

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

In re:	§	
	§	
ASARCO LLC, et al.,	§	Case No. 2:09-cv-00177
	§	
Debtors.	§	
	§	

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

In re:	§	Case No. 05-21207
	§	
ASARCO LLC, et al.,	§	Chapter 11
	§	
Debtors.	§	(Jointly Administered)
	§	

**DEBTORS' OBJECTION TO REPORT AND RECOMMENDATION
TO THE DISTRICT COURT REGARDING DEBTORS' SIXTH
AMENDED JOINT PLAN OF REORGANIZATION**

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COUNSEL TO DEBTORS

ASARCO LLC and its subsidiary debtors (“Debtors”) filed amendments to their plan of reorganization on September 10, 2009 to give the Bankruptcy Court¹ and creditors the benefit of additional consideration offered by Sterlite. Although Sterlite made this proposal after the Bankruptcy Court’s original report and recommendation regarding confirmation, ASARCO believes the District Court should still consider the proposal. Competition in this case led to the proposal of two full payment plans. Continued competition will best assure that both plans remain for the District Court to consider and that the plan chosen by the District Court actually closes. For these reasons, the Debtors object to the Bankruptcy Court’s *Report and Recommendation to the District Court Regarding the Debtor’s Sixth Amended Joint Plan of Reorganization*. (Dkt 12937).²

I. PROCEDURAL HISTORY

On August 31, 2009, the Bankruptcy Court issued the *Report and Recommendation for Entry of Findings of Fact and Conclusions of Law on Plan Confirmation* (the “Original Recommendation”) recommending that the District Court confirm the Parent’s Plan and deny confirmation of the Debtors’ Plan. (Dkt 12748). The Debtors timely objected to the Original Recommendation on September 10, 2009. (Dkt 12823). The State of Arizona and the Union also objected to the Bankruptcy Court’s recommendation that the District Court confirm the Parent’s Plan. (Dkt 33 in the District Court; Dkt 12832, 12833).

On September 11, 2009, the Bankruptcy Court issued the *Amended and Supplemental Report and Recommendation for Entry of Findings of Fact and Conclusions of Law on Plan Confirmation* (the “Amended Recommendation”). (Dkt 22 in the District Court). The Amended

¹ Capitalized terms not defined herein shall have the meaning provided in the Amended Recommendation (defined below).

² Unless otherwise noted, references to “Dkt” refer to docket entries on the docket of the Bankruptcy Court case, Case No. 05-21207, under which the Debtors’ bankruptcy cases are jointly administered.

Recommendation left much of the Original Recommendation unchanged, but corrected typographic and editing mistakes, corrected a factual error, included updates to the Parent's Plan, and added a section recommending approval of the Asbestos Settlement. *See* Amended Recommendation at 1. The Debtors timely objected to the Amended Recommendation on September 21, 2009. (Dkt 12917).³

Between the issuance of the Original Recommendation and the Amended Recommendation, Sterlite proposed certain modifications to the New Plan Sponsor PSA to enable the Debtors to improve the immediate cash distributed under the Debtors' Plan. Significantly, Sterlite also agreed (subject to certain conditions) that it would not terminate the New Plan Sponsor PSA pending the District Court's decision on confirmation.⁴ The Debtors believe that retaining the Sterlite option ensures continued competition, increasing significantly the likelihood that a full payment plan is not only confirmed, but is also timely consummated. As the Bankruptcy Court correctly noted, "[t]he history of the case demonstrates that all of the Parent's plans were proposed in reaction to other plans, tactically designed to retake control of the Debtor during this case or to limit liability in the SCC Litigation." *See* Amended Recommendation at 5.⁵

After careful consideration, on September 10, 2009, the Debtors filed, in accordance with 11 U.S.C. § 1127, the September 10th Plan, which (i) increased Sterlite's stated cash consideration from \$2.135 billion to \$2.565 billion; (ii) provided for the monetization of the SCC

³ The Debtors renew and hereby incorporate by reference their previously filed objections to the Original Recommendation and Amended Recommendation.

⁴ *See* Waiver Letter dated August 31, 2009 attached to Debtors' Sixth Amended Joint Plan of Reorganization, as Modified, with Further Modifications as of September 10, 2009 (the "September 10th Plan"). (Dkt 12822).

