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

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

SUPPLEMENTAL OBJECTION OF STERLITE (USA), INC. AND STERLITE INDUSTRIES (INDIA) LTD. TO THE REPORT AND RECOMMENDATION TO THE DISTRICT COURT REGARDING DEBTOR'S SIXTH AMENDED JOINT PLAN OF REORGANIZATION

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Sterlite (USA), Inc. ("Sterlite") and Sterlite Industries (India) Ltd ("Sterlite India") respectfully submit this Supplemental Objection in response to the Bankruptcy Court's Report and Recommendation to the District Court Regarding Debtor's Sixth Amended Joint Plan of Reorganization (the "Second Recommendation").[1]

PRELIMINARY STATEMENT

Sterlite and the Debtors submitted the Debtors' Modified Plan for further review by the District Court with the aim of clarifying and resolving a limited set of errors and disputes regarding the consideration provided under the Debtors' Original Plan. These errors must be clarified one way or another, and the Debtors' Modified Plan provides the most straightforward and expeditious way to do so. Similarly, the Stipulations made by Sterlite in the Supplemental Brief are intended to further minimize disputed issues and to eliminate potential delays in the confirmation process.[2] Accordingly, the Stipulations and the modified plan will facilitate the District Court's decision-making process and will expedite confirmation by resolving factual disputes that were not addressed by the Bankruptcy Court, and doing so in a manner that is not prejudicial to any party involved. Consideration of the Stipulations and the Debtors' Modified Plan is permitted under applicable law and is in the best interests of the Debtors' creditors and other stakeholders and should therefore be allowed.

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1 The Bankruptcy Court's August 31, 2009 Report and Recommendation for Entry of Findings of Fact and Conclusions of Law on Plan Confirmation (as amended) will be referred to herein as the "First Recommendation", and together with the Second Recommendation, the "Recommendations." Sterlite's response to the First Recommendation will be referred to as the "Original Sterlite Objection" and Sterlite's response to the Bankruptcy Court's request at the September 15 hearing (the "September 15 Hearing") for additional briefing will be referred to as the "Supplemental Brief." The Debtors' modified full payment plan, featuring the enhancements reflected in Amendment No. 8 to the Settlement and Purchase and Sale Agreement among the Debtors and Sterlite, dated as of March 6, 2009 (the "New Plan Sponsor PSA"), will be referred to herein as the "Debtors' Modified Plan" and the plan prior to the modified plan will be referred to as the "Debtors' Original Plan." All other terms used but not otherwise defined herein will have the meanings attributed to such terms in the Original Sterlite Objection.

2 The term "Stipulations" shall be used herein to refer to the stipulations Sterlite made in the Supplemental Brief with respect to the maximum amounts of the "shortfall" and the value of the SCC Final Judgment.

Consideration of the Debtors' Modified Plan and the Stipulations will conserve judicial resources by narrowing the disputes truly at issue at this point to a pair of critical legal questions:

- First, can the Parent's Plan be confirmed notwithstanding the Parent's failure to negotiate an agreement with the United Steel Workers and in light of the plain language and clear intent of the Special Successorship Clause, which require the Parent to have done so?
- Second, does the Bankruptcy Code provide that a bid supported by an equity holder must be confirmed if such bid provides for payment of allowed claims of creditors in full, notwithstanding that the creditors overwhelmingly prefer an alternative bid that provides them superior economic and non-economic treatment?

The Debtors' Modified Plan and the Stipulations bring these questions to the analytical fore by addressing a number of distracting but peripheral disputes that might otherwise complicate and delay the District Court's confirmation decision. At the same time, the District Court could and should arrive at the same conclusion even if it determines that it should not consider the Debtors' Modified Plan and should consider only the Debtors' Original Plan. No matter which of the Debtors' plans the District Court ultimately decides to consider, it should draw the conclusion: that under either plan creditors will benefit from a transaction that will close and will provide for payment in full of their allowed or negotiated claims. The District Court thus need not focus on ancillary issues related to the treatment of allowed claims but may instead focus on the two key questions outlined above. It is these two questions, both of which were incorrectly addressed by the Bankruptcy Court, that most urgently require the District Court's attention.

