to the successful results obtained. As Debtors' counsel, Baker Botts was generally successful in developing a consensus among the key creditor constituents to support the Debtors' business or legal strategy. Baker Botts kept constituents informed of the Debtors' intended course of conduct, solicited creditor input, carefully considered their views, and then explained and provided, as appropriate, the analytical underpinning of the Debtors' decisions. There were many more hours spent at the negotiating table than in court.

49. Examples of consensus among the Debtors and their creditor constituents abound, including the agreements reached regarding the debtor-in-possession financing, the approval of the collective bargaining agreement, the plan sponsor selection process, and, finally, the confirmation hearing itself at which there was overwhelming creditor support for the Debtors' plan. However, the best examples of successful negotiations among the Debtors and the creditor constituents are the court-approved settlements of the Debtors' environmental, asbestos, toxic-tort, and Mission Mine liabilities. The Debtors' exposure to these claims was substantial and would have taken decades and hundreds of millions of dollars in professional fees to resolve in the tort system or in the context of an administrative proceeding (as was the case for the Mission Mine liabilities). Baker Botts developed and deployed innovative legal strategies that enabled the Debtors to settle over \$10 billion of environmental, asbestos, toxic-tort, and Mission Mine claims in less than five years and on a cost-effective basis. The Court finds that Baker Botts' efforts with respect to ASARCO's most significant liabilities, and the results achieved by the Firm, provided tangible benefit to the estate. Baker Botts' work decreased ASARCO's liabilities and made the Company more desirable to potential buyers and ultimately more valuable to the Parent.

### **5. Resolving the Environmental Liabilities**

50. At the outset of these cases, ASARCO faced billions of dollars of environmental liabilities at approximately 100 sites in seventeen different states and six regions of the Environmental Protection Agency (the "EPA ") involving many of the largest, oldest, and most complex Superfund sites in the country, including the two largest--Coeur d'Alene and Tri-States. Because resolution of the environmental claims

outside of bankruptcy would have taken many years and perhaps decades, Baker Botts recommended that the Debtors seek to estimate them under [section 502\(c\) of the Bankruptcy Code](#). However, only a handful of bankruptcy courts had actually estimated environmental claims prior to these cases, and none had undertaken estimation of environmental liabilities on such a large scale. The number and amounts of the claims, the large number of diverse sites, and the plethora of difficult issues posed a daunting challenge.

**\*10** 51. Baker Botts' accomplishments in the environmental aspect of the bankruptcy were outstanding. ASARCO faced staggering claims for billions of dollars of alleged environmental harm substantiated by credible experts, many of whom had spent decades or their entire careers studying the disputed sites. For each site, Baker Botts faced a shifting array of interests and demands from various governments, potentially responsible parties ("*PRPs*"), and constituencies. To resolve these claims in a timely manner--thereby allowing the Company to promptly reorganize--Baker Botts negotiated a creative case management order (the "*CMO*") that provided for the estimation of approximately \$6 billion of claims at twenty-one sites, involved dozens of parties, and required those estimation proceedings to be conducted and concluded in an expedited time frame. Baker Botts then executed the tasks contemplated by the CMO by assigning teams of highly proficient bankruptcy and environmental lawyers to each of the sites and requiring these teams, as well the other parties to the estimation proceedings, to meet the demanding schedule for discovery, third-party mediation, and actual estimation hearings, all as contemplated by the CMO. Baker Botts settled or tried all claims at the sites covered by the CMO within the timeframe allowed. Ultimately, Baker Botts managed to craft a "global environmental settlement" that resolved billions of dollars of environmental liabilities. And the Firm did it in a demanding, compressed time frame.

52. The Court finds that the global environmental settlement was of substantial material benefit to the estates, and that Baker Botts' superior performance in obtaining the settlement and gaining the Court's approval of the same provided a tangible benefit to the estates.

## **6. Implementing the Global Environmental Settlement**

53. Another excellent feature of Baker Botts' work was addressing the difficulties inherent in the large numbers of property transactions that underpinned the settlement agreements and trusts that were necessary for the global environmental settlement.

54. Baker Botts established custodial trusts that resolved ASARCO's liabilities at the properties to be transferred to the trusts. Baker Botts again faced numerous legal and logistical challenges in the transfer of these properties. Included in these challenges was incorporating twenty-seven designated properties, located in fourteen states, each with different legal obligations and liabilities to be addressed.

55. There were several months of negotiations with the federal and state agencies aimed at releasing ASARCO from these liabilities and establishing the terms and funding for custodial trusts. Ultimately, the

Baker Botts team reached a deal with the governments to release ASARCO of the liabilities at these certain properties in exchange for funding a trust that would take ownership of the properties.

## **7. Resolving the Asbestos Liabilities**

\*11 56. Another significant factor contributing to the Debtors' need to reorganize was their exposure to asbestos liability. Before their bankruptcy filings, approximately 195,600 asbestos claims had been filed against ASARCO or its subsidiaries. While about half of these claims had been settled, the Company was still facing 20,000 claimants with unfunded settlements and about 67,000 pending claims.

57. Resolution of the Debtors' asbestos liability was a critical path to their exit from bankruptcy. Without this resolution and a section 524(g) channeling injunction, the Debtors faced the prospect of litigating thousands of prepetition asbestos claims and an unknown number of future claims in jury trials across the nation, and proving feasibility of any plan of reorganization would have been a significant challenge for any plan proponent.

58. The task of resolving the asbestos claims and future demands was not an easy one, but, drawing on its previous experience with asbestos and bankruptcy matters, Baker Botts developed creative strategies for addressing these claims and demands and successfully assisted the Company in resolving its alleged asbestos liability in a timely and cost-effective manner. Among the creative strategies that Baker Botts developed was an innovative asbestos bar date process to obtain detailed claims information without expensive and prolonged discovery. The process facilitated direct communications among the experts and consultants for the major constituencies and provided the factual basis from which substantive negotiations could proceed.

59. In large part due to the efforts of Baker Botts, the Debtors were able to settle all asbestos claims and demands for a present value of \$912.3 million under the Parent's plan--almost \$1.2 billion less than the asbestos claimants' experts' estimate of the Subsidiary Debtors' asbestos liability alone. The Court finds that the services that Baker Botts performed with respect to the Debtors' alleged asbestos liabilities were excellent, allowed the Debtors to emerge from bankruptcy free from all asbestos liabilities in a timely and cost-effective manner, and provided a tangible and material benefit to the estates.

## **8. Resolving the Toxic-Tort Liabilities**

60. In addition to its staggering environmental and asbestos liability exposure, ASARCO was burdened by 1,380 toxic-tort claims in the aggregate amount of \$1.47 billion, excluding claims filed in an undetermined amount. Further complicating matters was the problem that individuals asserting such claims suffered from serious diseases and health impairments (*e.g.*, children exposed to lead and arsenic). Despite these obstacles, Baker Botts encouraged claimants to settle rather than to litigate. With the assistance of Baker Botts, ASARCO successfully settled substantially all of the toxic-tort claims for approximately \$35 million--an outcome that, at the beginning of these cases, seemed impossible. By the commencement of the confirmation

hearing, all but two of the remaining claims were either settled or disallowed. The Court finds that Baker Botts demonstrated excellent wisdom and skill in negotiating these settlements, without which the Company undoubtedly would have incurred significant costs and expended valuable resources in litigation with no assurance of success.

\*12 61. The Court finds that Baker Botts' work on the Debtors' toxic-tort claims was a successful and efficient resolution of complex personal injury claims that otherwise would have taken years, if not decades, to resolve in the tort system at a significantly greater cost to the Debtors and their estates. Baker Botts' services with respect to toxic-tort claims provided tangible and material benefit to the estates.

## **9. Resolving the Mission Mine Liabilities**

62. Central to ASARCO's ability to emerge from chapter 11 as a viable mining company was the Company's ability to continue mining copper at its Mission Mine. After hard-fought negotiations complicated by distrust for the Company and Grupo Mexico, Baker Botts successfully resolved the claims relating to the Mission Mine for only \$30 million in contrast to the estimates of the claimants of between \$69 million and \$1 billion, and ASARCO was permitted to continue mining copper at its Mission Mine.

63. The Court finds that the Mission Mine Settlement provided tangible and material benefit to the estates.

## **10. Resolving Labor and Employee Benefit Issues**

64. From the beginning of these cases until their conclusion, ASARCO has had a troubled relationship with its workforce and labor unions. Baker Botts played a significant role in repairing this severed relationship when it assisted the Company in negotiating a new collective bargaining agreement with the unions and resolving problems that had arisen in connection with employee benefit plans and pensions. In **2006**, Baker Botts worked closely with ASARCO's new President and Chief Executive Officer, Joseph Lapinsky, as he negotiated with the labor representatives on the terms of a definitive collective bargaining agreement. ASARCO, again with the assistance of Baker Botts, also addressed settlement of the retiree medical class action suit filed in the United States District Court for the District of Arizona. The collective bargaining agreement that Baker Botts helped to bring about "was critical to a successful reorganization and assisted in the Debtor[s] being in position to generate \$1.4 billion in cash that ma[de] both the Debtor's Plan and the Parent's Plan possible." [\[FN17\]](#)

[FN17](#). *Amended Report and Recommendation*, ¶ 15.

65. In addition to the labor strike, ASARCO, under the control of the Parent, had also allowed many of the employee benefit plans to languish to the point that many of them no longer complied with applicable law and ran the substantial risk of being terminated. Baker Botts' efforts were crucial to getting these issues

resolved and the plans back into compliance because ASARCO otherwise lacked the resources, personnel, or expertise to do so independently.

66. ASARCO also had to address issues regarding the adequate funding of its pension plans during the course of these cases, which Baker Botts expended significant time and energy in addressing on ASARCO's behalf.

67. The Court finds that Baker Botts' efforts with respect to labor, employee benefits, and pension matters contributed to the stable workforce that enabled ASARCO to generate approximately \$1.4 billion in cash, which ultimately was distributed to creditors under the Parent's plan. The Court finds that Baker Botts' superior performance with respect to labor and employee benefits and pension issues provided tangible and material benefit to the estates.

### **11. Creating Competition for the Assets of the Estates**

\*13 68. Throughout these cases, Baker Botts encouraged ASARCO to adopt a strategy of creating a competitive environment for the control of the Company's assets to maximize the value of the estates and the return to creditors. Competition was necessary to encourage the Parent to put forth a full-payment plan. The benefits of competition accrued to the estates by providing more and better creditor options, maximizing the value of the Debtors' estates, and presenting for confirmation two confirmable full-payment plans.

69. The Court finds that Baker Botts' efforts to create competition for the assets of the estates were outstanding and provided tangible and material benefit to the estates.

### **12. Securing Sterlite as the Plan Sponsor**

70. Baker Botts worked closely and effectively with ASARCO and Lehman Brothers to develop and implement an auction process that resulted in the selection of a plan sponsor that vigorously competed with the Parent. By securing Sterlite as a plan sponsor and later encouraging ASARCO to both evaluate alternatives to a Sterlite-sponsored plan and to keep Sterlite engaged in the auction process, Baker Botts provided a tangible and material benefit to the estates.

71. On March 6, **2009**, the Debtors entered into a new purchase and sale agreement with Sterlite. Pursuant to the terms of the New Sterlite PSA, Sterlite would obtain a release from ASARCO's breach of contract claim against it only if Sterlite successfully purchased the Company. Because the Parent's plan was ultimately confirmed, ASARCO delivered to the Parent at closing a \$50 million deposit and the breach of contract claim against Sterlite--a claim Reorganized ASARCO is now pursuing.

72. The renegotiated contract with Sterlite and the threat of the litigation against it if it did not win the Company kept Sterlite competing with the Parent, contributed to the competitive bidding process at confirmation and ultimately to two full-payment plans.

### **13. Maintaining Competition During Plan Confirmation**

73. This Court previously noted the effect of competition on the Parent when it explained that, "[t]hroughout this case, the Parent has proposed and withdrawn many plans. On numerous occasions, attorneys for the Parent suggested that the Parent would propose a full payment plan. However, the history of this case demonstrates that all of the Parent's plans were proposed in reaction to other plans, tactically designed to regain control of the Debtor during this case or as an effort to limit liability in the SCC Litigation." [\[FN18\]](#)

[FN18.](#) *Amended Report and Recommendation*, at 5.

74. Baker Botts analyzed the numerous changes to the Parent's plan and evolving deal terms, conducted necessary discovery at an accelerated pace before and during confirmation. Baker Botts identified and forced the Parent to close loopholes and walk-away rights and to solidify its funding and escrow agreement as part of a competitive bidding process.

75. Throughout the confirmation hearing, Baker Botts continued to negotiate with Sterlite to improve the Debtors' plan, and four amendments to the plan were filed during the course of the confirmation hearing. The Debtors' improvement to their plan pressured the Parent to improve its plan, resulting in six plan amendments from the Parent after the commencement of the confirmation hearing.

\*14 76. The Debtors' plan on which the creditors voted provided for a distribution to creditors of \$1.1 billion cash, a \$770 million nine-year, non-interest-bearing note, and litigation trust interests in the SCC Judgment. The Parent's plan on which creditors voted proposed a \$1.4625 billion cash distribution plus an additional \$280 million note to the asbestos trust. Baker Botts encouraged Sterlite to increase the cash consideration and to monetize the non-cash consideration under the Debtors' plan such as the SCC Litigation trust interests. By the end of confirmation, Sterlite had contractually agreed to buy the interests in the SCC Litigation Trust that would otherwise have been distributed to creditors under the Debtors' plan for a total of \$1.1515 billion. In response to this competitive pressure, the Parent increased its cash consideration and improved the terms of its plan by way of six amendments. However, creditors voted overwhelmingly in favor of the Debtors' plan. [\[FN19\]](#)

[FN19.](#) *Amended Report and Recommendation*, at 7.

77. By the conclusion of the confirmation hearing, the Debtors' plan provided for \$2,272 billion cash in aggregate consideration (subject to additional contributions if necessary for claims to be paid in full), and the

Parent's plan proposed \$2.4801 billion cash in aggregate consideration (subject to the return of cash in excess of the amount necessary for claims to be paid in full).

78. This Court entered its report and recommendation in favor of the Parent's plan on August 31, **2009**. Sterlite offered to improve its offer under the New Sterlite PSA, thereby improving the Debtors' plan. Because Sterlite's presence in these cases had always incentivized the Parent, Barclays recommended that the Debtors keep Sterlite as an available alternative. Sterlite agreed to waive its right to terminate the New Sterlite PSA (Sterlite had a termination right if this Court failed to recommend the Debtors' plan for confirmation), and to allow the Debtors to prepare for a closing with the Parent, but only if the Debtors objected to the report and recommendation.

79. The Court finds that it was reasonable for the Debtors and its advisors to believe that copper price volatility could impede financing under the Parent's plan. It also was reasonable for them to believe that the Parent might have devised a strategy before closing if it became necessary or desirable for the Parent to avoid or delay a closing. After careful consideration and deliberation, the Board decided to object to the report and recommendation on certain limited discrete issues, provided Sterlite would stipulate that the Company and its advisors could and would prepare for a prompt closing of the Parent's plan if and when confirmed.

80. The District Court entered its confirmation order in favor of the Parent's plan on November 13, **2009**. The Debtors, aided by Baker Botts, worked diligently and professionally to prepare for a prompt closing of the Parent's plan. Copper prices held, the Parent obtained its financing, the plan closed on December 9, **2009**, and the creditors were paid in full.

\***15** 81. The Court finds that Baker Botts' efforts before and during confirmation not only benefitted the Debtors and their creditors but the Parent and Grupo Mexico as well. Not only did Grupo Mexico retain its indirect ownership of ASARCO, but it received a company cleansed of its liabilities and well positioned to compete in the world of commerce. At closing, ASARCO received the benefit of the \$50 million Sterlite deposit, a breach of contract claim against Sterlite that it is pursuing, and a refund from the Plan Administrator of approximately \$70 million. Grupo Mexico has advertised the benefits it has received from the ASARCO bankruptcy and reorganization. Baker Botts Exhibits 70 and 71 are Grupo Mexico's Fourth Quarter Results **2009** and First Quarter Results **2010** that are published on its website (<http://www.gmexico.com/finacial/en-fi00.asp>). Extracts from those reports follow:

- The restructuring of Asarco was successfully concluded in December, consolidating once again as a subsidiary of [Grupo Mexico] completely free of any environmental and asbestos related contingencies and liabilities. With the integration of Asarco, [Grupo Mexico] positions itself as the number one company in copper reserves worldwide ... and reaffirms its position as one of the main producers of mined and refined copper.

