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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS

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

HALCYON MASTER FUND L.P.'S AND MIDTOWN ACQUISITIONS L.P.'S (F/K/A DK ACQUISITION PARTNERS, L.P.) PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THEIR MOTION FOR AN ORDER (A) GRANTING MOVANTS' ALLOWED ADMINISTRATIVE EXPENSE CLAIMS PURSUANT TO BANKRUPTCY CODE 503(b); AND (B) AUTHORIZING AND DIRECTING DEBTORS TO PAY SUCH CLAIMS

On February 9, 2010, the Court heard evidence and argument relating to Halcyon Master Fund L.P.'s and Midtown Acquisitions L.P. (f/k/a DK Acquisition Partners, L.P.)[1] and its

[1] As used herein "DK" refers to Davidson Kempner Capital Management ("DKCM"), the investment funds to which DKCM serves as investment manager (the "Davidson Kempner Funds") and Midtown Acquisitions L.P. ("Midtown"), formerly known as DK Acquisitions Partners, L.P., which is the trading vehicle that purchases investments for the benefit of the Davidson Kempner Funds.

affiliates' (the "Movants") Motion for an Order (A) Granting Movants' Allowed Administrative Expense Claims Pursuant to Bankruptcy Code § 503(B); and (B) Authorizing and Directing Debtors to Pay Such Claims. At the conclusion of the evidence on February 9, 2010, the Court directed the parties to submit written findings of fact and conclusions of law within ten days. The Movants' proposed findings of fact and conclusions of law are as follows.

I. PROCEDURAL BACKGROUND

1. The Debtors first sought bankruptcy protection in 2005. At that time, copper prices were depressed and the Debtors were saddled with massive environmental liability, financial debt, potential asbestos-related liability, and a striking workforce. Over the course of the four-year bankruptcy process, the Debtors were able to improve operations to take advantage of rising copper prices, settle their environmental and asbestos-related liabilities and, eventually, emerge from bankruptcy under a plan that pays all creditors in full.

2. On August 31, 2009, this Court issued its report and recommendation on plan confirmation to the District Court, recommending that the District Court confirm the plan put forth by the Debtors' Parent, ASARCO Inc. and Americas Mining Corporation, (the "Parent's Plan") and deny confirmation of the plan put forth by the Debtors (the "Debtors' Plan"). On November 13, 2009, the District Court confirmed the Parent's Plan, which became effective on December 9, 2009.

3. Among the more significant events in the bankruptcy was the principal debtor ASARCO LLC's action against Americas Mining Corporation ("AMC") which sought to avoid the transfer of ASARCO LLC's ownership interest in Southern Copper Corporation (the "SCC Litigation"). The SCC Litigation was tried in front of Judge Andrew S. Hanen of the United States District Court for the Southern District of Texas. On August 30, 2008, Judge Hanen found AMC liable for actual fraudulent transfer, aiding and abetting, and conspiracy, and on

April 15, 2009, Judge Hanen entered the final judgment awarding damages to ASARCO LLC consisting of 260,093,694 shares of SCC common stock and $1,382,307.75 in money damages and pre-judgment interest (the "SCC Judgment").

4. At ASARCO LLC's direction, the Debtors' financial advisor, Barclays Capital Management ("Barclays"), evaluated alternatives for monetizing the SCC Judgment by auctioning off some or all of the SCC Judgment. This substantial contribution motion concerns that auction, in which the Movants -- who were bondholders of the Debtors -- participated by submitting an initial indication of interest and, ultimately, making a committed, binding proposal to purchase a portion of the SCC Judgment.

5. On October 20, 2009, Movants brought this motion (the "Motion"), by which they seek payment of their attorneys' fees and a work fee in connection with their participation in the auction process. While the hearing on the Movants' Motion was originally scheduled for December 11, 2009, it was postponed until February 2010 at the request of the Parent in order to allow additional discovery to be conducted. (Docket Nos. 13297, 13310.) Between December 23, 2009 and February 5, 2010, the parties conducted discovery, which included written interrogatories, document production and depositions. A hearing was held on February 9, 2010.

II. THE PARTIES' CONTENTIONS

6. The parties' contentions with respect to the Motion are set forth in the briefs filed in advance of the February 9, 2010 hearing. The Movants contend that they are entitled to the reimbursement of expenses and fees in the amount of approximately $2.875 million under Bankruptcy Code Section 503(b)(3)(D) and (b)(4) because, by submitting the only binding bid for a fixed amount in an auction process that "brought tangible benefit to the Debtor's estate and was perhaps the final impetus needed to encourage the Parent to file its plan which pays creditors

in full," (Conf. Report [Docket No. 12748] at ¶ 57), the Movants made a substantial contribution to the bankruptcy case.

7. Specifically, the Movants contend that they are entitled to recover, under Section 503(b)(4), the attorneys fees and expenses that they incurred in connection with the submission of their bid in the auction, which total $367,998.75, as well as the attorneys fees and expenses incurred in seeking reimbursement through this Motion, which as of January 31, 2010, total $501,221.00. The Movants' costs of litigating the Motion were significantly increased by the Parent's request for a postponement of the hearing and insistence on additional discovery. Failure to compensate the Movants for their attorneys' fees incurred in being forced to litigate this motion will unfairly dilute the reimbursement fees that Movants are entitled to receive.

8. The Movants further contend that they are entitled to recover, under Section 503(b)(3)(D), a work fee of $1.875 million to compensate them for their internal costs and expenses associated with the formulation and submission of their bid. The Movants contend that a work fee is an appropriate measure of their internal costs and expenses, and is appropriate given that the Debtors disclosed the Movants' bid in violation of the Debtors' express and implied duties of confidentiality, which prevented Movants from having the opportunity to be selected as the stalking-horse bidder.

9. The Debtors and the Parent contend that the Movants are not entitled to recover any expenses or fees under Section 503(b) because (1) the Parent contends that Midtown Acquisitions L.P. (f/k/a DK Acquisition Partners, L.P.) and its affiliates were not creditors of the Debtors, and (2) the Parent contends that the Movants did not make a substantial contribution to the Debtors' estate.

III. THE LAW REGARDING SUBSTANTIAL CONTRIBUTION

10. Section 503(b)(3)(d) of the United States Bankruptcy Code mandates that actual and necessary expenses incurred by a creditor in making a substantial contribution be allowed as administrative expenses. Specifically, Section 503(b)(3)(d) provides:

> After notice and a hearing, there ***shall be allowed***, administrative expenses . . . including . . . the actual, necessary expenses . . . incurred by . . . a creditor . . . in making a substantial contribution in a case under chapter 9 or 11 of [the Bankruptcy Code].

11 U.S.C. § 503(b)(3)(D) (emphasis added).

11. In interpreting statutes, a court's function "is to construe the language so as to give effect to the intent of Congress." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). Use of the word "shall" connotes a mandatory intent. *Sierra Club v. Train*, 557 F.2d 485, 489 (5th Cir. 1977). "The court is bound by the plain language of the statute especially where, as here, there is nothing in the statute or its legislative history to indicate a contrary intent. Therefore, under the plain language of the statute, if [the Movants] meet[] the requirements of section 503, [they] *shall* recover administrative expenses. This statutory mandate permits of no discretionary calls by the courts." *In the Matter of DP Partners Ltd. P'ship*, 106 F.3d 667, 671-72 (5th Cir 1997) *cert. denied*, 522 U.S. 815 (1997) (emphasis in original).

12. A substantial contribution is made where a creditor fosters and enhances the process of reorganization. *Matter of DP Partners*, 106 F.3d at 672. The goal of 11 U.S.C. § 503(b)(3)(D) is to promote meaningful creditor participation in the reorganization process. *Id.* at 673.

13. Substantial contribution does not require "but for" causation; it is enough that the creditor substantially contributed to the enhanced value of the estate, and it need not have been the sole cause of such enhancement. *See Matter of DP Partners*, 106 F.3d at 672 (finding that a

creditor made a substantial contribution where the increase in value of the final amended plan was "[d]ue *in part* to [creditor's] participation") (emphasis added); *see also In re Mirant Corp.*, 354 B.R. 113, 135-39 (Bankr. N.D. Tex. 2006) (granting certain creditors administrative expense claims under 503(b)(4) for, among other reasons, eliminating an issue that would have to be addressed to confirm a plan, and providing critical information during a valuation hearing related to confirmation).

14. A creditor's motive in performing an act that constitutes a substantial contribution is irrelevant to the question of whether that creditor is entitled to expenses. *Matter of DP Partners*, 106 F.3d at 673 ("We . . . hold that a creditor's motive in taking actions that benefit the estate has little relevance in the determination whether the creditor has incurred actual and necessary expenses in making a substantial contribution to a case.").

15. Section 503(b)(4) requires a debtor's estate to pay reasonable compensation to professionals of an entity entitled to reimbursement of expenses under section 503(b)(3)(D). Specifically, section 503(b)(4) provides:

> After notice and a hearing, there ***shall be allowed***, administrative expenses . . . including . . . reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under [certain subparagraphs] of paragraph (3) of this subsection, . . . and reimbursement for actual, necessary expenses incurred by such attorney or accountant . . . .

11 U.S.C. §503(b)(4) (emphasis added).

16. A court may allow an administrative expense claim for a creditor's professional fees under section 503(b)(4) even where it does not allow reimbursement of the creditor's direct expenses under section 503(b)(3)(D). *Matter of DP Partners*, 106 F.3d at 674 (remanding the case for a determination of reasonable attorney's fees even though no independent allowable

17. The Fifth Circuit has endorsed a cost-benefit analysis to substantial contribution motions, whereby courts are instructed to "weigh the cost of the claimed fees and expenses against the benefits conferred upon the estate which flow directly from those actions." *Matter of DP Partners*, 106 F.3d at 673

18. A creditor is not required to give advance warning, prior to plan confirmation, that it will seek an administrative claim based upon substantial contribution to estate. *Matter of DP Partners*, 106 F.3d at 671-72.

