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

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

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO MOTION OF HALCYON MASTER FUND L.P. AND DK ACQUISITION PARTNERS L.P. FOR ORDER (A) GRANTING MOVANTS ALLOWED ADMINISTRATIVE EXPENSE CLAIMS PURSUANT TO BANKRUPTCY CODE § 503(b); AND (B) AUTHORIZING AND DIRECTING DEBTORS TO PAY SUCH CLAIMS

TO THE HONORABLE RICHARD S. SCHMIDT,
UNITED STATES BANKRUPTCY JUDGE:

ASARCO LLC *et al*. (the "Reorganized Debtors"), ASARCO Incorporated, and Americas Mining Corporation (collectively "ASARCO") hereby submit the following Proposed Findings of Fact and Conclusions of Law With Respect to the Motion (the "Substantial Contribution Motion") of Halcyon Master Fund L.P. ("Halcyon") and DK Acquisition Partners L.P. ("DK Acquisition") for Order (A) Granting Movants Allowed Administrative Expense Claims Pursuant to Bankruptcy Code § 503(b); and (B) Authorizing and Directing Debtors to Pay Such Claims. ASARCO respectfully requests that the Court enter the following Findings of Fact and Conclusions of Law and deny the Substantial Contribution Motion in its entirety and hereby reserves its rights to supplement these Proposed Findings and Conclusions:

INTRODUCTION

Movants seek in excess of $2.6 million in the form of a substantial contribution claim under section 503(b)(3)(D) from the Reorganized Debtors' estate based on the claim that Movants' bid for the SCC Judgment propelled the Parent to submit the full-payment plan of reorganization that this Court recommended for confirmation and that the District Court ultimately confirmed based upon that recommendation. Movants' claim rests on the fact that Professor Kenneth Klee's August 15, 2009 Proffer mentioned that an unnamed party submitted a proposal to purchase a fractional interest (the exact amount of the interest was undisclosed) in the SCC Judgment for an undisclosed price. The Court finds that neither Movant has established the required elements of a substantial contribution claim. Accordingly, the Court enters the following Findings of Fact and Conclusions of Law denying Movants' Substantial Contribution Motion in its entirety.

FINDINGS OF FACT

A. The Movants—Halcyon Master Fund L.P. and DK Acquisition Partners L.P.

Movants Halcyon Master Fund L.P. ("Halcyon") and DK Acquisition Partners L.P. ("DK Acquisition") filed a Motion for Order (A) Granting Movants Allowed Administrative Expense Claims Pursuant to Bankruptcy Code § 503(b); and (B) Authorizing and Directing Debtors to Pay Such Claims (the "Substantial Contribution Motion"). (Doc. No. 13065.) The Substantial Contribution Motion seeks a break-up fee of $1.875 million based on Movants' Joint Bid for the SCC Judgment and attorneys' fees of up to $1,000,000 associated with the bid and for prosecuting the Substantial Contribution Motion. (Ex. 8, 33.) Neither the Joint Bid nor any break-up fee or other stalking-horse bidder protection provisions were accepted by ASARCO LLC (the "Debtor") or approved by the Bankruptcy Court. (Substantial Contribution Hrg. Tr. at

82:3-83:4, 94:9-95:5, 95:20-23, 137:21-138:10, 138:21-139:7.) Nevertheless, Movants contend that they are entitled to these amounts under section 503(b). Halcyon is a bondholder of the Debtor and has participated in these bankruptcy cases since their inception in 2005. DK Acquisition, on the other hand, is not a bondholder or otherwise a creditor, although it asserts that one of its alleged affiliates became a bondholder in May 2009—over four years after the Debtor filed these cases. (*Id*. at 76:14-77:1.)

B. The SCC Judgment Auction Process.

In the absence of express authority from this Court, Barclays Capital ("BarCap") and the Debtor initiated a process to sell the SCC Judgment. On June 4, 2009, the Debtor attempted to expand its engagement of BarCap to include the potential sale of all or a portion of the SCC Judgment. (Ex. 4.) Although the Court held a hearing on this request, it never entered an order approving the Debtor's retention of Bar Cap in connection with the sale of the SCC Judgment.

Nevertheless, BarCap devised a piecemeal process that it hoped would result in the sale of the SCC Judgment. (Ex. 4.) First, BarCap would send an introductory letter and teaser to entities it believed might have an interest in the SCC Judgment. (*Id*.) Second, BarCap would send an information memorandum to certain parties that expressed an interest in learning more about the SCC Judgment; those parties would be invited to join a virtual data room containing pleadings, deposition and hearing transcripts, exhibits and other information about the SCC Judgment. (*Id*.) Third, BarCap would send an indication-of-interest letter, which would invite potential bidders to submit, by July 16, 2009, "a preliminary, non-binding written indication of interest for a partial or full purchase of the SCC Judgment," a so-called "Indicative Offer." (*Id*.) Fourth, BarCap would invite a subset of these "Initial Bidders" to conduct additional diligence and submit a binding bid. (*Id*.)

According to BarCap, there would be additional steps to occur after the "binding" bids were submitted. The Debtor, in conjunction with its advisors, was to analyze any offers and then determine whether to negotiate and enter into a final form of stalking-horse purchase agreement. (*Id*.) The next step would be the filing of a motion with the court seeking (i) approval of any bid protections, including an expense reimbursement to a qualified stalking-horse bidder under legally acceptable bidding procedures, and (ii) approving "topping fee" provisions, if any. (*Id*.) It is undisputed that these additional steps never happened, and it is undisputed that the Court never approved this piecemeal process.

C. The Court's Expense Reimbursement Order.

On July 29, 2009, the Court entered the Expense Reimbursement Order. (Doc. No. 12144.) Under the Expense Reimbursement Order's terms, the Court authorized the Debtor to reimburse certain bidders in conjunction with a proposed—but never approved—sale of the SCC Judgment. (*Id*. at 1-2.) Specifically, the Debtor could reimburse (i) incurred expenses, such as legal fees to outside counsel to evaluate the SCC Judgment, and (ii) "work fees." (*Id*.)