- Asarco contributed US\$1.357 billion from its own cash and made payment to its creditors for an aggregate cash consideration of US\$3.562 billion.
- Tax Benefits of US\$1.024 billion. [Grupo Mexico's] investment in the reorganization of Asarco generated a fiscal benefit of US\$1.024 billion to be realized in the following quarters. Taking this benefit into account, the net transaction cost was US\$1,181 million. At the average copper price of US \$3.25 per pound estimated by analysts for **2010**, Asarco will generate an EBITDA of approximately US\$550 million in **2010**, implying for the transaction a very attractive valuation of 2.1 times EBITDA.
- Consolidated sales for 1Q10 were US\$1.933 billion compared to US\$851 million for 1Q09, an increase of 127% mainly due to greater production by the Mining Division through the recovery of Asarco and higher metal prices.

82. Grupo Mexico's overall net cash position has significantly improved following the ASARCO acquisition, allowing Grupo Mexico to prepay its debt and reward its stockholders with at least two cash dividends. During the first quarter of **2010**, "prepayments were made on the AMC loan and the ASARCO note for a total of US\$500 million." Additionally, "[o]n January 29, **2010**, the Board of Directors approved a dividend payment of \$0.14 pesos per outstanding share," which equates to a total dividend of \$83,594,131. [\[FN20\]](#) "On April 23, **2010**, the Board of Directors approved a dividend payment in cash of \$0.17 pesos per outstanding share," which equates to a total dividend of \$108,599,660. [\[FN21\]](#) The Court finds that Grupo Mexico benefitted from the superior performance of Baker Botts in representing ASARCO in these cases.

[FN20.](#) This amount was calculated as of January 29, **2010**, at which time there were 7,785,000,000 shares outstanding and the conversion factor was 0.0766989.

[FN21.](#) This amount was calculated as of April 23, **2010**, at which time there were 7,785,000,000 shares outstanding and the conversion factor was 0.082058.

### III. DISCUSSION

#### A. [Section 330 of the Bankruptcy Code](#)

\***16** 83. [Section 330 of the Bankruptcy Code](#) governs the award of fees and expenses for professionals retained under [section 327 of the Bankruptcy Code](#). [Section 330](#) of the Bankruptcy Code "authorizes compensation for services and reimbursement of expenses of officers of the estate," and "prescribes the standards on which the amount of compensation is to be determined." [\[FN22\]](#) [Section 330](#) provides that a bankruptcy court, in its discretion, determines "the amount of reasonable compensation" for professionals retained under [section 327 of the Bankruptcy Code](#). [\[FN23\]](#)

[FN22.](#) H.R.Rep. No. 95-595, at 329 (1977); see also *Chamberlain v. Kula (In re Kula)*, 213 B.R. 729, 736 (B.A.P. 8th Cir.1997) ("[Section 330](#) applies to all bankruptcy cases, including Chapter 11 cases.").

[FN23](#). [11 U.S.C. § 330\(a\)\(3\)](#); see [In re Farah](#), 141 B.R. 920, 923 (Bankr.W.D.Tex.1992) ("Determining what constitutes reasonable compensation is soundly within the discretion of the bankruptcy court, primarily because the bankruptcy judge is in the best position to determine the reasonableness of a proposed fee.").

84. [Section 330](#) provides considerable guidance to bankruptcy courts in determining reasonable compensation. It provides:

(3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including--

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title. [\[FN24\]](#)

[FN24](#). [11 U.S.C. § 330\(a\)\(3\)](#). [Section 330\(a\)\(3\)](#) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act in **2005**. The amendment to [section 330\(a\)\(3\)](#) is effective for all [title 11](#) cases filed after October 17, **2005**. The ASARCO bankruptcy case was filed prior to that date. The amendment to [section 330\(a\)\(3\)](#) added an additional statutory factor for courts to consider in determining reasonable compensation: with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field. [11 U.S.C. § 330\(a\)\(3\)](#). Even if the amendment to [section 330\(a\)\(3\)](#) governed these cases, the Court concludes that Baker Botts has demonstrated skill and experience in the bankruptcy field. Baker Botts' proffers and the Court's first-hand experience presiding over these cases support this conclusion.

This list is non-exclusive. [\[FN25\]](#)

[FN25](#). See *Staiano v. Cain (In re Lan Assocs. XI, L.P.)*, [192 F.3d 109, 123 \(3d Cir.1999\)](#) ("[T]he factors set forth in [§ 330\(a\)](#) are not exhaustive and ... bankruptcy courts may consider relevant factors beyond those listed in the statute.").

## **1. Application of the Statutory Factors Listed in [Section 330 of the Bankruptcy Code](#)**

### **a. Time Spent on Services**

85. Courts may determine the reasonable amount of time a professional should spend on a given project. [\[FN26\]](#) In making such determination, the Court may take into account the complexity of the legal

issues for which the services were performed. [\[FN27\]](#) A fee applicant should also demonstrate good faith "billing judgment." [\[FN28\]](#)

[FN26. \*In re Wildman\*, 72 B.R. 700, 713 \(Bankr.N.D.Ill.1987\).](#)

[FN27. \*See Frazin v. Haynes & Boone LLP \(In re Frazin\)\*, 413 B.R. 378, 424 \(Bankr.N.D.Tex.2009\).](#)

[FN28. \*Hensley v. Eckerhart\*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 \(1983\).](#)

86. The Court finds that Baker Botts spent a total of 319,860.85 hours of professional time during the Application Period.

87. Baker Botts firm policy requires timekeepers to record their hours contemporaneously with the work they perform, or as soon thereafter as reasonably possible, recognizing the vagaries and demands of the practice. Baker Botts lawyers are to accurately describe the work performed, and record all of their time but "not a minute more." The Court has no reason to doubt that any attorney who worked on these cases performed as efficiently and as diligently as he or she reasonably could under the circumstances.

88. In terms of complexity and novel issues, few if any chapter 11 cases in United States history rival these cases.

89. The amount of time that Baker Botts spent securing the SCC Judgment; developing the innovative auction of the SCC Judgment; addressing the Debtors' environmental, asbestos, and toxic-tort liability; addressing the Debtors' cash-flow deficiencies in the early stages of these cases; participating in the resolution of disputes between ASARCO and the labor unions and work on the Debtors' employee benefits issues; addressing ASARCO's corporate governance issues; identifying and securing Sterlite as the plan sponsor; seeking confirmation of the Debtors' plans of reorganization and responding to other plan sponsors' plans of reorganizations; maintaining competition among the plan sponsors in these cases; and performing other services that counsel for debtors-in-possession routinely perform in chapter 11 cases was reasonable and fully compensable.

\*17 90. The Court concludes that Baker Botts exercised good faith billing judgment during these cases, Baker Botts staffed these cases properly under the circumstances, the work was performed efficiently and consistent with high standards, and the time Baker Botts spent on the services it performed for the Debtors during the Application Period was reasonable and fully compensable.

#### **b. Rates Charged for Services**

91. Courts take a number of different factors into account when reviewing the rates charged by a fee applicant, including (1) the customary compensation charged by comparably skilled professionals;

[\[FN29\]](#) (2) the novelty and complexity of the issues, the special skill and experience of counsel, the quality of the representation, the results obtained, and the superior performance of counsel; [\[FN30\]](#) (3) the lack of objection to the rate charged; [\[FN31\]](#) (4) the type of services performed; [\[FN32\]](#) (5) the bankruptcy court's own experience with the rates charged by other fee applicants; [\[FN33\]](#) and (6) whether the applicant charges more for bankruptcy services than for non-bankruptcy services. [\[FN34\]](#) In addition, courts will analyze what the prevailing market rate is for similar work in connection with a lodestar analysis. [\[FN35\]](#)

[FN29.](#) See, e.g., [Pal Family Credit Co. v. County of Albany \(In re Pal Family Credit Co., Inc.\)](#), 425 B.R. 1, 9 (N.D.N.Y.2010); see also [In re Berg](#), 05-39380, 2008 WL 2857959, at \*5 (Bankr.E.D.Pa. July 21, 2008) (taking into account the experience and skill of the professionals in the case, the market cost for a professional with such experience and skill, and the applicant's normal billing rate).

[FN30.](#) [In re Tan, Lie Hung & Mountain States Inv., LLC](#), 413 B.R. 851, 862 n. 23 (Bankr.D.Or.2009).

[FN31.](#) [In re Moss](#), 320 B.R. 143, 157 (Bankr.E.D.Mich.2005).

[FN32.](#) [In re Busy Beaver Bldg. Centers, Inc.](#), 19 F.3d 833, 849 (3rd Cir.1994).

[FN33.](#) [In re Allegheny Int'l, Inc.](#), 139 B.R. 336, 339 (Bankr.W.D.Perm.1992).

[FN34.](#) [In re Fleming Cos., Inc.](#), 304 B.R. 85, 92-93 (Bankr.D.Del.2003).

[FN35.](#) See, e.g., [In re Atwell](#), 148 B.R. 483, 489 (Bankr.W.D.Ky.1993).

92. The Court concludes that consideration of the novelty and complexity of these cases, the results obtained, and the rates charged by comparably skilled attorneys in other large chapter 11 cases is more appropriate when determining the prevailing market rate under the lodestar analysis.

93. The Court finds that no other firm could have achieved the results in these cases at the rates charged by Baker Botts. Baker Botts presented un rebutted evidence to support this finding. Baker Botts' expert, Paul Wickes, testified that Baker Botts was one of a select few law firms that could have achieved the results obtained in these cases. Mr. Wickes further testified that none of the other firms capable of achieving the results obtained in these cases would have been "prepared to take [these cases] for a blended hourly rate of anything close to the \$354 per hour that Baker Botts has charged and would have instead insisted on a blended hourly rate more in the range of that charged by [the Parent's counsel] Milbank." Mr. Wickes even admitted that his former firm, Linklaters, would not have been able to handle these cases. Mr. Kinzie testified that while there might be a handful of firms that could have represented ASARCO successfully, it is unlikely any of those firms could have done so for less than \$200 million. The Court agrees.

### **c. Baker Botts' Hourly Rates**

94. For the period **2005** through **2009**, Baker Botts billed ASARCO at the standard rates that Baker Botts had in place for each of those years. The rates that Baker Botts charged to ASARCO are the same or lower than they would have been in a non-bankruptcy matter of similar size and complexity.

95. The standard rates that Baker Botts charged during these cases are generally lower than those charged by Baker Botts' competitors. Baker Botts sets its standard rates at the lower end of the range of rates relative to most of the firms that Baker Botts considers its primary competitors. Baker Botts' average standard rates are generally 9% to 14% lower than competitor firms headquartered outside New York or California, and 7% to 11% lower than other large Texas firms.

\***18** 96. In part because Baker Botts' rates are relatively modest compared to the firms with which it primarily competes, but also because of the Firm's billing practices, the quality of its lawyers, and the sophistication of its practice, Baker Botts sets standard rates but then bills or collects at or above the Firm's standard rates. Between **2005** and **2009**, 58% of the time that Baker Botts billed to its clients was at or above its standard rates. Of the 58%, 42% was billed at standard rates and more than 16% was billed at premium rates (*i.e.*, rates above standard). For this period of time, Baker Botts' premium fees as a percentage of standard fees ranged from approximately 13% to 19%. The work for ASARCO represented 3.9% of Baker Botts' overall standard work value during the years **2005** through **2009**. If the time worked on behalf of ASARCO is removed from this analysis, the result is that over 56% of the remaining work was billed at or above Baker Botts' standard rates. The average percentage of the work billed at premium rates rises to 17%.

97. Billing and collecting premium rates is part of Baker Botts' billing practice and a material component of the Firm's revenues. While Baker Botts' average rates are at the lower end of the spectrum relative to its primary competitors, between 15% and 20% of the Firm's production is billed at a premium to standard rates (an average of approximately 16% in years **2005** to **2009**). Premiums are billed and collected by Baker Botts for several reasons, but in general Baker Botts' clients agree to pay a premium because of the exceptional effort, significant result, or specialized skill of the Baker Botts lawyers involved in the representation.

98. For all Baker Botts timekeepers that worked on these cases during the years **2005** through **2009**, work on these cases represented 10% of the total time billed to all clients. For these same timekeepers and time period, of the 90% of their hours billed to other clients, 79% of their hours were billed at or above Baker Botts' standard rates.

99. During **2005** through **2009**, it was Baker Botts' typical practice to invoice most of its time to clients at or above Baker Botts' standard rates with very little write down at the time of invoicing. Baker Botts' clients typically pay Baker Botts' invoices on a timely basis, which averages from fifty to fifty-two days. ASARCO's payment cycle average was approximately forty-nine days during the period **2005** through **2009**.

100. The Court finds that the possibility of receiving premium rates based on extraordinary circumstances is an important consideration of Baker Botts in setting its standard rates. The Court further finds that, when Baker Botts set its standard rates in these cases, bankruptcy professionals had a reasonable expectation that they could receive an increase to their standard rates based on results obtained if the Court determined the circumstances warranted.

#### **d. Comparison of Baker Botts' Hourly Rates to Others**

\*19 101. The Court finds that the hourly rates that Baker Botts charged in these cases were low when compared to (1) the rates other law firms charged representing debtors in other chapter 11 cases as well as the rates that law firms participating in these cases charged in other chapter 11 cases representing debtors and official creditor committees; (2) the rates that law firms representing debtors charged in chapter 11 cases filed in Corpus Christi, Dallas, Houston, and San Antonio; and (3) the rates that other professionals charged in these cases.

#### **i. Comparison of Baker Botts' Rates to Rates Charged in Other Chapter 11 Cases**

102. The Court finds that the average hourly rate that Baker Botts charged in these cases was substantially lower than rates charged by other firms in other large, complex chapter 11 cases pending during the same time as these cases. To reach this finding, the Court considered the rates charged in other cases that were derived from the following sources: (1) the top five bankruptcy cases reported on [www.bankruptcydata.com](http://www.bankruptcydata.com) for every year from **2005** through **2009**; (2) all cases listed on Exhibit B to Barclays' motion for allowance of fee enhancement; (3) cases where Milbank, Tweed, Hadley & McCloy, Haynes and Boone, LLP, Vinson & Elkins LLP, Shearman & Sterling LLP, Kramer Levin Naftalis & Frankel LLP, Gibson, Dunn & Crutcher LLP, and Latham & Watkins, LLP (each of whom participated in these cases) were counsel to a debtor or official creditors committee; and (4) various chapter 11 cases filed in Texas from **2005** through **2009**. The chart attached hereto as exhibit 1 shows comparison of Baker Botts rates with other chapter 11 cases.

103. The hourly rate of Baker Botts' highest billing-rate partner was lower than the hourly rate of the highest billing-rate partners in several other bankruptcy cases that were pending from **2005** through **2009**. The chart attached hereto as exhibit 2 shows a comparison of Baker Botts partners with partners in other chapter 11 cases.

104. The hourly rate of Baker Botts' associates was lower than the hourly rate of the associates in several other bankruptcy cases that were pending from **2005** through **2009**. The chart attached hereto as exhibit 3 compares the highest rates of second-, fourth-, and eighth-year associates at Baker Botts to the highest rates of associates at the same level in other national bankruptcy cases. The highest associate rates of Milbank and Haynes and Boone in these cases are also included in this chart.

#### **ii. Comparison of Baker Botts' Rates to Rates Charged in Other Bankruptcy Cases Pending in Texas**

105. The average hourly rate that Baker Botts charged in these cases was lower than the rates charged by comparable firms in other bankruptcy cases pending in Corpus Christi, Dallas, Houston, and San Antonio from 2006 through 2009. The chart attached hereto as exhibit 4 shows the average rates charged in Texas bankruptcy cases.

**iii. Comparison of Baker Botts' Rates to Rates Other Professionals Charged in these Cases**

\*20 106. The average hourly rate for all professionals that Baker Botts charged over the course of these cases was \$353.98, which is substantially lower than rates charged by other firms in these cases. This is true even taking into account that Milbank reduced its rates for partners beginning November 2008 and took an additional \$4 million voluntary reduction, and taking into account Haynes and Boone's 10% discount for all timekeepers beginning January 1, 2009.