19. "[T]o the extent expenses are incurred -- which, although incurred in conjunction with a creditor's participation in the purchase of a debtor's assets -- also directly, materially, and demonstrably contribute to the process of achieving a successful sale for the benefit of creditors generally, then such expenses should be allowed as administrative expenses under section 503(b)(3)(D)." *In re Kidron, Inc.*, 278 B.R. 626, 631 (Bankr. M.D. Fla. 2002); *see also In the Matter of Baldwin-United Corp.*, 79 B.R. 321, 344 (Bankr. S.D. Ohio 1987) (finding a substantial contribution where a "firm developed a plan to purchase the [asset] which eventually drew a competing bid").

20. A substantial contribution claim is statutory, not contractual. *See, e.g.*, 11 U.S.C. § 503(b); *Matter of DP Partners*, 106 F.3d at 672 (analyzing the statutory basis for substantial contribution fees); *In re Am. Plumbing and Mech.*, 327 B.R. at 279-80 (same).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

21. Based on the evidence presented at the February 9, 2010 hearing, the Court finds that the Movants, through their submission of a binding, committed bid to purchase a portion of the SCC Judgment in the auction, substantially contributed to the bankruptcy case. The auction,

which was designed by the Debtors and their advisors Barclays and Baker Botts and sanctioned by the Court, was a key part of the Debtors' proposed plan at the time of the Confirmation Hearing, and was closely watched by the Court, the Debtors, and the constituents. Soon after the results of the auction -- and in particular the Movants' Joint Binding Bid -- were publicly announced, the Parent offered for the first time a full payment plan of reorganization. Faced with a binding offer to purchase a portion of the SCC Judgment, the Parent was forced to offer a full payment plan in order to avoid losing control of the Debtors, the SCC Judgment, or both. The Parent's full payment Plan was eventually confirmed and has gone effective.

22. The Movants participated in the auction in good faith, relying on written agreements and representations by the Debtors and their advisors that the auction would be confidential and that the bids would not be publicly disclosed prior to a stalking-horse agreement being entered into. The Movants incurred substantial actual and necessary expenses in the course of valuing the SCC Judgment and submitting preliminary and final bids to purchase a portion of the SCC Judgment. Those actual and necessary expenses include substantial professional fees as well as significant internal costs, and should be reimbursed.

A. DK and Halcyon are former creditors of the Debtors under 11 U.S.C. §503(b).

23. The Movants are former creditors with standing to seek reimbursement under 11 U.S.C. §§ 503(b)(3)(D) and 503(b)(4).

24. There is no dispute as to Halcyon's status as a bondholder and creditor during the relevant time period.

25. Neither is there any dispute that the investment funds on whose behalf Midtown submitted the Joint Binding Bid and filed the Motion (the "Davidson Kempner Funds") were

[2] (Motion at 8; Ex. 28; Vogel Proffer at ¶ 7; 2/9/10 Tr. at 120:18-121:21 (Vogel).)

B. The Debtors' Decision to Auction the SCC Judgment.

26. The Debtors' decision to initiate an auction process for the SCC Judgment was motivated by a number of potential benefits. (7/21/09 Tr. at 35:25-36:1 (Debtors' Counsel) ("the importance of this auction is several-fold").)

27. First, the Debtors determined that the auction would help place a value on the SCC Judgment by exposing it to the market. (Joint Disclosure Statement [Docket 11899] at 18.) The Debtors viewed the auction as "the best option to seek to monetize the SCC Judgment" and hoped that it would "assist in the SCC Judgment's confirmation valuation." (Ex. 24 at ASARCO_LLC_0045458-59).

28. The Debtors acknowledged that the need to value the SCC Judgment was one of the factors in initiating the auction process, as valuing the SCC Judgment was necessary to confirmation of either the Debtors' Plan or the Parent's Plan:

> Confirmation of the Debtors' Plan requires determination of the value of the SCC Judgment for distribution purposes. Confirmation of the plan of reorganization proposed by the Parent (the 'Parent's Plan'), which is predicated on a release of the SCC Judgment, requires a comparison of the value of the claims being released to the amount of the Parent contribution under the Plan. Thus, the auction would provide important and impartial information critical to either plan of reorganization.

(Debtors' Obj. [Docket. 13180] at 2.) The Debtors made the same point during their opening statement at the confirmation hearing. (Ex. 41 at HALC0000963 ("To confirm either plan, [the]

[2] The Joint Binding Bid and Motion specifically state that they were submitted by Midtown on behalf of its affiliates in contemplation of the fact that the purchase of assets would have been made by Midtown on behalf of the Davidson Kempner Funds that were bondholders and that would have funded the purchase price. (Motion at 2; Ex. 8; Vogel Proffer at ¶ 7.)

Court will need to determine [the] present value of ASARCO's lottery ticket -- SCC Judgment.").) (*See also* 8/10/09 Tr. at 57:18-22.)

29. George Mack of Barclays, who ran the auction on behalf of the Debtors, also testified that Barclays "thought that the value of the [SCC] judgment would be relevant to the confirmation process." (2/2/10 Mack Dep. at 24:21-22.) Mack testified that there was general agreement that the SCC Judgment needed to be valued in order for any plan to be confirmed. (2/2/10 Mack Dep. at 26-27; 100.)

30. As the Debtors reported in their disclosure statement, the Debtors' plan had the potential to pay all creditors in full with post-petition interest, depending on the ultimate recovery from the SCC Judgment. (Joint Disclosure Statement [Docket No. 11899] at 5.) The problem with the Debtors' plan, however, was that any recovery from the SCC Judgment included a risk of reversal on appeal and the delay in collecting the judgment as a result of the appeals process. (*Id.*) The Parent had also raised a Section 1129(b)(2)(B) objection to the Debtors' plan, arguing that the creditors would be paid more than 100% under the Debtors' proposed plan. (*Id.* at 140.) Selling all or a portion of the SCC Judgment at auction was designed to address these concerns, as it allowed the Debtors to distribute more cash to creditors upon consummation of the plan, increased the certainty of those distributions, and potentially eliminated any argument that creditors could ever be overpaid.

31. In addition to providing necessary information about the value of the SCC Judgment, the Court and the Debtors also recognized that the auction might encourage the Parent to finally offer a full payment plan. The Debtors candidly acknowledged that "[t]here is the possibility that this auction may well benefit the parent more than it will benefit the debtors' plan." (7/21/09 Tr. at 36:10-12.) George Mack of Barclays agreed, testifying that "the more

value we could generate [through the auction process], the better the chances that there would be a response by the Parent to top whatever value the Debtors created." (2/2/10 Mack. Dep. at 100:5-8.)

32. Selling all or a portion of the SCC Judgment to a third party would mean that the Parent would no longer have the ability to resolve the SCC Judgment by simply buying back the Debtors. A sale of a portion of the SCC Judgment could have been devastating to the Parent, as "the worst possibility for the parent was to lose both the judgment and the debtor." (11/16/09 Tr. at 23:13-16.)

33. Finally, the auction process was necessary because no one had been able to value the SCC Judgment due to its unique nature. The Court acknowledged that "[t]his is the most difficult asset that I have had to value, if I have to value it, in my 23 years as a judge." (8/17/09 Tr. at 38:23-24.) The Debtors also recognized the challenge of valuing the judgment, telling the Court: "This is a unique asset. The process we've devised is unique, designed to maximize the value of this asset. It requires some banker, legal and judicial ingenuity." (7/28/09 Tr. at 22:6-8.)

34. Faced with the need to value such a unique asset but the inability to independently do so, the Debtors opted to run an auction process to identify a stalking horse. (*See* 7/21/09 Tr. at 22:7-9 ("We will do the evaluation of those bids for the purpose of selecting under the business judgment, evaluation of the board, the stalking horse.").)

35. In approving the auction process, the Court observed that "[t]here are lots of ways to value things, but I think even the Supreme Court believes that the most accurate way is to hold an auction." (7/28/09 Tr. at 116:25-117:2.)

36. The Movants, as creditors, also thought that the auction was a good idea because it "helped the Court determine valuation of this asset, which was very difficult to quantify" and because it "could have created an opportunity to bring the parent to the table." (2/9/10 Tr. at 107:3-15 (Vogel); *see also* 2/9/10 Tr. at 188:3-13 (Greene).)

37. Barclays, the Debtors' financial advisor throughout the reorganization, ran the auction on behalf of the Debtors. (2/2/10 Mack Dep. at 137.)

38. In connection with the auction, both Movants entered into expense reimbursement agreements with the Debtors on August 5, 2009. (Exs. 3 and 10 (together, the "Expense Reimbursement Agreements").) The Expense Reimbursement Agreements required reimbursement of certain expenses of the Movants associated with the auction process.

39. The Expense Reimbursement Agreements were intended to serve as an incentive to the Movants to continue in the expensive auction process. (Vogel Proffer at ¶¶ 25-28; Greene Proffer at ¶¶ 25-27.)

C. The Confidential Auction Process.

40. The auction participants' intention and obligation to keep the bid information confidential is clear. Not only did the Debtors sign an agreement containing an express confidentiality provision, but the conduct of the auction process, the numerous statements to the Court, and the reasonable expectation of both the Movants and Barclays that the bid process would be confidential, provide ample evidence of such a duty.

41. Confidentiality was critical to the auction process because it would allow the Debtors to obtain the highest possible valuation and maximize the value to the estate. (Ex. 20, Mack Proffer, at ¶ 20 ("It is imperative that parties participating in the Bid Solicitation Process have trust in the process. . . . Since the outset, attracting potential bidders has been difficult because many bidders believe that the Parent's actions may result in no transaction occurring.").)

The Debtors made clear that the need for confidentiality in the auction process was paramount, telling the Court that "what is most critical is to me the most intuitive: it's confidentiality." (7/21/09 Tr. at 24:22-24.)

42. The Debtors won the right to file documents relating to the auction process under seal over the objection of the Parent so as "to maintain the integrity and confidentiality of the bid procedures process." (*Id.* at 18:12-16 ("Those matters are sought to be sealed in order to maintain the integrity and confidentiality of the bid procedures process, the bids that are being made, the number of bidders who actually responded as qualified bidders. . . . ").)

