ENTERED
09/11/2009

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

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

AMENDED AND SUPPLEMENTAL REPORT AND RECOMMENDATION FOR ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAN CONFIRMATION

In accordance with deadlines set out in the Plans of Reorganization and to facilitate confirmation and consummation before the end of the year, on Monday, August 31, 2009, this Court entered its Report and Recommendation. The Report was entered ten days after the close of evidence in the confirmation hearing and only six days after conclusion of closing arguments. After further review of the Report and Recommendation and upon the suggestion of several interested parties, the Court now amends its Report and Recommendation to correct typographic and editing mistakes, to correct one factual error, and to include updates to the Parent's Plan in compliance with the Court's September 2, 2009, *Sua Sponte* Order. The amendment also includes a section recommending approval of the 9019 Asbestos Settlement previously omitted.

Beginning on August 10, 2009, and continuing through August 25, 2009, the Bankruptcy Court conducted an evidentiary hearing (the "Confirmation Hearing") to consider confirmation of two competing plans of reorganization for the Debtor, ASARCO LLC (the "Debtor" or "ASARCO") and its Chapter 11 subsidiaries:

- Sixth Amended Joint Plan of Reorganization for the Debtors under Chapter 11 of the United States Bankruptcy Code, As Modified, With Further Modifications As of August 23, 2009 ("Debtors' Plan"), and

- ASARCO Incorporated and Americas Mining Corporation's Seventh Amended Plan of Reorganization for the Debtors Under Chapter 11 of the United States Bankruptcy Code As Modified on August 20, 23, and 27 2009, ("Parent's Plan").[1] A conformed Plan containing all modifications was filed on August 30, 2009.

In connection with the Confirmation Hearing, the Bankruptcy Court received testimony from more than 20 witnesses and admitted more than 400 documentary exhibits and 2000 additional documents related to asbestos claims. The Court has considered all testimony presented (whether live or by proffer) and evidence admitted at the Confirmation Hearing. The Court also has considered the Disclosure Statement dated July 6, 2009, supplemental disclosure statements, plan objections and modifications, and briefs and memoranda filed in connection with confirmation. In addition, the Court has taken judicial notice of the prior proceedings, the Bankruptcy Court docket, all pleadings and other documents filed, all previous Orders entered, and all previous hearings and evidence and argument presented in these bankruptcy cases and all associated adversary proceedings.

Because both plans of reorganization seek a permanent channeling injunction under 11 U.S.C. §524(g), by Order dated August 6, 2009, the District Court withdrew the reference regarding proceedings related to confirmation of a plan of reorganization in this case and related requests for a channeling injunction. The August 6, 2009, Order also referred these issues to the Bankruptcy Court for hearing and directed the Bankruptcy Court to make proposed findings of fact and conclusions of law. Accordingly, the Bankruptcy Court recommends that the District Court enter the following proposed findings of fact and conclusions of law[2] in support of

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[1] A third plan, the Second Amended Chapter 11 Plan filed by Harbinger Capital Partners Master Fund I, Ltd. ("Harbinger's Plan"), was also filed, but the plan proponent requested that it be held in abeyance and not considered.

[2] Findings of fact shall be construed as conclusions of law and vice versa where appropriate. *See* Fed. R. Bankr. P. 7052. The Court's findings of fact and conclusions of law announced on the record in open court are hereby incorporated by reference herein.

confirmation of the Plan of Reorganization of Americas Mining Corporation ("AMC") and ASARCO Incorporated (together, the "Parent") and denying confirmation of the Debtor's Plan.

PRELIMINARY STATEMENT AND OVERVIEW

The Confirmation Hearing marked the culmination of this four-year bankruptcy case. When ASARCO sought bankruptcy protection in 2005, the company had essentially run out of cash and was saddled with massive environmental liability, financial debt, potential asbestos-related liability, falling copper prices, and a striking workforce. Moreover, two of ASARCO's three board members had resigned. ASARCO's ability to reorganize successfully results directly from the diligent efforts of management installed early on in this case as well as ASARCO's workforce. In the course of the bankruptcy case, ASARCO's leadership and its workers achieved a cooperative relationship that enabled ASARCO to improve operations and capitalize on rising copper prices during the past four years.

In that time, the Debtor[3] has devoted significant attention to continuing operations in Chapter 11 with minimal disruption, improving corporate governance and controls, stabilizing the Debtors' financial condition, increasing productivity, improving labor relations, and most importantly, improving the Debtor's cash condition, all of which paved the way to a successful

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[3] As used herein, in addition to ASARCO LLC, who filed August 9, 2005, , the term "Debtor" includes, , Lac d'Amiante du Québec Ltée (f/k/a Lake Asbestos of Quebec, Ltd.); Lake Asbestos of Quebec, Ltd.; LAQ Canada, Ltd.; CAPCO Pipe Company, Inc. (f/k/a/ Cement Asbestos Products Company); and Cement Asbestos Products Company ("Asbestos Subsidiary Debtors"), which filed for bankruptcy protection on April 11, 2005. The Asbestos Subsidiary Debtors were affiliated companies which had been out of business for many years and had as their principal asset a lawsuit in the State District Court of Nueces County, Texas. Therefore, venue was proper in the Southern District of Texas, Corpus Christi Division as to the Asbestos Subsidiary Debtors. 28 U.S.C. §1408.

"Debtor" also includes Encycle, Inc., which filed on August 26, 2005; ASARCO Consulting, Inc., which filed on September 1, 2005; ALC, Inc.; American Smelting and Refining Company; AR Mexican Explorations Inc.; Asarco Master, Inc.; Asarco Oil and Gas Company, Inc.; Bridgeview Management Company, Inc.; Covington Land Company; Government Gulch Mining Company, Limited; which filed on October 13, 2005; and Southern Peru Holdings, LLC; AR Sacaton, LLC, a Delaware limited liability company; and ASARCO Exploration Company, Inc. which filed December 12, 2006. "Debtor" also includes Alta Mining and Development Company, Blackhawk Mining and Development Company, Limited, Green Hill Cleveland Mining Company, Tulipan Company, Inc., Peru Mining Exploration and Development Company and Wyoming Mining and Milling Company. Encycle/Texas, Inc., which has been converted to a chapter 7 bankruptcy, is not referenced by the term "Debtors."

reorganization. Moreover, the Debtor and its professionals continuously moved this case toward the confirmation of a plan that resulted in the best possible recovery for creditors - - full payment.

The bankruptcy case contains over 12,500 docket entries, numerous adversary proceedings and consumed thousands of hours of court hearing time. The Court was assisted by two bankruptcy judges who conducted mediations and by the District Court who presided over trial of the SCC litigation. This Court is extremely grateful for the assistance of those three judges, their staff, and the Office of the Clerk of the Court.

The Court is now presented with two competing reorganization plans which improved on an almost daily basis during the confirmation hearing. Both plan proponents believe their plans to be full-payment plans which return full principal and interest to the creditors.

The Debtor's Plan sells the assets of ASARCO to Sterlite (USA) Inc. ("Sterlite") for consideration of $1.4394 billion in cash plus $722 million to monetize the SCC Litigation Trust interest of Class 3.[4] This is the second plan proposed by the Debtor based on a sale to Sterlite. As described below in detail, Sterlite originally contracted to purchase the assets of ASARCO for $2.6 billion, but later defaulted. The Debtor's plan sets up the SCC Litigation Trust which is assigned beneficiary interest based upon the value of the judgment as determined by this Court. The SCC Litigation Trust is also used to back-stop payment in full to creditors. The Debtor's plan consideration, plus ASARCO's cash on hand estimated at $1.4 billion, is used to pay creditors in full with interest. Sterlite is obligated to pay any additional amounts necessary to pay the claims in full plus reasonable expenses incurred by the plan administrator. These obligations are guaranteed by Sterlite Industries (India), Ltd. To ensure that Sterlite closes upon

[4] The SCC Litigation is described in detail in Section IV. I., below.

confirmation, it agreed to provide $625 million in the form of a letter of credit as security for closing.

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 designed to regain control of the Debtor during this 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.

Pursuant to the Parent's Plan, the Parent will contribute to the Debtor $2.2051 billion cash. Simultaneous with the delivery of the consideration to an independent plan administrator, the Debtor shall release the SCC Judgment. In addition, the Parent is providing (i) AMC's guarantee of a $280 million promissory note payable to the Section 524(g) Trust, backed by a pledge of 51 percent of the Equity Interests in Reorganized ASARCO; (ii) a $200 million Working Capital Facility to fund Reorganized ASARCO's operations upon emergence from bankruptcy; and (iii) a release of the Parent's claims against the Estates. The Parent currently has at least two claims against the Estates: (1) an administrative expense claim for reimbursement of $161.7 million (estimated to be approximately $190 million with interest) for ASARCO's liability for taxes attributable to the Debtors' post-petition income, and (2) a claim by AMC to a tax refund that is presently estimated to be worth approximately $60 million, which shall be available for distribution to creditors pursuant to the Parent's Plan. The Parent's commitments to make the contribution of $2.2051 billion, to guarantee the $280 million note, and to provide the working capital facility are further guaranteed by AMC. Grupo México, the Parent's corporate owner, has guaranteed AMC's obligations, as set forth in the Second

Amended Grupo México Guarantee Agreement filed on September 5, 2009. AMC is a U.S. corporation subject to jurisdiction and service of process in the United States. Grupo México has voluntarily submitted to the jurisdiction of the courts in the Southern District of Texas, and waived service of process, for the limited purpose of any action to enforce Grupo México's obligations by a party to or third party beneficiary of the Grupo México Guarantee Agreement. Finally, Reorganized ASARCO will remain liable for any unlikely shortfall in the funds available to satisfy Claims. These funds and other sources of consideration are sufficient to provide payment in full to all classes of claims at the allowed or agreed-upon amount. The Parent will retain 100% of the equity interests in Reorganized ASARCO.