D. Movants' Expense Reimbursement Agreements.

Pursuant to the Expense Reimbursement Order, on August 5, 2009, Movants each entered into Expense Reimbursement Agreements with the Debtor. (Exs. 3, 10.) Under Halcyon's Expense Reimbursement Agreement, Halcyon agreed to cap its reimbursement for bidding on the SCC Judgment at $75,000. (Ex. 3 at ¶1.) The Debtor agreed to pay Halcyon $37,500 initially, with the remaining $37,500 payable *if* Halcyon submitted "a final, complete and binding bid prior to the bid deadline of 5:00 p.m. Eastern time on August 13, 2009." (*Id.* at ¶¶ 1(a)-(b).) Halcyon further agreed that "the amount payable" to it "shall *in no event* exceed $75,000 in the aggregate." (*Id*. at ¶ 1(b) (emphasis added).) The agreement also provides that

"only such legal due diligence expenses incurred by [Halcyon] prior to such time as ASARCO advises [Halcyon] in writing that [Halcyon] shall no longer be permitted to pursue the Transaction . . . shall be reimbursed." (*Id*. at ¶ 2.) The Halcyon Expense Reimbursement Agreement did *not* contain a confidentiality provision. (*See* Ex. 3.)

The Debtor also entered into an Expense Reimbursement Agreement with Davidson Kempner Capital Management LLC ("DK Capital Management"), an alleged affiliate of DK Acquisition, the party seeking a substantial contribution claim in this Court. (Ex. 10.) The Debtor never entered into an Expense Reimbursement Agreement with DK Acquisition. DK Capital Management agreed to cap its reimbursement at $200,000. (Ex. 10 at ¶ 1.) The Debtor would pay DK Capital Management $100,000 initially, with the remaining $100,000 payable *if DK Capital Management* submitted "a final, complete and binding bid by the bid deadline of 5:00 p.m. Eastern time on August 13, 2009." (*Id*. at ¶¶ 1(a)-(b).) DK Capital Management further agreed that "the amount payable. . . shall in no event exceed the Reimbursement Cap" of $200,000. (*Id*. at ¶1(b).) The agreement also provides that "only such legal due diligence expenses incurred by [DK Capital Management] prior to such time as ASARCO advises [DK Capital Management] in writing that [DK Capital Management] shall no longer be permitted to pursue the Transaction . . . shall be reimbursed." (*Id*. at ¶ 2.) DK Capital Management's Expense Reimbursement Agreement contained a confidentiality provision; but the provision authorized the Debtor to disclose the terms of any bid to its "advisors." (*Id*. at ¶ 4.)

E. The Movants' Joint Bid Had No Effect on the Parent's Decision to Submit a Full-Payment Plan.

On August 13, 2009, at 5:02 p.m. (after the agreed-to deadline set in the Expense Reimbursement Agreements), Movants submitted a Joint Bid seeking to purchase 7.5% of the SCC Judgment for $37.5 million. (Ex. 8.) Professor Klee, in an August 15, 2009 proffer

regarding the valuation of the SCC Judgment, stated the following: "On August 13, 2009, Barclays received a binding bid for a fractional interest in the SCC Litigation Trust with the implied value of the whole being $500 million." (Ex. 36 at ¶ 62.) The Court finds that (i) this limited and general reference to one of the bids did not violate the confidentiality provision contained in DK Capital Management's Expense Reimbursement Agreement, (ii) this limited disclosure was not contrary to any expectation of confidentiality that either Movant might have had, and (iii) this limited disclosure had no effect on the Parent's plan amendment decisions.

The Parent's plan amendments during the spring and summer of 2009, including the amendments resulting in a full-payment plan, were driven by several factors, including but not limited to (i) the gradual but substantial rise in copper prices that occurred over the course of the chapter 11 case and specifically during the 2009 plan negotiation and confirmation process, (ii) the Parent's long-held desire to maintain its ownership of ASARCO LLC and bring the U.S. assets and operations back into the fold of its global mining business, and (iii) the Parent's strong desire to bring an end to the costly, time-consuming, and distracting litigation involving environmental and asbestos claims. (Lazalde Proffer at ¶ 5.) The Parent understood that to achieve these goals, it must eventually come forward with a full-payment plan. (*Id*. at ¶ 4.) And Halcyon understood this well before the disclosure to Professor Klee. (Substantial Contribution Hrg. Tr. at 157:21-160:11 (stating that the Parent was "dead in the water" without a full-payment plan).) Neither the SCC Judgment "auction" nor Movants' last-minute fractional-interest bid played any role in the Parent's decision. (Lazalde Proffer at ¶¶ 6-8; Doc. No. 13920, Mack Dep. at 101:6-11, 101:17-20).) The Klee disclosure was a non-event in the Parent's eyes. (Lazalde Proffer at ¶ 8.)

The history of the plan amendment process reveals why this is the case. The Parent, the

Debtor, the Court, and the creditor constituencies all were confronted with Sterlite's request for the Court to enter an order confirming the Debtor's Plan no later than August 31, 2009. The Court scheduled pre-trial matters, the trial, closing argument, the submission of closing briefs, and the plan proponents' proposed Findings of Fact and Conclusions of Law with this constraint in mind.

The multi-step bid process—which was to lead to the designation of a stalking-horse bidder, the approval of bid and bidder protection procedures, the scheduling of an auction, and finally the setting of a hearing on notice to obtain approval of a sale to the highest bidder auction process—could never have been accomplished in the limited timeframe available. Even if creditors would want to seek a sale of the SCC Judgment, that objective would have been better served under confirmation of the Debtor's Plan with its proposed transfer of the SCC Judgment to the SCC Litigation Trust—where an orderly post-closing process could have been conducted in a structure controlled by the creditors. Consistent with how this process unfolded, the Court finds that the Parent gave no credence whatsoever to the auction process, but was focused solely on the confirmation of its Plan. (*See* Lazalde Proffer at ¶ 8.)

F. Movants Had Actual Knowledge that Klee Would Disclose Certain Aspects of the Joint Bid But Took No Steps to Prevent this Limited Disclosure.

Movants' central claim is that the disclosure of their bid to Professor Klee violated their alleged confidentiality rights. But after a careful review of the factual record related to this disclosure, the Court finds that Movants had actual knowledge that this disclosure would occur and took no steps to prevent it. The Court finds that Movants learned in mid-July 2009 that the details of any binding bids would be disclosed to, reviewed by, and included in the proffered testimony of Professor Klee. Yet they did nothing to prevent (a) the disclosure of their bids to Professor Klee or (b) the Debtor from filing Klee's Final Proffer with the Court.