AVERAGE RATES OF FIRMS INVOLVED IN THESE BANKRUPTCY CASES

Milbank	\$482.84 (36.4% higher than Baker Botts)
Jordan Hyden	\$434.00 (22.6% higher than Baker Botts)
Reed Smith	\$417.00 (17.8% higher than Baker Botts)
Haynes and Boone (not discounted)	\$415.86 (17.5% higher than Baker Botts)
Haynes and Boone	\$397.97 (12.4% higher than Baker Botts)
Baker Botts	\$353.98

107. The hourly rates of ten Milbank partners were at least 20% higher than Baker Botts' highest hourly rates during these cases. Milbank discounted its hourly rates for its partners beginning in November 2008, but its partners' hourly rates were still substantially higher than Baker Botts' partners even in 2009. The chart attached hereto as exhibit 5 shows a comparison of Milbank's highest rates with Baker Botts' highest rates.

108. The range of rates Baker Botts charged during the Application Period was \$365-\$800 per hour for partners, \$195-\$525 per hour for associates, and \$50- \$250 per hour for paraprofessionals. Baker Botts did not charge a higher rate for its bankruptcy professionals than its non-bankruptcy professionals. The majority of Baker Botts' timekeepers billing to these cases were non-bankruptcy lawyers. Exhibit C to the Fee

Application reflects that Baker Botts does not charge more for a particular service, including bankruptcy work.

109. Baker Botts has cultivated an impressive legal record since its founding in 1840. The Firm has demonstrated excellence in a variety of fields and is widely regarded as one of the country's most prestigious law firms. Moreover, the Firm, and Mr. Kinzie in particular, has specialized knowledge of section 524(g) bankruptcies in which a debtor has massive asbestos liability. Baker Botts also has garnered impressive litigation results, including the largest unreversed judgment in United States history in the *Pennzoil v. Texaco* case. Mr. Terrell, who was the lead trial lawyer in the SCC Litigation, was one of the lead lawyers in the *Pennzoil* case.

110. The rates that Baker Botts charged are comparable to or lower than the rates charged in these chapter 11 cases by other professionals paid by the estates. Also, based on this Court's experience with fee applications in this Court, the rates that Baker Botts charged to the Debtors as interim fees under [section 331](#) are not unreasonable. Moreover, Reorganized ASARCO did not object to the hourly rate that any Baker Botts attorney charged in these cases. [\[FN36\]](#) Accordingly, the Court holds that the hourly rates that Baker Botts charged for all professionals and paraprofessionals during the Application Period are not unreasonably high and are fully compensable. However, the Court also holds that Baker Botts' hourly rate is approximately 20% lower than an appropriate market rate.

[FN36.](#) See *Amended Objection to Final Fee Application*, n. 15.

#### **e. Necessary or Beneficial to the Estates**

\*21 111. In *Andrews & Kurth, LLP v. Family Snacks, Inc.* ([In re Pro-Snax Distribs., Inc.](#)), [157 F.3d 414, 426 \(5th Cir.1998\)](#) ("*Pro-Snax*"), the Fifth Circuit held that work performed by legal counsel on behalf of a debtor must be of material benefit to the estate. The *Pro-Snax* standard does not, however, require unbridled success. An estate may benefit from first tries, mixed results, and even failures that lay the groundwork for future progress. *Pro-Snax* does not require denial of compensation that is rightfully earned by second-guessing reasonable decisions that ultimately advanced the case. While the Parent argues that *Pro-Snax* requires a court find from hindsight that each action taken by Debtor's counsel resulted in tangible benefit to the estate, this Court disagrees with that interpretation of Fifth Circuit law. (See below for specific discussion of the Parent's Objections.) This fact was recently emphasized in [In re Cyrus II Partnerships, No. 05-39857, 2009 WL 2855725, at \\*5 n. 5; 2009 Bankr.LEXIS 2587, \\*16. n. 5 \(Bankr.S.D.Tex. Sept. 1, 2009\)](#): "[A] service may 'benefit the estate' under *Pro-Snax* even though the service did not directly result in a quantifiable or monetary benefit."

112. In *Cyrus II*, a fee applicant sought compensation for pursuing a motion to compromise that was ultimately unsuccessful. [\[FN37\]](#) The court allowed compensation for work performed regarding the unsuccessful motion. [\[FN38\]](#) The court noted that "the failure of a motion to compromise teaches lessons

that lead to an ultimate resolution." [\[FN39\]](#) The Court refused to "read *Pro-Snax* to hold that ... counsel can only be compensated for litigation in which the estate succeeds." [\[FN40\]](#)

[FN37. \*In re Cyrus II P'ships\*, 2009 WL 2855725, at \\*8.](#)

[FN38. \*In re Cyrus II P'Ships\*, 2009 WL 2855725, at \\*9.](#)

[FN39. \*In re Cyrus II P'ships\*, 2009 WL 2855725, at \\*9.](#)

[FN40. \*In re Cyrus II P'ships\*, 2009 WL 2855725, at \\*9 \(citing \*Pro-Snax\*, 157 F.3d at 426\).](#)

113. If *Pro-Snax* required payment only upon success, then every professional compensated by an estate would be working on a contingency fee. In *Cyrus II*, the court stated that conditioning payment of a professional's fees on the success of their work would effectively force all professionals compensated by an estate to accept a contingency fee arrangement. Judge Isgur stated:

If the Court were to read *Pro-Snax* to limit Trustee's counsel's fee awards to matters in which the Trustee was the prevailing party, then the Court would be impermissibly converting hourly lodestar fees to contingent fees. Just as courts may not convert a contingency fee approved pursuant to § 328 into an hourly fee, the Court here may not convert the pre-approved hourly fee into a contingency fee. [\[FN41\]](#)

[FN41. \*In re Cyrus II P'Ships\*, 2009 WL 2855725, at \\*10.](#)

114. Since *Pro-Snax*, courts have struggled with the question of whether to analyze material benefit from a hindsight or "at the time the services were rendered" perspective. Reorganized ASARCO argues that the material benefit test is an objective after-the-fact test whereby the Court must determine " 'whether [ ] services resulted in an identifiable, tangible, and material benefit to the bankruptcy estate,' regardless of the reasonableness of such services at the time that they were rendered." [\[FN42\]](#)

[FN42. \*See Amended Objection to Final Fee Application\*, ¶ 18 \(quoting \*Quisenberry v. Am. State Bank \(In re Quisenberry\)\*, 295 B.R. 855, 865 \(Bankr.N.D.Tex.2003\)\).](#)

\*22 115. Courts have applied the material benefit test in three fashions: first, some courts apply a strict hindsight test; [\[FN43\]](#) second, some courts state that they apply a pure hindsight approach but then include a prospective viewpoint in their analysis; [\[FN44\]](#) and third, some courts apply a hybrid approach that explicitly includes prospective and hindsight viewpoints. [\[FN45\]](#) The third approach is the better-reasoned approach because it harmonizes the express language of [section 330\(a\)\(3\)\(C\) of the Bankruptcy Code](#), which states that the necessity and benefit of services should be evaluated "at the time at which the service was rendered," with the Fifth Circuit's decision in *Pro-Snax*.

[FN43. \*See In re Weaver\*, 336 B.R. 115, 119 \(Bankr.W.D.Tex.2005\), \*In re Quisenberry\*, 295 B.R. at 865.](#)

FN44. See *PricewaterHouseCoopers, LLP v. Litzler (In re Harbor Fin. Group, Inc.)*, 99-37255, 2001 WL 1041785, at \*3-4 (N.D.Tex. Sept.5, 2001); *In re JNS Aviation, LLC*, 04-21055, 2009 WL 80202, at \*8 (Bankr.N.D.Tex. Jan.9, 2009).

FN45. See *In re Spillman Dev. Group, Ltd.*, 376 B.R. 543, 550-54 (Bankr.W.D.Tex.2007); *In re Energy Partners, Ltd.*, 409 B.R. 211, 228-30 (Bankr.S.D.Tex.2009).

116. Under any standard, the services that Baker Botts provided to the Debtors during the Application Period were necessary and beneficial to the bankruptcy estates. The benefits Baker Botts' representation produced for the estates are significant and numerous. As this Court has noted before, the ASARCO bankruptcy "is probably the most successful Chapter 11 of any magnitude in the history of the Code." [FN46] The outcome of these cases for creditors and for ASARCO itself far surpassed expectations. Creditors have been paid in full and ASARCO has been remade into a functioning business. Below is a non-exhaustive list of examples where Baker Botts provided a material and tangible benefit to the bankruptcy estates:

FN46. Hr'g Tr. 41:5-6, November 23, 2009.

- obtaining the SCC Judgment, which motivated the Parent to file the full-payment plan;
- developing the innovative auction of the SCC Judgment;
- identifying Sterlite as a plan sponsor;
- maintaining competition in these cases by negotiating the New Sterlite PSA;
- vigilantly representing the Debtors during the confirmation hearing whereby both plan sponsors' plans were amended multiple times to improve recovery to creditors;
- assisting the Parent with closing the multi-billion-dollar transaction contemplated under the Parent's plan;
- devising and implementing an unprecedented procedure for estimation of over \$6 billion of environmental claims asserted by federal and state agencies, Native American tribes, and individual parties;
- eliminating almost \$5 billion of the Debtors' environmental liabilities;
- pursuing estimation of ASARCO's asbestos liability, creatively collecting claims data, and vigorously negotiating with the parties representing asbestos claims and future demands;
- reducing the Debtors' toxic-tort liability by approximately 94% from \$1.383 billion to \$34.97 million;
- resolving ASARCO's reclamation obligation under the Mission Mine Leases;
- participating in resolution of the labor strike;
- obtaining an injunction prohibiting the dismantling of the profitable South Mill, avoiding the sale of the mill, and obtaining the return of the mill, which ultimately earned the estates millions of dollars; and
- realizing tax benefits for the estates.

#### **f. Performance of Services Within a Reasonable Amount of Time**

\*23 117. The Court may determine what is the reasonable amount of time a professional should have to spend on a given project. [\[FN47\]](#) The Court may draw inferences of the reasonable amount of time necessary to perform legal services based on the record of the proceeding. [\[FN48\]](#)

[FN47. \*In re Palladino\*, 267 B.R. 825, 831 \(Bankr.N.D.Ill.2001\).](#)

[FN48. \*All Trac Transp., Inc. v. Tramp. Alliance Bank \(In re All Trac Tramp., Inc.\)\*, 310 B.R. 570, 573 \(Bankr.N.D.Tex.2004\).](#)

118. As Mr. Kinzie testified, there are bankruptcy cases in which the only significant issue is the company's asbestos liability that lasted longer than these cases. When one combines the opposition of the Parent with the asbestos, environmental, toxic tort, labor, corporate governance, tax, litigation, and other issues that had to be addressed, these cases were resolved in a remarkably short period of time. Further, Baker Botts positioned these Debtors for a robust, competitive confirmation hearing as early as November 2008, but citing the global financial crisis and the collapse of credit and commodity markets in September 2008, Sterlite refused to proceed with its purchase obligations under its original purchase and sale agreement and the Parent withdrew its 2008 plan shortly thereafter. The Court also notes that Reorganized ASARCO did not argue, or present any evidence to suggest, that any particular task that Baker Botts performed was not performed in a timely or reasonable manner.

119. The Court holds that based on the services that the Debtors required of Baker Botts, the complexity of these chapter 11 cases, and the time required to achieve full recovery to creditors, the services that Baker Botts performed for the Debtors were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problems, issues, and tasks addressed in these cases.

#### **g. Customary Compensation Charged by Comparably Skilled Practitioners**

120. [Section 330](#) and its legislative history express a congressional intent "that compensation in bankruptcy matters be commensurate with the fees awarded for comparable services in non-bankruptcy cases."

[\[FN49\]](#) As Judge Perris stated [in \*Columbia Aircraft Manufacturing Corporation\*, No. 07-33850, 2008 WL 1337855, at \\*2 \(Bankr.D.Or. Apr. 10, 2008\)](#), "[t]he idea behind the factors set out in [§ 330\(a\)\(3\)](#) is that professionals should not be paid an arbitrarily low rate in bankruptcy cases (in order to preserve the estate), but instead should be paid comparably to rates they would receive outside bankruptcy, so professionals will be willing to serve in bankruptcy cases." In discussing [section 330\(a\)\(3\)\(E\)](#), another court stated that it "strives to balance the fiduciary obligation of a debtor to spend its limited assets in a judicious fashion so as to maximize the ultimate distribution to its creditors against the importance of compensating the professionals who advise the chapter 11 debtor fairly, so as to encourage competent and experienced professionals to continue to participate in chapter 11 cases." [\[FN50\]](#)

[FN49. \*In re UNR Indus., Inc.\*, 986 F.2d 207, 209 \(7th Cir.1993\)](#) (citing H.R.Rep. No. 595, 329-30, reprinted in 1978 U.S.C.C.A.N. 5963, 6286).

[FN50. See \*In re Fibermark, Inc.\*, 349 B.R. 385, 395-96 \(Bankr.D.Vt.2006\).](#)

121. During the Application Period, Baker Botts charged the Debtors at its standard rates. As the Court previously noted, the majority of Baker Botts' timekeepers billing to these cases were non-bankruptcy lawyers. Exhibit C to the Fee Application reflects that Baker Botts does not charge more for a particular service, including bankruptcy work. [\[FN51\]](#) Moreover, there is no evidence in the record that comparably skilled practitioners would have charged less in non-bankruptcy cases than the Baker Botts professionals and paraprofessionals charged in these cases. To the contrary, the evidence shows that Baker Botts' standard rates are below market. The Court holds that the total compensation that Baker Botts requests, inclusive of the upward adjustment to the fees discussed below, is consistent with the customary billing practice of Baker Botts to charge a premium for outstanding results, and is consistent with the customary compensation charged by comparably skilled practitioners in non-bankruptcy cases.

[FN51. See \*Final Fee Application\*, Baker Botts Exhibit 17, Exhibit C.](#)

## **B. Reorganized ASARCO's Objections to the Fees Charged by Baker Botts to the Estates During the Application Period**

\*24 122. As described above, Reorganized ASARCO objects to Baker Botts' requested compensation and argues that the requested fees charged by Baker Botts to the estates during the Application Period should be reduced for various reasons. The Court has considered Reorganized ASARCO's objections and finds them to be without merit.

### **1. The Court's Discretion in Evaluating Fees and Objections Thereto**

123. The Court has broad discretion in evaluating the Fee Application and the objections thereto. [\[FN52\]](#) Appellate courts defer to the sound discretion of the bankruptcy court because that court "is more familiar with the actual services performed and 'has a far better means of knowing what is just and reasonable than an appellate court can have.' " [\[FN53\]](#)

[FN52. \*Lawler v. Teofan \(In re Lawler\)\*, 807 F.2d 1207, 1211 \(5th Cir.1987\)](#) ("[T]he bankruptcy court has broad discretion in determining compensation for services performed in a bankruptcy proceeding.").

[FN53. \*In re Lawler\*, 807 F.2d 1207, 1211.](#)

124. The Court can and should utilize its own knowledge of these cases in assessing the Fee Application. [\[FN54\]](#) The Court is itself an expert on the fees in question and, as such, is not bound by the

testimony of expert witnesses, even if un rebutted. [\[FN55\]](#) The Court has used its firsthand knowledge of these cases in evaluating the Fee Application and Reorganized ASARCO's objections to the Fee Application.

[FN54. See \*Nat'l Benevolent Ass'n of Christian Church v. Weil, Gotshal, & Manges, L.L.P.\*, No. 04-50948-RBK, 2006 WL 2516522, at \\*3 \(W.D.Tex. Aug. 2, 2006\)](#) ("[T]he Bankruptcy Court is intimately aware of the fee application in question, and it is prudent for the bankruptcy judge to use his background knowledge of the case to reach a decision on this issue.").

[FN55. See \*In re McClanahan\*, 137 B.R. 73, 74 \(Bankr.M.D.Fla.1992\)](#) (expert testimony regarding attorneys fees not binding on the court even if such testimony is un rebutted).

125. Many of Reorganized ASARCO's objections to Baker Botts' fees are grounded in the argument that compensation should be denied when counsel fails to strictly adhere to the Guidelines. [\[FN56\]](#) While the Guidelines are useful tools for counsel, they are not binding on the Court. The Guidelines are in place to aid fee applicants in providing the Court with sufficient information to determine whether requested fees are reasonable. So long as the Court has such information, the purpose of the Guidelines has been fulfilled.