To demonstrate its intention and ability fully and timely to consummate its Plan, the Parent has established an Escrow Account funded with 83,710,000 shares of stock of SCC, with a market valuation as of the close of the Confirmation Hearing in excess of $2.4 billion. Before the Parent's Plan is recommended by the Bankruptcy Court for confirmation by the District Court, such shares in the Escrow Account will act as a forfeitable deposit, ensuring that the Parent's Plan is not terminated, withdrawn, modified, or amended in a manner that would effect a materially adverse change to the treatment afforded unsecured creditors, prior to the conclusion of the Confirmation Hearing (the "Pre-Confirmation Deposit"). No later than August 28, 2009, the Parent's ultimate parent company, Grupo México, is depositing into the Escrow Account an additional $500 million in cash in U.S. dollar currency.[5] The Escrow Account will be maintained through consummation of the Parent's Plan and will act as a forfeitable deposit, ensuring that the Parent will timely consummate the Parent's Plan.

[5] The Parent filed a document purporting to evidence the transfer of $500 million from BBVA Bancomer to an escrow account at Bank of New York on August 28, 2009.

Although both plan proponents raised objections to confirmation of the other's plan, the Court believes that both plans are confirmable. The only objections remaining to the Debtor's Plan are the objections of the Parent. The only objections remaining to the Parent's Plan are the objections of the Debtor and the United Steel Workers Union (the "Union"). The creditors voted overwhelmingly in favor of confirmation of the Debtor's Plan. With respect to the Parent's Plan, all creditors are unimpaired except for Class 4, and Class 4 voted overwhelmingly in favor of confirmation of the Parent's Plan.[6] Section 1129(a) of the Bankruptcy Code permits confirmation of only one plan of reorganization. Considering 1) the type of plans, 2) the treatment of creditors and equity, 3) the relative feasibility of each plan, and 4) the preferences of creditors and equity, this Court believes that the Parent's Plan of reorganization is superior. Both plans provide for the continuation of the business of the Debtor. Both plans pay creditors in full. The Parent's Plan retains the Parent's equity, while the Debtor's plan allows the Parent only the potential to retain a share of the SCC Litigation Trust after payment of creditors based upon a formula after determination of the value of the SCC Litigation Trust at confirmation. The Debtor's Plan is overwhelmingly preferred by creditors. However, the Parent's Plan is more likely to pay creditors in full in that it is funded with sufficient cash to pay creditors in full at confirmation, while the Debtor's Plan relies upon some recovery of the SCC Judgment. Although both plans are feasible, both plans raise feasibility questions. The Parent failed to reach a collective bargaining agreement with the Union which could result in a crippling strike. The Parent's Plan saddles the reorganized Debtor with obligations requiring it to upstream dividends and sales

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[6] In the original Report and Recommendation the Court stated that "the creditors voted overwhelmingly in favor of both plans." The statement is inaccurate because only the class 4 creditors voted in favor of the Parent's Plan. The votes of the remaining creditors, however, do not impact the Court's overall recommendation, since these creditors are unimpaired under the Parent's Plan and deemed to have accepted the Parent's Plan. Further, the Court made no error when discussing the preference of the creditors at ¶281 below.

proceeds to the Parent to pay off the borrowing facility used to fund the plan. Under the Parent's Plan the Debtor would also be liable for any creditor shortfall. On the other hand, support for the future operation of the reorganized debtor under the Debtor's Plan relies on the good graces of the Sterlite parent and not on any legal commitment. The Debtor's Plan guarantees performance with a $625 million letter of credit. The Parent's Plan guarantees performance with the escrow of $2.2 billion in cash and securities. In total, the Parent's Plan pays $2.4799 billion for the assets of the Debtor while the Debtor's Plan pays only $2.1675 billion.

Ultimately, this exceedingly complex bankruptcy case boils down to two major issues. Although other issues are raised and discussed herein, this Court believes that confirmation turns on: 1) whether the Parent's Plan violated the Special Successorship Clause ("SSC") of the Collective Bargaining Agreement between the Debtor and the Union[7] and 2) assuming it does not, which plan should be confirmed under Section 1129(c) of the Bankruptcy Code.[8] Because this Court believes both plans are confirmable but that the Parent's Plan should be confirmed, the Court will make detailed recommended findings with respect to the Parent's Plan. If the District Court disagrees with the Bankruptcy Court's proposed findings regarding either the SSC or Section 1129(c), it should return the case back to the Bankruptcy Court for further findings if it so desires.[9]

For the reasons detailed below, the Bankruptcy Court recommends that the District Court confirm the Parent's Plan and deny confirmation of the Debtor's Plan. The Bankruptcy Court also recommends that the District Court issue all injunctions set forth in the Parent's Plan.

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[7] Discussed in detail at IX. A. & B., below.

[8] Discussed in detail at X below.

[9] The Court would have to satisfy itself that the Debtor's Plan is still feasible because after the Bankruptcy Court's recommendation, Sterlite is no longer obligated to close under its Purchase and Sale Agreement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INITIATION OF BANKRUPTCY CASE AND APPOINTMENT OF CASE FIDUCIARIES

1. ASARCO is an integrated copper-mining, smelting and refining company that has operated for more than 100 years. The Debtor's need for bankruptcy protection arose when five interrelated and compounding problems—longstanding insolvency, debilitating bond debt, the lingering effects of a falling copper market, mounting asbestos and environmental claims, and an ongoing labor strike—converged.[10] As is detailed further below, some of these problems stemmed directly from actions taken by ASARCO's corporate parent, AMC, under the direction of the entities' ultimate parent, Mexican conglomerate Grupo México.

2. The Debtors filed voluntary petitions for reorganization in the Bankruptcy Court under chapter 11 of the Bankruptcy Code at various times in 2005, 2006, and 2008 as shown in Exhibit K to the Disclosure Statement and in footnote 3 herein. The Reorganization Cases are jointly administered as *In re ASARCO LLC, et al.*, Case No. 05-21207.[11] ASARCO voluntarily petitioned for relief under chapter 11 on August 9, 2005. The Debtor has remained in possession of its property and has operated its businesses as debtor in possession.

3. On August 25, 2005, the U.S. Trustee appointed an official committee of unsecured creditors of ASARCO ("ASARCO Committee"). (Dkt 182) The ASARCO Committee retained legal counsel (Reed Smith LLP) and financial advisors (FTI Consulting, Inc.).

4. On April 27, 2005, the U.S. Trustee appointed an official committee of unsecured creditors for the Asbestos Subsidiary Debtors (the "Asbestos Subsidiary Committee").

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[10] *See* Affidavit in Support of First-Day Motions ("First-Day Affidavit") ¶ 14. (Dkt 24, Ex. D248)

[11] Except where otherwise noted, references to the docket sheet ("Dkt") refer to the docket sheet in case No. 05-21207.

(Dkt 46 in Case No. 05-20521) The Asbestos Subsidiary Committee is comprised of 11 asbestos personal injury claimants acting through their counsel, asbestos plaintiffs' lawyers.[12] The Asbestos Subsidiary Committee retained various professional advisors[13] and has actively participated in the Reorganization Cases. Both Committees attended all court-ordered mediations, were involved in development of the plan sponsor selection process, and engaged in plan negotiations.

5. On August 26, 2008, the Bankruptcy Court directed the U.S. Trustee to appoint an Official Committee of Asbestos Claimants (the "Asbestos Claimants' Committee") to represent the specific class of creditors with asbestos-related claims against all Debtors. (Dkt 8859) The members of the Asbestos Subsidiary Committee were appointed as members of the Asbestos Claimants' Committee along with three additional members with premises liability claims. (*Id.*)

6. On April 19, 2005, the Bankruptcy Court approved the selection of Judge Robert C. Pate (the "Future Claims Representative" or "FCR") as the legal representative in the Asbestos Subsidiary Cases to represent the interest of future asbestos-related claimants. (Dkt 37 in Case No. 05-20521) On August 15 and 26, 2008, the Bankruptcy Court appointed Judge Pate as the legal representative for future claimants with asbestos-related claims against ASARCO and the subsidiary debtors other than the Asbestos Subsidiary Debtors. (Dkt 8734) The FCR

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[12] The attorney representatives include Al Brayton, Ann Harper, Brent Coon, Bryan Blevins, Charles Finley, Ryan A. Foster, Eric Bogdan, Thomas W. Bevan, Steve Baron, Thomas M. Wilson, Steven Kazan, Christina Skubic, Robert Phillips.