43. The Debtors expressed concern about the Parent gaining access to the confidential bid information, telling the Court:

> This is a very high-priced asset and a very difficult asset to tease people into spending real money on the process, and confidentiality is absolutely critical. If we tell these bidders, 'Oh, by the way, the judgment debtor is going to have your information and they're going to have that in advance of you completing and finishing a bid', then I think we have substantially and materially chilled what we're trying to do.

(*Id.* at 32:9-16.)

44. In response to the Debtors' expressed concern and their motion for a protective order to keep information regarding the bidders and the bids confidential from the Parent, the Court granted the Debtors' motion and ruled that while limited discovery regarding the auction process could go forward, the names and terms of any bids received could not be shared with the Parent (or anyone else outside a very narrow circle). (7/23/09 Tr. at 23:11-16; 28:22-29:4; 39:18-24.)

45. In particular, the terms of the bids were to be kept confidential until such time as a stalking-horse agreement was entered. (7/23/09 Tr. at 18:13-16 (Debtors' Counsel) ("We do intend to, we hope that we negotiate a stalking horse or stalking horses and that we come back

and file a motion, there would be full discovery and disclosure and all of that.").) The procedure laid out by the Debtors for the Court and bidders contemplated a confidential bidding process, followed by a stalking-horse agreement and a "topping auction," which would have been non-confidential and allowed bidders, including the Parent, to make "higher and better" offers than the stalking horse. (Motion for Order Approving Expense Reimbursement ("Expense Reimbursement Motion") [Docket No. 12008] at 5-6; *see also* 2/2/10 Mack Dep. at 41-43, 74, 77; Ex. 19.)

46. Even the Parent conceded that it was not entitled to know the identity or terms of the bids until a staking-horse agreement was entered, telling the court: "we have specifically provided that the debtors may redact any of the documents to exclude any information regarding the identity of the bidders and the amount of any bids. … [we] reluctantly agree that that's probably inappropriate for the parent to look at at this point in time. At some point in time we may be entitled to that, depending on how this process proceeds, but at this point in time, we agree we're not entitled to that." (7/23/09 Tr. at 20:21-21:6.) As demonstrated above, the parties and the Court acknowledged that keeping bid information confidential until a stalking-horse agreement was entered was the surest way to maximize the value of the estate. (7/21/09 Tr. at 34:16-17 ("When the process becomes the stalking horse and the topping auction, then it will be known.").)

47. "The doctrine of judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding." *Ergo Science, Inc. v. Martin* 73 F.3d 595, 598 (5th Cir. 1996) ("We recognize the applicability of this doctrine in this circuit because of its laudable policy goals. The doctrine prevents internal inconsistency, precludes litigants from 'playing fast and loose' with the courts,

and prohibits parties from deliberately changing positions based upon the exigencies of the moment.") (citing *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993)).

48. Based on their numerous statements to the Court regarding the confidentiality of the auction bids, both the Debtors and the Parent are judicially estopped from now claiming that the bids were always intended to be publicly disclosed before a stalking-horse agreement was entered into.

49. The potential bidders also recognized, and demanded, that the process be kept confidential. The Debtors reported to the Court that "most of the bids, maybe all of them, are conditioned on their contents being kept confidential," adding that "we all understand the reasons for the information that's confidential and the reasons for the confidentiality" (7/23/09 Tr. at 19:19-21; 26:23-24). The Debtors agreed and again clarified that the "condition of confidentiality" would apply until such time as a stalking-horse agreement was entered:

> [T]he bidders, all of these bidders made these bids on the condition of confidentiality at this point. They of course realize ultimately, if there's a contract entered into, that this kind of -- that, you know, that information will be disclosed, but at this stage they've all conditioned their bids on confidentiality. So, we need to respect their requests for confidentiality, but more than that, we are very much concerned about the integrity of the process and maintaining a level playing field.

(*Id.* at 10:18-11:1.)

50. The Movants were focused on the confidentiality of the auction process on two levels: first, as a general rule "all auctions require some level of confidentiality to maintain the integrity of an auction." (2/9/10 Tr. at 109:6-10 (Vogel); Vogel Proffer at ¶ 17; Greene Proffer at ¶ 18.) And second, confidentiality as to the Parent was of particular concern in the context of the SCC Judgment auction, since the Parent was the judgment creditor, an implicit bidder in the

auction, and a plan sponsor. (2/19/10 Tr. at 109:12-18 (Vogel); 188:17-25 (Greene); Vogel Proffer at ¶ 18; Greene Proffer at ¶ 18.)

51. The Movants made clear that they had an understanding and expectation of confidentiality by including confidentiality language in each of their auction submissions. The initial indication of interest sent by DK to Barclays on July 16, 2009 was marked "CONFIDENTIAL" and contained the following language:

> The terms of this non-binding term sheet and any discussions between Purchaser and Barclays Capital, Debtor and their respective agents are confidential and may not be disclosed to any party, including [the Parent], without [DK's] prior written consent and any disclosure to the Bankruptcy Court shall not reveal the identity of [DK] without [DK's] prior written consent.

(Ex. 11 at MIDTOWN0000072.)

52. Likewise, the initial indication of interest, submitted by Halcyon on July 16, 2009 (collectively with DK's July 16, 2009 initial indication of interest the "Initial Bids") was marked "CONFIDENTIAL" and contained the following language: "Halcyon's Indicative Offer is conditioned upon the confidentiality of this letter and the Indicative Offer." (Ex. 7.) Barclays also understood that the Initial Bids were conditioned on confidentiality. (2/2/10 Mack Dep. at 79, 81.)

53. In addition, the expense reimbursement agreement that DK and the Debtors negotiated and executed on August 5, 2009 after DK was invited to participate in the second round of bidding contained a confidentiality provision:

> 4. Confidentiality. The identity of Purchaser, the terms of this letter agreement and the [Initial Bid] and any discussions between ASARCO and Purchaser and their respective agents or advisors are confidential and may not be disclosed to any party, other than ASARCO and its advisors, without Purchaser's prior written consent, except as otherwise required by law or order of the Bankruptcy Court.

(Ex. 10 at MIDTOWN0001942.) This agreement was signed by DK and the Debtors and prohibited the Debtors from disclosing the terms of any bid submitted by DK without DK's prior written consent. (*Id.*)

54. Finally, in response to the Debtors' expressed concern and their motion for a protective order to keep information regarding the bidders and the bids confidential from the Parent, the Court expressly ruled that the names and terms of any bids received were to be kept confidential from the Parent and the public. (7/23/09 Tr. at 23:11-16; 28:22-29:4; 39:18-24.)

55. Enforceable confidentiality agreements do not require an express writing. *See, e.g.*, *Phillips v. Frey*, 20 F.3d 623, 632 (5th Cir. 1994); *Smith v. Snap-On Tools Corp*., 833 F.2d 578, 580 (5th Cir. 1987); *Prescott v. Morton Intern., Inc.*, 769 F. Supp. 404, 410 (D. Mass. 1990).

56. When documents marked as confidential are provided by one party to another in the course of a business transaction, the question is whether "the parties' conduct would lead a reasonable person in the industry to infer that [the party receiving the proprietary documents] promised not to use the information . . . without authorization." *See Prescott*, 769 F. Supp. at 410.

57. Express confidentiality provisions are unnecessary where the wrongfully-disclosing party "actively solicited" the confidential information, *see Snap-On Tools*, 833 F.2d at 580, and where "both parties mutually came to the negotiation table, and the disclosure was made within the course of negotiations." *Phillips*, 20 F.3d at 632.

58. Based on all the aforementioned law and evidence, the Court concludes that the parties understood that the Debtors would keep the auction bids confidential until such time as a stalking-horse bidder was selected. (2/2/10 Mack Dep. at 212:17-213:5.) The Movants' reliance

on this mutual understanding of confidentiality was reasonable, and the Movants undertook substantial effort and conferred substantial value to the estate by submitting a Joint Binding Bid.

59. Specifically, based on the confidential Initial Bids, Barclays invited the Movants to submit final, binding bids by August 13, 2009. (Vogel Proffer at ¶ 23; Greene Proffer at ¶ 23; 2/2/10 Mack Dep. at 80, 82.) The Movants did so.

D. The Movants' Joint Binding Bid.

60. On August 13, 2009, the Movants submitted a joint, binding, committed bid to the Debtors' agents at Barclays (the "Joint Binding Bid"). (Ex. 8.) The Joint Binding Bid was a committed offer to purchase 7.5% of the SCC Litigation Trust in exchange for $37.5 million in cash. (*Id*.) The Joint Binding Bid implied a total valuation for the SCC Judgment of $500 million. (Ex. 19 at ASARCO_LLC_0021437; 2/2/10 Mack Dep. at 129-30.) The August 13, 2009 submission by the Movants to the Debtors and Barclays included a Bid Letter, an Asset Acquisition Agreement and Litigation Trust Agreement (Exs. 8, 33 and 34, respectively) (the "Final Bid Materials").

61. As stated in the Bid Letter, both the Asset Acquisition Agreement and the Litigation Trust Agreement were executable and the bidders were "prepared to enter into these agreements with ASARCO." (Ex. 8.) Had the Debtors executed the Final Bid Materials, the Movants would have been bound to perform under the terms of the agreements. Thus, the Final Bid Materials submitted to the Debtors and Barclays constituted a committed, binding bid.

62. The Joint Binding Bid contained the following confidentiality provision:

> 6. Confidentiality. Subject to the requirements of applicable law, the existence and terms and conditions of this letter (including our identities) are confidential and are not to be disclosed to any third party (other than to ASARCO's legal and financial advisors and other agents and representatives who need to know such information in connection with the Acquisition, each of whom

> shall be directed by ASARCO to maintain the confidentiality of such information).

(Ex. 8) Again, Barclays understood that the Joint Binding Bid was confidential and not to be disclosed absent explicit consent of the Movants or after the signing of a stalking-horse agreement. (2/2/10 Mack Dep. at 79:9-15; 81:8-13; 84:23-85:23.)