[FN56. ASARCO Exhibit 1007A, Meckler Report, ¶ 47; \*Amended Objection to Final Fee Application\*, ¶ 19.](#)

## **2. Information Needed to Determine if Fees are Reasonable**

126. Baker Botts has provided the Court with ample and detailed information regarding the services performed by the Firm through the Fee Application, proffers, hearing testimony, and other evidence. The Court concludes that this information is sufficiently detailed to allow the Court to assess the reasonableness of Baker Botts' fees.

127. Billing records need only provide the Court with sufficient information to allow the Court to evaluate the reasonableness of the requested fees. [\[FN57\]](#) Fee applications that do not reach "an ideal level of completeness" may still support an award for compensation so long as the Court has sufficient information to assess the reasonableness of the fees. [\[FN58\]](#)

[FN57. \*In re Pan Am. Gen. Hosp. LLC\*, 385 B.R. 855, 876 \(Bankr.W.D.Tex.2008\)](#) ("We must remember the purpose of the fee detail--to allow the court to evaluate the reasonableness of the requested fee. So long as the detail provided is sufficient for the court to make that determination, that is enough.").

[FN58. \*In re Lawler\*, 807 F.2d 1207, 1211-12 \(5th Cir.1987\)](#) ("While the time sheets submitted by [the applicants] did not reach an ideal level of completeness, it cannot be said that they lack the necessary information.").

128. Applicants are not required to " 'detail the exact number of minutes spent nor the precise activity to which these hours are devoted.' " [\[FN59\]](#) It is sufficient if the billing entries "show the amount of time devoted to the case by each of the involved persons" and make clear that "the work was not duplicative or otherwise prohibited by the Bankruptcy [Code]." [\[FN60\]](#)

[FN59. \*In re Lawler\*, 807 F.2d 1207, 1211-12 \(quoting \*Riddell v. Nat. Democratic Party\*, 545 F.Supp. 252, 257 \(S.D.Miss.1982\)\).](#)

[FN60. \*In re Lawler\*, 807 F.2d at 1211-12.](#)

#### **a. Reorganized ASARCO's Objections Regarding the Specificity of Billing Entries**

129. Reorganized ASARCO asserts that \$9,373,251 in fees for work performed by Baker Botts should be disallowed in full because the work performed allegedly was inadequately described in Baker Botts' billing statements. The Court has considered this objection along with the testimony of Reorganized ASARCO's expert, Mr. Meckler, on this subject. The Court finds this objection without merit and will not reduce Baker Botts' requested fees on these grounds.

\*25 130. Baker Botts' billing descriptions, when considered in conjunction with the record and the Court's knowledge of these cases, are sufficiently detailed to provide the Court with an opportunity to assess the reasonableness of the requested fees.

131. Furthermore, Reorganized ASARCO's own experts disagree as to what constitutes a vague or inadequate billing description. Billing entries identified by Mr. Meckler as vague were identified as not vague by Judge Monroe, who has considerably more experience in evaluating fee requests in bankruptcy.

132. Billing descriptions are sufficient so long as the Court possesses enough information to determine if the requested fees are reasonable. [\[FN61\]](#) Courts have recognized that a billing entry that could be considered vague if read in isolation, may not be vague when viewed in the context of the surrounding work performed. [\[FN62\]](#) Likewise, billing entries that appear vague to an outside fee expert or fee auditor, may not be vague to the Court, which is very familiar with the case. [\[FN63\]](#) This is especially true where the outside fee expert is not a bankruptcy practitioner. [\[FN64\]](#)

[FN61. \*In re Pan Am. Gen. Hosp.\*, 385 B.R. 855, 876 \(Bankr.W.D.Tex.2008\).](#)

[FN62. \*In re Worldwide Direct, Inc.\*, 316 B.R. 637, 644 \(Bankr.D.Del.2004\)](#) ("Though other entries were not very explicit, when viewed in context with the other work done by the attorneys at the same time ... the Court is able to determine what issues were researched.").

[FN63. \*In re Worldwide Direct, Inc.\*, 316 B.R. at 644.](#)

[FN64. \*In re Worldwide Direct, Inc.\*, 316 B.R. at 644](#) ("since the Fee Auditor was not a bankruptcy practitioner and did not inquire of anyone involved in the case about the nature of the research, he could not opine as to its significance. The court is familiar with the case (and the contested issues) and, therefore, is able from the descriptions and the context to determine the appropriateness of the research done.")

133. In light of these standards, the Court finds the level of detail submitted by Baker Botts to be sufficient. The Court would reach the same conclusion with or without Baker Botts' revised time entries.

134. Even if Baker Botts' billing entries could be considered vague, denying the requested compensation would not be appropriate in light of Baker Botts' performance in these cases. Reduction of fees is not mandatory for insufficiently detailed time records. [\[FN65\]](#)

[FN65. See \*In re Wire Cloth Prods. Inc.\*, 130 B.R. 798, 807 \(Bankr.N.D.Ill.1991\)](#) ("The Court also agrees that certain time entries are insufficiently detailed. However, such deficiencies do not warrant a reduction in compensation due to other factors which weigh heavily in the Court's evaluation.").

#### **b. Reorganized ASARCO's Objections Regarding Block-Billing**

135. Reorganized ASARCO requests that the Court reduce Baker Botts' fee because time entries for approximately \$12,900,000 worth of work performed were allegedly block-billed. The Court has considered this objection and finds it without merit. The billing entries to which Reorganized ASARCO objects do not prevent the Court from assessing the reasonableness of Baker Botts' requested fees.

136. Applicants are not required to "detail the exact number of minutes spent nor the precise activity to which these hours are devoted." [\[FN66\]](#) Applications that do not reach "an ideal level of completeness" may still support an award for compensation. [\[FN67\]](#)

[FN66. \*In re Lawler\*, 807 F.2d 1207, 1211-12 \(5th Cir.1987\)](#) (quoting [Riddell v. Nat. Democratic Party](#), 545 F.Supp. 252, 257 (S.D.Miss.1982)).

[FN67. \*In re Lawler\*, 807 F.2d 1207, 1211-12.](#)

137. While counsel should make an effort to separate their time by project, such a requirement should not be enforced as to "impose slavish and over burdensome record-keeping requirements which, in the final analysis, result in fee applications of such enormous length and detail that they are of little ultimate value to the Court in awarding fees." [\[FN68\]](#) Courts refuse to reduce requested compensation for clumped time when such clumping has not been a detriment to the estate. [\[FN69\]](#) Compensation may be awarded for clumped time where the Court, using its own knowledge of the case, can determine the time spent was reasonable. [\[FN70\]](#)

[FN68. \*In re Reconversion Techs., Inc.\*, 216 B.R. 46, 58 \(Bankr.N.D.Okla.1997\).](#)

[FN69. \*In re Reconversion Techs., Inc.\*, 216 B.R. 46, 58; see also \*In re Lanier Spa\*, 99 B.R. 490, 492 \(Bankr.N.D.Ga.1989\)](#) ("When such lumping makes it impossible for the court to allocate time to each activity or to each attorney, the court may disallow all the hours which were lumped together.... In the instant case, however, the lumping is not so egregious as to prevent the court from determining if the number of hours spent on specific activities were reasonable.").

[FN70. See \*In re McGuier\*, 346 B.R. 151, 168 \(Bankr.W.D.Pa.2006\)](#) ("The entries again include the practice of 'lumping'. Nevertheless, the Court was able to discern the necessity and reasonableness of the services.").

\*26 138. Reorganized ASARCO's own experts did not agree on a definition of clumping or which Baker Botts billing entries should be considered impermissibly clumped. When presented with billing entries identified as impermissibly clumped by Mr. Meckler, Judge Monroe did not believe that such entries were inappropriate.

139. The evidence submitted by Baker Botts and the record as a whole contain ample information allowing the Court to assess the reasonableness of requested fees. In light of this evidence and the Court's own knowledge of the case, the Court holds that compensation should not be reduced on the grounds that certain billing entries were allegedly clumped. The Court would reach the same conclusion with or without Baker Botts' revised time entries.

### **c. Supplemental Information Submitted by Baker Botts**

140. After Reorganized ASARCO filed its Amended Objection to the Fee Application, Baker Botts submitted supplemental billing descriptions that provided the Court with additional information regarding the tasks performed and the specific amounts of time spent on certain tasks. While the Court finds that the Fee Application contained sufficient information without these supplemental billing descriptions, the Court notes that this additional information supports the conclusion that the requested fees are reasonable.

141. Supplementation of fee applications is permissible. [\[FN71\]](#) Courts permit supplementation of fee applications to address concerns such as alleged clumping or vagueness. [\[FN72\]](#)

[FN71. See \*Zolfo, Cooper & Co., v. Sunbeam-Oster Co., Inc.\*, 50 F.3d 253, 262 \(3rd Cir.1995\)](#) ("When a bankruptcy court denies compensation to an applicant who has attempted to comply in good faith with specificity requirements of the bankruptcy rules, the court should allow time to supplement the application."); [In re Busy Beaver Building Ctrs., Inc.](#), 19 F.3d 833, 84748 (3rd Cir.1994) (if a court determines that there are deficiencies in an application, the court should "allow the professional a reasonable

time to supplement the application with either a more detailed description of the questionable services, or with a memorandum of points and authorities in support of the application.").

[FN72](#). See *In re Indep. Am. Real Estate, Inc.*, 146 B.R. 546, 556 (Bankr.N.D.Tex.1992) (temporarily disallowing a portion of an applicant's fees due to clumping, but permitting the applicant to file supplemental information curing these defects); *In re Temple Retirement Cmtys., Inc.*, 97 B.R. 333, 339 (Bankr.W.D.Tex.1989) ("Counsel should supplement their time records with written narrative that places the services rendered in context so that the court can evaluate the necessity of their rendition."); *In re Garrison Liquors, Inc.*, 108 B.R. 561, 566 (Bankr.D.Md.1989) ("The time records submitted in support of the application are deficient because they fail to disclose the nature of services performed, and in fact are indecipherable.... Counsel will be afforded the opportunity to correct the various problems outlined in this opinion by submitting a revised fee application within 60 days.").

142. The supplemental information submitted by Baker Botts was considered by the Court and supports the Court's conclusion that the requested fees are appropriate and should not be reduced on the grounds that billing descriptions were inadequate.

### **3. Clerical and Administrative Efforts**

143. Reorganized ASARCO asserts that approximately \$3,469,155.00 in fees should be completely disallowed because the underlying work was allegedly administrative in nature. [\[FN73\]](#) The Court has considered this argument and finds it without merit. The Court will not reduce Baker Botts' compensation on the grounds that work performed was administrative or clerical in nature.

[FN73](#). *Amended Objection to Final Fee Application*, ¶¶ 3738

144. "[T]he classification of services as clerical or non-clerical does not decide the question of compensability under [§ 330](#): clerical services may be compensated in the proper context." [\[FN74\]](#) "[T]he bankruptcy court should review fee applications not for whether each particular service undertaken by a paralegal is clerical or paraprofessional by nature, but for whether non-bankruptcy attorneys typically charge and collect from their clients fees for that particular service when performed by a member of that profession, and the rates charged and collected therefor." [\[FN75\]](#)

[FN74](#). *In re Busy Beaver*, 19 F.3d at 851.

[FN75](#). *In re Busy Beaver*, 19 F.3d at 849.

145. The Court concludes that Baker Botts' compensation should not be reduced on the grounds that certain tasks performed were clerical or administrative in nature because Baker Botts has shown that the Firm typically charges its clients fees for such services. [\[FN76\]](#) Other firms also typically charge their clients for

such services. Furthermore, the Court concludes that many of the categories of services alleged to be administrative by Reorganized ASARCO in fact required legal training or knowledge. The Court concludes that the services objected to by Reorganized ASARCO on these grounds were actual, reasonable, necessary, and beneficial to the estates.

[FN76](#). See Baker Botts Exhibit 3, Proffer of J. Prince, ¶¶ 168-186.

#### 4. Summer Associates

\*27 146. Reorganized ASARCO asserts that approximately \$493,000.00 in fees requested by Baker Botts should be completely denied because the underlying work was performed by summer associates. The Court has considered this argument and finds it without merit. The Court will not reduce Baker Botts' requested fees on the grounds that certain fees reflect work performed by summer associates.

147. "[S]ummer associates can be valuable and worthy of billing at reasonable rates." [\[FN77\]](#) Numerous bankruptcy courts have allowed compensation for work performed by summer associates. [\[FN78\]](#)

[FN77](#). *In re Recycling Indus., Inc.*, 243 B.R. 396, 404 (Bankr.D.Colo.2000) (allowing a firm to bill for summer associates, but reducing the rates at which they were billed).

[FN78](#). See, e.g., *In re Child World, Inc.*, 185 B.R. 14, 19 (Bankr.S.D.N.Y.1995) (finding that fees requested by debtor's counsel for paralegals and summer associates were reasonable within the meaning of [§ 330](#) based on testimony from the debtor despite objections from the Trustee); *In re Davidson Metals, Inc.*, 152 B.R. 917, 921-22 (Bankr.N.D.Ohio 1993) (finding that \$75 per hour was a reasonable rate for summer associates but reducing an applicant's fees by 30% based on other factors); *In re Auto Parts Club, Inc.*, 224 B.R. 445, 449 (Bankr.S.D.Cal.1998) (allowing a firm to charge "summer interns" at \$80 an hour instead of the \$140 an hour requested by the firm).

148. Summer associate time is compensable outside of bankruptcy as well. As the Supreme Court has stated, "the increasingly widespread custom of separately billing for services of paralegals and law students who serve as clerks ... must be taken into account." [\[FN79\]](#) "[E]ncouraging the use of low cost [paralegals and law clerks] rather than attorneys wherever possible ... encourages cost-effective delivery of legal services." [\[FN80\]](#)

[FN79](#). *Missouri v. Jenkins*, 491 U.S. 274, 286, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) (citing *Ramos v. Lamm*, 713 F.2d 546, 558 (10th Cir.1983)).

[FN80](#). *Missouri v. Jenkins*, 491 U.S. at 288 (citing *Cameo Convalescent Ctr., Inc. v. Senn*, 738 F.2d 836, 846 (7th Cir.1984)).

149. The Court rejects Mr. Meckler's "extraordinary showing" standard for paying fees for summer associate work. As long as summer associate work is necessary and beneficial to the estates and the time expended is reasonable--in order words, as long as the work satisfies the criteria established by [section 330 of the Bankruptcy Code](#)--debtor's counsel can collect fees for work performed by summer associates.

150. The Court has awarded compensation for work performed by summer associates in the past. Furthermore, the Court notes that several firms involved in these cases billed and collected for summer associate time, including counsel for Reorganized ASARCO.

151. The Court finds fees billed by Baker Botts summer associates to be reasonable and their work beneficial to the estates. Accordingly, Baker Botts' requested compensation will not be reduced on the grounds that the Firm billed for work performed by summer associates.

## **5. Document Review Efforts**

152. Reorganized ASARCO asserts that "all attorneys who performed document review tasks should have been billed at the lowest billing rate of any document review attorney." Reorganized ASARCO requests that Baker Botts' fees be reduced by \$1,689,298 for fees associated with document review. The Court has considered this argument and finds it without merit. The Court will not reduce Baker Botts' requested compensation on these grounds.

153. The "document review" work performed by Baker Botts' attorneys consisted of screening documents for privilege, responding to discovery requests, identifying exhibits for use at deposition or at trial, preparing summaries of particular factual matters, and other trial preparation work.

154. The Court finds the fees associated with document review work are reasonable and that the work performed was necessary and beneficial to the estates. Reorganized ASARCO cites to no authority holding that debtor's counsel should charge uniform and reduced rates for document review. Furthermore, the Court notes that the billing rates charged by the Parent's counsel for document review attorneys exceeds the rates Reorganized ASARCO would have the Court impose on Baker Botts.

## **6. Services that Allegedly Failed to Provide a Material Benefit to the Estates**

\*28 155. Reorganized ASARCO requests that the Court reduce Baker Botts' requested compensation for \$9,022,885 in fees for work that, according to Reorganized ASARCO, did not provide a material benefit to the estates. The Court has considered this objection and finds it to be without merit. The Court finds that the work performed by Baker Botts was necessary and provided a material benefit to the estates.

156. Reorganized ASARCO cites to the *Pro-Snax* decision in support of its position that Baker Botts' requested compensation should be reduced. Reorganized ASARCO misconstrues the language of *Pro-*

*Snax* to require something that it does not. Contrary to Reorganized ASARCO's interpretation, *Pro-Snax* does not require that every action taken by a debtor's counsel be successful in order for counsel to receive compensation.