[13] Stutzman, Bromberg, Esserman & Plifka, P.C. (legal counsel), L Tersigni Consulting PC (financial advisors terminated on June 6, 2007), Charter Oak Financial Consultants, LLC (financial advisors), Risk International (insurance advisors), David P. Anderson and The Claro Group, LLC (insurance advisors), Legal Analysis Systems, Inc. (asbestos claims consultant), and Law Offices of Dean Baker (Connecticut local counsel).

retained various professional advisors.[14] The FCR also participated actively in the Reorganization Cases, attended all court-ordered mediations, was involved in development of the plan sponsor selection process, and engaged in plan negotiations. The FCR acted with diligence and reasonable prudence, and in all respects fulfilled his duties, responsibilities, and obligations as the legal representative of Demand holders in accordance with section 524(g) of the Bankruptcy Code. The FCR neither holds nor represents an interest that is adverse to the interests of any future asbestos claimant respecting the scope of his appointment.

II. SIGNIFICANT MILESTONES IN THE PROGRESS TOWARD ASARCO'S REORGANIZATION.

7. As detailed in the Disclosure Statement dated July 6, 2009, the four-year history of this complex case involved a vast array of issues and a huge number of parties in interest. Some of the milestones in the case are briefly summarized below.

A. Corporate Governance.

8. One of the first issues addressed by the Bankruptcy Court was ASARCO's corporate governance. By November 2005, due to a series of resignations after the August 2005 bankruptcy filing, ASARCO's sole director was Carlos Ruiz Sacristán, Grupo México's appointee. Ruiz was simultaneously a director of another Grupo México affiliate, Southern Peru Copper Corporation ("SPCC"), which competes directly against ASARCO. In addition, as is detailed below, SPCC[15] was the subject of a fraudulent transfer proceeding brought by ASARCO against AMC.

9. Raising possible conflicts of interest, the creditors' committees in the bankruptcy, supported by other major stakeholders, moved to restructure ASARCO's corporate

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[14] Oppenheimer, Blend, Harrison & Tate, Inc. (legal counsel), Legal Analysis Systems, Inc. (asbestos claims consultant), and Charter Oak Financial Consultants (financial advisors).

[15] SPCC is now known as Southern Copper Corporation ("SCC").

governance. After numerous bankruptcy court hearings, the corporate governance issues ultimately were resolved in December 2005 by a court-approved stipulation to which all parties, including the Parent, agreed. The Corporate Governance Stipulation (Dkt 1223, Ex. D250) added two independent directors—H. Malcolm Lovett, Jr. and Edward R. Caine—to ASARCO's board. The express purpose of the Stipulation was to "assure the independence of [ASARCO's] Board of Directors from interests of . . . Grupo." (*Id.*)

10. On January 23, 2006, the board unanimously determined to create a special committee of independent directors to handle matters where conflicts of interest may develop. The independent committee would oversee all transactions with Grupo México and its affiliates. Thereafter, additional matters, including but not limited to all litigation regarding the Tax Sharing Agreement between ASARCO and AMC and the SCC Litigation, were also referred to the independent committee. Disclosure Statement at 56. (Dkt 11899, Ex. 16)

11. Despite the fact that the Parent agreed to the Corporate Governance Stipulation and that the conflicts continued to persist, the Parent repeatedly sought to undo the independence of the Board. On January 23, 2007, the Parent moved to amend the Corporate Governance Stipulation to provide for ASARCO to have a five-person board, with three directors appointed by the Parent. (Dkt 3630, Ex. D251) After the Bankruptcy Court rejected this request, the Parent filed a second motion, this time seeking access to information or, alternatively, for an order amending the Corporate Governance Stipulation to provide for a five-member board. (Dkt 4245) When the Bankruptcy Court denied its request again, the Parent filed a third motion seeking to require ASARCO to obtain the Parent's consent before entering into any settlement or compromise that would result in a cash payment or claim allowance in excess of $10 million. (Dkt 5532, Ex. D254) The Bankruptcy Court denied that request as well. (Dkt 6329, Ex. D255)

The District Court rejected the Parent's appeal. Order, *In re ASARCO,* LLC, No. 2:07-CV-00461 (S.D. Tex. Apr. 18, 2008). The Parent dismissed its further appeal to the Fifth Circuit.

B. Labor Issues.

12. One of the principal factors leading to ASARCO's bankruptcy filing was a strike by nearly 1500 unionized workers representing about 70 percent of the company's workforce that began in July 2005.[16] Union representatives testified that in the period preceding the strike, ASARCO was starved of financial support and engaged in an antagonistic labor relations policy that included, among other things, elimination or modification of promised retiree health care benefits.[17] The policy, coupled with ASARCO's demands for "massive wage and benefit concessions" at the time of high copper prices, precipitated the four-month strike.[18] The vote approving the strike was nearly unanimous. By the time the strike began, collective bargaining agreements had expired, and most of the striking workers had been without any agreement for more than a year. The disruption caused by the strike resulted in immediate and substantial loss of sales, eroded customer confidence, stressed salaried employees and management, undermined worker moral, and diminished productivity. As the Bankruptcy Court previously found, the strike "significantly injured the debtor."[19]

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[16] *See* Lapinsky Proffer ¶ 76. (Dkt 12387, Ex. D170); Proffer of George M. Mack in Support of Confirmation of the Debtors' Joint Plan of Reorganization and in Opposition to Confirmation of Parent's and Harbinger's Plans of Reorganization ("Mack Proffer") ¶ 56. (Dkt 11936, Ex. 54); *see also* First-Day Aff. ¶ 19. (Dkt 24, Ex. D248)

[17] *See* Proffer of Manuel Armenta In Support of USW Objection to Confirmation of Parent Plan of Reorganization ("Armenta Proffer") ¶ 10. (Dkt 12375, Ex. USW669)

[18] *See* Proffer of Terry Bonds in Support of Motion ("Bonds Proffer") ¶¶ 11-12. (Dkt 4007, Ex. D166) Union representatives testified that the strike was precipitated by a hostile relationship with Grupo México which, according to the Union, "operated ASARCO solely in the interest of Grupo and ignored the interests of ASARCO's employees, creditors, and the communities in which it operated." *Id.* at ¶ 11.

[19] *See* March 15, 2007 Order Approving New Collective Bargaining Agreement with Unions, Including Monetary Obligations Thereunder, Pursuant to 11 U.S.C. §§ 363(b) and 105(a) ("CBA Order") ¶ 7. (Dkt 4179, Ex. D229); *see also* Rebuttal Report of George M. Mack in Response to the Proffer of Lisa M. Poulin in Support of ASARCO Incorporated and Americas Mining Corporation's Modified Fifth Amended Plan of Reorganization for the Debtors Under Chapter 11 of the Bankruptcy Code ("Mack Rebuttal to Poulin Proffer") ¶ 19 ("The labor strike in the second half of 2005 resulted in materially lower production and sales. For example, from July 2005 through

13. The strike was temporarily resolved in November 2005 with an interim agreement with approximately a year's duration. Even after workers returned to the job, labor relations were strained. Ed Caine, who became a member of ASARCO's Board of Directors in December 2005, concluded that "ASARCO needed to undertake significant efforts to improve its damaged relations with its hourly employees." Proffer of Ed Caine in Support of the Debtor's Collective Bargaining Agreement ("Caine CBA Proffer") at ¶ 5. (Dkt 12288-1, Ex. D275) As Caine explained:

> The company, as was assumed when the independent directors were named, had a very, very angry work force, very antagonistic. The operations were allowed to deteriorate substantially. The mines had been hydrated (sic). They weren't doing the stripping. Equipment was transferred.

2/28/07 Tr. at 168. (Ex. USW652) Joseph Lapinsky, after being appointed CEO of ASARCO by the new Board, visited each of the facilities and estimated that 98 percent of the acrimony was directed toward the Parent and 2 percent "to some of the management people who were perceived to be the face of Grupo." *Id.* at 243. He described the impact of the strike as "devastating." Proffer of Joseph F. Lapinsky in Support of the Debtor's Collective Bargaining Agreement ("Lapinsky CBA Proffer") at ¶ 58. (Dkt 12288-1, Ex. D276)

14. After months of arduous negotiations in anticipation of the expiration of the interim labor agreement, ASARCO and the Union finally agreed on the terms of a new Collective Bargaining Agreement ("CBA"). The CBA was supported by the creditors' committees, the FCR, and ASARCO's majority bondholders. The Bankruptcy Court approved the CBA on March 15, 2007. (Dkt 4179, Ex. D229)

November 2005, aggregate mine production was 92 million pounds, which is 48 percent lower than the 177 million pounds produced during the same five-month period in 2008."). (Dkt 12029, Ex. 55)

15. In approving the CBA, the Bankruptcy Court found that the CBA included significant concessions from the Union to allow ASARCO to "optimize efficiencies through job combinations, simplification of job classes, and similar arrangements." *See* Dkt 4179 at ¶ 9. These concessions by the Union were designed to "greatly improve efficiency and . . . lead to significant cost savings for the Debtor." (*Id.*) In short, the CBA was critical to a successful reorganization and assisted in the Debtor being in position to generate $1.4 billion in cash that makes both the Debtor's Plan and the Parent's Plan possible. By Order dated October 14, 2008, the District Court affirmed the approval order. *See ASARCO Inc. v. ASARCO LLC*, Civil No. CC-07-133, 2008 WL 4609997, at *1 (S.D. Tex. Oct. 14, 2008). (Ex. D279) The Parent appealed that decision to the Fifth Circuit, but subsequently dismissed its appeal. (Ex. D280)