Sterlite respectfully submits that the District Court should first consider the Special Successorship Clause and find that it prohibits confirmation of the Parent's Plan. If the District Court does not arrive at this conclusion, then these cases should be decided based on the proper application of Section 1129(c) of the Bankruptcy Code. Sterlite respectfully submits that Section 1129(c) provides no basis whatsoever for preferring confirmation of a plan that proposes the acquisition of equity by an existing equity holder. An equity holder making a bid to acquire the equity of an estate that does not have sufficient assets to repay its creditors cannot expect that its interest in such worthless equity provides it with a veto right over superior plans that are proposed by third-party bidders and are preferred by creditors of the estate. The Bankruptcy Code provides no such right to the parent of an insolvent entity, and the District Court should not create a new rule to the contrary. To do so would be inequitable to the creditors in these cases and would have highly undesirable policy results, such as disincentivizing potential bidders and promoting opportunistic bankruptcy filings designed to minimize complex tort, environmental and other liabilities.

ARGUMENT

I. The Debtors' Modified Plan Should Be Considered Because it Was Submitted to Address Errors, Will Not Result in Delay, and Is Permitted Under the Plain Language of Section 1127(a) of the Bankruptcy Code.

The Debtors' Modified Plan should be considered by the District Court because it rectifies fundamental errors made in the First Recommendation. Specifically, the First Recommendation concluded that Sterlite had been "outbid" and that the non-cash consideration provided to certain creditors was not of equal value to the cash consideration provided by the Parent. The First Recommendation also suggested that the Parent had outbid Sterlite in the aggregate by providing for greater total consideration than Sterlite, even though there is no reason to believe this purportedly higher consideration would be distributed to creditors.[3]

[3] In the Second Recommendation, the Bankruptcy Court suggests that Sterlite cannot improve its bid by offering increased cash that might not be distributed to creditors. But the Bankruptcy Court fails to explain how *the Parent* can meaningfully be said to improve the terms of its bid by promising to increase the cash "offered" when it is clear that this cash will not be distributed to creditors but rather will be retained for the benefit of the Parent. The theory that Parent can provide a superior bid by promising to move money "from one pocket to another" underlies two erroneous conclusions reached by the Bankruptcy Court: first, it is the basis for the original conclusion that Sterlite was outbid by the Parent, and, second, it is the basis for concluding that there will be an endless "bidding war" if the Debtors' Modified Plan is approved. There

Sterlite respectfully maintains that both of these conclusions were clearly erroneous and that they must be corrected.[4] One option for addressing these errors is for the District Court to consider the Debtors' Modified Plan, which is designed to address and remedy these errors in a manner that prevents the need for remedial action or remand by the District Court.

A. The Debtors' Modified Plan is Permitted Under Section 1127(a) of the Bankruptcy Code and Should be Considered Along with the Stipulations In Order to Expedite the Confirmation Process and Eliminate Judicial Errors.

The Debtors' Modified Plan is permitted under the Bankruptcy Code by the plain language of Section 1127(a), which provides in pertinent part:

> The proponent of a plan may modify [a] plan at any time before confirmation….[and] after the proponent of a plan files a modification of such a plan with the court, the plan as modified becomes the plan.

The Second Recommendation cites a number of cases, many of which have nothing to do with Section 1127(a) but arise instead in the context of issues surrounding actions by federal magistrate judges, and argues that the cases show that there is no unfettered right to modify a plan under Section 1127(a) after a bankruptcy court has made a recommendation to a district court. These cases are simply not relevant to the facts at hand. The common themes running through all the cases cited in the Second Recommendation are the existence of "gamesmanship" or some other improper procedural purpose and the prospect of interminable delay. Here, there has been no such gamesmanship nor will there be any delay. To the contrary, the changes to the Sterlite bid were intended solely to remedy judicial errors in a manner that would allow for continuation of an expedited confirmation process. The modified offer from Sterlite and the Debtors represents a good faith offer to monetize non-cash consideration in a manner that would

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need not be a bidding war if the District Court correctly concludes, as it should, that Parent's promises to "pay itself" do not amount to improved or otherwise superior offers.