157. The facts of the *Pro-Snax* case differ significantly from these cases. *Pro-Snax* was filed as an involuntary chapter 7 and converted to a chapter 11 by the debtor. [\[FN81\]](#) Creditors requested that the case be reconverted to chapter 7. [\[FN82\]](#) The court denied the motion to reconvert but appointed a chapter 11 trustee. [\[FN83\]](#) The court was presented with two separate issues: (1) whether debtor's counsel could be compensated for services after the trustee had been appointed, and (2) whether debtor's counsel could be compensated for services performed before the appointment. [\[FN84\]](#) The majority of the court's opinion addressed the first question: compensation for work done after the appointment of the trustee, which the court concluded should not be awarded. At the end of the court's opinion, the court briefly addressed the second question of compensation before the trustee was appointed. [\[FN85\]](#) The court concluded that for work by a debtor's counsel to be compensable, the work must have provided material benefit to the estate. [\[FN86\]](#) The court denied compensation to debtor's counsel for pursuing a failed chapter 11 plan because the majority of creditors "repeatedly informed the Debtor and the bankruptcy court that they believed the case should be administered under chapter 7." [\[FN87\]](#) The court denied compensation to the applicant on the basis that the services were not reasonable at the time performed and because such services were not beneficial when judged in hindsight. [\[FN88\]](#)

[FN81. \*Pro-Snax\*, 157 F.3d at 416-418.](#)

[FN82. \*Pro-Snax\*, 157 F.3d at 416-418.](#)

[FN83. \*Pro-Snax\*, 157 F.3d at 416-418.](#)

[FN84. \*Pro-Snax\*, 157 F.3d at 419-20, 426.](#)

[FN85. \*Pro-Snax\*, 157 F.3d at 425-26.](#)

[FN86. \*Pro-Snax\*, 157 F.3d at 425-26.](#)

[FN87. \*Pro-Snax\*, 157 F.3d at 425-26.](#)

[FN88. \*Pro-Snax\*, 157 F.3d at 425-26](#) ("[W]e find that [the applicant] should have known from the outset that the Debtor's prosecution of a Chapter 11 plan would fail.").

158. Unlike in *Pro-Snax*--where the creditors urged liquidation, and the fee applicant, as noted by the Fifth Circuit, should have known from the outset that prosecution of the debtor's chapter 11 plan would fail--in

these cases creditors voted overwhelmingly in favor of confirmation of the Debtors' plan, which in turn provided the competitive pressure that resulted in the Parent's full-payment plan.. [\[FN89\]](#)

[FN89.](#) *Amended Report and Recommendation* at 7, 111.

## **7. Benefit Conferred by Specific Categories of Services**

159. Reorganized ASARCO seeks to disallow fees for six categories of services: (a) seeking a cash bond for the SCC Judgment, (b) researching and drafting a directors and officers bonus motion, (c) researching and drafting a contingency fee memorandum, (d) researching and drafting a conflict of interest memorandum, (e) plan confirmation efforts from May 2008 until the 9019 Hearing for the New Sterlite PSA, and (f) supporting a revised plan after this Court's confirmation recommendation. [\[FN90\]](#) These services provided benefits to the estates as follows.

[FN90.](#) *Amended Objection to Final Fee Application*, ¶ 5.

### **a. Cash Bond for the SCC Judgment**

\*29 160. By putting pressure on the Parent to provide some manner of security on appeal and ultimately obtaining additional security on appeal, Baker Botts provided a tangible benefit to the estates.

161. In its Amended Objection, Reorganized ASARCO asks the Court to disallow \$186,935 in fees requested in the Fee Application for efforts to obtain a cash bond for the SCC Judgment because these efforts purportedly provided no material benefit to the estates. The Court disagrees with Reorganized ASARCO and finds that Baker Botts' efforts to secure the SCC Judgment provided tangible and material benefit to the estates.

162. The District Court entered a final judgment in the SCC Litigation on April 15, 2009, requiring AMC to return to ASARCO stock and dividends and prejudgment interest (net of consideration paid) worth over \$6 billion. That same day, the District Court entered an agreed order restricting the transfer and voting of shares of SCC by AMC and execution on or enforcement of the SCC Judgment by ASARCO. Under the agreed order, ASARCO could not take any action to execute on or enforce the SCC Judgment from the date of the agreed order through June 5, 2009.

163. On April 24, 2009, AMC filed a notice of appeal from the SCC Judgment and all adverse orders, rulings, decrees, opinions, and judgments leading up to and included within that judgment. Five days later, on April 29, 2009, AMC filed a motion to alter or amend the SCC Judgment or for a new trial and a motion for stay of execution of the SCC Judgment pending appeal of that judgment.

164. ASARCO's independent directors instructed Baker Botts to do everything necessary to protect the SCC Judgment, which they considered to be ASARCO's most valuable asset.

165. In response to the motion to stay, ASARCO argued that the District Court should allow it to execute on the SCC Judgment or the District Court should stay execution only upon the posting of a supersedeas bond, as required by [Federal Rule of Civil Procedure 62\(d\)](#).

166. In seeking a cash bond for the SCC Judgment at the direction of the Independent Committee, Baker Botts helped ASARCO fulfill its fiduciary duties to increase and protect the assets of the estates.

167. On June 2, **2009**, the District Court entered a memorandum opinion and order partially granting and partially denying AMC's motion for stay of execution of the SCC Judgment. The District Court did not require AMC to post a supersedeas bond to secure the monetary portion of the SCC Judgment. The District Court nevertheless adopted almost all of the minimum requirements sought by Baker Botts to secure both the non-monetary and monetary portion of that judgment.

168. The Court finds that Baker Botts' efforts to maximize the security provided by AMC pending appeal of the SCC Judgment provided tangible and material benefit to the estates.

#### **b. Directors and Officers Bonus Motion**

169. Researching and drafting the directors and officers bonus motion provided tangible benefit to the estates by securing appropriate compensation for ASARCO's management.

\***30** 170. In its Amended Objection, Reorganized ASARCO asks the Court to disallow \$10,207 in fees requested in the Fee Application for efforts researching and drafting the directors and officers bonus motion because these efforts purportedly provided no material benefit to the estates. This objection concerns the *Motion for Approval of Bonuses to Edward R. Caine and H. Malcolm Lovett, Jr. as Members of the Board of Directors of ASARCO LLC and Joseph F. Lapinsky* filed on December 4, **2009**. The Court disagrees with Reorganized ASARCO and finds that Baker Botts' efforts with respect to the directors and officers bonus motion provided a tangible and material benefit to the estates.

171. On December 3, **2009**, the Board, in a two-to-one vote, passed a resolution approving a bonus of no more than \$4 million to be divided among board members electing to participate. The Board also voted by a two-to-one margin to pay ASARCO's President, Joseph Lapinsky, a bonus of \$2.5 million. The Board directed Baker Botts to file a motion approving payment of the bonuses. No creditor objected to the motion.

172. On December 9, **2009**, the Parent assumed control of Reorganized ASARCO and a new board of directors was appointed. On December 22, **2009**, the new board voted by unanimous written consent to

rescind the prior board's action in approving the bonuses and authorized withdrawal of the motion. On March 24, 2010, this Court denied the motion.

173. Mr. Caine, Mr. Lovett, and Mr. Lapinsky each deserved consideration for a special bonus. In its order denying the motion, this Court noted that the service of Messrs. Lovett, Caine, and Lapinsky "was not only highly beneficial to the debtor, but also professional in every aspect."

174. The Court finds that Baker Botts' efforts in researching and drafting the directors and officers bonus motion provided tangible and material benefit to the estates by helping the Debtors and the Court ensure that appropriate compensation was paid to members of the management team who successfully guided the Company through the chapter 11 process. The Board directed Baker Botts to file the motion, and no creditor constituency opposed it. Baker Botts' efforts were reasonable, necessary, and compensable. Actions taken by Reorganized ASARCO to rescind the Board's prior approval of the motion after the Parent assumed control of the Company can be attributed to the Parent and should not be permitted to deny Baker Botts reasonable compensation for its services.

### **c. Contingency Fee Memorandum**

175. Researching and drafting the contingency fee memorandum provided tangible benefit to the estates by allowing the parties to assess all compensation arrangements and their prospective benefits for ASARCO.

176. In its Amended Objection, Reorganized ASARCO asks the Court to disallow \$5,780 in fees requested in the Fee Application for efforts researching and drafting a memorandum on the question of whether Baker Botts should bill its time for the SCC Litigation on a contingency-fee basis because these efforts purportedly provided no material benefit to the estates. The Court disagrees with Reorganized ASARCO and finds that Baker Botts' efforts with respect to the contingency-fee memorandum provided a tangible and material benefit to the estates.

\*31 177. In November 2006, Mr. Terrell raised the issue with Mr. Kinzie of whether Baker Botts could represent ASARCO in what would later become the SCC Litigation on a contingency-fee basis. Baker Botts considered whether a contingent fee was appropriate in order to perhaps reduce the estates' legal costs. Baker Botts researched whether and under what circumstances bankruptcy law would allow a contingency-fee arrangement. Baker Botts ultimately decided, and ASARCO and the ASARCO Committee's counsel concurred, that the litigation should be pursued on an hourly basis.

178. Baker Botts' efforts in connection with the contingency-fee memorandum provided tangible and material benefit to the estates by allowing Company management and creditor constituencies to assess various compensation arrangements and their respective benefits to ASARCO. These efforts were reasonable, necessary, and compensable. In hindsight this may have saved the Debtors' parent several billion dollars.

#### **d. Conflict of Interest Memorandum**

179. In its Amended Objection, Reorganized ASARCO asks the Court to disallow \$79,863 in fees requested in the Fee Application for efforts researching and drafting a so-called "conflict of interest" memorandum because these efforts purportedly provided no material benefit to the estates. The Court disagrees with Reorganized ASARCO and finds that Baker Botts' efforts in this regard provided a tangible and material benefit to the estates.

180. In late **2007** and early **2008**, events in the SCC Litigation justifiably led Mr. Terrell to believe that Grupo Mexico and AMC intended to try to disqualify Baker Botts--or even bring suit against Baker Botts on the basis of a purported "conflict situation"--as a litigation tactic in an attempt to derail the scheduled May **2008** trial. Among other things, at a hearing held on January 28, **2008**, AMC's counsel suggested that Baker Botts was in a "conflict situation."

181. Mr. Terrell directed certain Baker Botts lawyers to perform legal research into disqualification issues, to investigate Baker Botts' prepetition representation of ASARCO, to determine whether any investigation into the substance of the SCC transaction had been conducted before May **2006** (when David Genender of Baker Botts began his investigation of that transaction at the direction of the Independent Committee), and to draft pleadings necessary to respond immediately in the event that Grupo Mexico or AMC were to move to disqualify or sue Baker Botts in an attempt to delay the trial.

182. Although no disqualification motion or suit was ever filed, and the trial proceeded on ASARCO's preferred expedited schedule, the Court finds that Baker Botts' efforts researching and drafting the so-called "conflict of interest" memorandum were reasonable and necessary. As the Court has noted repeatedly, the SCC Litigation aimed to obtain the return of an enormously valuable asset. The sooner AMC faced a judgment requiring the return of the fraudulently transferred stock, the sooner ASARCO would be in a position to confirm a full-payment plan of reorganization and exit bankruptcy. Baker Botts' efforts to keep the SCC Litigation trial date, including its analysis of and preparation to defend a motion to disqualify the Firm, provided tangible benefit to the estates and are fully compensable.

#### **e. Initial Sterlite Plan Confirmation Efforts**

\*32 183. In its Amended Objection, Reorganized ASARCO asks the Court to disallow \$8,400,000 in fees requested in the Fee Application for "Plan Confirmation Efforts from May **2008** Agreement with Sterlite until 9019 Hearing for New Sterlite Agreement" because these efforts purportedly provided no material benefit to the estates. The Court disagrees with Reorganized ASARCO and finds that Baker Botts' efforts in this regard provided a tangible and material benefit to the estates.

184. On February 4, **2008**, the Debtors filed a motion seeking entry of an order approving bid procedures in connection with selecting a chapter 11 plan sponsor and exit transaction under a chapter 11 plan. On March 25, **2008**, this Court approved the bid procedures on a preliminary basis, reserving the right to rule on the appropriateness of the proposed breakup fee and to give final approval to the process and other bid protections at a final hearing. The Parent and three other bidders (including Sterlite) submitted qualified bids pursuant to the court-approved bid procedures. After a two-day plan sponsor selection meeting held on May 22 and 23, **2008**, at Baker Botts' offices in Dallas, the Board, by a vote of two in favor and one against, named Sterlite the "stalking horse" or "lead bidder" and authorized the Company and its advisors to negotiate (but not execute) final transaction documents with Sterlite. With board approval, ASARCO and Sterlite entered the Original Sterlite PSA on May 30, **2008**. On July 1, **2008**, this Court entered a final order approving (1) bid procedures for selecting a chapter 11 plan sponsor and exit transaction and (2) bid protections for Sterlite in connection therewith. The bid protections included a break-up fee to be paid to Sterlite in the event that a higher and better bid was made for ASARCO's assets at or before confirmation.

185. On July 31, **2008**, the Debtors filed a plan of reorganization proposing to sell substantially all of ASARCO's operating assets to Sterlite pursuant to the Original Sterlite PSA. The Parent sought and obtained a modification of exclusivity and filed its own competing plan on August 26, **2008**. This Court approved the disclosure statements for the plans proposed at that time by the Debtors and the Parent and approved procedures for solicitation and voting on both plans. The DOJ supported the Debtors' efforts to enter the Original Sterlite PSA. By contrast, the Parent's plan received no significant creditor support.

186. Sterlite announced its intention not to perform the Original Sterlite PSA on October 14, **2008**. Shortly thereafter, the Parent withdrew its plan.

187. After Sterlite's breach, ASARCO and its legal and financial advisors made a careful study and analysis of alternatives reasonably available to ASARCO and counseled and recommended that ASARCO resume discussions with Sterlite. The Debtors chose this course to maintain a competitive process and thereby maximize the value of the estates. Ultimately, the Debtors entered into the New Sterlite PSA with Sterlite and asked this Court to approve the New Sterlite PSA and revised bid protection and release provisions. This Court did so, overruling the objections of the Parent and other parties in interest after a contentious hearing on April 13-14, **2009**. The Debtors submitted a new plan of reorganization based on the New Sterlite PSA with Sterlite on May 11, **2009**. The Parent submitted an amended plan on May 15, **2009**. With that, the competition for ASARCO resumed.

**\*33** 188. In its report and recommendation, this Court found that "[t]he continuation of the Plan Selection Process resulting in the New Plan Sponsor PSA resulted in tangible benefit to the estate by promoting plan competition that resulted in the filing and prosecution of the Parent's Plan." Further, this Court found that "in connection with the New Plan Sponsor PSA, ASARCO and its Board complied with fiduciary duties and

'acted in the best interest of the Debtors, their estates and all creditors and stakeholders.' " This work was reasonable, necessary, and beneficial to the estates.

189. Engaging Sterlite throughout the bankruptcy created competition which contributed to the ultimate success of the bankruptcy. The Court finds that this work provided tangible and material benefit to the estates.

#### **f. Post-Recommendation Amended Sterlite Plan**

190. Supporting a revised plan after this Court's confirmation recommendation provided tangible benefit to the estates by ensuring Sterlite's continued presence in these cases, which, in turn, incentivized the Parent to close on its plan and pay creditors.

191. In its Amended Objection, Reorganized ASARCO asks the Court to disallow \$340,000 in fees requested in the Fee Application for efforts supporting a Sterlite-backed plan of reorganization after the Court issued its Confirmation Report and Recommendation because these efforts purportedly provided no material benefit to the estates. The Court disagrees with Reorganized ASARCO and finds that Baker Botts' efforts in this regard provided a tangible and material benefit to the estates.

192. This Court entered its report and recommendation in favor of the Parent's plan on August 31, **2009**. The Debtors then "weighed their options, but the correct course was not obvious." Sterlite offered to improve its offer under the New Sterlite PSA, thereby improving the Debtors' plan. Because Sterlite's presence in these cases had always incentivized the Parent, Barclays recommended that the Debtors keep Sterlite as an available alternative. Sterlite agreed to waive its right to terminate the New Sterlite PSA (Sterlite had a termination right if this Court did not recommend the Debtors' plan for confirmation), and even to allow the Debtors to prepare for a closing with the Parent, but only if the Debtors objected to the report and recommendation.