C. Plan Sponsor Selection Process.

16. ASARCO and its professional advisors devoted two years' effort to identifying and negotiating with a plan sponsor in order to maximize the value of the Debtor's Estates. After evaluating different alternatives to maximize Estate assets and consulting with its legal and financial advisors, the ASARCO Board approved an auction of the Debtor's assets as the best way to maximize value. At an April 11, 2007, hearing before the Bankruptcy Court, the Debtor submitted a process and tentative timetable to identify parties (including creditors, the Parent, and third parties) interested in co-sponsoring a Debtor-proposed plan of reorganization and to provide those parties access to the Debtor's information for the purpose of assessing plan alternatives. *See* Courtroom Minutes Apr. 27, 2007. (Dkt 4583, Ex. D265)

17. Over the next year, ASARCO's financial advisor, Lehman Brothers, implemented an aggressive marketing program to find a plan sponsor. This included collecting information, populating a virtual data room, and executing confidentiality agreements. Also, during this time, the Parent filed a motion seeking the appointment of an examiner to investigate

the good faith of ongoing plan negotiations, which the Court approved. (Dkt 7081, 7350) The Examiner monitored and assessed the plan selection process, and ultimately reported that the process was conducted in accordance with all relevant orders.

18. On March 25, 2008, the Bankruptcy Court approved the Bid Procedures Order for selecting a Chapter 11 plan sponsor. (Dkt 7239, Ex. D269) The plan-sponsor-selection procedures were designed to maximize the value of the assets of the Estates by encouraging bidders to submit qualifying bids in order to participate in a plan-sponsor-selection meeting and to increase their bids at the meeting relative to other competing bidders. By establishing guidelines for the process, the procedures were intended to advance the process to completion, maintain a level playing field among participants, and promote healthy competition.

19. In May 2008, ASARCO conducted a plan-sponsor-selection meeting attended by more than 130 individuals. Four bidders, including the Parent, competed to be selected as plan sponsor. The result of the plan-sponsor-selection meeting was the selection of Sterlite, a global mining company based in India, as plan sponsor. Sterlite and ASARCO entered into a purchase and sale agreement (the "Original Sterlite PSA") under which Sterlite agreed to purchase substantially all of ASARCO's assets for $2.6 billion, as well as to assume certain liabilities worth approximately $400 million. In a July 1, 2008, Order, the Bankruptcy Court found that "ASARCO's selection of Sterlite as the Successful Bidder was made pursuant to ASARCO's sound business judgment and in accordance with the procedures approved in the earlier Interim Order." (Dkt 8005) The Court further found that the procedures were "designed to maximize the value of ASARCO's estate" and that ASARCO had "fully marketed" its assets and demonstrated the likelihood that "all bidders that would be interested in this sale process have been identified." (*Id.*)

20. The Parent appealed the Bankruptcy Court's July 1, 2008, Order. The District Court concluded that the order was not final or appealable and alternatively found "no error in the Bankruptcy Court's legal conclusions and no clear error in its factual findings." Order Dismissing Appeal, *ASARCO Inc. and Americas Mining Corp. v. ASARCO LLC,* No. CC-08-214 (S.D. Tex. Sept. 26, 2008). The Parent appealed to the Fifth Circuit, but later dismissed its appeal.

D. Lifting of Exclusivity.

21. In July 2008, in conjunction with approval of selection of Sterlite as plan sponsor, the Bankruptcy Court lifted exclusivity, allowing the Parent to file a competing plan of reorganization to that of the Debtor's planned sale to Sterlite.

E. Default by Sterlite.

22. On October 13, 2008, Sterlite informed ASARCO that, as a result of the decline in copper prices and general economic downturn, it would not close under the Original Sterlite PSA without a material price reduction. The Original Sterlite PSA did not contain any copper price or financing contingencies excusing Sterlite's performance (as acknowledged by Mr. C.V. Krishan, President of Sterlite USA and Managing Director of Sterlite India, in his testimony on April 14, 2009). Mr. Krishnan also testified that at the time Sterlite asked for a renegotiation of the Original Sterlite PSA in October 2008, Sterlite had cash and facilities to close under the original terms and original purchase price. ASARCO accordingly suspended solicitation and balloting with respect to the plan. The Parent likewise suspended its competing plan of reorganization.

F. Continuation of the Plan Selection Process.

23. Shortly thereafter, Barclays (which ASARCO retained as its financial advisor after Barclays' acquisition of certain businesses of Lehman Brothers) began efforts to re-market the assets to other potential plan sponsors, albeit under substantially different market and financial conditions than when it began the initial marketing process in 2007. ASARCO presented evidence that since October 2008, at least fifteen major mining companies had announced that, as a result of significant reduction in copper prices, they were decreasing production through mine closures, production halts, or slowdowns, and several copper miners had delayed or canceled planned operational expansions. Merger and acquisition activity in the copper market had slowed dramatically. In addition, debt and equity financing, frozen in late 2008, had been slow to thaw. Proffer of George M. Mack in Support of Motion for Order, Pursuant to §§ 363, 105, and Fed. R. Bankr. P. 9019, Approving Settlement and Release and Revised Bid Protections Contained in the New Purchase and Sale Agreement Among ASARCO LLC and Certain of its Subsidiaries and Sterlite (USA), Inc. and for Related Relief ¶¶ 16-18. (Dkt 10801, Ex. D150)

24. In addition to seeking other third-party transactions, ASARCO's Board of Directors also directed its advisors not only to continue negotiating with Sterlite on a modified transaction but also to develop a stand-alone plan alternative. As part of this process, ASARCO formulated a stand-alone plan that was circulated to its creditor constituents in December 2008.

25. Ultimately, after four months of vigorous negotiations with Sterlite, more than 20 meetings of the ASARCO Board of Directors between October 2008 and February 2009, and a full vetting of the advantages and disadvantages of a Sterlite-sponsored, stalking-horse plan and other plan structures potentially available to ASARCO, the Board, in consultation with

ASARCO's advisors and some of the key creditor constituents, determined that a modified transaction and settlement with Sterlite would yield the highest and best value, and thus, was in the best interests of the Debtor, its creditors, and the Estates. ASARCO entered a new purchase and sale agreement with Sterlite that as subsequently amended ("New Plan Sponsor PSA") forms the basis of the Debtor's Plan.

26. After an evidentiary hearing, the Bankruptcy Court approved certain provisions of the New Plan Sponsor PSA by Order entered April 22, 2009. (Dkt 10935, Ex. D270) The Bankruptcy Court expressly found, among other things, that in connection with the New Plan Sponsor PSA, ASARCO and its Board complied with fiduciary duties and "acted in the best interest of the Debtors, their estates and all creditors and stakeholders." (*Id.*)

27. The New Plan Sponsor PSA addresses a potential release of Sterlite's liability for breach of the earlier purchase and sale agreement. The Bankruptcy Court's April 22, 2009, Order found that the release provisions are "the result of good-faith, arm's-length bargaining" and represent "a reasonable, fair and equitable resolution of the controversy between ASARCO and Sterlite." (*Id.*) Whether or not Sterlite ultimately will be released depends on a variety of circumstances, including whether the Debtor's Plan is confirmed.[20]

28. The Parent appealed the April 22, 2009, Order, but before briefing moved to stay the appeal, conceding that the appeal was likely to be mooted by subsequent events.

29. The continuation of the Plan Selection Process resulting in the New Plan

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[20] The April 22, 2009 Order explicitly clarifies situations in which Sterlite will not be released. In particular, in accordance with the parties' representations to the Bankruptcy Court, the Order provides that Sterlite will not be released if a reorganization plan filed by the Parent is confirmed without support of ASARCO. The Order further prohibits ASARCO from taking action in support of an alternative plan without court approval, provides that abstaining from supporting an alternative plan shall not be deemed "support" so as to trigger a release of Sterlite, and provides that the ASARCO Board may in the exercise of its fiduciary duties abstain from supporting an alternative plan so as to avoid releasing Sterlite, if that course of action is in the best interest of the estate. (Dkt 10935, Ex. D270)

Sponsor PSA resulted in tangible benefit to the estate by promoting plan competition that resulted in the filing and prosecution of the Parent's Plan.

G. Environmental Claims and Settlement.

30. This case is perhaps the largest and most complex in bankruptcy history with respect to claims for environmental liability. Asserted environmental claims against ASARCO total approximately $6.5 billion and involve more than 50 different sites throughout the United States. Claimants include the United States, sixteen state governments, two Indian tribes, and numerous private parties. On January 30, 2007, ASARCO moved the Bankruptcy Court to estimate the environmental claims.