By their own admission, Movants "closely followed" the hearings on the Debtor's motion for approval of their respective Expense Reimbursement Agreements. (Vogel Proffer at ¶ 41; Greene Proffer at ¶ 41.) Movants attended and participated in multiple court hearings, court filings, and depositions, all of which featured open discussion and announcements of the plan and intention to disclose the bid information to Professor Klee. (Lazalde Proffer at ¶ 4.)

Kirkland & Ellis, counsel for Halcyon and subsequently for DK Acquisition, attended a hearing on July 14, 2009, concerning the submission deadline for Professor Klee's Initial Proffer. Debtor's counsel stated in open court: "[T]he market test of an asset is a really important indicator of value. And so the market test isn't just . . . one indicator among many, it is one [Professor Klee] really wants to see before he forms his final opinion." (Hearing Tr. 48:13-17, July 14, 2009). On July 21, 2009, Kirkland & Ellis attended another hearing, this time concerning the scheduling of Klee's deposition. Parent's counsel stated in open court: "[O]ne data point that Mr. Klee wanted to look at was marketing data of the judgment." (Hearing Tr. 85:18-19, July 21, 2009.)

Also on July 21, 2009, the Debtor filed Professor Klee's Initial Proffer with the Court, in which Professor Klee expressly stated his need for and intent to use bid information in forming his final opinion as to the SCC Judgment's value:

- "For example, in reaching my opinion, I will consider the outcome of the stalking-horse auction or, if not yet concluded, the value of binding bids submitted as part of the auction process, which I understand are due in early August." (Klee Initial Proffer at ¶ 3).

- "I also expect that market information to be learned in the course of the stalking-horse auction, if and when available, and including bid amounts and concerns and observations from the bidders, might affect and could be factored into all the methods of valuation. This information may be particularly relevant because it may provide insight into how third parties view the SCC Judgment, and my opinion will value the SCC Judgment from the perspective of how much creditors (i.e., third parties) are receiving for an asset that ASARCO is proposing to transfer under its plan." (Klee Initial Proffer at ¶ 4).

- "I intend to submit a supplemental proffer that will include my opinion of the value of the SCC Judgment promptly after the conclusion of the auction (or, at the earliest, the receipt of binding proposals for the SCC Judgment)." (Klee Initial Proffer at ¶ 6).

- "I reserve the right to submit a final proffer, at the earliest, on the date that the values of any Binding Proposals at the auction are revealed to me." (Klee Initial Proffer at ¶ 52).

Professor Klee's first deposition occurred on July 30, 2009, and, again, Kirkland & Ellis was present. The deposition, like the preceding hearings and proffer, contained discussion concerning the disclosure of bid information to Professor Klee:

- "Q: Have you come up with a figure yet for the value of the Brownsville judgment? A: No. Q: Why not? A: Because I don't have enough facts to be able to do it. . . . So just to give you an example, we – we know that, as we sit here today, at least I don't have indications of the bids for the judgment, either in whole or in part, either preliminary bids or final binding bids. We don't know the result of the auction, and the exposure of the judgment to the marketplace is an important factor, not just under the method that looks at what would happen if you auctioned it in the market, but in assessing whether this is comparable to other transactions, in assessing a reasonable settlement range if the litigation was going to be settled, and using what I've dubbed the competent counsel method, the normal method by which we would advise clients how to value a judgment and what the odds are." (Klee Dep. at 12:18-23, 13:6-20).

- "Q: When do you expect to have your value conclusion reached? A: At the earliest, when I see some final binding bids." (Klee Dep. at 23:9-12).

- "Q: And as I understand your testimony, Professor Klee, you're going to – you're going to complete this quantitative analysis and the last step in that process will be to look at the actual numbers that are arrived at by these bidders for this asset[?] A: Yes, that's yes." (Klee Dep. at 42:3-11).

- "Q: Why haven't you been able to complete that analysis, as we sit here today? A: I haven't been able to complete that analysis because I don't have the binding bids, the result of the auction, and the factors that we've talked about." (Klee Dep. 110:18-22).

The Parent moved to exclude or limit Professor Klee's testimony, and on August 12, 2009, the Court heard arguments on the Parent's motion. John Greene, an employee of Halcyon personally attended the hearing as did DK Acquisition's counsel, Quinn Emanuel. At that hearing, Debtor's counsel stated in open court:

> [H]ere he's going to be looking at the actual auction that Barclays is conducting. He has, as he testified in his deposition, spoken with Barclays and he will almost certainly speak again with Barclays as the results of the auction come out and he will be looking at the non-binding indications of [interest] that already have been delivered to the debtor or to Barclays, as well as the binding bids that are submitted later on this week, if any are.

(Confirmation Hearing Tr. 68:2-9, Aug. 12, 2009).

Notwithstanding the fact that Movants "closely followed" the hearings, depositions, and proffers described above and attended most, if not all, of them in person, through counsel, or in both capacities, and notwithstanding the fact that numerous and extensive discussions and announcements took place pertaining to the planned and imminent disclosure of bid information to Professor Klee, Movants now claim they were "shocked" at the disclosure of their final binding bid to Professor Klee. (Vogel Proffer at ¶ 41; Greene Proffer at ¶ 41.)

On August 14, 2009, DK Acquisition participated on a call with Baker Botts (Debtor's counsel), Barclays, and Gibson Dunn (Barclay's counsel), during which the Debtor informed Movants that they had now in fact disclosed Movants' initial bid and final binding bid to Professor Klee. (Vogel Proffer at ¶ 37; Greene Proffer at ¶ 37.) Movants claim that they objected to the disclosure during the call and immediately thereafter in an e-mail sent to Baker Botts. (Vogel Proffer at ¶¶ 37-38; Greene Proffer at ¶¶ 37-38.) But Movants also made the conscious choice not to withdraw their final binding bid. (Vogel Proffer at ¶ 39; Greene Proffer at ¶ 39.) And even though Professor Klee had not yet publicly disclosed any of the bid information in his Final Proffer, Movants chose not to seek the Court's assistance in preventing the disclosure of their bid information.