[4] See Section I of the Original Sterlite Objection for further discussion of these issues.

eliminate any dispute over whether such non-cash consideration provides creditors superior or inferior value.[5] The Debtors' Modified Plan also aims to eliminate confusion over the open-ended "blank check" bid made by Sterlite, by expressly committing to a higher estimated cash purchase price.[6] These good faith modifications, intended to clarify disputed confirmation issues that were not properly addressed in the First Recommendation, can by no means be considered "gamesmanship" or an abuse of process.[7] The cases referred to in the Second Recommendation are thus inapposite, and the Debtors' Modified Plan should be allowed and considered by the District Court, as is required under Section 1127(a) of the Bankruptcy Code.

Sterlite's Stipulations should also be considered for the same reasons. If the District Court disagrees with the Recommendations and supports confirmation of the Debtors' plan, it may need to remand the cases for further recommendations, including valuation of the SCC Final Judgment. To eliminate the need for any such time-consuming remand, and in order to provide greater clarity regarding the lack of prejudice to equity under the Debtors' plan, ***Sterlite has expressly adopted the arguments and conclusions of the Parent with respect to the***

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5 Indeed, if the Debtors' Modified Plan is not considered by the District Court, the District Court may conclude that the consideration provided to asbestos creditors under the Debtors' Original Plan is in fact superior to the value provided under the Parent's Plan. As discussed in further detail in the Original Sterlite Objection, this is clearly the case.

6 See Section I.B and Annex I.B of the Original Sterlite Objection for a discussion of the open-ended bid made by Sterlite and reflected in the Debtors' Original Plan. This feature was not properly recognized in the Recommendations and forms at least part of the basis of the error that Sterlite has been "outbid".

7 Also, it should be noted that the August 31 "deadline", which the Parent and the Second Recommendation suggest was imposed by Sterlite, ***was in fact eliminated by Sterlite*** on August 6, 2009, at the request of the District Court and the Bankruptcy Court in order to facilitate the timeline preferred by the District Court. See Section 2 of Amendment No. 4 to Settlement and Purchase and Sale Agreement. In contrast, ***Parent's own plan was subject to an August 31 deadline***. See Section 9.1(c) of Parent's Plan, as filed on August 30, 2009. The papers filed by the Parent in connection with the September 15 Hearing misstated these facts and suggested that the Bankruptcy Court recommend that the District Court find that the August 31 was a deadline imposed by Sterlite. Parent's Response to Order to Show Cause (Docket No. 12872) at 1-2. The Parent has misstated the true source of the August 31 deadline, which remained a deadline only because the Parent continued to insist upon it. The Second Recommendation adopted this misstatement of the facts.

value of the SCC Final Judgment.[8] The District Court's consideration of these stipulations will thus expedite and simplify the District Court's confirmation decision, whatever the ultimate result.

B. No Additional Discovery or Bidding Would be Required.

The Second Recommendation incorrectly suggests that allowing the Debtors' Modified Plan will create delay in the process because it will result in the need for additional discovery and perhaps bidding. No additional discovery will be required because the changes do not implicate new factual issues. There is abundant evidence already in the record relating to the financial resources available to Sterlite and Sterlite India, and there can be no doubt about their ability to make the cash payments called for under the terms of the Debtors' Modified Plan. Similarly, there is sufficient evidence in the record for the District Court to adopt the Stipulations. In any event, the Stipulations are as much legal as they are factual, and they should be considered as concessions on legal points rather than as raising new factual issues (*i.e.*, the stipulation as to the value of the SCC Final Judgment can be considered as nothing more than the adoption of the legal conclusion that the value of the SCC Final Judgment cannot be different than the value stated in the SCC Final Judgment itself).

C. The Record is Not "Closed" Because the Reference has Been Withdrawn and the District Court has Broad Discretion to Consider the Debtors' Modified Plan and the Stipulations.