63. Despite Barclays' solicitation of bids from over 150 bidders, the Final Bid was one of only two binding bids received by the Debtors. (Ex. 19 at ASARCO_LLC_0021437-40; 2/2/10 Mack Dep. at 66.)

64. Of the two binding bids received, the Joint Binding Bid was the best bid received by the Debtors for two reasons. First, it was the only binding bid that attributed a fixed value to the SCC Judgment; the other binding bid received by the Debtors was for an amount that would be calculated based on an as-yet-undetermined deficiency amount. (Ex. 19 at ASARCO_LLC_0021437; 2/2/10 Mack Dep. at 68-69 ("No one really knew the deficiency amount. There are a number of -- I don't think even today anyone knows the deficiency amount that would have occurred because there are a lot of facts that need to be determined").) Second, the Joint Binding Bid had the highest implied valuation. (Ex. 19 at ASARCO_LLC_0021437; 2/2/10 Mack Dep. at 69.)

65. The Asset Acquisition Agreement that was submitted as part of the Final Bid Materials on August 13, 2009 contained a provision allowing for payment of a break-up fee in the event that the Joint Binding Bid was used as a stalking horse but the Movants did not win the topping auction. (Ex. 33 at HALC0000212.) The break-up fee was defined as "the greater of (a) 5% of the Purchase Price and (b) $1.875 million." (*Id*. at HALC0000192.)

66. The Bid Letter also contained an expiration provision (Ex. 8 at HALC000127). The Parent has claimed that this provision somehow limits the Movants' eligibility for

reimbursement under §503(b)(3)(D). This argument is unpersuasive, as the expiration of the Joint Binding Bid has no relevance to the Movants' petition for reimbursement under §503. The automatic expiration of the Movants' Joint Binding Bid -- after it was used by the Debtors at a public hearing -- does not reduce the substantial contribution made by the Movants to the estate. The Movants' unwillingness to commit their capital indefinitely is reasonable, and does not function as a waiver of their rights under §503(b) of the Bankruptcy Code.

E. The Disclosure of the Bid Information.

67. On Friday afternoon, August 14, 2009, one day after submitting their Joint Binding Bid, the Movants participated in a phone call with the Debtors' counsel at Baker Botts, Barclays and Barclays' counsel at Gibson Dunn. (2/2/10 Mack Dep. at 167; Vogel Proffer at ¶ 37; Greene Proffer at ¶ 37.) During the phone call, the Debtors' counsel requested permission from the Movants to disclose the terms of their confidential Initial Bids and Joint Binding Bid to Professor Kenneth Klee so that he could include the information in his final proffer to be filed the next day. (2/9/10 Tr. at 112:12-25 (Vogel); 190:11-20 (Greene); Vogel Proffer at ¶ 37; Greene Proffer at ¶ 37.)

68. The Movants and their counsel refused to consent to the disclosure, asserting that it was a breach of numerous confidentiality agreements made with respect to the auction process and would compromise the auction process. (2/9/10 Tr. at 112:12-25 (Vogel); 190:11-20 (Greene); Vogel Proffer at ¶ 37; Greene Proffer at ¶ 37.) The Debtors' counsel then revealed that they had in fact already disclosed the terms of the Initial Bids and Joint Binding Bid to Professor Klee. (2/9/10 Tr. at 113:1-3 (Vogel); Vogel Proffer at ¶ 37; Greene Proffer at ¶ 37.)

69. Professor Klee filed a proffer disclosing the terms of the Initial Bids and Joint Binding Bid on August 15, 2009. (Ex. 69 [Docket No. 12514].) Professor Klee was deposed on August 16, 2009 and testified at the confirmation hearing on August 17, 2009 regarding, among

other things, the Initial Bids and Joint Binding Bid received from the Movants. (8/17/09 Tr. at 41-73.)

70. Significantly, Barclays -- who was tasked by the Debtors with running the auction process -- also did not learn of the disclosure to Professor Klee until after it had happened. (2/2/10 Mack Dep. at 87.) Barclays' corporate representative, George Mack, stated that "at the point it was disclosed, our understanding was that the bid was conditioned on confidentiality." (*Id.* at 95.) Barclays also testified that the idea of disclosing the bids to Professor Klee for use in his proffer before a stalking-horse agreement was entered had never been discussed with any of the bidders, and that it was Barclays' understanding that the bids would not be provided to Professor Klee absent consent of the bidders or a stalking-horse agreement. (*Id.* at 202, 212-213.)

71. The Movants made clear to the Debtors, Barclays and their counsel that they did *not* consent to disclosure of any terms of the bids, and confirmed their objection in writing. (2/9/10 Tr. at 112:12-25 (Vogel); 190:11-20 (Greene); Exs. 35, 37.) Nevertheless, less than 24 hours after first alerting the Movants of the disclosure, on Saturday, August 15, 2009, the Debtors publicly filed Professor Klee's Final Proffer, which contained confidential information regarding the terms of the Initial Bids and the Joint Binding Bid (Ex. 69 [Docket No. 12514] at ¶¶ 62-63.)

72. While the Movants considered withdrawing the Joint Binding Bid once the Debtors revealed the breach of confidentiality, they opted not to do so, since, as creditors of the estate, the Movants understood the value of the Joint Binding Bid to the Klee testimony and the confirmation process. (2/9/10 Tr. at 113:14-25 (Vogel) and 191:2-8 (Greene); Vogel Proffer at ¶ 39; Greene Proffer at ¶ 39.) In addition, because they had already incurred the enormous

expense associated with formulating and submitting the bids, they had nothing to gain by pulling their bid at that point. (Vogel Proffer at ¶ 39; Greene Proffer at ¶39.)

73. The Debtors and the Parent attempt to create the impression that the auction was not -- and was never intended to be -- confidential, because the parties knew that Professor Klee would eventually be given access to the auction bids for use in his expert opinion. This argument misses the point. While the parties -- including the Movants -- knew that Professor Klee wanted to review the bids *at some point*, it was never stated at any of the hearings cited by the Debtors and the Parent that Professor Klee would receive the bid information -- much less that it would be publicly filed -- while it was still confidential and before a stalking-horse agreement was entered. (7/21/09 Tr. at 34:16-17 (Debtors' Counsel) ("When the process becomes the stalking horse and the topping auction, then it will be known.").)

74. George Mack of Barclays, John Greene of Halcyon and Scott Vogel of DK all testified that it was their understanding and belief that the terms of the bids would not be shared with Professor Klee until *after* a stalking-horse agreement was entered or the Movants gave consent. (2/2/10 Mack Dep. at 202:7-8, 212:23-213:5; Vogel Proffer at ¶ 41; Greene Proffer at ¶ 41.); 2/9/10 Tr. at 114:4-14 (Vogel); 190:1-10 (Greene).) The Movants never consented to the terms of their bids being disclosed to Professor Klee or in open court. (2/9/10 Tr. at 114:12-16 (Vogel); 190:9-15 (Greene).)

75. And, as noted above, the Court had expressly ruled that the names and terms of any bids received were to be kept confidential, and only to be shared with a narrow group of notice parties that did *not* include the Parent. (7/23/09 Tr. at 23:11-16; 28:22-29:4; 39:18-24.) The Debtors never sought to amend that order nor did they ever seek permission from the Court

to disclose the confidential information to Professor Klee or to the public through Professor Klee's proffer.

76. Additionally, the July 14, 2009 hearing, the July 21, 2009 hearing, the July 21, 2009 Initial Klee Proffer, and the July 30, 2009 deposition of Professor Klee on which the Debtors and the Parent rely all predate DK's August 5, 2009 Expense Reimbursement Agreement, negotiated and signed by the Debtors, which contains an explicit confidentiality provision. The Debtors and the Parent's argument that the Movants should have inferred from general statements about Professor Klee's proposed testimony that the Debtors had no intention of honoring their written and oral confidentiality obligations is unavailing.

77. The Debtors acknowledged their obligation to keep the terms of the Initial Bids and Joint Binding Bid confidential by calling DK and Halcyon and seeking permission to disclose the bids to Professor Klee on August 14, 2009. (Vogel Proffer at ¶ 37; Green Proffer at ¶ 37.) If, as the Debtors and the Parent now contend, it was widely known that the bids would be given to Professor Klee upon receipt, there would have been no need to seek the Movants' permission to disclose their Joint Binding Bid.

78. The Debtors, in violation of their confidentiality agreements with the bidders and contrary to the general understanding of all parties, including the Court, disclosed the terms of the confidential bids (including the Movants' Initial Bids and Joint Binding Bid) to Professor Klee, despite the objection of the Movants and prior to a stalking-horse agreement being entered. (Exs. 35 and 46.) The Debtors, in turn, disclosed the terms of the bids to the world through Professor Klee's August 15, 2009 Proffer, his August 16, 2009 deposition, and August 17, 2009 hearing testimony. (Ex. 65, 69; 8/17/09 Tr. at 41-73.) This disclosure effectively accelerated the auction process and allowed the "topping auction" to occur before approval of a stalking-horse

agreement, and without the protections that are normally afforded to the stalking-horse bidder, including a contractual right to a break-up fee.

79. The Debtors candidly conceded to the Court that they had disclosed the bid information against the express wishes of the bidders, telling the Court on August 17, 2009:

> [T]he bidders are extremely concerned, some I would describe as agitated, about the disclosure of the amount of information that we have already disclosed and made public to Professor Klee even though we've kept their identity confidential. They didn't want any of this information being disclosed.

(8/17/09 Tr. at 35:18-23.) This contemporaneous statement to the Court by the Debtors also confirms that the disclosure of the confidential bids to Professor Klee was *not* something that had been openly discussed and implicitly agreed to.

80. This public disclosure was a breach of the confidentiality provisions in the Initial Bids, the Final Bid, and DK's Expense Reimbursement Agreement. It also violated the mutual understanding of Barclays and the Movants and was directly contrary to numerous statements and assurances given by the Debtors to the Court.