⁵ Significantly, when Sterlite indicated that it was not going forward with the Original Plan Sponsor PSA and the Debtors suspended confirmation of their Third Amended Plan in October of 2008, the Parent promptly withdrew its plan as well. *See* Amended Recommendation at ¶ 71.

Litigation Trust Interests, so that the Asbestos Trust would receive a cash payment of \$915 million on the Effective Date in lieu of the SCC Litigation Trust Interests; and (iii) provided that any late or subordinated claims would be paid in cash in full, plus interest on the Effective Date, in lieu of receiving SCC Litigation Trust Interests.⁶ In filing the September 10th Plan, the Debtors exercised their business judgment and determined that creditors and the Bankruptcy Court should be presented with this option that offered greater immediate cash recoveries to certain creditors instead of SCC Litigation Trust Interests. Equally important, however, the September 10th Plan also ensured the continued viability of the Sterlite option under the Debtors' Plan if the District Court does not adopt the Bankruptcy Court's recommendation or if the Parent fails to close its plan if confirmed.

The Bankruptcy Court entered a Show Cause Order on September 11, 2009, ordering the Debtors to show cause why the September 10th Plan should be considered. (Dkt 12849). At the Show Cause hearing on September 15, 2009, the Bankruptcy Court requested additional briefing, which the Debtors and the Parent both timely provided. On September 24, 2009, the Bankruptcy Court issued its *Report and Recommendation to the District Court Regarding the Debtor's Sixth Amended Joint Plan of Reorganization* (the "Report Regarding the September 10th Plan"), recommending that the District Court not consider the September 10th Plan or, if it is considered, that the District Court nevertheless confirm the Parent's Plan. (Dkt 12937)

II. ARGUMENT

A. The September 10th Plan Serves a Necessary Purpose.

The Debtors' overarching goal throughout these bankruptcy cases has been to obtain confirmation of a plan of reorganization under which creditors' claims would be paid in full,

⁶ Although the Debtors believe that the SCC Litigation Trust Interests would ultimately result in creditors being paid in full, the September 10th Plan makes such recoveries more certain.

with pre- and post-petition interest. As the Bankruptcy Court noted, “the Debtor and its professionals continuously moved this case toward the confirmation of a plan that resulted in the best possible recovery for creditors -- full payment.” See Amended Recommendation at 4. Consideration of the September 10th Plan will be instrumental in assuring that such a plan is not only confirmed, but is ultimately consummated. Contrary to a suggestion in the Recommendation Regarding the September 10th Plan, the September 10th Plan is not the product of gamesmanship and certainly should not be disregarded on that ground. The September 10th Plan was motivated by the Debtors’ good faith desire to ensure that the best possible plan is before the Court and is ultimately consummated. The Debtors had no control over the timing of Sterlite’s improved offer and, when presented with the proposal, reasonably and prudently decided that the appropriate course was to present the enhanced plan for consideration to creditors and to the Court and therefore promptly filed it.

Neither case cited in the Recommendation Regarding the September 10th Plan supports the conclusion that the District Court should not consider the September 10th Plan or that the September 10th Plan constitutes gamesmanship. The two cases cited, *In re Mid-State Raceway, Inc.*, 343 B.R. 21 (N.D.N.Y. 2006),⁷ and *University Creek Plaza, Ltd. v. New York Life Insurance Company (In re University Creek Plaza, Ltd.)*, 176 B.R. 1011 (S.D. Fla. 1995),⁸ each involved debtors who failed to submit confirmable plans to begin with and were seeking to file

⁷ In *Mid-State Raceway*, the debtor sought a late amendment solely to alter the classification scheme in its plan because a creditor necessary to obtain confirmation under section 1129 of the Bankruptcy Code had voted to reject the debtor’s plan, and the court had refused to void the vote. The court appropriately disallowed the amendment as improper gamesmanship because the amendment did not alter the treatment of the claim, but simply attempted to gerrymander the vote.

⁸ The debtor in *University Creek Plaza* had sought confirmation of a plan that failed to meet the requirements of section 1129 of the Bankruptcy Code for a variety of reasons, including the debtor’s lack of good faith. The court properly denied the debtor an opportunity to modify the plan after the denial of confirmation because (i) the debtor had adequate prior notice of the infirmities of its plan prior to the denial of confirmation, and (ii) the proposed plan modifications did not and could not remedy the debtor’s fundamental lack of good faith.

amendments to address legal obstacles to confirmation.