G. The Debtor Never Accepted the Joint Bid, and the Court Never Approved the Joint Bid or the Movants as Stalking Horse Bidders.

The Debtor received the Joint Bid on August 13, 2009, at 5:02 p.m. (Ex. 8.) The Debtor

never accepted the Joint Bid, and, according to the Movants, the Joint Bid expired on its own terms on August 17, 2009. (Ex. 8, Substantial Contribution Hrg. Tr. at 95:6-96:2.) The Joint Bid sought a $1.875 million break-up fee—5% of the $37.5 million total consideration offered—if Movants were selected and approved as stalking-horse bidders. (Ex. 33.) Movants also assert that they "contemplated certain stalking horse 'bid protections,'" including expense reimbursement and a break-up fee, to protect Movants if chosen as a stalking horse." (Motion at ¶18.) But the Debtor never negotiated or accepted the Joint Bid, and this Court never approved Movants as stalking-horse bidders nor any bidder protection provisions. Therefore, the Court finds that could the only contracts that govern the parties' relationships are the Expense Reimbursement Agreements.

CONCLUSIONS OF LAW

I. Threshold Issues Preclude Recovery by Movants.

A. DK Acquisition Lacks Standing Under Section 503(b)(3)(D) Because It is Not a Creditor.

Under section 503(b)(3)(D), only creditors, equity security holders, unofficial committees of creditors or equity security holders, and indenture trustees can assert substantial contribution claims. DK Acquisition is not a creditor for purposes of section 503(b)(3)(D) and therefore lacks standing to pursue a "substantial contribution" claim. (Substantial Contribution Hrg. Tr. at 76:18-77:1.)

DK Acquisition attempts to muddle the issue, suggesting that the Substantial Contribution Motion and the bid on the SCC Judgment were submitted on behalf of DK Acquisition and its affiliates. (Reply at 2 n.1, 32.) The bid makes clear that DK Acquisition, not any affiliate, sought to acquire the SCC Judgment. (Ex. 8.) In any event, the Court concludes that an affiliate's status as a creditor does not confer creditor standing on an affiliated company,

here DK Acquisition. *See, e.g.*, *In re Dorado Marine, Inc.*, 332 B.R. 637, 640 (Bankr. M.D. Fla. 2005) (holding that principals of the creditor entity were not themselves creditors and thus lacked standing to assert a substantial contribution claim); *In re Warner Springs P'ship*, 193 B.R. 28, 30 (Bankr. S.D. Cal. 1995) (holding that co-owners were not creditors when an association to which they belonged owned the right to recovery from the debtors).

Because DK Acquisition is not a creditor under section 503(b)(3)(D), the Court concludes that DK Acquisition lacks standing to assert a substantial contribution claim.

B. DK Acquisition is Not a Party to the Expense Reimbursement Agreement and Therefore Cannot Invoke Any Right to Confidentiality or Reimbursement Based on the Agreement.

DK Capital Management is a party to the Expense Reimbursement Agreement, but DK Acquisition is not. DK Capital Management's Expense Reimbursement Agreement expressly provides that "[n]one of [DK Capital Management's] rights, duties or obligations hereunder may be assigned without the prior written consent of ASARCO." (Ex. 3 at ¶ 4(e).) It is undisputed that the Debtor never consented to a transfer of the rights under this agreement to DK Acquisition. The Court therefore concludes that DK Acquisition has no confidentiality rights or rights to be reimbursed under the terms of the Expense Reimbursement Agreement.

C. Halcyon Has No Contractual Confidentiality Rights.

Movants contend that they were transformed into stalking-horse bidders because of an alleged breach of confidentiality. Halcyon's Expense Reimbursement Agreement does not contain a confidentiality provision. A mere expectation of confidentiality on Halcyon's part does not create a contractual obligation for the Debtor to keep Halcyon's bid confidential. *Haft v. Haft*, 671 A.2d 413, 417 (Del. Ch. 1995) ("[C]ourts do not look for and give legal force to a private subjective state of mind (intent) but to objective acts (words, acts[,] and context) that

constitute the enforceable contract and the 'objective' (reasonable person) interpretation of what the contracting parties meant (intended) to do."). Therefore, the Court concludes that Halcyon cannot recover based on any alleged confidentiality breach.

II. The Expense Reimbursement Agreements Preclude Movants' Substantial Contribution Claim.

Even if either party had any contractual right to the confidentiality of information related to their bids on the SCC Judgment, the Expense Reimbursement Agreements limits reimbursement to a maximum of $275,000. Halcyon agreed that its reimbursement "shall *in no event* exceed $75,000 in the aggregate." (*Id*. (emphasis added).) DK Capital Management agreed that its reimbursement "shall in no event exceed the Reimbursement Cap" of $200,000. (*Id*. at 2.) And Halcyon has conceded that "if its bid were not selected, it would only receive the expenses set out in the Expense Reimbursement Agreement . . . ." (Greene Proffer at ¶ 43.)

Nothing in the plain language of section 503(b)(3)(D) overrides the Expense Reimbursement Agreement or authorizes the Court to expand the terms of those agreements to encompass additional parties, additional confidentiality rights, or additional payments. The Court concludes that based on the caps and the plain language of the parties' agreements stating that "in no event" shall the reimbursement amounts exceed the contracted-for caps, the Expense Reimbursement Agreements control and preclude any claim for recovery by Movants under section 503(b)(3)(D). Accordingly, Movants have no right to recovery in the form of a substantial contribution claim associated with bidding on the SCC Judgment.