193. Baker Botts, at the direction of the Board, worked to keep the Sterlite option on the table to preserve a viable back-up option in case the Parent's plan could not be consummated or if the Parent decided to withdraw its plan. While the plan documents, escrow agreements, financing arrangements, and deposit terms appeared sound, a deal closing is never certain until the deal actually closes, and one never knows what hidden loopholes or clever litigation tactics an opponent might have at the ready. Furthermore, the Parent was financing its plan and a downturn in the price of copper could have imperiled that financing and impaired the Parent's ability to close. Baker Botts prepared a memorandum to the Board summarizing certain legal considerations in connection with keeping the Sterlite option available to ASARCO as either a primary or back-up plan while, at the same time, protecting ASARCO from unintended consequences.

**\*34** 194. The Debtors filed the Sixth Amended Plan of Reorganization on September 10, **2009**. The next day, this Court issued an order asking the Debtors to show cause why this Court should consider the newly

amended plan. A hearing was held on September 15, **2010**. At the hearing, the United States, ASARCO's largest creditor, encouraged this Court to consider the Sixth Amended Plan. This Court recommended that the District Court not consider the Sixth Amended Plan but also recommended confirmation of the Parent's plan as superior to the Sixth Amended Plan.

195. The District Court heard arguments in support of the Debtors' plan and the Parent's plan on October 19, **2009**, and entered its confirmation order in favor of the Parent's plan on November 13, **2009**. The District Court's confirmation order addressed the objections raised by the Debtors.

196. Mr. Lovett testified that he believes that filing the Sixth Amended Plan provided a benefit to the estates by ensuring the continued presence of an alternative full-payment option and by putting pressure on the Parent to close. The Court agrees. The Court finds that Baker Botts' work in support of the post-recommendation Sterlite plan was reasonable, necessary, and benefitted the estates by providing yet another incentive to close and an option in case the Parent could not or would not close.

### **C. Expenses**

197. Throughout these cases, it was necessary for Baker Botts to incur and pay in advance substantial out-of-pocket expenses in connection with its representation of the Debtors. Baker Botts submitted regular invoices for expenses and provided this Court with an "Expense Summary" as an exhibit to the Fee Application that summarized all expenses Baker Botts charged to the Debtors during the Application Period. Neither the Parent nor any other creditor constituent objected to expenses in any of Baker Botts' thirteen interim fee applications. In its Fee Application and responses to Reorganized ASARCO's Interrogatories, Baker Botts identified several categories of expenses that the Firm has agreed voluntarily to deduct from the requested expenses.

198. Reorganized ASARCO originally objected to \$1,024,724.65 in expenses requested by Baker Botts. Reorganized ASARCO later withdrew its objections to expenses.

199. The expense reimbursements requested by Baker Botts are for actual and necessary expenses. Baker Botts charges all of its clients for the types of expenses charged to the Debtors.

200. [Section 330 of the Bankruptcy Code](#) "authorizes compensation for services and reimbursement of expenses of officers of the estate ." [\[FN91\]](#) [Section 330](#) provides for compensation of "actual, necessary expenses." [\[FN92\]](#)

[FN91. House Report No. 95-595](#), 95th Cong., 1st Sess. 329 (1977); *see also In re Kula*, [213 B.R. 729, 736 \(B.A.P. 8th Cir.1997\)](#) ( "[Section 330](#) applies to all bankruptcy cases, including Chapter 11 cases.").

[FN92. 11 U.S.C. § 330\(a\)\(1\)\(B\)](#).

201. The Court has reviewed Baker Botts' requested reimbursements for expenses and concludes that the requested expenses were actual and necessary. [\[FN93\]](#)

[FN93.](#) *See supra* Section II(F)(6).

#### **D. Reorganized ASARCO's Other Objections**

202. Reorganized ASARCO makes several other miscellaneous objections. The Court has considered each and finds them to be without merit.

\***35** 203. Reorganized ASARCO asserts that the Court should apply a percentage reduction because Baker Botts did not create enough matter codes and because Baker Botts timekeepers did not consistently apply their time to matter codes that were created. [\[FN94\]](#) The Court has considered this objection and finds it without merit. Baker Botts segregation of time spent on various projects was sufficient to allow the Court to assess the reasonableness of the requested fees.

[FN94.](#) *Amended Objection to Final Fee Application*, ¶ 7.

204. Reorganized ASARCO asserts that Baker Botts unnecessarily duplicated work performed by Baker Botts attorneys and co-counsel. [\[FN95\]](#) Reorganized ASARCO has not directed the Court to any evidence of such duplication and the Court finds that the work performed by Baker Botts was necessary and non-duplicative. Reorganized ASARCO's expert, Mr. Meckler, stated that he did not form an opinion as to whether duplication of work took place. [\[FN96\]](#) The Court will not reduce Baker Botts' fees pursuant to Reorganized ASARCO's unsubstantiated argument that duplicative work took place.

[FN95.](#) *Amended Objection to Final Fee Application*, ¶ 23.

[FN96.](#) Hr'g Tr. 64:10-21, 65:7-12, June 2, **2010** (B.Meckler).

205. Reorganized ASARCO asserts that Baker Botts overstaffed these cases. [\[FN97\]](#) Reorganized ASARCO has not presented to the Court any evidence of overstaffing and the Court finds that Baker Botts' staffing of these cases was not unreasonable or unanticipated given the intensity and duration of these cases. Mr. Meckler testified that he did not reach a decision as to whether staffing was reasonable or unreasonable. [\[FN98\]](#) The Court will not reduce Baker Botts' fees pursuant to Reorganized ASARCO's argument that Baker Botts overstaffed these cases.

[FN97.](#) *Amended Objection to Final Fee Application*, ¶¶ 25-29.

[FN98.](#) Hr'g Tr. 59:3-7, June 2, **2010** (B.Meckler).

206. Reorganized ASARCO further argues that the turnover rate of Baker Botts' attorneys working on these cases was too high. [\[FN99\]](#) The Court has not been directed to any evidence showing that Baker Botts' turnover rate was inappropriate or somehow harmful to the estates. The Court finds that Baker Botts' turnover rate was appropriate. Mr. Meckler testified that he was not critical of attorney turnover. [\[FN100\]](#) The Court will not reduce Baker Botts' requested fees on these grounds.

[FN99.](#) *Amended Objection to Final Fee Application*, ¶ 30.

[FN100.](#) Hr'g Tr. 63:5-17, June 2, 2010 (B.Meckler).

207. Finally, Reorganized ASARCO argues that Baker Botts should have staffed the cases with lower-rate attorneys. [\[FN101\]](#) Reorganized ASARCO has submitted no evidence substantiating this claim and the Court concludes that Baker Botts' staffing of the cases was appropriate in this regard. In fact, Mr. Meckler testified that he did not find the partner-to-associate work ratio to be inappropriate. [\[FN102\]](#) The Court will not reduce Baker Botts' requested fees on these grounds.

[FN101.](#) *Amended Objection to Final Fee Application*, ¶ 31.

[FN102.](#) Hr'g Tr. 63:18-20, June 2, 2010 (B.Meckler).

## **E. Enhancement**

208. In the previous Section, the Court concluded that the number of hours for which Baker Botts has sought compensation in the Fee Application are reasonable. The Court also concluded that the rates charged by Baker Botts as interim compensation under [section 331](#) are not unreasonably high and are compensable.

209. Normally, the appropriate fee is calculated by use of the lodestar, multiplying the number of hours by the hourly rate. Here, however, Baker Botts seeks an enhancement of their fees either by way of an increase in the hourly rate or by award of an additional amount.

\***36** 210. Reorganized ASARCO counters that the recent Supreme Court case of [Perdue v. Kenny A., --- U.S. ----, 130 S.Ct. 1662, 176 L.Ed.2d 494 \(2010\)](#) is controlling and bars Baker Botts' ability to receive a fee enhancement.

211. Prior to *Perdue*, the Fifth Circuit ruled that a Bankruptcy judge has discretion to award an enhancement of attorneys fees where counsel succeeded in accomplishing a substantial recovery for their clients--money which might well have been totally lost but for their efforts. [Wolf v. Frank, 555 F.2d 1213, 1218 \(5th Cir.1977\)](#)(allowing enhancement of 33%); [Rose Pass Mines, Inc., v. Howard, 615 F.2d 1088, 1092 \(5th Cir.1980\)](#)(allowing enhancement of 16%).

212. In *CRG Partners v. United States Trustee*, 2011 U.S. Dist. LEXIS 14243 \*14 (N.D.Tex.2011) the District Court expressly rejected the argument made by Reorganized ASARCO and held that "the Supreme Court did not intend for *Perdue* to apply outside the context of federal fee-shifting statutes." The District Court explained that "*Perdue* established a framework different from the standard that has been used in Texas bankruptcy cases in determining whether to award a fee enhancement." *Id.* at \*11. The District Court noted that the *Perdue* opinion itself "expressly limits the scope of the issue to 'federal fee-shifting statutes.'" *Id.* at \*13. Additionally, the District Court found that the policies underlying the federal fee-shifting statutes and the Bankruptcy Code differ substantially and materially, quoting with approval from a New Mexico bankruptcy court that "[o]ther than the commonality of the lodestar as the subject of *Perdue* and of this case, which commonality arises from the fact that the lodestar methodology for calculating fees became commonplace after the practice of hourly billing had become widespread, the holding in *Perdue* is irrelevant for [the court's] inquiry." *Id.* at \*13 (quoting [In re Heise](#), 436 B.R. 143, 149 (Bankr.D.N.M.2010)).

213. In refusing to ignore decades of established bankruptcy jurisprudence based on a decision in a civil-rights case that does not even contain the word "bankruptcy," the District Court correctly observed that "[i]t is one thing for a court to seek guidance from a case decided in a different context; it is another thing entirely for a court to allow such a case to displace its previously established precedent." *Id.* at \*15. "Furthermore, the mere fact that the Fifth Circuit relies on *Johnson* in evaluating fees in bankruptcy cases does not compel the conclusion that *Perdue* applies as well." *Id.* at \*17. Indeed, courts are not rigidly bound to apply Supreme Court fee-shifting precedent in non-fee-shifting contexts. [Klein v. O'Neal, Inc.](#) 705 F.Supp.2d 632 (N.D.Tex.2010)(*Perdue's* application is strictly limited to federal fee-shifting cases and is inapplicable outside that context.); [Sheperd v. Dallas County](#), No. 3:05-CV-1442-D, 2010 WL 2573346, at \*3 n. 2 (N.D.Tex. June 24, 2010); [In re Vioxx Products Liability, Inc.](#), No. 1567, 2010 WL 5576193, at \* 17 n. 25(E.D. La. Oct 19, 2010)(*Perdue* has little bearing on the use of the lodestar as a cross-check of a common benefit fee awarded as a percentage of a common fund). This was true before *Perdue* and it continues to be true after *Perdue*. The body of case law has developed organically over the course of more than thirty years, during which time the Bankruptcy Code has been amended and jurisprudence unique to bankruptcy cases has evolved independent of the jurisprudence governing civil rights cases.

\*37 214. While *Perdue* is not binding, it does establish principles which must be followed in any request for an enhancement. First, whether it is a request to increase the hourly rate upward or a request for a lump sum bonus, enhancement is only appropriate in the rare and exceptional case. *Perdue, supra.* at 1673. Ordinarily, the amount billed by an attorney is the maximum reasonable fee. Second, the burden of proof for an enhancement is on the requesting attorney. The applicant must prove that the enhancement is warranted. *Perdue, supra.* at 1673. Third, the success in the case must be the result of the applicant's efforts. The outcome cannot be the result of inferior performance by opposing counsel, unanticipated concessions, or luck. *Perdue, supra.* at 1674. Finally, the awarding court must be able to make findings which adequately explain all aspects of the award. *Perdue, supra.* at 1666.

215. A fee enhancement is appropriate in this case. The overall representation of the Debtor by Baker Botts was outstanding. The bankruptcy case itself was rare and exceptional, beginning with minimal prospect of recover and ending with 100% pay out to creditors. The environmental claims were the largest ever in a bankruptcy case. The SCC litigation resulted in the largest fraudulent conveyance judgment ever in a bankruptcy case. The return to creditors was far more than expected. The rates charged by Baker Botts were below market rate because the Firm customarily collects premium rates or enhancements in non-bankruptcy representations.

216. Baker Botts requested that the Court calculate the enhancement by increasing its hourly rate by 20%. Such an approach has been approved by courts in the past. However, much of the work in this case, although outstanding, is the type of professional legal work expected of a national law firm such as Baker Botts. Enhancement should reward rare and exceptional work and should be tied to both the effort and the outcome. In addition, much of the success in this case is due to a coalescence of factors beyond the work of Baker Botts.

217. As this Court previously found, the Parent's full-payment plan was attributable to a number of factors, including:

- A well-timed and substantial rise in copper prices in **2009**;
- The SCC Judgment;
- The Parent's desire to retain ownership and control of ASARCO LLC and move to a full-payment plan;
- The Parent's strong desire to bring an end to the costly, time-consuming and distracting litigation involving the environmental claims and asbestos claims;
- This Court and how this Court conducted the case; and
- Other participants, constituents, professionals, and attorneys.

218. However, Baker Botts was directly responsible for the successful recovery in the SCC litigation which resulted in recovery of a substantial asset for the estate. The case was tried to conclusion with outstanding representation by both sides. An enhancement based upon a 20% upward adjustment of the hourly rate for the SCC litigation services is appropriate and results in a fee enhancement of \$4,161,708.96. [\[FN103\]](#)

[FN103](#). 58,781.2 (hours expended on the SCC Litigation) x \$70.80 (20% hourly fee enhancement) = \$4,161,708.96

## **F. Preparation and Defense of the Final Fee Application**

\***38** 219. [Section 330\(a\)\(6\) of the Bankruptcy Code](#) states that the Court may award to a professional employed under [section 327](#) compensation for the preparation of a fee application based on the level and skill reasonably required to prepare the application. [\[FN104\]](#) Though there is no binding Fifth Circuit authority on the issue and there is a split in authority in other jurisdictions, the better-reasoned cases have concluded that [section 330\(a\)\(6\)](#) authorizes a bankruptcy court to award a professional fees and expenses for

defending a fee application if the professional is successful. Reorganized ASARCO's counsel agreed with this proposition at a hearing held on April 23, **2010**:

[FN104. 11 U.S.C. 330\(a\)\(6\).](#)

[W]e clearly acknowledge that the professional firms employed at the expense of the estate are entitled to reasonable compensation to pursue approval of their final fee applications and that the reorganized Debtor has assumed responsibility under the plan and the various implementing orders, your Honor, that you have entered to satisfy the fees that are allowed. [\[FN105\]](#)

[FN105.](#) Hr'g Tr. 31:24-32:5, April 23, **2010** (R. Moore).

220. The rule that a bankruptcy lawyer may recover costs for successfully litigating a fee application originated in the Ninth Circuit. In *Boldt v. Crake* (*In re Riverside-Linden Investment Co.*), 945 F.2d 320 (9th Cir.1991), the Ninth Circuit held that the bankruptcy court did not abuse its discretion in disallowing fees incurred in an unsuccessful defense of a fee application. [\[FN106\]](#) A decade later, the Ninth Circuit revisited the issue--but this time with a fee applicant that was successful in its defense of its fee application. [\[FN107\]](#) The Ninth Circuit awarded the fee applicant its fees in connection with the defense of its fee application, reasoning:

[FN106.](#) *Boldt v. Crake* (*In re Riverside-Linden Inv. Co.*), 945 F.2d 320, 323 (9th Cir.1991).

[FN107.](#) See *Smith v. Edwards & Hale, Ltd.* (*In re Smith*), 317 F.3d 918, 928 (9th Cir.2002), *abrogated on other grounds by* *Lamie v. United States Tr.*, 540 U.S. 526, 531-39, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004).

Failure to grant fees for successfully defending challenges to an authorized fee application would dilute fee awards, in violation of [section 330\(a\)](#), and this would reduce the effective compensation of bankruptcy attorneys to levels below the compensation available to attorneys generally. [\[FN108\]](#)

[FN108.](#) *In re Smith*, 317 F.3d at 928.