F. The Auction Process -- and the Movants' Participation in the Process -- Fostered and Enhanced the Debtors' Reorganization.

81. At the time the Debtors decided to initiate an auction process for the SCC Judgment, they recognized that an auction would bring a number of benefits. (7/21/09 Tr. at 35:25-36:1 (Debtors' Counsel) ("the importance of this auction is several-fold").)

82. First, the auction would help determine the value of the SCC Judgment by exposing it to the market. (Joint Disclosure Statement [Docket No. 11899] at 18.) The Debtors, as late as October 2009, admitted that this benefit was "critical" to the reorganization:

> Confirmation of the Debtors' Plan requires determination of the value of the SCC Judgment for distribution purposes. Confirmation of the plan of reorganization proposed by the Parent (the 'Parent's Plan'), which is predicated on a release of the SCC

> Judgment, requires a comparison of the value of the claims being released to the amount of the Parent contribution under the Plan. Thus, the auction would provide important and impartial information critical to either plan of reorganization.

(Debtors' Obj. [Docket. 13180] at 2.)

83. Second, selling all or a portion of the SCC Judgment at auction would increase the immediate cash distributions to creditors under the Debtors' plan and, depending on the sale price, could allow the Debtors' plan to pay creditors in full with post-petition interest upon consummation of the plan. (Joint Disclosure Statement [Docket No. 11899] at 5.) The Debtors admitted that "there is only one method . . . that makes the Debtor's plan a hundred percent . . . and that is to monetize the judgment." (7/21/09 Tr. at 60:1-4 (Debtors' Counsel).)

84. The auction also helped lessen two of the Debtors' confirmation risks -- (1) the risk of reversal and delay resulting from the Parent's appeal and, (2) the risk that the Debtors' plan would not be confirmable if the Parent's Section 1129(b)(2)(B) absolute priority objection, which related to the distribution of SCC Judgment trust interests, was upheld. (*See* Joint Disclosure Statement [Docket No. 11899] at 17.) Selling the SCC Judgment at auction transferred the appellate risk to a third-party and would have allowed the Debtors to distribute cash -- rather than SCC Judgment trust interests -- to creditors, thereby rendering the Parent's absolute priority objection moot. (*Id.*) And even if only a portion of the SCC Judgment were sold, the market-based valuation information would render the valuation of the SCC Judgment more certain and, as a result, the Debtors' plan more readily confirmable.

85. Third, because of these potential benefits, the auction and the possibility of an imminent sale of the SCC Judgment also gave the Parent a strong incentive to improve its plan. If the Debtors sold the SCC Judgment to a third-party, it would mean that the Parent would no longer have the ability to resolve the SCC Judgment by simply buying back the Debtors. So the

auction carried with it the risk that the Parent would lose control of both the Debtors and the SCC Judgment.

86. In particular, Debtors' counsel told the Court that "the importance of this auction is several-fold, but it also includes the idea if you -- as the Court knows, the Parent's not proposing a hundred percent plan. . . . All I'm suggesting is the Parent has not offered anything more than 95 percent. The only way that this happens is to monetize the judgment." (7/21/09 Tr. at 35:25-36:3; 60:21-23.) The Debtors candidly acknowledged the Court's observation that "[t]here is the possibility that this auction may well benefit the parent more than it will benefit the debtors' plan." (*Id.* at 36:10-13.)

87. George Mack, who ran the auction on behalf of Barclays, testified that "the more value we could generate [through the auction process], the better the chances that there would be a response by the Parent to top whatever value the Debtors created." (2/2/10 Mack Dep. at 100.)

88. And even the Parent viewed itself as an "implicit" bidder in the auction. The Parent contended in the Joint Disclosure Statement that "the Parent's Plan contains an implicit bid for the SCC Litigation equal to the difference between the total consideration to be provided by the Parent under the Parent's Plan and ASARCO's enterprise value." (Joint Disclosure Statement [Docket No. 11899] at 18.)

89. The Parent's new suggestion that it was indifferent to the auction process -- or believed that a sale of the SCC Judgment could actually benefit the Parent by increasing the Debtors' cash on hand and allowing the Parent to pay less for the Debtors -- is neither supported by evidence nor logically tenable. As an initial matter, the evidence shows that the Parent put up every possible roadblock against the Debtors' initiation of the auction process. So it clearly was not indifferent to -- and certainly not supportive of -- the auction.

90. Moreover, any conclusion that the Parent thought that the sale of the SCC Judgment would benefit it (by increasing the Debtors' cash on hand and correspondingly reducing the amount of cash necessary to propose a full payment plan) requires a series of illogical or counterfactual assumptions and inferences.

91. One first has to assume that the SCC Judgment would be sold before either the Debtors' or the Parent's plan was recommended for confirmation, which is not how the process was structured. Instead, the auction and any subsequent sale were only part of the Debtors' Plan, intended to be accomplished "in anticipation of Confirmation" of the Debtors' Plan and the auction proceeds were to be "distributed as Plan Consideration" pursuant to the Debtors' Plan. (Joint Disclosure Statement [Docket No. 11899] at 178.)

92. Next, one has to assume that confirmation of the Parent's Plan was guaranteed; an assumption that is demonstrably false since even the full-payment plan that it ultimately proposed was not assured of confirmation. (*See* Conf. Report at ¶ 275 (rejecting Parent's argument that "the Bankruptcy Code requires confirmation of any plan which pays the creditors in full and retains equity" and agreeing that "a 'tie' should not necessarily go to equity.").)

93. Finally, for the Parent to have really considered the auction a "non-event," one has to assume that the Parent truly valued that SCC Judgment at $0. While the Parent now suggests that was the case, (*see* Lazalde Proffer at ¶ 6.), that testimony is simply not credible and counterfactual. The fact is that the Parent described their Plan as including "an implicit bid for the SCC Litigation equal to the difference between the total consideration to be provided by the Parent under the Parent's Plan and ASARCO's enterprise value," an amount that is *not* zero. (Joint Disclosure Statement [Docket No. 11899] at 18.) Furthermore, the Parent's actions in opposing the Debtors' Plan demonstrate that it believed that the SCC Judgment had value. The

Parent asserted an absolute priority objection on the basis that recoveries from the SCC Litigation Trust Interests could result in payment to creditors of more than they were owed by the Debtors. And the Parent also indicated that it would "vigorously oppose [a finding that the damages recoverable by the SCC Litigation Trust on account of the SCC Final Judgment shall not be subject tot any limitation, reduction or cap], and will likely appeal such a finding, if made." (*Id.* at 18.) All of this evidence starkly contrasts with the notion that the Parent viewed the SCC Judgment as valueless.

94. Logic, too, contradicts this claim. The SCC Judgment was the result an order entered by a respected District Court judge, based heavily on credibility and factual issues. Given the high rates of affirmance on appeal -- and particularly in appeals where the review is deferential -- it would have been irresponsible and economically irrational to assign absolutely no value to the SCC Judgment. The Parent's after-the-fact claim that the auction was a "non-event" is simply not credible.

95. As it turned out, just as predicted by the Court, Barclays and the Debtors, the auction did serve to motivate the Parent to finally improve its offer to a full-payment plan.

96. On August 15, 2009, the Debtors revealed the terms of the Initial Bids and Joint Binding Bid to the world at large when they filed the Final Klee Proffer. (Ex. 69.) That proffer stated that the auction had generated "a binding bid for a fractional interest in the SCC Litigation Trust with the implied value of the whole being $500 million." (*Id.* at ¶ 62.) In forming his opinion regarding the value of the SCC Judgment, Professor Klee "placed more significant weight on the auction method because this method depended upon actual indications of market value for the SCC Judgment." (*Id.* at ¶ 66.)

97. Notably, the Debtors disclosed the Movants' bid to Professor Klee (and to the world, when his proffer was filed) despite an express obligation to keep the bid confidential -- an obligation that the Debtors' recognized because they unsuccessfully sought the Movants' permission to disclose the bid. (Vogel Proffer at ¶ 37; Greene Proffer at ¶ 37.) The Debtors' willingness to breach their confidentiality obligations and defy the express wishes of the Movants demonstrates the Debtors' strong belief that the Movants' bid would have an important affect on the confirmation process.

98. On August 17, 2009, Professor Klee testified at the confirmation hearing. That morning, the Court denied the Parent's motion to strike the testimony of Professor Klee, clearing the way for Klee's testimony as to the value of the SCC Judgment to come into evidence. (8/17/09 Tr. at 38:19-41:4.) That testimony would provide a basis upon which the Court could determine the value of the SCC Judgment. (*Id.* at 40:14-23 (Court noting that "I think that the testimony is relevant. I think it will be helpful to the Court").) Valuing the SCC Judgment would destroy the Parent's absolute priority objection to the Debtors' plan because -- as the Court ultimately ruled -- the SCC Judgment interests distributed to creditors would have a fixed value at the time of confirmation, and future appreciation would not create an absolute priority issue. (Conf. Report at ¶ 100-103.)

99. Additionally, the presence of a committed, binding bid for the SCC Judgment demonstrated that some or a portion of the SCC Judgment could be sold to third parties. A sale of all or some of the SCC Judgment to third parties would have harmed the Parent in two demonstrable ways: (1) it would have increased the cash recoveries offered under the Debtors' plan, making the plan more attractive to creditors; and (2) it would have eliminated the Parent's option to resolve the SCC litigation by simply repurchasing the Debtors.

100. Notably, while Professor Klee testified that a binding, committed bid had been received from a bidder valuing the SCC Judgment at $500 million, the percentage of the SCC Judgment that the Movants were seeking to purchase was not disclosed. (Ex. 69, Klee Proffer at ¶62.) The Parent, therefore, did not know what percentage of the judgment was at risk of being sold.

101. These facts gave the Parent ample incentive to propose a plan that would take the SCC Judgment out of play, and the only way to do that was through a full payment plan.