III. Movants Have Not Satisfied Their Burden to Establish a Substantial Contribution.

A. Substantial Contribution Standards.

A "substantial contribution" is "a contribution that is considerable in amount, value or worth." *Hall Fin. Group, Inc. v. DP Partners, L.P.* (*In re DP Partners, L.P.*), 106 F.3d 667, 673

(5th Cir.), *cert. denied*, 522 U.S. 815 (1997). Therefore, a substantial contribution claim requires a showing of a "direct, significant and demonstrable benefit to the estate." *In re Buttes Gas & Oil Co.*, 112 B.R. 191, 194 (Bankr. S.D. Tex. 1989). "[C]ourts . . . narrowly construe the substantial contribution statute granting applications in only unusual or rare circumstances." *In re Eldercare Home Health & Hospice*, No. 04-71101, 2007 WL 527943, at *1 (Bankr. S.D. Tex. Feb. 14, 2007); *In re Am. Plumbing & Mech., Inc.*, 327 B.R. 273, 279 (Bankr. W.D. Tex. 2005). "That narrow construction is also consistent with the general doctrine that priority statutes, such as § 503(b), should be strictly construed to preserve the estate for the benefit of creditors." *In re Am. Plumbing*, 327 B.R. at 279 (citing *In re Federated Dep't Stores, Inc.*, 270 F.3d 994, 1000 (6th Cir. 2001); *In re Commercial Fin. Servs., Inc.*, 246 F.3d 1291, 1293 (10th Cir. 2001)). "The burden of proof is on the movant or applicant in establishing their entitlement to an award under 11 U.S.C. § 503(b) and they must demonstrate by a preponderance of the evidence that a substantial contribution was made." *In re Eldercare Home Health & Hospice*, 2007 WL 527943, at *1 (internal quotation marks and citation omitted).

This Court previously has noted that the term "substantial" is aimed at accommodating the section's twin goals of "encouraging meaningful participation in the reorganization process," while "keeping fees and administrative expenses at a minimum so as to preserve as much of the estate as possible for the creditors." *In re Eldercare Home Health & Hospice*, 2007 WL 527943, at *2-3 (quoting *Lebron v. Mechem Fin. Inc.*, 27 F.3d 937, 944 (3d Cir. 1994)). To those ends, this Court has cautioned that § 503(b)(3)(D) "should not become a vehicle for reimbursing every creditor who elects to hire an attorney," *id.*, and courts have narrowly construed the substantial contribution statute and granted substantial contribution applications only in unusual or rare circumstances. *Id*. (citing *In re Jack Winter Apparel, Inc.*, 119 B.R. 629, 637 (E.D. Wis. 1990));

see, e.g. In re Am. Plumbing & Mech., Inc., 327 B.R. 273, 279 (W.D. Tex. 2005) (citing *In re Randall's Island Family Golf Ctrs., Inc.*, 300 B.R. 590, 598 (Bankr. S.D.N.Y. 2003) ("rare"); *In re 9085 E. Mineral Office Bldg., Ltd.*, 119 B.R. 246, 250 (Bankr. D. Colo. 1990) ("unusual")). Courts in this jurisdiction also have found that substantial contribution requires a "direct, significant and demonstrable benefit to the estate." *Buttes Gas & Oil Co.*, 112 B.R. at 194.

To meet this high standard, "a substantial contribution applicant must show that his services have some causal relationship to the contribution." *In re Fortune Natural Res. Corp.*, 366 B.R. 546, 554 (Bankr. E.D. La. 2007); *In re Am. Plumbing & Mech.*, Inc., 327 B.R. at 279-80 ("Some courts have used a but-for test to determine whether that causal relationship exists [between the applicant's services and the contribution]."); *In re Roy Frischhertz Constr. Co.*, No. 05-21605, 2007 WL 643048, at *4 (E.D. La. Mar. 2, 2007) (establishing a "but for" test for causation). Thus, "when a bankruptcy judge is determining whether there has been a substantial contribution, he should, 'at a minimum . . . weigh the cost of the claimed fees and expenses against the benefits conferred upon the estate which flow directly from those actions.'" *In re Fortune Natural Res.*, 366 B.R. at 553 (quoting *In re DP Partners*, 106 F.3d at 673).

B. There is No Connection Between Movants' Bid or the Limited Disclosure of the Bid and the Parent's Submission of a Full-Payment Plan.

Movants argue that "by submitting the bid, [they] reignited a bidding war that ultimately would result in a full recovery for unsecured creditors and a solvent bankruptcy estate." (Motion at 14.) The evidence, however, establishes that Movants' last-minute, partial-interest bid played no role in the Parent's decision to submit a full-payment plan and that it was other big-picture and legal considerations that resulted in the Parent's successful reorganization plan.

The Parent's decision to submit a full-payment plan was driven by several factors, including (i) the gradual but substantial rise in copper prices that occurred over the course of the

chapter 11 case and specifically during the 2009 plan negotiation and confirmation process, (ii) the Parent's long-held desire to maintain its ownership of ASARCO LLC and bring the U.S. assets and operations back into the fold of its global mining business, and (iii) the Parent's strong desire to bring an end to the costly, time-consuming, and distracting litigation involving environmental and asbestos claims. (Lazalde Proffer at ¶ 5.) The Parent knew that to achieve these goals, it must eventually come forward with a full-payment plan. (*Id*. at ¶ 4.) Halcyon knew this as well. (Substantial Contribution Hrg. Tr. at 157:21-160:11.) Neither the SCC Judgment "auction" nor Movants' last-minute fractional-interest bid played any role in the Parent's decision. (Lazalde Proffer at ¶¶ 6-8; Doc. No. 13920, Mack Dep. at 101:6-11, 101:17-20).)

Moreover, the multi-step bid process envisioned by BarCap and the Debtor and mandated both by bankruptcy codified and case law and accepted bankruptcy sale procedure—which was premised first upon the designation of a stalking-horse bidder, the approval of bid and bidder protection procedures, the scheduling of an auction, and finally the setting of a hearing on notice to obtain approval of a sale to the highest bidder auction process—could never have been accomplished in the limited timeframe available, and the Court, the Parent, and other parties in interest in the chapter 11 cases were fully aware of this. Even if creditors had desired to seek a sale of the SCC Judgment, that objective would have been better served under confirmation of the Debtor's Plan with its proposed transfer of the SCC Judgment to the SCC Litigation Trust—where an orderly post-closing process could have been conducted in a structure controlled by the creditors. Consistent with how this process unfolded, the Parent gave no credence whatsoever to the auction process, but was focused solely on the confirmation of its Plan.

A claimant cannot recover a "substantial contribution" claim when the asserted contribution would have occurred even without the claimant's involvement. *See In re Alert Holdings,* 157 B.R. 753, 759 (Bankr. S.D.N.Y. 1993) (denying the substantial-contribution application when "even without the benefit of the LPOC's objection, most of the changes to the disclosure statement would have been made anyway"); *In re New Power Co.*, 311 B.R. 118, 124 (Bankr. N.D. Ga. 2004) (denying the substantial contribution application because "the Court must conclude that the Examiner would have been appointed . . . absent [the applicant's alleged contribution]"). Based on the evidence that the Parent's decision to submit a full-payment plan was driven by other factors, the Court concludes that Movants' Joint Bid and Klee's limited disclosure played no role in the Parent's plan decisions.