Finally, the Second Recommendation suggests that consideration of the Debtors' Modified Plan and the Stipulations would require "reopening" the record. The Bankruptcy Court further suggests that there is no basis for reopening the record and that the Debtors never asked that the record be reopened. Of course, these assertions *assume that the record in these matters*

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8 See Section III of the Supplemental Brief for discussion of Parent's argument that the SCC Final Judgment should be valued at face.

has in fact closed. Yet there is no reason to assume this is the case. Although the Bankruptcy Court correctly notes that it is not typical for there to be new evidence considered in the case of a decision on a core matter, the Second Recommendation fails to consider the fact that core matters generally are decided in a context where the reference remains in place. That is not the case here, and because the reference has been withdrawn in these cases there is no reason to presume that the record has been closed. The matter before the District Court is not an appeal of a core matter but rather the consideration of a recommendation in the context of a matter where the reference has been withdrawn. As such, it is entirely appropriate for the District Court to consider new items in the record when exercising its *de novo* review of the Recommendations.

It is certainly reasonable for the parties to respect the general timeline established for completion of these cases, and to assume there might indeed be certain additions to the record that would be inappropriate at this juncture. But neither the Stipulations nor the Debtors' Modified Plan come anywhere near being inappropriate additions. While both the Parent and the Bankruptcy Court cite and argue for the applicability of several cases dealing with federal magistrate judges, they neglect to consider the precedent most relevant in this jurisdiction. In *Freeman v. County of Bexar*, 142 F.3d 848, 852-53 (5th Cir. 1998), the Fifth Circuit stated a position that sought to reconcile the sometimes conflicting objectives of bringing "litigation to an end" and rendering "just decisions on the basis of all the facts." *Id.* at 852-53. The Fifth Circuit rejected the approach of cases relied upon in the Second Recommendation, such as the *Paterson-Leitch* case, and instead held that justice requires that courts exercise discretion in determining whether to consider additional evidence. *Id.* at 851-51. Applying a balancing analysis such as that preferred by the Fifth Circuit, the District Court should conclude that the proposed additions to the record in these cases will actually expedite the conclusion of these cases, by eliminating the need to remedy certain fundamental errors by the Bankruptcy Court, and also will ensure that these cases are decided correctly on their facts -- specifically, an accurate understanding and evaluation of the consideration being paid to creditors under each competing plan.

II. On the Basis of the Modified Plan, the Sterlite Bid Should Be Confirmed as the Superior Plan.

The District Court should reject the recommendation that the Debtors' Modified Plan does not provide a superior offer to that proposed by the Parent. In coming to this conclusion the Bankruptcy Court discussed a number of issues in the Second Recommendation, including issues such as the comparative cash commitments of the parties, treatment of the Parent's disputed tax claim, and the payments to asbestos under the competing plans. Sterlite takes issue with most of the Bankruptcy Court's conclusions on these points, but considers them side issues. Sterlite actually embraces the Bankruptcy Court's broader conclusion that the real issue requiring consideration and resolution by the District Court is the treatment of equity under the two competing plans.

A. The Increased Cash Purchase Price in the Debtors' Modified Plan Demonstrates that there is No Meaningful Difference in the Cash Paid to Creditors under Either Plan.

Addressing the increased cash estimate contained in the Debtors' Modified Plan, the Bankruptcy Court appears to find objectionable the fact that such cash is not being provided to make distributions to the Parent. This was never the intent of the Debtors' Modified Plan. Rather, the increased cash purchase price is being provided to account for the increased cash to be provided to creditors no longer receiving trust units, and, more importantly, to clarify that there has never been less cash in the Sterlite bid than in the Parent's bid. Both plans provide sufficient cash to pay creditors in full by providing cash purchase prices that are larger than the aggregate estimated claims of creditors.

Furthermore, both plans ensure that the benefit of any such excess cash is retained by the respective plan proponent. Therefore, properly understood, both plans are equal as far as the purchase price is considered because under each plan creditors are paid in full. In fact, the plans have always been equal in this regard and it was only because this was not properly appreciated in the First Recommendation (which concluded that the Parent's Plan included a higher purchase price) that Sterlite and the Debtors were compelled to include the increased purchase price in their modified plan. Sterlite makes no argument that it is paying more to creditors than the Parent is and for this reason there is no danger of an endless "bidding war". The District Court should find that there can be no further meaningful competition by allowing the plan proponents to make new promises to "pay themselves" ever increasing, but meaningless, sums.[9]

