

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION**

In re

ASARCO, LLC, et al.

Debtors

Case No. 2:09-cv-00177

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

In re

ASARCO, LLC, et al.

Debtors

Case No. 05-21207

Chapter 11

Jointly Administered

**STATE OF ARIZONA'S SUPPLEMENTAL TO THEIR OBJECTION
TO BANKRUPTCY COURT'S RECOMMENDATION OF PARENT'S
PLAN OF REORGANIZATION**

The State of Arizona (“Arizona”) respectfully submits this supplement to its previous Objection to the Bankruptcy Court's Report and Recommendation to the District Court Regarding Debtor’s Sixth Amended Joint Plan of Reorganization (Dkt. No. 12937) (September 24, 2009).

In coming to its findings, the court did not adequately consider the long-term feasibility of Parent’s Reorganization Plan and its ability to successfully carry out Asarco’s operations without returning to the shelter of the Bankruptcy

Court. The Debtors' Plan provides the greatest opportunity for long-term financial success of the new operating company.

BACKGROUND

Debtors' Brief Regarding the Impact of the Debtors' Modified Plan on the Application of Section 1129 (c) of the United States Bankruptcy Code was filed on September 21, 2009, in part to address the court's improperly valued non-cash consideration in the Debtor's Plan (Dkt. No. 12911). The amendment clarifies the previous Plan in that all classes will now be paid in cash, with the Class 4 Asbestos Creditors receiving cash payments plus additional monetary interests. Additionally, Debtors' Amended Plan increases total cash consideration from \$2.135 billion to \$2.565 billion-an increase of \$435 million. Parent's Plan purportedly proposes to pay \$2.4799 billion.

The court notes Parent's deposit of \$2.2051 billion in shares of stock, the \$500 million in U.S. currency, and the \$200 million Working Capital Facility to demonstrate its commitment to confirmation and consummation of their Plan. However, this must be balanced against the Parent's borrowing of \$1.3 billion and the attendant debt burden on ASARCO; the massive debt service entailed in borrowing \$1.3 billion increases the likelihood of another bankruptcy.

The court's reliance upon the value of the shares of stock is based upon the assumption of a static market; evidence however suggests that shares of copper vary widely in a cyclic market. Those same shares of stock were worth \$600 million to \$800 million in 2002 or 2003. Additionally, the court assumes Parent

will follow the ASACO prepared Five Year Business Plan. (Dkt. No. 12748-2, at ¶ 222). However, Parent's conduct after the previous 1999 highly leveraged buyout of ASARCO leaves great doubt as to their corporate stewardship.

The Bankruptcy Court entered its findings on Debtor's Amendment to their Plan, urging this Court to not consider Debtor's amendment. The court has drafted three separate Report and Recommendations (Dkt.'s 12844, 12844-2 and 12937), yet has not fully addressed feasibility in terms of the probability that reorganized ASARCO will be forced back into bankruptcy

Debtor's Plan satisfies all creditors with a cash payment (without the highly leveraged borrowing) which will render the new operating company with a stronger balance sheet and a higher likelihood of long term success. Arizona urges this Court to reject the findings as outlined in the Report and Recommendations to the District Court Regarding Debtor's Sixth Amended Joint Plan of Reorganization and to confirm the Debtor's Plan.

THIS COURT MUST CONSIDER WHETHER CONFIRMATION OF THE PLAN IS LIKELY TO BE FOLLOWED BY THE NEED FOR FURTHER FINANCIAL REORGANIZATION OF THE DEBTOR

In two explicit provisions, the Bankruptcy Code requires that, in assessing competing plans, courts must consider how the reconstituted company is likely to perform, and not solely the treatment of existing creditors and equity holders. First, the Code requires the courts to analyze the feasibility of the competing plans, including the likely success of the new company. *See* 11 U.S.C.A. § 1129(c); *In Re River Valley Fitness One L.P.*, 297 B.R. 354 (Bkrctcy. D.N.H.

2003). Second, courts must also determine the possibility that the company will be forced back into bankruptcy in the future. *See* 11 U.S.C.A. § 1129(a)(11); *In Re River Village Associates*, 181 B.R. 795, 807 (E.D. Pa. 1995) ("The feasibility requirement of confirmation means that a plan will 'not likely be followed by the liquidation, or the need for further financial reorganization of the Debtor or any successor to the Debtor under the plan'"). A court must examine several factors including the adequacy of the proposed capital structure, the earning power of the business, and the economic conditions facing the new company and its industry. *In re Mallard Pond Ltd.*, 217 B.R. 782, 784-785 (Bkrtcy. M.D. Tenn.,1997).

A. Proposed Capital Structure

Parent's Plan proposes a capital structure that saddles Reorganized ASARCO with borrowing of \$1.3 billion which will require *quarterly payments of \$45 million beginning six months after closing, increasing to \$98 million per quarter beginning one year after closing.* (See *de la Parra Supplemental Proffer at Annex I-2* (Dkt No. 12853, Ex. P432)) Parent's Plan also overloads Reorganized ASARCO with repayment of the \$280 million Asbestos Note *within one year after closing.*

Parent's Plan leaves Grupo and AMC highly leveraged; there is no certainty that either will be able to fund the \$200 million working capital facility or fund the employees' pension and retirees' medical benefits as such amounts become due in the future. (See Debtors' Liquidation Analysis; (Dkt No. 11927; Ex. D167.)