102. Thus, it was not surprising that within hours of Professor Klee's testimony, the Parent did offer a full payment plan, increasing the funding of its own plan by approximately $500 million and making significant changes to other aspects of its plan, such as increasing the escrow amount from $125 million to $1.6 billion, to demonstrate to the Court that it was serious about closing on the transaction.[3]

103. At the time, most or all impartial observers attributed the Parent's dramatic move to a full payment plan to concerns over the auction, and the auction's effect on the valuation of SCC Judgment. The Court found, in its report and recommendation on Confirmation that "Initiation of the auction process brought tangible benefit to the Debtor's estate and was perhaps the final impetus needed to encourage the Parent to file its plan which pays creditors in full." (Conf. Report at ¶ 57.) The Court also noted that

> Throughout this case, the Parent has proposed and withdrawn many plans. On numerous occasions, attorneys for the Parent suggested that the Parent would propose a full payment plan. However, the history of this case demonstrates that all of the Parent's plans were proposed in reaction to other plans, tactically

[3] The plan proposed in the Joint Disclosure Statement included a cash infusion of approximately $1.462 billion. (Joint Disclosure Statement [Docket No. 11899] at 24.) On the first day of the confirmation hearing, August 10, 2009, the Parent orally amended its proposed plan and later filed a supplement to the disclosure statement indicating that its equity contribution would increase to 1.72 billion. (Parent's Further Supplement to Joint Disclosure Statement [Docket No. 12497].) The amended plan orally proposed by the Parent on August 17, 2009, and later filed on August 20, 2009, increased the equity contribution to approximately $2.2 billion. (Amended Plan [Docket No. 12578].)

> designed to regain control of the Debtor during the case or as an effort to limit liability in the SCC Litigation. Finally, on the sixth day of a ten-day confirmation hearing, the Parent proposed a plan which pays all creditors in full with interest.

(Conf. Report at 4.)

104. The District Court likewise noted that "[t]he Parent has offered [over] $2 billion dollars (more than anyone ever thought of)." (Memorandum of Confirmation at 60 [Docket No. 13203].) The Court also attributed this move to the Parent's reaction to the risk of losing control of both the SCC Judgment and the Debtors -- a risk that the auction brought about. (*See* 11/16/09 Tr. at 23:13-16 ("I suspect that the bidding process had a major -- would have had -- played a major part of [the Parent's decision to offer a full payment plan] because the worst possibility for the parent was to lose both the judgment and the debtor.").)

105. Lastly, the Debtors themselves stated -- before they were controlled by the Parent -- that they "agree[] with the Bankruptcy Court's observation that 'initiation of the auction process brought tangible benefit to the Debtor's estate and was perhaps the final impetus needed to encourage the Parent to file its plan which pays creditors in full." (ASARCO LLC's Response to Parent's Second Renewed Motion for Stay Pending Appeal [Docket No. 13047] at ¶ 12.)

106. The Debtors did not present any affirmative evidence or testimony at the February 9, 2010 hearing regarding the Motion.

107. The only affirmative evidence presented by the Parent at the February 9, 2010 hearing was the proffer of Jorge Lazalde. (Docket No. 13853.)

108. The Parent's claim that other factors -- namely the rise in copper prices, the need to resolve environmental and asbestos claims and the desire to maintain its ownership of the Debtors -- motivated it to propose a full payment plan, and that the results of the SCC Judgment auction were not a factor, is not credible. (Lazalde Proffer at ¶¶ 5-8.) The Parent offers only the after-the-fact, self-serving testimony of its corporate representative, Mr. Lazalde, as support for

109. Statements made by the Parent's counsel Mr. Moore during the hearing on February 9, 2010 as to "how the Parent viewed this auction process," (2/9/10 Tr. at 55:12-14), are not evidence. *In re Zonagen, Inc.*, 322 F. Supp. 2d 764, 778 (S.D. Tex. 2003) ("Attorney argument is not evidence.").

110. Moreover, the three factors claimed by the Parent to be the sole reasons why it offered a full payment plan on August 17, 2009 fail to explain its actions during the confirmation hearing. First, the Parent's desire to maintain its ownership of the Debtors actually supports the notion that the auction motivated the Parent to improve its plan, because the auction threatened the Parent's ability to retain control of the Debtors unless it offered payment in full. Second, although copper prices increased throughout the first half of 2009, they remained relatively stable during first half of August 2009. (*See* http://www.lme.com/copper_graphs.asp.) And third, the environmental and asbestos claims against the Debtors had been settled well before the confirmation hearing even began. (*See* Conf. Report at ¶¶ 35, 46.) None of these three factors, therefore, explain the Parent's decision to increase its plan contribution by roughly $500 million and finally offer a full payment plan on August 17, 2009.

111. The only change in circumstances that can explain the Parent's decision to finally offer a full payment plan was the presence of the Movants' binding, committed bid and the threat that it presented to the Parent's ability to maintain control of the Debtors and resolve the SCC Litigation. The evidence supports the conclusion, therefore, that the disclosure of the terms of the Movants' Initial Bids and Joint Binding Bid contributed to the Parent's decision to finally offer a full payment plan on August 17, 2009.

112. Accordingly, the facts demonstrate that the auction process brought tangible benefits to the Debtors' estate and was a final impetus needed to encourage the Parent to file its plan which pays creditors in full.

113. Substantial contribution does not require "but for" causation; it is enough that the creditor substantially contributed to the enhanced value of the estate, it need not have been the sole cause of the enhancement. *See Matter of DP Partners*, 106 F.3d at 672 (finding that a creditor made a substantial contribution where the increase in value of the final amended plan was "[d]ue *in part* to [creditor's] participation") (emphasis added); *see also In re Mirant Corp.*, 354 B.R. 113, 135-39 (Bankr. N.D. Tex. 2006) (granting certain creditors administrative expense claims under 503(b)(4) for, among other reasons, eliminating an issue that would have to be addressed to confirm a plan, and providing critical information during a valuation hearing related to confirmation). Even if the Parent was motivated by multiple considerations, therefore, the Movants are still entitled to their expenses under section 503(b) because their offer to purchase a portion of the SCC Judgment was one contributing factor -- and a significant one -- to the enhanced value brought to the estate.

G. The Movants' Requested Attorneys' Fees are Reasonable.

114. "Under the plain language of the statute, if [the Movants] meet[] the requirements of section 503, [they] *shall* recover administrative expenses. This statutory mandate permits of no discretionary calls by the courts." *Matter of DP Partners*, 106 F.3d at 671-72. Once it is determined that a substantial contribution has been made, the question for the Court is whether the "claimed expenses were actual and necessary and that any fees are reasonable." *Matter of DP Partners*, 106 F.3d at 673.

115. The August 13, 2009 submission of the Joint Binding Bid represented the culmination of the Movants' and their counsel's significant legal, financial and transactional

work over the preceding month and a half. (Vogel Proffer at ¶ 32; Greene Proffer at ¶ 32.) The decision by Movants to commit capital to the purchase of a portion of the SCC Judgment was not undertaken lightly, and required significant diligence into the myriad issues unique to this asset. *Id*.

116. Because of the highly legal nature of the SCC Judgment, the assistance of outside counsel was essential to the bidders' attempts to value the asset. The central role of outside counsel in the process was anticipated by Barclays, who, on May 15, 2009, told the ASARCO Board of Directors that the "[h]ighly legal nature of the diligence work requires potential buyers to incur substantial legal expenses." (Ex. 17 at ASARCO_LLC_0061367.) In its solicitation materials, Barclays, on behalf of the Debtors, described many of the legal "risk factors" that would have to be analyzed, including the fact that "the outcome of litigation is inherently uncertain and the Judgment Owner may not be successful in defending any appeal of the SCC Judgment…and any damage award could be significantly reduced or eliminated." (Ex. 5 at HALC0000407.)

117. To analyze and report on the legal risk factors inherent in the SCC Judgment, DK retained the law firm of Quinn Emanuel Urquhart & Hedges, LLP ("Quinn Emanuel") and Halcyon retained Kirkland & Ellis LLP ("Kirkland"). (2/9/10 Tr. at 114:18-23 (Vogel); 191:16-20 (Greene).)

118. The Movants' counsel first addressed questions related to valuation in preparation of the Movants' Initial Bids, submitted separately on July 16, 2009. These Initial Bids included preliminary valuations of the SCC Judgment. Submission of initial indications of interest was required of potential bidders seeking to receive an invitation into the second phase of the auction process. (Vogel Proffer at ¶¶ 20-24; Greene Proffer at ¶¶ 20-24; Ex. 4 at HALC000022-23.)

Movants' counsel performed significantly more legal research and analysis as the Movants prepared to commit actual capital to a binding bid. (Vogel Proffer at ¶ 31; Greene Proffer at ¶ 31.)

119. Preparation and submission of the Joint Binding Bid required substantial effort by the Movants' outside counsel, who needed to perform diligence on multiple issues of law, and to review and draft legal documents. Among the issues requiring thorough research were the likelihood of the SCC Judgment being upheld by the Fifth Circuit Court of Appeals; the possibility of some cap in the damages awarded; potential delays in recovery; the financial condition of the Parent and Southern Copper; expenses related to the appeal; fluctuation in the value of Southern Copper stock and copper prices generally; the structure and operation of the litigation trust that would be created in order to sell a portion of the SCC Judgment; and the possibility that the Debtors' plan would not be confirmed. (Vogel Proffer at ¶ 14; Greene Proffer at ¶ 14.)

120. DK and Halcyon also jointly retained Kirkland to manage the transactional side of the auction process. (2/9/10 Tr. at 114:24-115:3 (Vogel); 191:16-20 (Greene).) In this capacity, Kirkland managed the Movants' participation in the auction and prepared the agreements that constituted the Joint Binding Bid. The auction process was made considerably more difficult by the tight, shifting deadlines put forward by Barclays in running the auction. For example, Kirkland was given less than ten days from the time that Barclays suggested that the Movants submit a joint bid to the time that the Movants were required to submit their Bid Letter, Asset Acquisition Agreement, and Declaration of Trust. (Vogel Proffer at ¶¶ 30-31; Greene Proffer at ¶¶ 29-31.)