221. Numerous other courts have followed this rule. [\[FN109\]](#) The Court has not identified any published cases within the Fifth Circuit directly addressing the issue, but bankruptcy courts within the Fifth Circuit--including this Court--have granted applicants' requests for fees and expenses incurred in connection with defending their fee applications. [\[FN110\]](#)

[FN109.](#) See, e.g., *Boyd v. Engman* (*In re Engman II*), 404 B.R. 467, 482-83 (W.D.Mich.2009) (defending attorney fee applications is "part and parcel with the attorney's role in the administration of the bankruptcy process" and compensable under the Bankruptcy Code); *Hennigan Bennett & Dorman LLP v. Goldin Assocs.*

L.L.C. (*In re Worldwide Direct Inc.*), 334 B.R. 108, 111-12 (D.Del.2005) (allowing fees incurred in successful defense of fee application); *Big Rivers Elec. Corp. v. Schilling (In re Big Rivers Elec. Corp.)*, 252 B.R. 670, 675 (W.D.Ky.2000) (same); *In re Buckridge*, 367 B.R. 191, 207 n. 26 (Bankr.C.D.Cal.2007) (same); *In re 14605, Inc.*, No. 05-11910, 2007 WL 2745709, at \*8-9 (Bankr.D.Del. Sept.19, 2007) (same); *In re Atwell*, 148 B.R. 483, 491-92 (Bankr.W.D.Ky.1993) (same); *In re Hutter Constr. Co.*, 126 B.R. 1005, 1013 (Bankr.E.D.Wis.1991) (same); *In re DN Assocs.*, 165 B.R. 344, 355 (Bankr.D.Me.1994) (denying compensation for unsuccessfully defending against an objection to fees); *In re Courson*, 138 B.R. 928, 936 (Bankr.N.D.Iowa 1992) (same); *In re Great Sweats, Inc.*, 113 B.R. 240, 245-46 (Bankr.E.D.Va.1990) (same); *In re Watervliet Paper Co.*, 109 B.R. 733, 735 (Bankr.W.D.Mich.1989) (same).

**FN110.** See, e.g., *Scotia Dev., LLC, et al.*, Case No. 07-20027, Dkt. No. 3897 (Nov. 24, 2008) (order granting supplemental fee application for defense costs).

222. Courts also have awarded compensation of fees and expenses incurred in the successful defense of applications to increase the applicant's base fee request. **[FN111]** In the *Big Rivers* case, the district court denied fees incurred in defending a fee enhancement request that was reversed on appeal.

**[FN112]** However, the district court engaged in a lengthy discussion about when a fee applicant may be awarded its defense costs. **[FN113]** Making no distinction between the base application and the fee enhancement request, the district court in *Big Rivers* allowed defense costs for the base application because the base fees were affirmed but denied defense costs for the fee enhancement request because the fee enhancement award was reversed. **[FN114]**

**FN111.** See *In re Vista Foods USA, Inc.*, 234 B.R. 121, 135 (Bankr.W.D.Okla.1999) (awarding compensation for time and effort in relation to application for upward fee adjustment); *In re Buckridge*, 367 B.R. 191, 207 n. 26 (Bankr.C.D.Cal.2007) (awarding fees incurred defending a final fee application that included a fee enhancement request).

**FN112.** See *In re Big Rivers Elec. Corp.*, 252 B.R. at 675.

**FN113.** See *In re Big Rivers Elec. Corp.*, 252 B.R. at 675.

**FN114.** See *In re Big Rivers Elec. Corp.*, 252 B.R. at 675.

**\*39** 223. Compensating bankruptcy lawyers for successfully defending their fee applications is necessary to avoid unfair dilution of professionals' fees. **[FN115]** Bankruptcy involves a unique process whereby a lawyer who is compensated by the bankruptcy estate must publicly file his fee statements, and multiple parties are given the opportunity to object to those fees. A non-bankruptcy lawyer would not be subject either to the same level of scrutiny or to the same number of potential objectors. Bankruptcy lawyers would be unfairly prejudiced--and the goal of compensating bankruptcy lawyers the same as non-bankruptcy

lawyers would be undermined--by a rule that does not allow bankruptcy lawyers to recover costs for defending their fee applications in a process required by statute. One district court provided a succinct justification for allowing bankruptcy lawyers to recover costs for successfully litigating their fee applications:

[FN115](#). See *In re Downs & Assocs., Ltd.*, No. 02-32905, 2002 WL 32139302, at \*3 (Bankr.W.D.N.C. Dec.11, 2002); *Sloan v. Hoffman (In re Chavez)*, 157 B.R. 30, 33 (D.Colo.1993).

[T]he unambiguous policy inspiring [Section 330\(a\)](#) ... is that professionals and para-professionals in bankruptcy cases should earn the same income as their non-bankruptcy counterparts. That policy cannot be vindicated through the rule expressed by the Bankruptcy Court in this case. If compensation is not permitted for fees incurred in defending a fee application, creditors could negotiate reductions in these fee awards knowing full well that the attorney is in a no-win situation. Even if the attorney prevails, he or she will in effect have financed the litigation without any hope of surviving it whole. [\[FN116\]](#)

[FN116](#). *In re Worldwide Direct Inc.*, 334 B.R. 108, 111 (D.Del.2005) (citations and quotations omitted); see also *In re Computer Learning Ctrs., Inc.*, 285 B.R. 191, 224 (Bankr.E.D.Va.2002) ("Congressional objective of compensating professionals the same whether they are engaged in a bankruptcy case or in a non-bankruptcy matter [is] furthered by allowing additional fees to successfully present, prosecute or defend a fee application in appropriate circumstances."); *In re 14605, Inc.*, 2007 WL 2745709 at \*9.

Denying fees incurred in defending fee applications would provide an incentive for parties in interest to mount objections to extract a fee reduction. [\[FN117\]](#)

[FN117](#). *In re Worldwide Direct Inc.*, 334 B.R. at 111; see also *In re Riverside-Linden Inv. Co.*, 945 F.2d at 323 (opining that denying the applicant fees for defending against frivolous objections would only encourage parties to file meritless objections).

224. Some courts have denied recovery of fees incurred in defending a fee application in bankruptcy, reasoning that those fees are not specifically allowed by [section 330 of the Bankruptcy Code](#). [\[FN118\]](#) These courts have held that in the absence of a statutory or common law exception, the American Rule that parties bear their own litigation costs applies to litigation over a fee application in a bankruptcy case. [\[FN119\]](#) Two bankruptcy judges in the Northern District of Texas have adopted this rule on the theory that the American Rule prevents recovery of defense costs in bankruptcy. [\[FN120\]](#)

[FN118](#). See, e.g., *In re St. Rita's Assoc. Private Placement, L.P.*, 260 B.R. 650, 652 (Bankr.W.D.N.Y.2001).

[FN119](#). See *In re St. Rita's Assoc. Private Placement, L.P.*, 260 B.R. at 652; see also *In re Brous*, 370 B.R. 563, 572 (Bankr.S.D.N.Y.2007) (trustee failed to justify a departure from the American Rule where objections to the fee award were made in good faith and were largely meritorious).

[FN120](#). See *Frazin v. Haynes & Boone LLP (In re Frazin)*, 413 B.R. 378 (Bankr.N.D.Tex.2009); *In re JNS Aviation LLC*, No. 04-21055, 2009 WL 80202 (Bankr.N.D.Tex. Jan. 9, 2009); *In re Teraforce Tech. Corp.*, 347 B.R. 838 (Bankr.N.D.Tex.2006).

225. In the *Engman II* case, a district court judge held that these cases are contrary to the "underlying purpose of [Section 330\(a\)](#) and other federal statutes allowing for attorney fees" because those statutes "show that [time spent defending a fee application] is necessary and beneficial to the bankruptcy system as a whole, and indirectly, to each estate participating in the system." [\[FN121\]](#) Preventing recovery of prosecution costs would allow an objecting party-in-interest to extract unwarranted fee reductions from a fee applicant by placing the applicant in a no-win situation: the resources the applicant would expend fighting objections could quickly overtake the value of the reduction the objector sought. [\[FN122\]](#)

[FN121](#). *In re Engman II*, 404 B.R. at 483 (reversing a bankruptcy court following the rule denying recovery of fees incurred in prosecuting a fee application).

[FN122](#). *In re Engman II*, 404 B.R. at 483.

\*40 226. Reorganized ASARCO's objections placed Baker Botts in the very "no-win situation" that the *Engman II* court envisioned when it reversed the bankruptcy court. Denying recovery of fees incurred in defending a fee application "would undoubtedly compromise" and "might also deter" competent lawyers and firms like Baker Botts from taking on long-term, complex bankruptcy cases such as this one. [\[FN123\]](#)

[FN123](#). See *Engman II*, 404 B.R. at 483.

227. This Court is not bound by the Northern District of Texas bankruptcy cases and refuses to apply the holdings in those cases here for the same statutory, policy, and fairness reasons articulated by the district court in *Engman II*. Allowing Baker Botts to recover its fees and costs incurred in this litigation is consistent with the policy driving [section 330 of the Bankruptcy Code](#) and provides an actual benefit to the bankruptcy estates and the bankruptcy system as a whole.

228. The Court further concludes that the line of cases holding that a fee applicant is entitled to compensation for the successful defense of a fee application also applies to the prosecution of an enhancement. Moreover, as discussed above, [section 330 of the Bankruptcy Code](#) requires the Court to determine Baker Botts' reasonable compensation, and the lodestar analysis, in addition to the factors set forth in [section 330](#), is the vehicle by which the Court must make that determination.

229. No published opinion in the Fifth Circuit has addressed the issue of whether the amount a fee applicant may recover in prosecution costs is capped. Some courts outside the Fifth Circuit have imposed such a cap ranging from 3% to 7.5% for ordinary cases, but no uniform rule has emerged on the amount of the

limitation. [\[FN124\]](#) "Courts either do not provide a rationale for the specific percentage limitation or adopt rationales [based on reasonableness]." [\[FN125\]](#)

[FN124. \*Coulter v. Tennessee\*, 805 F.2d 146, 151 \(6th Cir.1986\)](#) (holding in a federal-fee shifting case that fees should be limited to "3% of the hours in the main case when the issue is submitted ... without a trial and should not exceed 5% of the hours ... when a trial is necessary"); [In re Bass](#), 227 B.R. 103, 109 (Bankr.E.D.Mich.1998) (following the 5% rule in the absence of extraordinary circumstances); [In re Atwell](#), 148 B.R. 483, 491-92 (Bankr.W.D.Ky.1993) (following the 5% rule); [In re Churchfield Mgmt. & Inv. Corp.](#), 98 B.R. 838, 866 (Bankr.N.D.Ill.1989) (holding that "in the absence of unusual circumstances, the hours allowed for preparing and litigating an attorney's fee application should not exceed three percent of the total hours applied for"); [In re Chicago Lutheran Hosp. Ass'n](#), 89 B.R. 719, 743 (Bankr.N.D.Ill.1988) (awarding an applicant 7.5% of its total fees for pursuing its fee application).

[FN125. \*In re CF & I Fabricators of Utah, Inc.\*, 131 B.R. 474, 483 n. 8 \(Bankr.D.Utah 1991\).](#)

230. Even those bankruptcy courts that impose a cap on the amount of fees that may be recovered for defending a fee application generally do so "in the absence of unusual circumstances." These cases present the "unusual circumstances" [\[FN126\]](#) that cause percentage cap courts to deviate from their self-imposed limits. Baker Botts has been forced to respond to Reorganized ASARCO's challenges to over \$20 million of the fees and expenses that Baker Botts charged to the estates during the Application Period. [\[FN127\]](#)

[FN126. \*In re Churchfield Mgmt. & Inv. Corp.\*, 98 B.R. at 866.](#)

[FN127. \*Amended Objection to Final Fee Application.\*](#)

231. However, the Court concludes that the fees and expenses that Baker Botts has requested for preparing and defending the Fee Application through July 13, **2010**, are higher than were reasonable or necessary based on the level and skill reasonably required to prepare and defend the Fee Application. The amounts sought by Baker Botts for preparing and defending the Fee Application through July 13--including the enhancement--reflect the actual billable time expended by Baker Botts and the actual and necessary expenses incurred by Baker Botts in performing that work. However, the Court finds that the reasonable compensation for the actual, necessary services performed by Baker Botts in preparing and defending the Fee Application through July 13, **2010**, is \$5,000,000 based on the level and skill reasonably required to prepare and defend the Fee Application.

\***41** 232. The Court finally approves and allows \$5,000,000.00 in fees and \$457,443.83 in expenses requested by Baker Botts for preparing and defending the Fee Application through July 13, **2010**.

233. Few cases have addressed whether a bankruptcy court may award a professional the costs he incurs in defending an appeal of a fee award. Of the handful of cases that have addressed this issue, the majority

award defense costs to fee applicants for successfully defending a fee award on appeal. [\[FN128\]](#) Like the cases that allow defense costs through the trial of a fee application, courts allow appellate defense costs to avoid an unfair dilution of the professional's base fee award. [\[FN129\]](#) The minority of cases deny such costs, reasoning that they benefit the law firm but not the estate. [\[FN130\]](#)

[FN128](#). See, e.g. [In re Manoa Fin. Co., Inc.](#), 853 F.2d 687, 692 (9th Cir.1988) (appellant entitled to fees incurred in successfully appealing denial of fee award); [Nunley v. Jessee](#), 92 B.R. 152, 154 (W.D.Va.1988) (executrix for chapter 11 estate entitled to fees incurred in defending fee award on appeal); see also [In re Hers Cosmetics Corp.](#), 114 B.R. 240, 244 (Bankr.C.D.Cal.1990) (awarding fees incurred in defending claims on appeal and stating "reimbursement for reasonable attorneys fees incurred in defending a fee award on appeal should be available").

[FN129](#). [In re Hers Cosmetics Corp.](#), 114 B.R. at 243-44.

[FN130](#). See, e.g., [In re DN Assocs.](#), 165 B.R. 344, 354-55 (Bankr.D.Me.1994).

234. The Court agrees with the majority line of decisions and concludes that it may award appellate defense fees and expenses to Baker Botts if the Firm successfully defends the Court's fee award on appeal.

235. The Court will include in its final order resolving the Fee Application a provision authorizing Baker Botts to submit supplemental applications for additional defense fees and expenses incurred after July 13, **2010**, upon resolution of any appeals or in connection with any subsequent proceedings in the event of a remand.

#### IV. CONCLUSION

236. The Court finds and concludes that:

- \$6,046,135.06 in expenses incurred by Baker Botts during the Application Period were actual, necessary expenses;
- The services summarized in the Fee Application and performed by Baker Botts during the Application Period were substantial and provided a tangible and material benefit to the estates;
- The fees sought by Baker Botts for the services it performed during the Application Period reflect the actual and reasonable billable time expended by Baker Botts during the Application Period in connection with these cases and do not reflect (1) any unnecessary duplication of services, or (2) services that were not (a) reasonably likely to benefit the estates or (b) necessary to the administration of the cases;
- The reasonable compensation for the actual, necessary services performed by Baker Botts during the Application Period is \$117,613,158.44;
- \$457,443.83 in expenses incurred by Baker Botts in preparing and defending the Fee Application through July 13, **2010**, were actual, necessary expenses;
- The fees sought by Baker Botts for preparing and defending the Fee Application through July 13, **2010**, reflect the actual time expended by Baker Botts for preparing and defending the Fee Application.

However, the Court finds that the reasonable compensation for the actual, necessary services performed by Baker Botts in preparing and defending the Fee Application through July 13, **2010**, is \$5,000,000 based on the level and skill reasonably required to prepare and defend the Fee Application.

237. The Court finally approves and allows \$117,613,158.44 in fees and \$6,046,135.06 in expenses for services performed and expenses incurred by Baker Botts during the Application Period. The \$117,131,158.44 fee award is comprised of (1) \$113,074,527.74 in fees approved by this Court on an interim basis under [section 331 of the Bankruptcy Code](#) and paid to Baker Botts; (2) *plus* \$263,994.74 in additional, unpaid fees incurred by Baker Botts for the period of November 1, **2009**, through December 8, **2009**; (3) *plus* \$4,161,708.96 as an enhancement because there are rare and extraordinary circumstances in these cases and Baker Botts' services in the SCC litigation were instrumental in producing the exceptional results that were unanticipated at case commencement.; (4) *minus* \$112,927.00 in fees charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates The \$6,046,135.06 expense award is comprised of (1) \$6,065,598.58 in expenses approved by this Court on an interim basis under [section 331 of the Bankruptcy Code](#) and paid to Baker Botts; (2) *minus* \$19,463.52 in expenses charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates.

**\*42** 238. The Court finally approves and allows \$5,000,000.00 in fees and \$457,443.83 in expenses incurred by Baker Botts in preparing and defending the Fee Application through July 13, **2010**.