B. The Treatment of Asbestos Creditors is Not Inferior Under the Debtors' Modified Plan.

The comparative treatment of asbestos creditors is also substantially similar under the two plans and should not be considered relevant in selecting a plan to be confirmed. The Second Recommendation suggests that under the Debtors' Modified Plan the consideration to be provided to asbestos creditors may be some $8 million less than the value being provided under the Parent's Plan. This is both inaccurate and beside the point. Broken apart, the purported $8

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9 Similarly, the discussion in the Second Recommendation of the treatment of the Parent's alleged tax claims is a side issue of no real significance. The Parent's tax claims are either legitimate or they are not. If the claims are allowed after appropriate adjudication, then under the Debtors' Modified Plan they will be paid in full, as and when allowed. If the claims are not legitimate and are disallowed by the court, then they will not be paid. This was also true under the Debtors' Original Plan and is not a new issue. The treatment provided under the Debtors' plan is no less favorable than the treatment of the claims under the Parent's Plan and should not factor into the confirmation of one plan or another.

million difference comprises: (i) $5 million on account of the new theory that the $280 million promissory asbestos note need not be discounted, and (ii) $3 million on account of a waiver of a loan for professional fees.

The proposition that the asbestos note should not be discounted is a novel one, and it is inconsistent with the record, logic and the proposed findings of the First Recommendation.[10] The Bankruptcy Court originally discounted this note by over $5 million, a number that is arguably too low given the substantial overall debt burden of post-reorganized ASARCO and the Parent and their track record managing these assets. But even assuming this original discount is accurate, and assuming there remains a difference of less than $3 million on account of the waiver of the estimated balance of the intercompany DIP loan to the asbestos subsidiaries, this amount would need to be compared against the value of the other consideration provided to asbestos creditors under the Debtors' plan. Specifically, the Debtors' plan provides asbestos creditors with interests in a liquidation trust and certain other property such as Reorganized Covington, which are not provided under the Parent's Plan. Because it fails to value and compare these assets, and because it alters its previous recommendation with respect to the appropriate discount of the asbestos note, the Bankruptcy Court's suggestion that asbestos creditors receive more value under the Parent's Plan is unfounded. More importantly, the representatives of the asbestos creditors have indicated that they view the consideration as "substantially similar" and are in any event bound by the terms of a contractual commitment to

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[10] In the First Recommendation, the Bankruptcy Court valued the asbestos note at $274.8 million, effectively discounting the note by more than $5 million. See footnote 241 of the First Recommendation. It is unclear why, or on what basis the Bankruptcy Court has altered this proposed conclusion. There is no evidence in the record supporting the view that the note should not be discounted, and the notion that any financial instrument that is not immediately payable should not be discounted is inconsistent with sound financial reasoning, which would suggest that there is always some appropriate discount on account of risk and delayed payment of funds.

support both competing plans.[11] Under the circumstances, and in light of the subjective valuations and *de minimis* amounts involved, these cases should not be decided on the basis of any purported differences between the consideration provided to asbestos creditors.

C. The Stipulations Demonstrate That There is No Prejudice to the Parent Under the Terms of the Debtors' Plan.

Ultimately, these issues of estimated cash consideration, treatment of tax claims, and any *de minimis* difference in the consideration provided to asbestos creditors are side issues of limited importance or relevance. The Bankruptcy Court seems more or less to share this view, concluding that "[i]n short, both plans will likely pay all creditors in full with interest" and suggesting that the real issue of difference under the two plans is the treatment of equity. Sterlite respectfully submits that there is no significant prejudice to equity under the Debtors' plan, and that the near unanimous support of creditors for a plan that they view as superior on both economic and non-economic terms should therefore be honored over the preferences of equity.

In short, there seem to be two issues leading the Bankruptcy Court to conclude and recommend that equity is being ill treated under the Debtors' plan. First, there is the concern that the Parent could be liable for a portion of the SCC Final Judgment under the Debtors' plan, and second, there is the concern that under the Debtors' plan the Parent will not retain its equity.