The Court also rejects Movants' argument that the timing of the Klee disclosure and the subsequent submission of the Parent's full-payment plan establishes that Movants made a substantial contribution. As noted previously, a substantial contribution applicant has to show a causal relationship between his services and the contribution. *In re Fortune Natural Res.*, 366 B.R. at 553-54. And a temporal connection alone is insufficient to establish causation. *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 271 (5th Cir. 2007) (concluding that "when multiple negative items are announced contemporaneously, mere proximity between the announcement and the stock loss is insufficient to establish loss causation"); *Brown v. Stalder*, No. 06-CV-0280, 2008 WL 3077287, at *4 (W.D. La. July 11, 2008) ("There may be some temporal proximity between various complained of events and some grievance, but the order of the events does not suggest a cause and effect relationship."); *Miles-Hickman v. David Powers Homes, Inc.*, 613 F. Supp. 2d 872, 882 (S.D. Tex. 2009) (holding that under the Americans with Disabilities Act of 1990, "temporal proximity alone is insufficient to prove but

for causation") (citing *Strong v. Univ. Healthcare Sys., LLC*, 482 F.3d 802, 808 (5th Cir. 2007)). Because Movants have no evidence of such a connection and rely merely on bare speculation, the Court concludes that Movants have not satisfied the substantial contribution standard.

IV. Movants Have No Right to Recover a $1.875 Million Break-Up Fee.

A. The Court Did Not Approve Movants as Stalking-Horse Bidder or the $1.875 Million Break-Up Fee.

Movants claim that they "contemplated certain stalking horse 'bid protections,'" including a break-up fee and expense reimbursement, to protect the Movants if chosen as a stalking horse." (Motion at ¶18.) But their bid was never selected, they were never chosen as a stalking horse, and the Debtors never sought bid protections from this Court.

Break-up fees require extensive oversight and scrutiny by the court. *In re O'Brien Envtl. Energy, Inc.*, 181 F.3d 527, 534-35 (3d Cir. 1999) ("The proposed break-up fee must be carefully scrutinized to insure that the Debtor's estate is not unduly burdened and that the relative rights of the parties in interest are protected."). The absence of court approval is fatal to Movants' break-up fee claim. *In re Pub. Serv. Co. of N.H.*, 160 B.R. 404, 455 (Bankr. D.N.H. 1993) (stating that the right to a break-up fee must be established by court order before the auction; the court and all parties must be put on notice that break-up fees will be forthcoming); *In re Diamonds Plus, Inc.*, 233 B.R. 829, 832 n.1 (Bankr. E.D. Ark. 1999) ("In reported bankruptcy cases dealing with break-up fees, the fees have previously been agreed upon by the Debtor or Trustee and the prospective buyer and the agreement has been memorialized in a binding contract. The issue is typically whether the court will approve such fees."). The Court therefore concludes that in the absence of any prior approvals of Movants as stalking-horse bidders or a break-up fee, Movants cannot, as a matter of law, obtain a break-up fee under the guise of a substantial contribution claim.

B. The Expense Reimbursement Agreements Do Not Create a Right to a Break-Up Fee.

Movants claim that they were transformed into stalking-horse bidders entitled to a break-up fee because their partial-interest bid was disclosed to Klee, who then provided a limited disclosure of that bid to the Court in conjunction with his efforts to value the SCC Litigation Trust Interests. The Court concludes that Movants have no legal right to recover a break-up fee because any such fee is contrary to the parties' Expense Reimbursement Agreements, there was no breach of any confidentiality obligation, and Movants waived any confidentiality rights.

1. There is No Contractual Right to a Break-Up Fee.

The Expense Reimbursement Agreements do not authorize the recovery of a break-up fee; rather, the Expense Reimbursement Agreements expressly cap any recovery at $275,000. (Exs. 3, 10.) The Confidentiality provision of DK Capital Management's Expense Reimbursement Agreement specifies no remedy for a disclosure of confidential information, and nothing in its language supports Movants' claim that they can recover a 5% break-up fee based on that breach. (*See* Ex. 10 at ¶ 4.) Any remedy for breach of confidentiality arises under the confidentiality provision or other common-law, and a 5% break-up fee is not the proper remedy for breach of a contractual confidentiality obligation. *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 146 (Del. 2009) ("Contract damages are designed to place the injured party in an action for breach of contract in the same place as he would have been if the contract had been performed. Such damages should not act as a windfall."). Accordingly, the Court concludes as a matter of law that any breach of the Expense Reimbursement Agreements does not create a right to recover a break-up fee.

2. There Was No Breach of Any Confidentiality Right.

Halcyon's Express Reimbursement Agreement does not contain a confidentiality

provision. And under DK Capital Management's Expense Reimbursement Agreement, the Debtor was expressly authorized to make disclosures to its "advisors." The Debtor only disclosed Movants' Joint Bid to Professor Klee, who is within the scope of the "advisor" exception. (Ex. 3 at ¶ 4.) The Debtor disclosed only the aggregate amount of the bid, included none of the specific terms, and did not identify the names of any bidders. Klee provided only a very general and limited description of the Joint Bid. He did not identify the parties, the price, or the fractional interest Movants sought to acquire. This is all that Klee disclosed: "On August 13, 2009, Barclays received a binding bid for a fractional interest in the SCC Litigation Trust with the implied value of the whole being $500 million." (Ex. 36 at ¶ 62.) Therefore, the Court concludes as a matter of law that there was no breach of any expectation of confidentiality that Halcyon might have had or of the confidentiality provision in DK Capital Management's Expense Reimbursement Agreement.

3. Movants Waived Confidentiality.

A waiver of contractual rights occurs when a party either intentionally relinquishes a known right or engages in intentional conduct inconsistent with claiming that right. *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982); *Johnson v. Structured Asset Servs., LLC*, 148 S.W.3d 711, 722 (Tex. App.—Dallas 2004, no pet.) (citing *In re Epic Holdings, Inc.*, 985 S.W.2d 41, 57 (Tex. 1998)).