31. After discussions with interested parties, the Bankruptcy Court issued a case management order on March 23, 2007, which set forth procedures for estimating environmental claims at 21 sites. These 21 sites together comprised approximately $6 billion of the approximately $6.5 billion in asserted environmental claims. (Dkt 4238) Before estimation hearings began, ASARCO settled claims related to all or part of 19 of the 21 sites; these settlements were approved by the Court, and no party appealed. Between August 6, 2007, and October 12, 2007, the Court proceeded with scheduled estimation hearings regarding certain claims at the three largest sites that had not been settled.

32. Soon thereafter, a Bankruptcy Court-ordered mediation that originally was intended to focus on asbestos liability (which is discussed below) broadened to encompass environmental issues and ultimately resulted in an agreement in principle with respect to the majority of the Debtors' environmental liability. Based on this agreement in principle, the parties requested that the Bankruptcy Court defer ruling on the three pending estimation

proceedings and defer hearing additional estimation proceedings regarding environmental claims.

33. The agreement in principle reached at the mediation was incorporated into the plan of reorganization that the Debtors filed on July 31, 2008, and as amended on September 12, 2008, and September 25, 2008. (Dkt 8569, 9101, 9350) As is discussed above, this plan was based on the original purchase and sale agreement and was subsequently suspended. Following suspension of that plan, however, the Debtors and the federal and state governments continued negotiations to resolve issues left open by the agreement in principle and ultimately reached a comprehensive settlement comprised of five separate settlement agreements that resolved approximately $3.5 billion of environmental claims filed against the estate.

34. Just before the Bankruptcy Court was to conduct a hearing on the Debtors' motion to approve the environmental settlements, the Parent moved to withdraw the reference and remove the proceeding to the District Court. In its report and recommendation on the motion, the Bankruptcy Court concluded:

> [T]he Parent's last minute attempt to remove . . . cannot be viewed as anything more than forum shopping and delay tactics. . . . If the Parent can delay the process and cause the Sterlite deal to fall apart, the Parent will arguably be the only contender for the Debtor. The Parent's motion to withdraw the reference is simply another delay tactic aimed at knocking out competitive bidders.

(Dkt 10992). The District Court denied the motion to withdraw the reference and subsequently denied the Parent's motion to certify that decision for interlocutory review and to stay further proceedings on the motion to approve the environmental settlements. Order Denying Motion to Withdraw the Reference, *In re ASARCO, LLC*, No. CC-09-91 (S.D. Tex. May 12, 2009); Order Denying the Parent's Motion for Certification of Interlocutory Appeal and Stay, *In re ASARCO, LLC*, No. CC-09-91 (S.D. Tex. May 15, 2009).

35. The Bankruptcy Court conducted evidentiary hearings regarding the environmental settlements on May 18-29, 2009, and heard closing argument on May 29, 2009. The Bankruptcy Court considered testimony from almost 50 witnesses and admitted 1700 exhibits. On June 5, 2009, the Bankruptcy Court issued a 96-page Findings of Fact and Conclusions of Law (Dkt 11631) and issued orders approving the environmental settlement agreements under bankruptcy and environmental law. (Dkt 11631, 11637-11642) Although the Parent appealed the approval order, the Parent's Plan provides that it will withdraw its objection and appeal and implement the settlement agreements if the Parent's Plan is confirmed. On August 6, 2009, the District Court granted the Parent's motion to stay its appeal pending confirmation.

H. Asbestos-related Claims and Settlement.

36. Another factor precipitating the Debtor's bankruptcies was the specter of asbestos-related liability. More than 100,000 claimants filed asbestos-related claims or submitted electronic claims data against ASARCO or one or more of the Subsidiary Debtors. Lapinsky Proffer ¶ 31. (Dkt 12387, Ex. D170) In a number of these claims against the Asbestos Subsidiary Debtors, and in prepetition lawsuits, ASARCO was alleged to be derivatively liable for claims against the Asbestos Subsidiary Debtors, an allegation ASARCO has denied. *Id.*

37. On June 15, 2005, ASARCO initiated an adversary proceeding against the Asbestos Subsidiary Debtors and the FCR, seeking a declaration that ASARCO was not liable for the derivative asbestos claims. (Adv. P. 05-02048) Pursuant to a stipulation approved on April 25, 2006, the Asbestos Subsidiary Committee and the FCR were granted standing to prosecute the derivative asbestos claims on behalf of the Asbestos Subsidiary Debtors' Estates and were authorized to take the lead role in prosecuting the adversary proceeding and all claims,

defenses, and counterclaims against ASARCO related to the derivative asbestos claims. (Dkt 2054)

38. In March 2006, ASARCO moved for estimation of the amount of ASARCO's liability, if any, for the derivative asbestos claims, and proposed a procedure for such estimation proceedings. (Dkt 1887) Objections to the estimation motion were filed by the Asbestos Subsidiary Committee, the FCR, and Fireman's Fund Insurance Company ("FFIC"). On May 9, 2006, the Asbestos Subsidiary Committee and the FCR, on behalf of the Asbestos Subsidiary Debtors, filed an Amended Complaint seeking a declaratory judgment that ASARCO is liable for the Asbestos Subsidiary Debtors' asbestos-related liabilities under alter ego theories. (Dkt 51 in Adv. P. 05-02048)

39. Discovery related to the asbestos adversary proceeding and the estimation motion was extensive, and the Bankruptcy Court held numerous status conferences and discovery hearings. Millions of pages of documents were produced and many millions more were reviewed. Historic documents relating to ASARCO and its subsidiaries, LAQ, and CAPCO were collected from storage facilities around the country. In addition to discovery from the Debtors, the Asbestos Subsidiary Committee and FCR issued third-party subpoenas to and/or gathered materials from Arthur Andersen LLP, Keegan Linscott Kenon P.C., Credit Suisse Securities (USA) LLC, PricewaterhouseCoopers LLP, JPMorgan Chase Bank, Covington & Burling LLP, and Porzio Bromberg & Newman, P.C. ASARCO produced its historic asbestos claims data. Three expert econometricians (one retained by ASARCO, one by the FCR and Asbestos Subsidiary Committee, and one by the ASARCO Committee) issued reports, supplemental reports, and rebuttal reports and were deposed.

40. ASARCO reached agreement with the Asbestos Subsidiary Committee and the FCR regarding some aspects of a procedure for resolving the derivative asbestos claims. The agreement provided for a stipulated process in a contested matter under section 502 of the Bankruptcy Code to establish the aggregate amount of ASARCO's liability, if any, for the asbestos-related liability of the Asbestos Subsidiary Debtors. The established amount would be incorporated into ASARCO's plan of reorganization. The Bankruptcy Court entered an order approving this agreement on March 20, 2007. (Dkt 4215)

41. The order included an addendum that resolved concerns raised by FFIC in an objection and provided that estimation proceedings would be conducted to provide for "insurance neutrality." (*Id.*) Eventually, the terms of the insurance neutrality addendum were extended to all insurance companies that are or may become interested parties in the Debtor's reorganization cases. (Dkt 7965, 11231)

42. On May 16, 2007, the parties served their estimates of the maximum aggregate asbestos-related liability of the Asbestos Subsidiary Debtors as of the dates that the Asbestos Subsidiary Debtors and ASARCO filed for bankruptcy protection. The estimates ranged from $80 million to $2.1 billion. These estimates did not include premises liability claims, direct asbestos claims against ASARCO, and defense costs.

43. By order dated September 20, 2007, the Bankruptcy Court appointed the Honorable Elizabeth W. Magner, United States Bankruptcy Judge for the Eastern District of Louisiana, to mediate estimation of the derivative asbestos claims. (Dkt 5885) Judge Magner was specially assigned by Fifth Circuit Chief Judge Edith Jones to serve in this role. Mediation talks began in October 2007, and continued in November and December 2007, and January 2008. The focus of discussions expanded from asbestos claims to encompass a consensual plan

of reorganization, and Judge Magner began a dialogue among ASARCO and its key constituencies. Because the talks were productive, the parties asked the Bankruptcy Court to postpone the estimation hearing regarding the derivative asbestos claims, which was set to begin on January 2, 2008.

44. These discussions ultimately resulted in development of a global resolution of the Debtor's asbestos and environmental liabilities, which became part of a consensual plan of reorganization and, in the parties' view, obviated the need for an estimation hearing. The agreements regarding asbestos and environmental liabilities were incorporated into a proposed plan of reorganization. As discussed above, the Debtor suspended this plan in October 2008. Beginning in March 2009, the ASARCO Committee requested, with the support of the Debtor, that the Bankruptcy Court resume scheduling of an estimation hearing on derivative asbestos claims against ASARCO. The Bankruptcy Court granted the request and set a date for the estimation hearing. Days before the scheduled estimation hearing, ASARCO requested that the Bankruptcy Court expand the estimation hearing to include direct claims against ASARCO.