With respect to the first concern, the impact of the SCC Final Judgment, the Second Recommendation notes that even when the SCC Final Judgment is valued at face value, there remains a "negative impact" on the Parent under the Debtors' plan insofar as it remains liable for up to approximately 10% of the SCC Final Judgment, or a maximum of approximately $900 million. Although this is accurate, the Bankruptcy Court's follow-on conclusion that the Debtors' plan "therefore provides less to equity than the Parent's Plan" does not flow logically

[11] *See* Motion Hearing Re Document 12043, 12305, 12643 and 12849 Tr. 86:12-87:5, Sept. 15, 2009.

and is incorrect. To the contrary, and by Parent's own admission, ***the Parent will in fact pay much more than $900 million to settle the SCC Final Judgment under the terms of its own plan***. In fact, by its own reasoning, the Parent may pay as much as $1.6 billion to procure the release of the judgment under its plan, an amount that is ***nearly double*** the maximum amount that would be payable under the Debtors' plan.[12] Moreover, under the Debtors' plan the Parent will retain its rights of appeal, and so could actually end up paying nothing. Simply put, there is a "negative impact" on equity under either plan (and less so under the Debtors' plan). This negative impact, however, is not the result of the plans themselves, but rather is a result of the fraudulent prepetition conduct of the Parent. The Parent will pay a heavy price on account of its past acts no matter which plan is confirmed, but under the Debtors' plan the price paid for the release of liability will be less than the price paid under the Parent's own plan.

Given that the Parent likely will pay several hundreds of millions of dollars to settle its liability for the SCC Final Judgment irrespective of which plan is confirmed, the remaining question is whether the Parent's interests are prejudiced by the fact that they would not be permitted to retain their equity under the Debtors' plan. To properly consider this question, it is critical to recall from the outset that ***the ASARCO estates are insolvent but for the existence of the SCC Final Judgment***.[13] That is to say, leaving aside the legal obligation of the

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[12] *See* Section III and footnotes 16 and 17 of the Supplemental Brief for further discussion of the sources of these figures.

[13] THE COURT: The difference between solvency and insolvency in this debtor is the Brownsville judgment.

MR. MOORE: Well, Your Honor, but I've heard every party on the other side of the aisle here say this is a solvent debtor, every single one of them.

THE COURT: It's a solvent debtor because it's got the Brownsville judgment.

MR. MOORE: Fine, then it's a solvent debtor because it has the Brownsville judgment. That's fine."

Confirmation Hearing Closing Statements – Afternoon Session Tr. 138:8-18, Aug. 25, 2009.

Parent to make its creditors whole on account of its prior fraud, there are insufficient assets in the Debtors' estates to ensure payment of all creditors in full. Furthermore, as is true in the case of any insolvent estate, where there are insufficient funds available to pay creditors in full, ***there is no value remaining for equity and equity is effectively wiped out and divested of any ownership rights and interests***.

Of course, the mere fact that equity is valueless in the context of an insolvent estate does not prohibit equity from making a bid to reacquire their old equity interests by providing new funds to the estate. That is the situation here. But there is no rule under the Bankruptcy Code, or any other applicable law, that provides that an equity holder can make a bid deemed to be inferior by the overwhelming majority of interested stakeholders, yet be selected as the superior bidder merely because it prefers to reacquire its valueless equity. Put another way, ***there is no prejudice suffered by the Parent if it fails to retain its equity, because that equity is now effectively worthless***. As a consequence, the Parent should be viewed as standing in the shoes of a third party bidder, with no existing right or interest in the equity in question, and should be required to bid for the equity on the same grounds as any other bidder (*i.e.*, it should be required to make a competitive bid that is judged superior by the creditors who retain property rights and entitlements to the assets of the estate). To hold otherwise would be to endorse the view that Section 1129(c) provides an implied veto right with respect to competing plans of reorganization filed by an out-of-the-money equity holder who is willing to pay allowed claims in full but is otherwise unwilling to make a competitive bid for the assets or equity in question.

On the facts of these cases, the inferior aspects of the Parent's Plan are numerous, significant, and for the most part ***voluntary***. The Parent has refused to match Sterlite's offer of an industry-leading collective bargaining agreement for its unionized employees. The Parent has declined to grant retiree creditors the same level of comfort with respect to their retiree benefits. The Parent has denied the general creditor body the same assurances provided by Sterlite that they will not be subject to ongoing litigation of their claims against the estate. The Parent has not made the same commitments to regulators that Sterlite has made with respect to intended future operations and certifications. The Parent has refused to make a bid that does not burden the future operations of ASARCO with a substantial debt load of over $1.58 billion, notwithstanding the grave concern expressed by federal and state governments regarding the likely adverse impact of such leverage on the Parent's future operations and compliance with local laws. ***The Parent has deliberately chosen not to match these and other superior terms of the Sterlite bid*** and has chosen instead to deprive creditors of the related protections and consideration afforded by Sterlite's superior bid.