A party waives a right to confidentiality by failing to protect the information that it seeks to keep confidential. *See Tenneco, Inc. v. Enter. Products, Co.*, 925 S.W.2d 640, 643 (Tex. 1996) ("A party's silence or inaction for a period of time long enough to show an intention to yield the known right, is also enough to prove a waiver"); *Compaq Computer Corp. v. Lapray*, 75 S.W.3d 669, 675 (Tex. App.—Beaumont 2002, no pet.) (citing *Tenneco, Inc.*, 925 S.W.2d at

643) (holding that a party's failure take the steps required by a protective order to protect the confidentiality of deposition transcripts resulted in an intentional waiver of confidentiality); *Lawfinders Assocs., Inc. v. Legal Research Ctr., Inc.*, 65 F. Supp. 2d 414, 418 (N.D. Tex. 1998) (explaining that, under Texas law, the owner of a trade secret must take measures to protect itself and to prevent its trade secret from becoming available to persons other than those permitted by the owner to have access); *Triton Constr. Co. v. E. Shore Elec. Servs., Inc.*, No. 3290-VCP, 2009 WL 1387115, at *21 (Del. Ch. May 18, 2009) (explaining that the owner of a trade secret must take reasonable steps to keep the information secret).

Movants did not protect the confidentiality of their bid information. Not once did Movants object during the hearings or during Professor Klee's deposition; not once did Movants take issue with Professor Klee's Initial Proffer explicitly stating his intent to consider the value of any and all binding bids submitted; not once did Movants seek from the Court a protective order, an injunction, or some mechanism to preserve the confidentiality of their bid. Movants' conduct is wholly inconsistent with any assertion of confidentiality and amounts to the intentional relinquishment of their right to confidentiality. Accordingly, the Court concludes that Movants have waived their asserted right to confidentiality.

C. The Joint Bid Does Not Create a Right to a Break-Up Fee.

The Court also concludes that because the Joint Bid expired on its own terms without acceptance by the Debtor or approval by this Court, the Joint Bid cannot serve as a basis for the recovery of a break-up fee. (*See* Ex. 8, Substantial Contribution Hrg. Tr. at 95:6-96:2.)

D. As a matter of law, the Break-Up Fee Proposed by Movants was Excessive.

Movants assert the right to recover 5% of the consideration they offered to pay ($37.5 million) for 7.5% of the SCC Judgment. The Court determines that the $1.875 million fee for a

fractional bid that the Debtor never accepted and the Court never approved is unnecessary and excessive as a matter of law.

The leading case on break-up fees in bankruptcy is *Calpine Corp. v. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy, Inc.)*, 181 F.3d 527, 535 (3d Cir. 1999), in which the Third Circuit held that the bidder must prove "that the fees were actually necessary to preserve the value of the estate." *Id.* Consistent with *O'Brien*, the court in *In re Hupp Industries, Inc.* held that "bidding incentives such as break-up fees and bid increment limitations are *carefully scrutinized* in § 363(b) asset sales to insure that the debtor's estate is not unduly burdened and that relative rights of the parties in interest are protected." 140 B.R. 191, 195-96 (Bankr. N.D. Ohio 1992) (emphasis added). The court in *In re America West Airlines, Inc.* also held that a break-up fee was subject to "careful scrutiny" to verify that "all aspects of the transaction are in the best interests of all concerned." 166 B.R. 908, 911-12 (Bankr. D. Ariz. 1994) (rejecting business-judgment standard). And in *In re S.N.A Nut Co.*, the court reiterated that the appropriate standard for a break-up fee is "whether the interests of all concerned parties are best served by such a fee"; "the test is whether the payment of a breakup is in the best interests of the estate." 186 B.R. 98, 104-05 (Bankr. N.D. Ill 1995); *see also In re APP Plus, Inc.*, 223 B.R. 870 (Bankr. E.D.N.Y. 1998).

Movants have not satisfied this standard. Halcyon knew of the risks associated with the bidding process and was well aware that the Debtor never agreed to, and the Court never authorized, this fee. (Substantial Contribution Hrg. Tr. at 159:6-10); *O'Brien*, 181 F.3d at 537 (emphasizing that the bidder "knew that it risked not receiving any break-up fees or expenses. Its decision to proceed in the face of this risk undercuts its current contention that it viewed the fees

and expenses as necessary to make its continued involvement worthwhile"). The same is true for DK Acquisition. (Substantial Contribution Hrg. Tr. at 92:19-95:23.)

The Court has found that the Movants' bid played no role in the Parent's plan decisions. As a result, the Court determines that a break-up fee was not necessary to incentivize bidding. *See In re Reliant Energy Channelview, LP*, No. 09-2074, 2010 WL 143678, *5 & *6 (3d Cir. Jan. 15, 2010) ("[T]here is no escape from the fact that [the bidder] *did* make its bid without the assurance of a break-up fee, and this fact destroys [the bidder's] argument that the fee was necessary to induce it to bid.") (emphasis in original); *In re Beth Israel Hosp. Ass'n of Passaic*, No 06-16186 (NLW), 2007 WL 2049881, at * 12-13 (Bankr. D.N.J. July 12, 2007) (holding that break-up fee was not "necessary to preserve the value of the Debtor's assets" because party seeking payment did not make bid that propelled the auction forward).

The 5% break-up fee is also excessive as a matter of law. "A break-up fee should constitute a fair and reasonable percentage of the proposed purchase price, and should be reasonably related to the risk, effort, and expenses of the prospective purchaser." *In re Integrated Res., Inc.*, 147 B.R. 650, 662 (Bankr. S.D.N.Y. 1992). The Court concludes that there is no evidence that Movants sufficiently considered the risk, effort, and expense associated with its limited bid on the SCC Judgment. The Court also concludes that the 5% break-up fee far exceeds the customary break-up fees other bankruptcy courts have approved. *See In re Metaldyne Corp.*, 409 B.R. 661, 670 (Bankr. S.D.N.Y. 2009) (3% "falls within the range of what courts in this jurisdiction have found to be acceptable break-up fees"); *In re Bidermann Indus. U.S.A., Inc.*, 203 B.R. 547, 553 (Bankr. S.D.N.Y. 1997) (concluding that the size of the break up fees relative to the consideration to be realized by the debtors was inappropriate where "the fees to be paid ranged from 4.4% to 6.0%"); *In re Twenver, Inc.*, 149 B.R. 954, 957 (Bankr. D. Colo.