45. The estimation hearing was obviated by a June 2009, settlement agreement among ASARCO, the Asbestos Claimants' Committee, the Asbestos Subsidiary Committee, the FCR, and Sterlite. (Dkt 11898) As discussed below, under the Debtor's Plan, holders of Class 4 Unsecured Asbestos Personal Injury Claims would agree to reduce their aggregate claims to $1 billion. (*Id.*); Lapinsky Proffer ¶ 40. (Dkt 12387, Ex. D170) The Debtor agreed to the allowance of an aggregate Class 4 claim of $1 billion. The parties further agreed that, under the Debtor's Plan, for Class 4, $750 million would be used to calculate the pro rata

distributions of consideration between Classes 3 and 4. (Dkt 11898); Lapinsky Proffer ¶ 13. (Dkt 12387, Ex. D170)

46. Ultimately both the Debtor and the Parent reached agreements with the Asbestos Claimants' Committee, the Asbestos Subsidiary Committee, and the FCR. Both plans provide for similar consensual treatment of the asbestos liability and for a Section 524(g) channeling injunction.

I. The SCC Litigation Against AMC.

47. In February 2007, ASARCO filed a Complaint to avoid the 2003 fraudulent transfer of its 54.2 percent ownership interest in Southern Peru Copper Company ("SPCC") to its parent, AMC, a wholly owned subsidiary of Grupo México. By agreement between the District Court and the Bankruptcy Court, and at the request of the Bankruptcy Judge, the reference was withdrawn with respect to this avoidance action, and the action was transferred to the District Court in Brownsville, Texas. The Honorable Andrew S. Hanen presided over a four-week bench trial of the action in May and June 2008.

48. In August 2008, the District Court issued a Memorandum Opinion and Order on liability issues. *ASARCO LLC v. Americas Mining Corp.*, 396 B.R. 278 (S.D. Tex. 2008) ("*ASARCO I*"). The District Court found AMC liable for actual fraudulent transfer because AMC entered into the challenged transaction with full knowledge that ASARCO's creditors would be hindered or delayed as a result. *See id.* The District Court further held that AMC aided and abetted and conspired with the directors of ASARCO to accomplish the challenged transaction in breach of the ASARCO directors' fiduciary duties owed to ASARCO for the benefit of ASARCO's creditors. *See id.* Among other things, the District Court found that AMC "did not engage in fair dealing" and showed "callous indifference" with respect to

ASARCO's creditors. *Id.* at 408, 420. The District Court concluded that, at the time of the challenged transaction, AMC "had an agreement with ASARCO's directors to abandon their duties to ASARCO and ASARCO's creditors and instead act to structure and accomplish the SPCC transfer, knowing that the transaction as contemplated would constitute a transfer in fraud of ASARCO's creditors." *Id.* at 420.

49. The District Court's liability opinion described the history of the Parent's prepetition conduct, directed by Grupo México, that contributed to ASARCO's precarious financial condition in the years preceding ASARCO's bankruptcy. According to the opinion, this conduct included, but was not limited to, planning and executing the 2003 fraudulent transfer:

- Grupo México's leveraged buyout of ASARCO in 1999 saddled ASARCO with a total long-term debt of $1.767 billion and a $450 million revolving credit facility. *Id.* at 301.

- To reduce the debt from the 1999 leveraged buyout, ASARCO almost immediately had to begin selling its "non-core" assets. *Id.* at 305.

- To stay afloat between 1999 and 2002, ASARCO monetized insurance policies, sold equipment, high graded certain mines, and failed to make payments and cash calls on certain legal obligations, investment properties, and/or mining prospects. *Id.* at 307.

- These actions proved futile. At the end of fiscal 2003, ASARCO—then insolvent—had a negative annual cash flow of $151.1 million. *See id.* at 300-01, 305-07, 314-15, 401.

- When Grupo México and AMC realized that the SPCC stock, which was ASARCO's crown jewel, might be lost to creditors, Grupo México and AMC decided that ASARCO should sell its interest in SPCC to AMC. *Id.* at 410.

- Grupo México and AMC had a strong desire and intent to transfer the SPCC shares from ASARCO to AMC so that Grupo México and AMC could have this asset unencumbered by the claims of others. *Id.* at 375.

- Grupo México and AMC concealed and manipulated information, broke promises, and ultimately closed the transaction over the objections and

contrary to the advice of ASARCO's independent directors, financial advisors, legal advisors, and management. *Id.* at 386.

- In consideration for ASARCO's 54.2 percent interest in SPCC, AMC "forgave" $41.75 million in intercompany debt and gave ASARCO $500 million in cash, a note with a face value of $123.5 million (to be paid in seven equal installments with 7 percent interest), and a note with a face value of $100 million (to be paid in eight equal installments with 7 percent interest and to be used to pay environmental claims). *Id.* at 339.

- AMC did not pay a fair price for ASARCO's interest in SPCC, but rather structured the transaction to leave a cash-starved ASARCO with less cash than it had prior to the transfer. *Id.* at 411, 414.

- Between the 2003 fraudulent transfer and ASARCO's bankruptcy filing in August 2005, ASARCO, controlled by Grupo México and AMC, continued to survive from hand to mouth. It cannibalized assets, sold or abandoned other assets, fired employees, high graded mines, monetized badly needed insurance policies, and cut costs. It also maintained a pattern of delaying or refusing to pay creditors. In layman's terms, it was constantly "robbing Peter to pay Paul." *Id.* at 314.

50. On April 1, 2009, the District Court issued a Memorandum Opinion and Order, amended on April 14, 2009 to correct a clerical error, in which it ordered AMC to return all stock traceable to the fraudulently transferred SPCC stock and to pay money damages exceeding $1 billion. *ASARCO LLC v. Americas Mining Corp.*, No. 1:07-CV-00018, 2009 WL 890551 (S.D. Tex. April 1, 2009); *ASARCO LLC v. Americas Mining Corp.*, 404 B.R. 150 (S.D. Tex. 2009) ("*ASARCO II*").

51. The District Court issued its Final Judgment on April 15, 2009 ("SCC Judgment"). The SCC Judgment awards ASARCO the return of more than 260 million shares of SCC common stock (which represents approximately 30.6 percent of the 850,000,000 total shares of SCC common stock currently outstanding) and money damages and prejudgment interest of $1,382,307,216, plus post-judgment interest. As of August 21, 2009, based on the price of SCC stock, which is publicly traded, the SCC Judgment on its face exceeds $8.8 billion.

52. On July 20, 2009, the District Court denied AMC's motion to alter or amend the SCC Judgment or for new trial. The District Court concluded:

> AMC planned, ordered, and engineered the transfer of ASARCO's "crown jewel" (i.e., the [SCC stock]) and then reaped the benefit of this illicit transfer. It was aware of the fiduciary duty owed by ASARCO's directors and was on notice that this transfer would be considered a violation of that duty. For AMC to claim immunity from liability for these wrongful actions simply because, rather than directly effecting the transfer itself, AMC accomplished its goal by inducing ASARCO's inside directors, over whom AMC had total control, to breach their fiduciary duty to ASARCO's creditors, is contrary not only to law, but to principles of equity and any plausible notion of ethical conduct.

ASARCO LLC v. Americas Mining Corp., No. 1:07-CV-00018, 2009 WL 2168778, at *6 (S.D. Tex. July 20, 2009).

53. AMC's appeal of the SCC Judgment is currently pending in the Fifth Circuit. As the District Court required, AMC secured the SCC Judgment pending appeal by, among other things, (i) placing 260,093,694 shares of common stock of SCC into an escrow account with a neutral third party, and (ii) placing additional shares of SCC common stock into the same escrow having a value equal to twice the value of the $1,382,307,216.75 cash portion of the SCC Judgment. *See* Memorandum Opinion and Order, *ASARCO LLC v. Americas Mining Corp.*, No. 1:07-CV-00018 (S.D. Tex., June 2, 2009).

J. Auction of the SCC Judgment.

54. The SCC Judgment is a valuable asset of ASARCO's estate. At ASARCO's direction, ASARCO's financial advisors, Barclays, evaluated alternatives for monetizing the SCC Judgment. Barclays contacted more than 150 persons, including hedge funds and private equity and institutional investors, that it had identified as potentially interested in acquiring all or a portion of the SCC Judgment. Barclays then distributed a series of informational materials to these persons depending on their level of interest. Eventually, Barclays received numerous indicative offers demonstrating interest in purchasing all or part of

the SCC Judgment. A select group of these were identified as having the financial wherewithal to consummate the potential purchase and were invited to conduct additional due diligence and make binding proposals. Proffer of George M. Mack in Support of the Debtors' Motion for an Order Approving the Expense Reimbursement in Connection with the Auction and Proposed Sale of the SCC Judgment ¶¶ 10-11. (Ex. D151)

55. Following hearings on July 21, July 23, and July 28, 2009, the Bankruptcy Court granted ASARCO's motion for approval of reimbursement of certain expenses to be incurred in connection with the auction and potential sale of the SCC Judgment. (Dkt 12144)[21] ASARCO received a total of eight indicative offers in the first round of the auction. *See* Final Proffer of Professor Kenneth N. Klee in Support of Confirmation of the Sixth Amended Joint Plan of Reorganization for the Debtors Under Chapter 11 of the United States Bankruptcy Code, As Modified ("Klee Proffer") ¶¶ 61, 62. (Dkt 12514, Ex. D156)

56. ASARCO, in consultation with its advisors, invited selected initial bidders to proceed to the second phase of the process during which they were given the opportunity to conduct additional due diligence and make a binding proposal for the purchase of all or a portion of the SCC Judgment. ASARCO received a binding bid for SCC Litigation Trust Interests on August 14, 2009. *See* Klee Proffer ¶ 62 (Dkt 12514, Ex. D156). Information regarding the auction was analyzed by Professor Klee in connection with his opinion of the value of the SCC Judgment. *Id.*

57. 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.