Against the backdrop of this intentionally inferior offer, and on the basis of its interest in the economically worthless equity of ASARCO, the Parent would now have the District Court adopt the Recommendation and create new law affirming that because they have promised to pay allowed claims in full, Sterlite's competing bid must be rejected as unfairly prejudicial because it would deprive the Parent of its purported right to reacquire its worthless equity without submitting a competitive bid. Not only is there no statutory basis in the Bankruptcy Code for such a conclusion, such a holding would turn state law and Bankruptcy Code priorities on their head by preferring the interests of an out-of-the-money equity holder to the interests and preferences of the Parent's creditors.[14] This result would be particularly inequitable to creditors under the circumstances of these cases, where there is cause to believe

[14] *See* Section II.D of the Original Sterlite Objection and Section III of the Supplemental Brief for a discussion of the precedent that would be set if the District Court adopts the Bankruptcy Court's decision.

that ASARCO's insolvency was engineered by the Parent's fraudulent acts in removing the "crown jewel" asset from creditors' reach. Such a ruling also would be bad policy.[15]

III. Even if the Debtors' Modified Plan and the Stipulations are Not Considered, the Sterlite Plan Remains the Superior Plan and Should Be Confirmed.

The Debtors' Modified Plan and the Stipulations should be allowed and should be considered by the District Court notwithstanding the Bankruptcy Court's recommendation to the contrary. Nonetheless, even if the District Court declines to accept and consider the Debtors' Modified Plan and the Stipulations, it should nonetheless remedy the deficiencies contained in the First Recommendation and confirm the Debtors' Original Plan. Each of the items addressed in the Debtors' Modified Plan and the Stipulations were targeted to remedy a specific error in the First Recommendation, but there are separate grounds, independent of accepting the Debtors' Modified Plan or the Stipulations, on which the District Court can conclude that the Debtors' Original Plan was superior to the Parent's Plan. These include the following:

- ***Sterlite was not "outbid" under the Debtors' Original Plan and did not offer to pay less to creditors because it was at all times obligated to pay an open-ended amount sufficient to pay creditors in full***. The conclusion that the Parent's Plan provided more consideration, in the aggregate, than the Debtors' Original Plan is erroneous. Sterlite committed under the terms of the New Plan Sponsor PSA and the Debtors' Original Plan to contribute any amount of cash necessary to ensure the payment in full of creditors. On this basis, and because any excess cash purportedly bid by the Parent would not be distributed to stakeholders but would be retained for Parent's own benefit, the estimated aggregate cash purchase price under the two competing plans is irrelevant. Both plans pay creditors in full and are equal in this regard. Sterlite respectfully directs the District

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15 The Bankruptcy Court also asserted that the Parent's Plan has greater certainty of closing. But the Parent's escrow agreement remains atypical in that it provides mere third party beneficiary status to purported beneficiaries. The Parent may have conceded jurisdiction to the Bankruptcy Court, but the Parent is a litigious appellant and could easily pursue a strategy of appeals that could result in the escrowed stock being tied up in litigation for an unknown period of time. During any such lengthy appeal period, the value of the stock securing the Parent's commitments could easily decline to a level that would not be sufficient to secure performance under their plan. In contrast, the Sterlite plan, and the $625 million letters of credit that would support it, provide equal if not greater certainty because they can be drawn immediately if required and so provide a genuine incentive to a timely closing. As argued in the Original Sterlite Objection, sophisticated and well advised creditors in these cases came to the conclusion that the Sterlite plan was equally if not more certain to close in a timely manner. The likelihood of closing does not favor one plan over another.

Court's attention to Sections I.B and I.E. and Annex I.B of the Original Sterlite Objection for further discussion of these issues.