1992) ("[T]he 10% [breakup fee] sought [in that case] greatly exceeds the 1% to 2% fees found to be reasonable in the majority of cases approving such fees.").

V. Movants are Not Entitled to Recover Attorneys' Fees.

Movants assert the right to recover up to $1 million in attorneys' fees under section 503(b)(4) of the Bankruptcy Code. To recover attorneys' fees as an administrative expense under section 503(b)(4), Movants must first establish that they made a substantial contribution. *See In re Patriot Aviation Servs., Inc.*, 384 B.R. 649, 652 (Bankr. S.D. Fla. 2008) ("As indicated by the plain language of the statute, the issue of whether fees can be awarded as administrative expenses under section 503(b)(4) typically is not decided until after the Court allows an administrative expense recovery under section 503(b)(3)."); *In re Rennie Petroleum Corp.*, 384 B.R. 412, 417 (Bankr. E.D. Va. 2008) ("[Section 503(b)(4)] provides compensation only for professional services incurred by an entity whose expenses are allowable under § 503(b)(3) of the Bankruptcy Code."); *In re Oxford Homes, Inc.* 204 B.R. 264, 267 (Bankr. D. Me. 1997) ("A finding under § 503(b)(3)(D) that [the] creditor . . . made a substantial contribution to [the Debtors'] reorganization is a prerequisite to administrative allowance of . . . counsel's fees under § 503(b)(4)"); *In re Glickman, Berkowitz, Levinson & Weiner, P.C.*, 196 B.R. 291, 295 (Bankr. E.D. Pa. 1996) ("As the plain language of § 503(b)(4) suggests, the allowance of attorneys[']fees is only appropriate in situations which fall within the scope of § 503(b)(3)."); *In re Am. Preferred Prescription, Inc.*, 194 B.R. 721, 724 (Bankr. E.D.N.Y. 1996) ("By the plain language of the statute, section 503(b)(4) requires a finding of substantial contribution by a creditor under section 503(b)(3)(D) as a pre-requisite to an award of counsel fees under section 503(b)(4)."); *Lebron v. Mechem Fin. Inc.*, 27 F.3d 937, 943 (3d Cir. 1994) (explaining that "§ 503(b)(4) authorizes awards of legal and accounting fees only in situations coming within the scope of §

503(b)(3)"); *Gen. Electrodynamics Corp.*, 368 B.R. at 555 ("[S]ection 503(b)(4), turning on section 503(b)(3)(D), requires a showing of 'a substantial contribution in a case'…."); 4 *Collier on Bankruptcy* ¶ 503.11[2] (15th ed. rev. 2009) ("An administrative expense priority is available under section 503(b)(4) only to an entity whose expenses are allowable under subsection (A), (B), (C), (D) or (E) of section 503(b)(3)."). Because the Court has determined that Movants did not make a substantial contribution, the Court likewise concludes that Movants are not entitled to recover attorneys' fees.

Independent of the fact that Movants made no substantial contribution, the Court also concludes that Movants have not satisfied the standards for the recovery of attorneys' fees in bankruptcy. To recover attorneys' fees, Movants must show that: (1) the compensation sought is reasonable; (2) the compensation is for an attorney's services; (3) the attorney is employed by an entity entitled to payment under § 503(b)(3); and (4) the requesting party actually incurred the compensation and expenses. *In re Energy Partners, Ltd.*, --- B.R. ---, No. 09-32957-H4-11, 2009 WL 5178451, at *14 (Bankr. S.D. Tex. 2009). In determining whether fees are "reasonable," the Court has followed the following three-step process: "(1) ascertain the nature and extent of the services supplied by the attorney with reference to the time records submitted; (2) assess the value of the services; and (3) briefly explain the findings and reasons upon which the award is based, including a discussion of how each of the twelve factors from *Johnson*[1] affected the court's decision." *In re Energy Partners*, 2009 WL 5178451, at *14 (citing *In re*

[1] *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir.1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87, 92-93 (1989). The twelve factors set forth in *Johnson* are: (1) time and labor required; (2) novelty and difficult of the questions; (3) skill required to perform the legal services properly; (4) preclusion of other employment due to acceptance of the case; (5) customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or other circumstances; (8) amount involved and the results obtained; (9) experience, reputation, and ability of the attorney; (10) "undesirability" of the case; (11) nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d at 718.

First Colonial Corp. of Am., 544 F.2d 1291, 1299-1300 (5th Cir.1977)). The Court concludes that Movants have adduced no evidence that their attorneys' fees associated with the bid process are reasonable.

The Court also considers, independent of the fees associated with the bid itself, Movants' claim that they should be entitled to recover attorneys' fees for prosecuting the Substantial Contribution Motion. This constitutes over $500,000 of Movants' attorneys' fees claim. Movants base this claim on anti-dilution principles originating in the section 330 context. (Reply at 22-24.) But the Fifth Circuit has never adopted anti-dilution principles in the section 330 context, much less under section 503(b). And at least one bankruptcy court in Texas expressly rejected anti-dilution principles to support attorneys' fees under section 330. *See In re Frazin*, 413 B.R. 378, 410 (Bankr. N.D. Tex. 2009). The Court declines to extend anti-dilution principles to permit Movants to recover fees for pursuing the Substantial Contribution Motion. The Court also notes that the Expense Reimbursement Agreements expressly provide that Movants are not entitled to reimbursement of fees after the conclusion of the auction process. (Exs. 3, 10.) An award of fees for prosecuting the Substantial Contribution Motion would therefore run afoul of the Expense Reimbursement Agreements.

Therefore, the Court concludes that Movants are not entitled to recover attorneys' fees associated with prosecuting the Substantial Contribution Motion.

Dated: _____, 2010

_____
Richard S. Schmidt
United States Bankruptcy Judge

Dated: February 19, 2010

Respectfully submitted,

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Certificate of Service

I certify that a true and correct copy of the foregoing pleading was served by electronic means through transmission facilities from the Court upon those parties authorized to participate and access the Electronic Filing System for the Southern District of Texas on February 19, 2010.

/s/ Charles A. Beckham, Jr.
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