239. In the event of an appeal, Baker Botts may file a supplemental fee application

240. The Court orders Baker Botts to prepare and submit an order consistent with these findings within ten (10) days from the date of entry of this Memorandum Opinion.

### EXHIBIT 1

FN131. Reorganized ASARCO's expert, Judge Monroe, testified that these cases involved national problems, national assets, and law firms with national clientele.

AVERAGE BILLING RATES FOR **2005–2009** NATIONAL BANKRUPTCY, CASES [FN131]

FN131. Reorganized ASARCO's expert, Judge Monroe, testified that these cases involved national problems, national assets, and law firms with national clientele.

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Firm	Case and Forum	Average Hourly Rate	Percentage Higher than Baker Botts in These Cases
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**2009**

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Milbank participated in these cases	Station Casinos, D. Nev.	\$684.60	71.1%
Milbank	VI Acquisition, D. Del.	\$628.58	57.1%
Milbank	Midway Games, D. Del.	\$613.47	53.4%
Skadden Arps	CIT Group, S.D.N.Y.	\$613.36	53.3%
Kramer Levin participated in these cases	Chrysler, S.D.N.Y.	\$600.12	50.0%
Kramer Levin	General Motors, S.D.N.Y.	\$598.28	49.6%
Latham & Watkins participated in these cases	Dayton Superior, D. Del.	\$595.49	48.9%
Milbank	ProtoStar, D. Del.	\$587.39	46.8%
Latham & Watkins	Spansion, D. Del.	\$565.29	41.3%
Shearman & Sterling participated in these cases	Worldspace, D. Del.	\$564.53	41.1%
Gibson Dunn participated in these cases	Fleetwood, C.D. Cal.	\$561.86	40.5%
Sidley Austin	Smurfit-Stone, D. Del.	\$560.93	40.2%
Cleary Gottlieb	Nortel Networks, D. Del.	\$548.31	37.1%
Cadwalader	Lyondell, S.D.N.Y.	\$539.99	35.0%
Weil Gotshal participated in these cases	Lehman Brothers, S.D.N.Y.	\$526.99	31.7%
Baker Botts	ASARCO, S.D. Tex.	\$400.02	
<hr/> <hr/> <b>2008</b> <hr/>			
Klee Tuchin	IndyMac, CD. Cal.	\$652.90	85.8%

Skadden Arps	Interstate Bakeries, W.D. Mo.	\$565.78	61.0%
Morrison & Foerster	Delta Financial, D. Del.	\$549.18	56.3%
Haynes and Boone participated in these cases	ATA Airlines, S.D. Ind.	\$492.69	40.2%
Kirkland & Ellis participated in these cases	Movie Gallery, E.D. Va.	\$448.88	27.7%
Baker Botts	ASARCO, S.D. Tex.	\$351.41	
<b>2007</b>			
Gibson Dunn participated in these cases	Scotia, S.D. Tex.	\$588.01	73.0%
Skadden Arps	Interstate Bakeries, W.D. Mo.	\$541.85	59.4%
Jones Day	Dana, S.D.N.Y.	\$449.25	32.1%
Alston & Bird	HomeBanc, D. Del.	\$442.28	30.1%
Baker Botts	ASARCO, S.D. Tex.	\$339.96	
<b>2006</b>			
Skadden Arps	Refco, S.D.N.Y.	\$493.15	52.7%
Gibson, Dunn participated in these cases	Solutia, S.D.N.Y.	\$493 .14	52.7%
Skadden Arps	Interstate Bakeries, W.D. Mo.	\$488.39	51.2%
Milbank participated in these cases	Winn Dixie, M.D. Fla.	\$484.79	50.1%
Baker Botts	ASARCO, S.D. Tex.	\$323.04	
<b>2005</b>			
Milbank participated in these cases	Intermet, E.D. Mich.	\$496.35	62.5%

Skadden Arps	Refco, S.D.N.Y.	\$493.25	61.5%
Stroock & Stroock participated in these cases	Delta Airlines, S .D.N.Y.	\$486.50	59.3%
Gibson, Dunn participated in these cases	Solutia, S.D.N.Y.	\$431 .54	41.3%
Haynes and Boone participated in these cases	Ultimate Electronics, D. Del.	\$368.38	20.6%
Baker Botts	ASARCO, S.D. Tex.	\$305.47	

**EXHIBIT 2**

HIGHEST BILLING RATE PARTNERS

Firm	Case	Rate	Percentage Higher than Baker Botts in These Cases
<b>2009</b>			
Jones Day	Chrysler, S.D.N.Y.	\$1,175	46.9%
Sidley Austin	Smurfit-Stone, D. Del.	\$1,076	34.5%
Weil Gotshal participated in these cases	SemCrude, D. Del.	\$1,070	33.8%
Cadwalader	Lyondell Chemical, S.D.N.Y.	\$1,050	31.3%
Skadden Arps	Spectrum Jungle, W.D. Tex.	\$1,050	31.3%
Latham & Watkins participated in these cases	Dayton Superior, D. Del.	\$1,025	28.1%
Weil Gotshal	Lehman Brothers, S.D.N.Y.	\$1,005	25.6%

Weil Gotshal	General Motors, S.D.N.Y.	\$1,000	25.0%
Milbank participated in these cases	ProtoStar, D. Del.	\$995	24.4%
Milbank	Lehman Brothers, S.D.N.Y.	\$995	24.4%
Milbank	VI Acquisition Corp, D. Del.	\$995	24.4%
Milbank	Midway Games, D. Del.	\$995	24.4%
Skadden Arps	CIT Group, S.D.N.Y.	\$995	24.4%
Shearman & Sterling participated in these cases	Stock Building Supply, D. Del.	\$995	24.4%
Cleary Gottlieb	Nortel Networks, Inc., D. Del.	\$980	22.5%
Latham & Watkins	Eddie Bauer Holdings, D. Del.	\$975	21.9%
Gibson, Dunn participated in these cases	Fleetwood Enterprises, C.D. Cal.	\$970	21.3%
Kirkland & Ellis participated in these cases	Masonite, D. Del.	\$965	20.6%
Vinson & Elkins participated in these cases	BI-LO, D.S.C.	\$960	20.0%
Baker Botts	ASARCO, S.D. Tex.	\$800	
<b>2008</b>			
Weil Gotshal participated in these cases	SemCrude, D. Del.	\$1,135	51.3%
Gibson Dunn participated in these cases	Scotia, S.D. Tex.	\$955	27.3%
Skadden Arps	Interstate Bakeries, W.D. Mo.	\$950	26.7%

Milbank participated in these cases	VI Acquisition, D. Del.	\$950	26.7%
Kirkland & Ellis participated in these cases	Movie Gallery, E.D. Va.	\$925	23.3%
Klee Tuchin	IndyMac, C.D. Cal.	\$925	23.3%
Kirkland & Ellis	Tropicana, D. Del.	\$915	22.0%
Baker Botts	ASARCO, S.D. Tex.	\$750	
<b>2007</b>			
Gibson Dunn participated in these cases	Solutia, S.D.N.Y.	\$950	35.7%
Skadden Arps	Interstate Bakeries, W.D. Mo.	\$950	35.7%
Gibson Dunn	Scotia, S.D. Tex.	\$890	27.1%
Skadden Arps	Delphi, S.D.N.Y.	\$875	25.0%
Jones Day	Dana, S.D.N.Y.	\$850	21.4%
O'Melveny & Myers	New Century, D. Del.	\$840	20.0%
Baker Botts	ASARCO, S.D. Tex.	\$700	
<b>2006</b>			
Kirkland & Ellis participated in these cases	Dura Automotive, D. Del.	\$975	40.3%
Kirkland & Ellis	Calpine, S.D.N.Y.	\$885	27.3%
Skadden Arps	Refco, S.D.N.Y.	\$875	25.9%
Skadden Arps	Interstate Bakeries, W.D. Mo.	\$875	25.9%
Gibson Dunn participated in these cases	Solutia, S.D.N.Y.	\$860	23.7%

Milbank participated in these cases	Refco, S.D.N.Y.	\$850	22.3%
Milbank	Winn Dixie, M.D. Fla.	\$850	22.3%
Milbank	Satelites Mexicanos, S.D.N.Y.	\$850	22.3%
Skadden Arps	Delphi, S.D.N.Y.	\$835	20.1%
Baker Botts	ASARCO, S.D. Tex.	\$695	
<b>2005</b>			
Kirkland & Ellis participated in these cases	Tower Automotive, S.D.N.Y.	\$850	47.8%
Skadden Arps	Interstate Bakeries, W.D. Mo.	\$835	45.2%
Skadden Arps	Winn Dixie, M.D. Fla.	\$835	45.2%
Skadden Arps	Refco, S.D.N.Y.	\$835	45.2%
Skadden Arps	Delphi, S.D.N.Y.	\$826	43.7%
Stroock & Stroock participated in these cases	Delta Airlines, S .D.N.Y.	\$825	43.5%
Gibson Dunn participated in these cases	Solutia, S.D.N.Y.	\$820	42.6%
Cadwalader	Northwest Airlines, S.D.N.Y.	\$800	39.1%
Milbank participated in these cases	Intermet, E.D. Mich.	\$790	37.4%
Milbank	Winn Dixie, M.D. Fla.	\$790	37.4%
Baker Botts	ASARCO, S.D. Tex.	\$575	

**EXHIBIT 3**

SUMMARY CHART COMPARING ASSOCIATE HOURLY BILLING RATES FOR NATIONAL BANKRUPTCY CASES

Firm	Case and Forum	2nd Year Associate	4th Year Associate	8th Year Associate
<b>2009</b>				
Milbank participated in these cases	Lehman Brothers, S.D.N.Y.	\$550 (83% higher)	\$600 (74% higher)	\$685 (40% higher)
Milbank participated in these cases	ASARCO, S.D. Tex.	\$525 (75% higher)	\$545 (58% higher)	N/A
Weil Gotshal participated in these cases	Lehman Brothers, S.D.N .Y.	\$500 (67% higher)	\$675 (96% higher)	\$650 (33% higher)
Latham & Watkins participated in these cases	Spansion, D. Del.	\$500 (67% higher)	\$585 (70% higher)	\$575 (17% higher)
Kramer Levin participated in these cases	Chrysler, S.D.N.Y.	\$485 (62% higher)	\$520 (51% higher)	\$650 (33% higher)
Undiscounted Haynes and Boone participated in these cases	ASARCO, S.D. Tex.	\$341 (14% higher)	\$402 (17% higher)	\$545 (11% higher)
Discounted Haynes and Boone participated in these cases	ASARCO, S.D. Tex.	\$310 (3% higher)	\$365 (6% higher)	\$495 (1% higher)
Baker Botts	ASARCO, S.D. Tex.	\$300	\$345	\$490
<b>2008</b>				
Milbank participated in these cases	ASARCO, S.D. Tex.	\$520 (63% higher)	\$580 (68% higher)	N/A
Kirkland & Ellis participated in these cases	Tropicana, D. Del.	\$490 (53% higher)	\$490 (42% higher)	N/A

Skadden Arps	Interstate Bakeries, W.D. Mo.	\$488 (53% higher)	\$540 (57% higher)	\$625 (47% higher)
Baker Botts	ASARCO, S.D. Tex.	\$320	\$345	\$425
Haynes and Boone participated in these cases	ASARCO, S.D. Tex.	\$310 (3% lower)	\$405 (17% higher)	\$480 (13% higher)
Haynes and Boone participated in these cases	ATA Airlines, S.D. Ind.	\$290 (9% lower)	\$415 (20% higher)	\$415 (2% lower)
<b>2007</b>				
Milbank participated in these cases	ASARCO, S.D. Tex.	\$500 (82% higher)	\$550 (72% higher)	\$585 (52% higher)
Skadden Arps	Delphi, S.D.N.Y.	\$390 (42% higher)	\$495 (55% higher)	\$576 (50% higher)
Jones Day	Dana, S.D.N.Y.	\$380 (38% higher)	\$455 (42% higher)	\$525 (36% higher)
O'Melveny & Myers	New Century, D. Del.	\$360 (31% higher)	\$480 (50% higher)	N/A
Haynes and Boone participated in these cases	ASARCO, S.D. Tex.	\$350 (27% higher)	\$415 (30% higher)	N/A
Baker Botts	ASARCO, S.D. Tex.	\$275	\$320	\$385
<b>2006</b>				
Milbank participated in these cases	ASARCO, S.D. Tex.	\$415 (51% higher)	\$500 (49% higher)	\$580 (61% higher)
Gibson Dunn participated in these cases	Solutia, S.D.N.Y.	\$410 (49% higher)	\$470 (40% higher)	\$665 (85% higher)
Skadden Arps	Refco,	\$375 (36%)	\$465 (39%)	\$540 (50%)

	S.D.N.Y.	higher)	higher)	higher)
Kirkland & Ellis participated in these cases	Dura Automotive, D. Del.	\$325 (18% higher)	\$440 (31% higher)	N/A
Haynes and Boone participated in these cases	ASARCO, S.D. Tex.	\$280 (2% higher)	\$315 (6% lower)	N/A
Baker Botts	ASARCO, S.D. Tex.	\$275	335	\$360
<b>2005</b>				
Gibson Dunn participated in these cases	Solutia, S.D.N.Y.	N/A	\$530 (89% higher)	\$650 (97% higher)
Kirkland & Ellis participated in these cases	Calpine, S.D.N.Y.	\$475 (98% higher)	\$480 (71% higher)	N/A
Milbank participated in these cases	Refco, S.D.N.Y.	\$470 (96% higher)	\$475 (70% higher)	\$525 (59% higher)
Skadden Arps	Delphi, S.D.N.Y.	\$437 (82% higher)	\$465 (66% higher)	\$540 (64% higher)
Milbank participated in these cases	ASARCO, S.D. Tex.	\$375 (56% higher)	N/A	\$495 (50% higher)
Cadwalader	Northwest Airlines, S.D.N.Y.	\$345 (44% higher)	\$410 (46 % higher)	\$450 (36% higher)
Baker Botts	ASARCO, S.D. Tex.	\$240	\$280	\$330

**EXHIBIT 4**

AVERAGE RATES IN TEXAS BANKRUPTCY CASES

Firm	Case	Forum City	Rate
Skadden Arps	Spectrum Jungle	San Antonio	\$529 (32% higher)

Labs

Vinson & Elkins participated in these cases	Energy Partners	Houston	\$491 (23% higher)
Akin Gump	Edge Petroleum	Corpus Christi	\$476 (19% higher)
Baker Botts	ASARCO	Corpus Christi	\$400
<b>2008</b>			
Gibson Dunn participated in these cases	Scotia	Corpus Christi	\$516 (47% higher)
Baker Botts	ASARCO	Corpus Christi	\$351
<b>2007</b>			
Gibson Dunn participated in these cases	Scotia	Corpus Christi	\$588 (73% higher)
Baker Botts	ASARCO	Corpus Christi	\$340
<b>2006</b>			
Vinson & Elkins participated in these cases	Integrated Electrical	Dallas	\$453 (40% higher)
Thompson & Knight	Davis Petroleum	Corpus Christi	\$375 (16% higher)
Baker Botts	ASARCO	Corpus Christi	\$323

**EXHIBIT 5**

Year	Baker Botts highest rate	Baker Botts lawyers at highest rate	Milbank's highest rates	Milbank lawyers with hourly rates at least 20% higher than Baker Botts
2005	\$575	Jack Kinzie	\$720 to \$790 (25% to 37% higher)	Luc Despins Michael Fitzgerald Roland Hlawaty Bruce Kayle

<b>2006</b>	\$695	William Giusti	\$840 (21% higher)	Michael Fitzgerald
<b>2007</b>	\$700	Irv Terrell Kirk Van Tine	\$875 to \$895 (25% to 28% higher)	Luc Despins Michael Fitzgerald  David Gelfand Bruce Kayle Bob Moore
<b>2008</b>	\$750	Greg Nelson James Raborn  Irv Terrell Kirk Van Tine	\$900 to \$950 (20% to 27% higher)	Linda Dakin-Grimm Luc Despins  Scott Edelman Michael Fitzgerald David Gelfand Ronald Hlawaty Bruce Kayle Michael Hirschfeld Michael Nolan
<b>2009</b>	\$800	Bill Jeffress Jack Kinzie James Raborn Irv Terrell	\$900 to \$905 (13% higher)	Linda Dakin-Grimm Michael Fitzgerald David Gelfand Ronald Hlawaty Bruce Kayle Bob Moore Elihu Robertson

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