- ***Creditors receiving SCC Litigation Trust Units will receive consideration that is of equal or greater value to the cash afforded such creditors under the Parent's Plan***. The Bankruptcy Court's recommendation that the value of the SCC Litigation Trust Units was inferior to the cash provided under the Parent's Plan is erroneous and inconsistent with other conclusions in the First Recommendation. The trust units to be provided to asbestos creditors, late filed creditors and holders of equitably subordinated claims (if any), would, by design, provide such creditors with present value in an amount equivalent to the size of their claims. By design, the Debtors' Original Plan called for the distribution of precisely the amount of SCC Litigation Trust Units required to ensure creditors in Classes 6 and 7 were paid in full. For example, a late filed creditor owed $100 would receive $100 worth of SCC Litigation Trust Units. These units were to be valued by the court in a manner that would account for the possibility that they may in fact turn out to be worthless, but for this reason, their potential upside value might have been greater than $100. In short, the net present value of the SCC Litigation Trust Units would have been risk adjusted in a manner that would guarantee that creditors receiving such units would receive value equal to that being provided under the Parent's Plan.

  Furthermore, asbestos creditors would have received SCC Litigation Trust Units worth approximately $244 million under the Debtors' Original Plan, an amount sufficient to ensure that asbestos creditors would receive over $20 million more value under the Debtors' Original Plan than under the Parent's Plan. Sterlite respectfully directs the District Court's attention to Section I.C and footnotes 13-15 of the Original Sterlite Objection for further discussion of these issues.

- ***Sterlite would have access to more than adequate working capital irrespective of whether a formal working capital commitment is in place***. Although Sterlite has committed to enter into a working capital facility of not less than $200 million under the Debtors' Modified Plan, this commitment was nothing more than a formalization of a commitment that Sterlite will enjoy from its corporate parents irrespective of whether there is any formal working capital facility in place. There is ample evidence for this in the record. Sterlite respectfully directs the District Court's attention to Section I.F of the Original Sterlite Objection for further discussion of these issues.

- ***There is an independent basis for the District Court to arrive at the conclusions stated in the Stipulations***. The District Court can arrive at the conclusions stated in the Stipulations irrespective of whether it accepts them as "stipulations in the record". With respect to the stipulated "shortfall" amount Sterlite has merely stipulated to the figures provided by the Debtors on account of such amounts and there is little if any doubt or contrary evidence in the record to dispute the shortfall numbers. Furthermore, the Parent has itself argued that the SCC Final Judgment must be valued at face value, and the District Court could adopt this argument simply by concluding that the value of the SCC Final Judgment was accurately stated in the District Court's judgment of liability against the Parent. Similarly, if the District Court were to accept the evidence of the expert presented by the Majority Bondholders, it could apply only a minimal discount to the

> face value of the SCC Final Judgment, and on this view the logic of Sterlite's arguments regarding the lack of prejudice to the Parent would continue to hold. If the District Court does not believe it can conclude that the Parent is not prejudiced simply because the Bankruptcy Court has concluded that absolute priority rule is not violated under the Debtors' Original Plan, then it should proceed to value the SCC Final Judgment on the basis of the evidence available so that it can properly consider whether there is in fact any prejudice to be suffered by the Parent under the Debtors' Original Plan.

In the event that the District Court chooses to adopt the Second Recommendation and elects not to consider the Debtors' Modified Plan and the Stipulations, Sterlite respectfully urges the District Court to consider the arguments above, as well as each of the other arguments contained in the Original Sterlite Objection and the Supplemental Sterlite Brief. These arguments were presented in summary form in the Original Sterlite Objection but were not highlighted because Sterlite did not anticipate that there would be any objection to its set of limited clarificatory amendments.

CONCLUSION

For all of the reasons stated above, and in the Original Sterlite Objection and the Supplemental Sterlite Brief, as well as any other pleadings filed in support of the Debtors' plan in these cases, Sterlite respectfully requests that the District Court decline to follow the Recommendations and confirm the Debtors' Modified Plan, or, in the alternative, confirm the Debtors' Original Plan.

Dated: September 29, 2009

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CERTIFICATE OF SERVICE

This is to certify that on September 29, 2009, a true and correct copy of the foregoing document was served by the Electronic Case Filing System for the United States District Court for the Southern District of Texas and the United States Bankruptcy Court for the Southern District of Texas.

/s/ William J.F. Roll, III
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