The proposed Capital Structure saddles the reorganized Debtor with obligations requiring it to upstream dividends and sale proceeds to the Parent to pay off the borrowing facility used to fund the Plan. Debtor would also be responsible to insure that all creditors are paid in full. (See Dkt. No. 12488-2, ppgs 7-8)

B. Earning Power of the Business

The Bankruptcy Court cites Parent's assertion of their intent to follow the Five Year Plan which should generate sufficient cash flow to meets its obligations, resulting in a positive EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization) for each year of the Plan. (Dkt. No. 12844-2, ¶ 220, 221.) By its own definition, EBITDA does not include the interest to be paid for the large scale debt.

Additionally, Parent found itself in a similar situation with ASARCO after the first leveraged buyout. After the 1999 buyout, with ASARCO financially struggling to continue operations, Parent demonstrated its lack of willingness to provide its own resources to ensure the proper operation of ASARCO.

Additionally, Parent further exacerbated ASARCO's poor financial health; the transfer of the SPCC stock was structured in a manner that left ASARCO without any additional cash to resume normal operations or pay its debts that were past due.

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C. Economic Conditions Facing the Company

The court suggests that the escrow account of \$2.2 billion in cash and securities guarantees performance. (Dkt. No. 12844-2, ¶2166) A one-time evaluation of the stock simply cannot account for the volatility of the copper market. In 2002 or 2003, the Southern Peru stock was assessed at between \$662 million and \$834 million, approximately one-tenth its current value. (*ASARCO LLC et.al. v. America's Mining Corporation*, 396 B.R. 278, 307 (2008).) If copper prices tumble, the value of the Southern Peru stock likewise will fall. As this Court noted in the 2008 *ASARCO* decision,

Those in the business essentially described the prediction of copper prices to be an exercise in futility. One veteran of 30-plus years in the mining industry, Bernard Guarnera [witness in trial] basically denied being an 'expert' in the area of price predicting because 'no one is ever right. . . . Copper companies, despite their size, have little direct effect on market prices. The market sets the price and most companies sell at this price'.

(*ASARCO*, 396 B.R. 278, 303.)

Therefore, the current value of the Southern Peru stock cannot be said to be permanent nor can ASARCO or its creditors rely upon it as a guarantee of performance.

PARENT'S PREVIOUS LEVERAGED BUYOUT OF ASARCO

The Parent's first leveraged buyout of ASARCO in 1999 burdened ASARCO with long-term debt of \$1.7 billion and a \$450 million revolving credit facility. (Amended Recommendations, at 26.). That leveraged buyout created the conditions for ASARCO to now seek the protections of bankruptcy.

As this Court noted in discussing ASARCO's past finances,

Throughout the years prior to its bankruptcy filing (2003-2005), ASARCO continued to survive from hand to mouth. It cannibalized assets, sold or abandoned other assets, fired employees, high-graded mines, monetized badly needed insurance policies, and cut costs. It also maintained a pattern of delaying or refusing to pay creditors. In layman's terms, it was constantly 'robbing Peter to pay Paul'.

(ASARCO, 396 B.R. 278, 314)

With the past leveraged buyout, Parent provided no financial assistance; ASARCO was forced to "cannibalizing" its operating assets to tread water in difficult financial times. Within six years (1999-2005), ASARCO had essentially run out of cash and had been over loaded with massive environmental liability, financial debt, potential asbestos related liability and falling copper process. (Amended and Supplemental Report and Recommendation, Dkt. No. 12844, pg. 3)

Under Parent's current Reorganization Plan, if Reorganized ASARCO is again run aground, they can no longer "rob Peter to pay Paul" by liquidating assets. With the syndicated financing, 100% of the proceeds from any asset sales (other than inventory, scrap, worn-out or obsolete property) must be directed to prepay the \$1.3 billion financing. (*See de la Parra Supplemental Proffer at Annex I-5, I-6* (Dkt. No. 12853-1, Ex. P432.))

CONCLUSION

Arizona continues to support Debtor's Plan. Parent's Plan poses a higher probability that debt service will once again drag down corporate earnings and force yet another bankruptcy intervention.

As a regulator entrusted with protecting its natural resources and maintaining compliance with our environmental regulations, Arizona is one of the parties with the greatest interest in the reconstituted company's future operations. The reorganized company will continue to operate four mines and a smelter in the state. The State continues to believe that the Debtor Plan best protects our most highly valued interests: successful and responsible corporate citizens, public health and welfare, and the ongoing integrity of our natural resources.

Dated: September 29, 2009

Respectfully submitted,
STATE OF ARIZONA

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CERTIFICATE OF SERVICE

I certify that on September 29, 2009 a true copy of the foregoing **State of Arizona's Supplemental to Their Objection to the Bankruptcy Court's Recommendation of Parent's Plan of Reorganization** was served on all parties on the service list entitled to notice through the Court's electronic filing system.

/s/ Rick Zeise _____