121. In all, the Movants' counsel was given approximately a month and a half to perform initial and final research into a profoundly complicated legal case, draft initial bid documents, negotiate reimbursement agreements, and prepare voluminous joint, binding bid materials. Without the legal support provided by counsel, the Movants would have been unable to participate in the auction, and the substantial benefit the Movants conferred to the bankruptcy estate would not have been possible. (Vogel Proffer at ¶ 48, Greene Proffer at ¶ 49.)

122. The work performed by Quinn Emanuel and Kirkland which led to the submission of the Final Bid has been thoroughly documented in itemized invoices that have been submitted to the Court. (Exs. 40 and 45.) At trial, the Movants identified the specific entries relating to the auction process for which they currently seek reimbursement. (*See* Exs. 86 and 87.)

123. In determining whether attorneys' fees are reasonable for purposes of §503(b)(4), courts in the Fifth Circuit apply a three-part test to: (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* affected the court's decision.[4] *In re Energy Partners*, 2009 WL 5178451, at *14 (citing *In re First Colonial Corp. of Am.*, 544 F.2d 1291, 1299-1300 (5th Cir. 1977)).

124. Having reviewed the testimony of the Movants and counsel's invoices, the Court finds that the expenses incurred by Movants' counsel were actual and necessary to the Movants' participation in the auction process. The Court further finds that these expenses are reasonable

[4] The *Johnson* factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the cases; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or other circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

under the test set forth in *Johnson*, 488 F.2d at 717-19. The questions posed by the auction process were "novel[] and difficult[]." *Id*. at 717. Substantial "time and labor" were required of counsel to satisfy the needs of the Movants in the auction process. *Id*. at 718. A valuation and transactional process as complicated as the stalking-horse auction required attorneys of the highest caliber. *Id*. Counsel was retained on an hourly-billing basis according to standard fees, and Movants do not seek more than they are contractually bound to pay their counsel. *Id*. at 718-19. Finally, the amount involved was a $37.5 million investment in a litigation judgment valued at $500 million; the "results obtained," described above, were in the form of a substantial contribution to both Debtors and creditors. *Id*.

125. The Court finds that the Movants' actual, necessary and reasonable attorneys' fees for work resulting in the submission of the Joint Binding Bid total $367,998.75.

126. DK and Halcyon also incurred significant attorneys' fees in petitioning the Court for the just compensation to which they are entitled. Because the Debtors and the Parent objected to the Motion, Movants had only one option to secure reimbursement -- litigating their claim. This process involved document discovery, the taking and defending of multiple depositions and additional motion practice.

127. Creditors who bring substantial contribution claims are entitled to reimbursement of legal fees incurred in making those claims. To exclude fees incurred in litigation would dilute the reimbursement of the creditors. *See, e.g.*, *In re Smith*, 317 F.3d 918, 928 (9th Cir. 2002); *In re Seneca Oil*, 65 B.R. 902, 910 (Bankr. W.D. Okla. 1986); *In re Ahead Commc'ns Sys., Inc.*, No. 02-30574, 2006 WL 2711752, at *5 (Bankr. D. Conn. Sept. 21, 2006).

128. The anti-dilution doctrine applies to creditors as well as debtors. *In re Wind 'N Wave*, 509 F.3d 938, 945 (9th Cir. 2007); *In re Hers Cosmetics Corp.*, 114 B.R. 240 (Bankr.

C.D. Cal. 1990; *cf. In re On Tour*, 276 B.R. 407, 418 (Bankr. D. Md. 2002) ("this court sees no basis for applying a different rule when applying for compensation under 11 U.S.C. §503(b) than used when applying for compensation under 11 U.S.C. §330."); *In re Celotex*, 227 F.3d 1336, 1341 (11th Cir. 2000).

129. Following the anti-dilution doctrine is necessary to fulfill the Congressional intent behind the Bankruptcy Code: "[S]o long as the services [for which fees are sought] meet the Section 503(b)(4) requirements and the case exemplifies a set of circumstances where litigation was necessary . . . [it] is necessary to prevent the dilution that would result if creditors' attorneys were forced to absorb the time devoted to successfully litigating a fee award—an outcome that would be contrary to Congressional intent against fee award dilution." *In re Wind 'N Wave*, 509 F.3d at 945.

130. In order to prevent the dilution of the Movants' award, the Court finds that the Movants are entitled to reimbursement for attorneys' fees incurred in seeking reimbursement through this Motion.

131. DK and Halcyon have submitted Kirkland's invoices documenting the attorneys' fees relating to work undertaken to recover their expenses. (Exs. 40 and 45.) Additionally, at trial, the Movants identified the specific entries relating to their substantial contribution litigation. (Exs. 86 and 87.) The Court finds that the entries identified by Movants document actual and necessary work for which Kirkland has reasonably billed the Movants.

132. The Movants' actual, necessary and reasonable attorneys' fees for work undertaken in seeking reimbursement under §§ 503(b)(3)(D) and 503(b)(4) through January 31, 2010 total $501,221.00.

133. Promptly upon entry of this order the Movants shall submit invoices for work performed by Kirkland since January 31, 2010, and in particular in connection with the February 9, 2010 hearing and preparation of these Proposed Findings of Fact and Conclusions of Law. Upon review by the Court for reasonableness, the total amount of attorneys' fees and expenses incurred by the Movants since January 31, 2010 shall also be added to the $501,221.00 for reimbursement.

H. The Movants' Requested Internal Work Fees Are Reasonable.

134. In addition to substantial outside legal expenses, the Movants also devoted a significant amount of their own time and resources to participation in the auction process. Corporate representatives for DK and Halcyon, Scott Vogel and John Greene, described in detail the work necessary to the Movants' participation in the auction process.

135. Halcyon and DK devoted considerable time and resources to participating in the auction process, a joint effort that led to a substantial contribution to the Debtors' bankruptcy case. (Vogel Proffer at ¶¶ 52-55; Greene Proffer at ¶¶ 53-55.) In order to achieve the level of confidence necessary to commit to the auction process, Halcyon and DK each had to review Barclays' solicitation documents to gain comfort with the complex, multi-phase, dynamic auction process constructed by the Debtors and its advisors. (Vogel Proffer at ¶¶ 11-13; Greene Proffer at ¶¶ 11-13.) After initial diligence into the financial details of the stalking-horse auction process and inquiry into the value of the SCC Judgment, the bidders were required to present an initial indication of interest, including the bidders' anticipated percentage interest in the SCC Judgment, their initial valuation of the total SCC Judgment, evidence of financing ability, and anticipated due diligence requirements. (Ex. 4.) Less than three weeks from the date that solicitation materials were received, and after rigorous discussions with outside counsel and internal management, Halcyon and DK each submitted Initial Bids to Barclays. (Exs. 7, 11.)

136. Significantly more work was required of Halcyon and DK once Barclays invited the parties to continue onto Stage II of the stalking-horse auction. First, in order to gain sufficient confidence in a valuation of the SCC Judgment, the Movants undertook intensive diligence efforts to identify and investigate potential legal risks factors. (Vogel Proffer at ¶ 31; Greene Proffer at ¶ 31.)

137. Valuation of the SCC Judgment posed unique challenges to the bidders. The District Court's award of damages was based on numerous distinct and often complex theories of law, all of which were to be reviewed by the Fifth Circuit Court of Appeals, and potentially the United States Supreme Court. In order to reach a final valuation result for the SCC Judgment, the parties had to analyze each theory of law, taking into account the various possible outcomes of the appeals process. (Vogel Proffer at ¶ 15; Greene Proffer at ¶ 15.) Professionals at Halcyon and DK reviewed the voluminous legal pleadings and transcripts associated with the SCC Judgment, attended hearings telephonically and in person, and discussed their observations with outside counsel. (Vogel Proffer at ¶ 52; Greene Proffer at ¶ 53.)

138. From July 1, 2009 to August 14, 2009, Scott Vogel, an investment professional at DK, devoted one quarter of his time to the auction process. (Vogel Proffer at ¶ 54.) During that same period, Robert Greebel, another investment professional, devoted approximately half of his time to the project. *Id*. Additionally, DK's in-house counsel devoted significant time to reviewing and negotiating bid documentation. *Id*.

139. From mid-June 2009 to August 14, 2009, John Greene, an investment professional at Halcyon, devoted approximately 65% of his time to the auction process, including a 90-hour four-day trip to attend the confirmation hearings in person. (Greene Proffer at ¶¶ 53-54). During that same time period, Halcyon's General Counsel, Manish Mital, also

devoted approximately "a full working week's worth of time" to reviewing bid documentation and providing feedback on the underlying claim. *Id*.

140. Investment professionals like those at DK and Halcyon do not traditionally keep time records, and do not bill on an hourly basis. As a result, in stalking-horse auctions where bidders are used to set a bidding floor, bidders are typically compensated through a break-up fee. Break-up fees serve the purpose of "cover[ing] reimbursement of the disappointed purchaser's out-of-pocket expenses related to the proposed acquisition and/or compensation for time, efforts, resources, lost opportunity costs and risks incurred by the disappointed purchaser." *In re APP Plus, Inc.*, 223 B.R. 870, 874-75 (Bankr. E.D.N.Y. 1998); *see also In re O'Brien Envtl. Energy*, 181 F.3d 527, 537 (3d Cir. 1999).

141. DK and Halcyon have testified that they believe that the break-up fee included as part of the Joint Binding Bid best estimates the costs created by their participation in the auction process. (Vogel Proffer at ¶ 57; Greene Proffer at ¶ 57). The Court agrees.

142. The break-up fee requested in the Joint Binding Bid -- $1.875 million -- constitutes five percent of the total capital committed by the Movants to the purchase of a portion of the SCC Judgment. A work fee of 5 percent is not unusual, particularly in unique circumstances like this, where the asset being auctioned was unique and extremely valuable, the Debtors breached numerous confidentiality obligations, and the tangible result of the Joint Binding Bid was to increase creditor recoveries by approximately $500 million. *See* 3 *Collier on Bankruptcy* ¶ 363.02. In light of the cost-benefit analysis implemented in the Fifth Circuit with regard to substantial contribution claims -- in which the Court must "weigh the cost of the claimed fees and expenses against the benefits conferred upon the estate which flow directly from those actions," *Matter of DP Partners*, 106 F.3d at 673, -- the Court finds that $1.875

million is a reasonable amount given the substantial benefit conferred upon the creditors and Debtors by Movants' bid.