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[21] The Parent appealed the expense reimbursement order. The Bankruptcy Court subsequently stayed payment of reimbursements until September 30, 2009.

K. Asset Sales.

58. As part of efforts to maximize recovery to the estate, the Debtor obtained Bankruptcy Court orders authorizing it to sell certain real property and other non-operating assets. *See, e.g.*, Dkt 3100, Ex. D259. These sales included the $63.5 million sale of the Tennessee Mines Division to Glencore Ltd. in 2006. (Dkt 2269, Ex. D260) In total, the Debtor has sold approximately $82.5 million in real property. *See* Disclosure Statement at 62. (Dkt 11899, Ex. 16) In addition, ASARCO sold certain stocks on the open market, which has yielded approximately $21.25 million, all for the benefit of the Estates. *Id.*

L. The Tax Adversary Proceeding

59. On February 5, 2007, ASARCO filed a Complaint for Declaratory and Injunctive Relief (the "Tax Complaint") against the Parent and certain other defendants[22] initiating a new adversary proceeding (the "Tax Adversary"). In the Tax Adversary the Parent and the Debtor have submitted briefing and evidence concerning the parties' respective rights and obligations with regard to (1) the Parent's request for an administrative expense for $161.7 million, plus $29.1 million in interest, for ASARCO's liability for post-petition taxes (for a total of approximately $190 million) incurred by Debtor's estate arising from over $1 billion in post-petition income earned by the estate (the "Tax Claim"); (2) an approximately $60 million tax refund, including interest (the "Tax Refund"); and (3) a deferred tax liability from a 2003 transaction resulting in a $600 million deferred intercompany gain (the "Deferred Tax

[22] Other defendants in the Tax Adversary include Lac d'Amiante du Quebec Ltee, ("Lac d' Amiante"), Lake Asbestos of Quebec, Ltd. ("Lake Asbestos"), LAQ Canada, Ltd. ("LAQ"), CAPCO Pipe Company, Inc. ("CAPCO"), Cement Asbestos Products Company ("Cement"), Rinker Materials South Central, Inc. f/k/a/ American Limestone Company ("Rinker"), Enthone Inc. f/k/a Enthone-OMI, Inc. ("Enthone"), EI Liquidation, Inc. f/k/a Enthone, Incorporated ("EI"), and OMI International Corporation ("OMI"). Debtor dismissed Rinker from the Tax Adversary Proceeding. *See* Stipulation and Order Dismissing Claims Against Rinker Materials South Central, Inc. f/k/a American Limestone Company. (Tax Docket No. 37.) Collectively, Enthone, EI, and OMI are the "Enthone Defendants.

Liability").[23] The Court heard evidence and argument from the parties on these three issues prior to these Confirmation hearings.

60. In the Tax Adversary, the Parent asserts the Tax Claim based on a Tax Sharing Agreement between the Debtor and the Parent. The Parent asserts a claim to the Tax Refund under federal law because ASARCO is a disregarded entity. If the Court rules that the Tax Refund is the property of ASARCO under principles of state merger or other state law, then the Parent asserts that the Deferred Tax Liability is a liability of ASARCO based on these same principles.

61. The Parent asserts that the Parent's Plan withdraws the Parent's Tax Claim and the Deferred Tax Liability claim, as well as the Parent's claim to the Tax Refund, thereby making the value of these claims available to the ASARCO estate and its creditors.[24] Therefore, the Parent's Plan does not depend on the outcome of the Tax Adversary. If, however, the Parent's Tax Claim or Deferred Tax Liability claim is allowed, or the Parent is entitled to the Tax Refund, the value given by the Parent's Plan to the estate increases by $190 million, $250 million or $60 million, respectively.

62. The Debtor's Plan, in comparison, assumes that the Debtor is entitled to the Tax Refund, and assumes that the Parent will not prevail on the Tax Claim – and if the Debtor is incorrect with regard to either claim, it will materially affect the Debtor's Waterfall. If the Parent prevails on the Tax Claim or the Deferred Tax Liability claim, or if the matter remains unresolved on the Effective Date, the Debtor will be required to reserve at least $190 or $250 million, respectively, to cover the Parent's Tax Claim or the Deferred Tax Liability claim; if the

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[23] These tax issues are being currently litigated in *ASARCO LLC v. Americas Mining Corporation (In re ASARCO LLC)*, Adversary No. 07-02011. Pleadings from the Tax Adversary will be referred to as "Tax Docket __.".

[24]

Parent prevails on the Tax Refund, the Debtor's Waterfall must be adjusted to compensate for the $60 million it will not receive by virtue of the Tax Refund.

63. Either the Parent or Debtor is liable for taxes that accrued with respect to the income from Debtor's operations from 2005 through 2008. A portion of the $161 million that makes up the Tax Claim will be refunded by the IRS when deductions arising under either plan of reorganization are carried back to prior tax years in the form of a tax refund claim. Taking into account the taxes due from Debtor's operations and the potential future tax refunds of such taxes, there will still be an estimated $85 million of taxes and interest that is non-refundable even after the maximum amount of tax refunds are obtained by Parent. The non-refundable tax is comprised of approximately $39 million in federal alternative minimum tax plus $31 million in state income tax plus $15 million in interest.

64. If the Parent's Plan is confirmed the Deferred Tax liability will remain with AMC, the SCC Judgment will be released, and the Deferred Tax liability will remain deferred unless and until there is a deconsolidation event that triggers the gain. If the Debtor's Plan is confirmed, and the SCC Judgment is not released and is affirmed on appeal, upon the transfer of the SCC Shares from escrow to Sterlite, a deconsolidation event will occur that will trigger the Deferred Tax liability, which will result in a tax liability of approximately $250 million on the $600 million deferred intercompany gain. If the Court determines that the Deferred Tax liability remains with the Parent, the Parent will be responsible for the resulting tax if and when the deferred intercompany gain is triggered. If the Deferred Tax liability remains with the Debtor, then the Debtor's Waterfall must account for the tax that will be triggered upon the transfer of the SCC Shares to Sterlite.

65. On June 5, 2009, Debtor filed an Equitable Subordination Complaint requesting the Parent's Tax Claim, if allowed, be subordinated.[25] Debtor's equitable subordination claim is based on the argument that the 2003 SPCC Transaction that is the subject of the SCC Litigation constitutes inequitable conduct warranting subordination. The Parent filed a Motion to Dismiss the Equitable Subordination Complaint. The Court has not yet determined whether the Equitable Subordination Adversary should be dismissed, or if the Parent's Tax Claim should be subordinated. The Debtor's Plan, however, subordinates any tax liability to the Parent.

M. Agreement With the Majority Bondholders.

66. The Debtor's Plan and the Parent's Plan offer the same treatment to the Bondholders. The Debtor and the Majority Bondholders entered into an agreement in principle to resolve Bondholder Claims, and the Parent agreed to accept the terms, as follows:

a. Holders of the Bonds will receive Allowed Class 3 Claims in an amount equal to the $439.8 million principal amount of their Bonds, together with all accrued but unpaid prepetition interest of $7.8 million on those Bonds, for a total of $447.6 million. These claims will be payable *pari passu* with the Allowed Claims of general unsecured creditors for principal and prepetition interest, if any.

b. Holders of the Bonds will receive Allowed Claims for all accrued Post-Petition Interest at the non-default rate specified in the relevant Bond indentures, compounded based on when interest payments were due under the indentures (estimated to be $162 million as of December 31, 2009). These Allowed Claims will be payable (a) after the Allowed Claims of general unsecured creditors for principal and prepetition interest have been paid in full and (b) *pari passu* with the Allowed Claims of general unsecured creditors for Post-Petition Interest.

c. Holders of the Montana 2033 Bonds, the Nueces 2027 Bonds, the Montana 2027 Bonds, the Nueces 2018 Bonds and the Gila Bonds will receive Allowed Claims in the amount of the prepayment premiums expressly provided under the indentures for such bonds. Holders of the 2013 Bonds will receive, in settlement of their claims for alleged breach of the no-call feature of those bonds, an Allowed Claim in the amount of $5

[25] (Main Dkt. 11633, Adversary No. 09-02020, (the "Equitable Subordination Adversary").)

million, calculated as 5% of the principal amount of their 2013 Bonds. Holders of the 2025 Bonds will receive, in settlement of their claims for alleged breach of the no-call feature of those bonds, an Allowed Claim in the amount of $10 million, calculated as 10% of the principal amount of their 2025 Bonds. These Allowed Claims will be payable (a) after the Allowed Claims of general unsecured creditors for Post-Petition Interest have been paid in full and (b) *pari passu* with the make whole claims of the holders of the 2013 Bonds and the 2025 Bonds set forth in the next succeeding paragraph.

d. The fees and expenses of the Indenture Trustees under the Bonds will be paid in full as Allowed Administrative Claims.