Here, the Bankruptcy Court found that the Debtors' Plan, even before the September 10 changes, met all of the Bankruptcy Code's requirements for confirmation. *See* Amended Recommendation at 7. Even before the September 10 changes, the Debtors' Plan had been accepted by all creditor classes. Indeed, creditors overwhelmingly preferred the Debtors' Plan over the Parent's Plan. *See* Amended Recommendation at 7. The September 10th Plan nonetheless addresses the Bankruptcy Court's perception that some economic disparity between the plans justifies confirming the Parent's Plan instead of the Debtors' Plan. Neither Sterlite nor the Debtors had any indication that the Bankruptcy Court would view the economics of the Debtors' Plan any differently than creditors, who actually viewed it as a superior alternative to the Parent's Plan. Soon after receiving the Original Recommendation, Sterlite made its proposal to the Debtors and the Debtors filed the September 10th Plan, not to game the system, but simply to address the Bankruptcy Court's perception of the economic disparity between the two plans.⁹

B. The September 10th Plan Will Not Cause Delay and Should Be Considered.

The Debtors persistently have moved these cases toward confirmation. *See* Amended Recommendation at 4.¹⁰ The Debtors' overriding goal is a prompt confirmation and successful consummation of a plan of reorganization that pays creditors' claims in full. In filing the September 10th Plan, the Debtors did not seek to reopen the evidence, otherwise alter the schedule for review by the District Court, or delay resolution of these cases. Evidence presented at the confirmation hearing supports confirmation of the September 10th Plan, which by

⁹ The Debtors continue to believe that the Bankruptcy Court's conclusion regarding this disparity was in error.

¹⁰ By contrast, the Parent consistently has been the source of delay frustrating progress in the case. *See, e.g.*, Amended Recommendation at 5 ("Throughout the case, the Parent has proposed and withdrawn many plans"); Amended Recommendation at ¶ 11 (Parent's attempts to undermine corporate governance); Amended Recommendation at ¶ 34 (Parent's last minute removal of motion to approve environmental settlements viewed as nothing but delay tactic).

operation of 11 U.S.C. § 1127(a), should be considered the operative plan of the Debtors before the District Court. See *In re Sentry Operating Co.*, 264 B.R. 850 (Bankr. S.D. Tex. 2001); *In re MCorp Fin.*, 160 B.R. 941 (S.D. Tex. 1993); *In re One Canadaigua Props.*, 140 B.R. 616 (Bankr. W.D.N.Y. 1992) (“It is abundantly clear under 11 U.S.C. §1127(a) that the proponent of a plan does not need leave of court to modify a plan prior to confirmation.”); *In re Glades Health Care, Ltd.*, 88 B.R. 439 (Bankr. S.D. Fla. 1988).

Consideration of the September 10th Plan is not only appropriate, but also important because it offers the estate the best possible alternative if the District Court or an appellate court concludes that the Parent’s Plan should not be confirmed, whether based on the successorship clause in the collective bargaining agreement with the Union, the absence of the required good faith, or any other reason. Similarly, if the District Court disagrees with the Bankruptcy Court and finds that creditor preferences and relative risk and feasibility make the Debtors’ Plan preferable under section 1129(c) of the Bankruptcy Code, the District Court should consider the September 10th Plan. Finally, even if the District Court confirms the Parent’s Plan, it is conceivable that the Parent could be unable or unwilling to close.¹¹ In any of these instances, having the Debtors’ Plan, which is premised on the New Plan Sponsor PSA, as a viable alternative is exceedingly important. The District Court should therefore consider the current version of that plan, the September 10th Plan.

III. CONCLUSION

For the reasons stated herein and in the Debtors’ objections to the Original Recommendation and the Amended Recommendation, the Debtors object to the Original Recommendation, Amended Recommendation, and Report Regarding the September 10th Plan.

¹¹ The Parent has an absolute out under its plan if the confirmation order is stayed beyond December 31, 2009.

Respectfully submitted this 29th day of September, 2009.

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