143. The reasonableness of the requested work fees is underscored by the fact that the Debtors in their business judgment and with Court approval, agreed to pay two other bidders who submitted a joint bid to purchase the SCC Judgment a combined work fee in the amount of $1.35 million. (Order Approving Expense Reimbursement ("Expense Reimbursement Order") [Docket No. 12144]; 11/16/09 Tr. at 17:9-18:4.)

144. For the above reasons, Movants' internal expenses are found to total $1,875,000.00.

I. The Expense Reimbursement Agreements Do Not Limit the Movants' Right to Reimbursement under § 503(b).

145. Both Movants entered into expense reimbursement agreements with the Debtors on August 5, 2009. (Exs. 3 and 10.) The Debtors received approval from the Court to enter into these agreements, which the Court found to be "fair, reasonable and appropriate and . . . designed to maximize the value of ASARCO's estate." (Expense Reimbursement Order.)

146. The Expense Reimbursement Agreements were intended to serve as an incentive to the Movants to continue in the expensive auction process. (Vogel Proffer at ¶ 25; Greene Proffer at ¶ 25.) The Expense Reimbursement Agreements entitled DK and Halcyon to certain payment in the event that they submitted a final bid. Debtors agreed to pay $75,000 to Halcyon and $200,000 to DK. (Ex. 3 at HALC0000782; Ex. 10 at MIDTOWN0001941.)

147. The Movants agreed to the reimbursement amounts contained in the Expense Reimbursement Agreements, even though they knew that the amounts would not cover all of their external and internal expenses, because they believed that the investment in the SCC judgment could provide an attractive rate of return. (Vogel Proffer at ¶ 28; Green Proffer at ¶

27.) In agreeing to amount of reimbursement set forth by the Expense Reimbursement Agreements, the Movants never assumed the risk that the auction would be hijacked or that their bids would be disclosed in violation of express agreements. (Vogel Proffer at ¶ 28; Green Proffer at ¶ 27.)

148. Though the Parent attempts to rely on the Expense Reimbursement Agreements to limit the Movants' right to reimbursement, these arguments fail to recognize the distinction between a *contractual* claim and a substantial contribution claim, which is purely *statutory*. *See, e.g.*, 11 U.S.C. § 503(b); *Matter of DP Partners*, 106 F.3d at 672 (analyzing the statutory basis for substantial contribution fees); *In re Am. Plumbing and Mech.*, 327 B.R. at 279-80 (same).

149. Courts ruling on substantial contribution cases routinely award creditors' expenses where there is no contract providing for the payment of those fees. *See, e.g.*, *Matter of DP Partners*, 106 F.3d 667 (awarding fees for creditor's participation in confirmation fight); *In re Energy Partners*, 2009 WL 5178451 (awarding fees for substantial contribution based on creditor's work in increasing momentum to form official committee of equity holders).

150. Because the Movants have brought their claims under 11 U.S.C. §§ 503(b)(3)(D) and 503(b)(4), the issue for the Court is whether the Movants substantially contributed to the Debtors' estate by fostering and enhancing the process of reorganization, not whether the Movants are entitled to fees under the Expense Reimbursement Agreements. *Matter of DP Partners*, 106 F.3d at 672.

151. The Parent claims that certain reimbursement caps in the Movants' Expense Reimbursement Agreements preclude Movants from recovering under §§ 503(b)(3)(D) and 503(b)(4). This argument fails both as a matter of contract law and under the statutory standard of § 503(b). The Expense Reimbursement Agreements contain nearly identical cap provisions,

which state that "the amount payable by ASARCO *under subsection (a) and (b) of this paragraph 1* shall in no event exceed" the agreed upon expense reimbursement amount. (Ex. 3 at HALC0000782-83; Ex. 10 at MIDTOWN1941-42 (emphasis added).) Under the plain language of these provisions, Movants are capped with regard to reimbursement under the Expense Reimbursement Agreements, however the provisions do not cap the reimbursement to which Movants may be otherwise entitled, including for substantial contribution. In fact the agreements are silent as to the availability of future, additional payment, whether in the form of a break-up fee or as compensation for substantial contribution under § 503(b).

152. Indeed, the auction was premised on the notion that the bidder selected as the stalking horse would receive additional protections and reimbursement of fees above and beyond that contained in the expense reimbursement agreements, as traditionally occurs in § 363 sales. (Greene Proffer at ¶16; Vogel Proffer at ¶ 16.)

153. The Court therefore finds that, in keeping with the plain language of the agreements, the reimbursement cap provisions in the Expense Reimbursement Agreements only limit payments to be made under those agreements.

154. In any event, under § 503(b), the question for the Court is whether the Movants made a substantial contribution and what expenses were incurred in the process of making this contribution. The terms of the Expense Reimbursement Agreements, including the reimbursement caps, are not relevant to the Court's inquiry.

155. The Parent also implies that reimbursement of Midtown's expenses under § 503(b) is inappropriate because DK's Expense Reimbursement Agreement was entered into by Davidson Kempner Capital Management LLC, Midtown's investment manager. (Ex. 10; Vogel Proffer at ¶ 1.) This argument is also unpersuasive. The plain language of the Expense

Reimbursement Agreement calls for payment under the agreement to the "Purchaser," and defines the Purchaser as "Davidson Kempner Capital Management LLC…together with its affiliates." (Ex. 10 at 1.) As the trading vehicle for the DK Funds, Midtown is an affiliate of Davidson Kempner Capital Management LLC, and is thus within the scope of the Expense Reimbursement Agreement. (Vogel Proffer ¶1.)

156. More importantly, however, as with the Parent's other unsuccessful appeals to the niceties of contract law, this argument is unavailing because it is irrelevant to the question of whether the Movants have substantially contributed to the Debtors' estate under § 503(b)(3)(D).

157. Finally, the Parent has raised as a obstacle to the Movants' reimbursement of fees and expenses the fact that the Movants' Joint Binding Bid was submitted at 5:02 PM -- two minutes after the deadline set forth in the Expense Reimbursement Agreements. The Parent's argument is unpersuasive. First, and most importantly, as discussed above, the Movants' claim for reimbursement is not based on enforcement of the Expense Reimbursement Agreements, and thus the fact that the Final Bid was allegedly submitted two minutes after the contractual deadline has no bearing on the question of Movants' entitlement to reimbursement of their expenses under §503(b). Having found that the disclosure of Movants' bids did in fact unleash a bidding war and provide an essential valuation for the SCC Judgment, the Court finds the Parent's timing objection irrelevant to the question of whether the Movants are entitled to reimbursement under §§ 503(b)(3)(D) and 503(b)(4).

158. Second, the evidence conclusively demonstrates that the Debtors and their agents at Barclays accepted the Joint Binding Bid, and never raised an issue of timeliness. (2/2/10 Mack Dep. at 71; 2/9/10 Tr. at 112:2-11 (Vogel).) Barclays, running the auction process on behalf of the Debtors, never discussed any alleged lateness of the Joint Binding Bid, either internally or

with the Movants, and confirmed that they considered the Joint Binding Bid to be timely. (*Id.*) Indeed, through Professor Klee's proffer, the Debtors described the Joint Binding Bid to this Court as a "binding bid for a fractional interest in the SCC Litigation Trust," demonstrating their belief that the Joint Binding Bid was in fact binding and committed. (Ex. 69 at ¶ 62.)

159. The Parent's attempts to use the Expense Reimbursement Agreements to avoid payment to the Debtors under Section 503(b) are particularly dubious given that the Parent has fought tooth-and-nail to avoid the obligations created by the terms of those agreements. (*See, e.g.*, Notice of Appeal [Docket No. 12271].)

160. To this day, the Debtors have not made any payments under the Expense Reimbursement Agreements. (Vogel Proffer at ¶ 51; Greene Proffer at ¶ 52.) In the Expense Reimbursement Agreement entered with DK, the Debtors represented and warranted that all objections to the Expense Reimbursement Agreement had been resolved or waived and that "there are no other conditions or approvals required for ASARCO to reimburse Purchaser for its Reimbursable Expenses." (Ex. 10 at ¶ 5(a)(ii).) This representation turned out to be false, as the Parent subsequently appealed the Court's Order approving the Expense Reimbursement Agreements and the issue remains on appeal. (2/9/10 Tr. at 88:15-19 (Vogel).) It would be perverse to allow the Parent and the Debtors to appeal to the sanctity of the Expense Reimbursement Agreements even as they aggressively seek to avoid enforcement of those same agreements.

V. CONCLUSION

161. Based on the evidence presented at the February 9, 2010 hearing and the briefs submitted by the parties in advance of the hearing, the Court finds that the Movants substantially contributed to the Debtors' estate through their participation in the auction of the SCC Judgment and their submission of the Joint Binding Bid to purchase a portion of the SCC Judgment.

Having found that the Movants substantially contributed to the Debtors' estate, I am bound by the clear language of section 503(b) of the Bankruptcy Code to award the Movants reimbursement of their actual and necessary expenses, including professional fees, incurred in connection with their substantial contribution. Accordingly, the Court orders the Debtors to reimburse the Movants for legal expenses pursuant to sections 503(b)(4) and 503(b)(3)(B) of the Bankruptcy Code in the amount of $869,219.75, plus reasonable fees and expenses incurred since January 31, 2010. In addition, the Court orders the Debtors to reimburse Movants' for their actual and necessary internal fees and expenses, in the amount of $1,875,000. I order the Debtors to pay these amounts to the Movants within 10 days of entry of this order.

Dated: February 19, 2010
New York, New York

/s/ Lee Ann Stevenson

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was served by ECF or electronic mail, on all parties entitled to notice on this 19th day of February 2010.

/s/ Lee Ann Stevenson
Lee Ann Stevenson