III. HISTORY OF PROPOSED PLANS OF REORGANIZATION

67. In July 2008, the Court modified the Debtor's exclusive right to file a plan to allow the Parent to file its own plan and in May 2009 permitted Harbinger to file a plan. Since exclusivity was modified, a succession of plan amendments and modifications demonstrates that creditors have benefited from robust competition between multiple plan sponsors.

A. 2008 Plans.

68. On July 31, 2008, the Debtor filed a plan of reorganization and accompanying disclosure statement that provided for a sale of ASARCO's operating assets to Sterlite. The plan and disclosure statement were amended on September 12, 2008, and on September 25, 2008.

69. On August 26, 2008, the Parent filed a disclosure statement and plan of reorganization for only ASARCO and three subsidiaries. The plan and disclosure statement were amended on September 20, 2008, and on September 25, 2008.

70. On September 25, 2008, the Bankruptcy Court approved the disclosure statements for the plans proposed at that time by the Debtorsand the Parent and approved procedures for solicitation and voting on both plans. Plans and ballots were mailed to all those entitled to vote. Before the October 27, 2008, voting deadline, as discussed above, Sterlite

notified ASARCO that it would not proceed with the original purchase agreement, and ASARCO obtained an order from the Bankruptcy Court suspending solicitation of the votes on the Debtor's plan. The Parent likewise suspended its competing plan.

B. 2009 Plans.

71. After derailment of the original plan confirmation schedule in the fall of 2008, ASARCO's Board attended six days of court-ordered mediation with the Honorable Bankruptcy Judge Marvin Isgur pursuant to an order entered by the Bankruptcy Court and the District Court. When the mediation failed, ASARCO's Board considered various alternatives. ASARCO re-marketed ASARCO's assets, formulated a stand-alone plan, and negotiated with Sterlite on an amended agreement. Ultimately, the Board determined, in consultation with ASARCO's advisors and some of the creditor constituents, that it was in the best interests of the Debtor, the estates, and the creditors to proceed with a plan of reorganization incorporating the New Plan Sponsor PSA. Lovett 9019 Proffer ¶¶ 3, 10. (Dkt 10797, Ex. D266) Consequently, a plan and disclosure statement were prepared in consultation with some of the creditor constituents. These were filed on March 16, 2009, and were subsequently amended on April 27, 2009. The Debtor's Fifth Amended Plan and Fifth Amended Disclosure Statement were filed on May 11, 2009. The Bankruptcy Court approved the adequacy of the Fifth Amended Disclosure Statement by order entered on May 12, 2009.

72. On May 15, 2009, the Parent filed its Third Amended Plan of Reorganization for the Debtor and a supporting disclosure statement. On May 27, 2009, Harbinger filed a Plan of Reorganization for the Debtor and a Disclosure Statement in support thereof. On June 1, 2009, the Parent filed its Fourth Amended Plan of Reorganization.

73. On June 15, 2009, the Debtor filed its Sixth Amended Plan of Reorganization. On June 23, 2009, the Parent filed its Modified Fifth Amended Plan of Reorganization. On June 29, 2009, Harbinger filed its First Amended Plan of Reorganization.

74. On July 2, 2009, the Bankruptcy Court entered an Order Approving the Disclosure Statement and Granting the Debtor's Motion to Establish Certain Procedures Related to Solicitation of the Debtor's, Parent's, and Harbinger's Plans of Reorganization (the "Solicitation Order"). (Dkt 11884, Ex. D271)

75. On July 6, 2009, the Debtor filed its Sixth Amended Plan as Modified.

76. Pursuant to the Solicitation Order, solicitation packages were mailed to creditors beginning July 2, 2009, that solicited votes regarding the Parent's Modified Fifth Amended Plan, the Debtor's Sixth Amended Plan as Modified, and Harbinger's Plan. Affidavit of Mailing ¶ 3. (Dkt 12542) Creditors were advised that ballots had to be received by August 5, 2009, to be counted.

77. On July 26, 2009, after numerous votes had been received by the balloting agent, the Parent filed an "emergency motion" announcing a Sixth Amended Plan and seeking to supplement the Disclosure Statement, re-solicit creditors, and allow creditors who had already cast their ballots to change their votes if they wished to do so. The Bankruptcy Court conducted hearings on the motion on July 28 and 30, 2009. The Parent continued to revise its plan and filed its Sixth Amended Plan on August 4, 2009.

78. On August 4, 2009, the Bankruptcy Court entered the "Order Granting Emergency Motion of ASARCO Incorporated and Americas Mining Corporation to Supplement Disclosure Statement and Modify Solicitation Procedures" (the "Re-Solicitation Order") approving the re-solicitation of the plans. (Dkt 12252)

79. On August 4, 2009, the Parent filed a Supplement to Disclosure Statement. (Dkt 12253) Under the Re-Solicitation Order, solicitation packages were mailed to creditors beginning August 5, 2009, with a voting deadline of August 17, 2009. Affidavit of Mailing ¶ 3. (Dkt 12543)

80. On August 3, 2009, Harbinger requested that its plan be held in abeyance and not considered during the Confirmation Hearing, and the Bankruptcy Court granted that request. (Dkt 12229, 12251) On August 7, 2009, the Debtor made certain technical and clarifying modifications to resolve objections to the plan.

C. Plan Amendments During the Confirmation Hearing.

81. At the outset of the Confirmation Hearings on August 10, 2009, the Debtor announced enhancements to its plan, including an increase in Sterlite's cash contribution from $1.1 billion to $1.587 billion. *See* 8/10/09 Tr. at 13-17. This increase in Sterlite's cash contribution was designed to pay the principal amount of all Class 3 general unsecured claims in full on the effective date. The Debtor also announced that Sterlite would monetize the Sterlite Copper Note to its $207.9 million present value and distribute the cash to the Asbestos Trust. *Id.* The Debtor filed its Sixth Amended Plan as modified on August 11, 2009, to document these changes. (Dkt 12446)

82. In response to the Debtor's earlier announcement, the Parent announced during its opening statement that it would amend its plan to increase the cash distributed under Options A, B, and C available under the Parent's then-existing Plan. The next day, on August 11, 2009, the Parent again announced changes to its plan that included the elimination of Options A and B and the treatment of all unsecured creditors pursuant to Option C. *See* 8/11/09 Tr. at 180-181. The Parent filed its Modified Sixth Amended Plan as modified on August 14, 2009, to document the changes to its plan announced in open court on August 10 and 11, 2009. (Dkt

12509) The Parent characterized this plan as a "new value plan." *See, e.g.,* 8/10/09 Tr. at 149; 8/11/09 Tr. at 25; 8/12/09 Tr. at 48; (Dkt 12515)

83. On August 17, 2009, the Parent announced for the first time since abandoning its 2008 plan that it intended to propose what its counsel described as a "payment in full" plan. 8/17/09 Tr. at 83-88. The announced amendments prompted the Court to grant the Debtor's motion to compel discovery regarding the Parent's ability to fund its amended plan. *Id.* at 92-93. Late in the evening of August 17, 2009, the Parent filed its Seventh Amended Plan. The Parent modified its Seventh Amended Plan on August 19, 2009. Additional modifications resulted in the Parent's Plan, filed August 20, 2009, with technical amendments filed August 23, 2009. On August 30, 2009, the Parent filed a Conformed Version of ASARCO Incorporated and Americas Mining Corporation's Seventh Amended Plan of Reorganization for the Debtors under Chapter 11 of the United States Bankruptcy Code, as Modified on August 20, 2009, August 23, 2009, and August 27, 2009 (docket no. 12728).

84. The Debtor made further enhancements to its plan that were reflected in the Debtor's Sixth Amended Plan as Modified as of August 20, 2009, and August 23, 2009, and in the Debtor's Plan, filed August 27, 2009.

IV. THE DEBTOR'S PLAN.

85. As detailed above, the Debtor's Plan follows exhaustive efforts to market ASARCO's assets, forge consensus with creditors, and maximize the value of the estate. The Debtor fully marketed the assets and considered all reasonable alternatives before settling on the approach represented by the Debtor's Plan.

86. The consideration provided to creditors under the Debtor's Plan consists of:

- The sale of substantially all of ASARCO's operating assets to Sterlite in exchange for $1,439,400,000 in cash.[26]

- ASARCO's cash on hand, which is estimated to be approximately $1.4 billion as of the effective date of the plan.

- Interests in the SCC Litigation Trust, which is formed to hold the SCC Judgment. As in earlier iterations of the Debtors' Plan, SCC Litigation Trust interests will be distributed to Class 3 and Class 4 based upon their ratable portions as provided in the Debtor's Plan. However, as a result of negotiations shortly before and during the Confirmation Hearing, Sterlite agreed to monetize the SCC Litigation Trust interests that are distributed to Class 3 for a payment of approximately $722 million. This obligation is reflected in the New Plan Sponsor PSA and is guaranteed by Sterlite Industries (India) Ltd.

- Sterlite's obligation to pay such additional amounts as are necessary so that all allowed claims in Classes 1, 2, 3, and 5 are Paid in Full on the effective date or as they are allowed. Sterlite also has assumed the obligation for any reasonable expenses incurred by the Plan Administrator or Reorganized ASARCO to effectuate the Plan. These obligations are documented in Amendment No. 7 to the New Plan Sponsor PSA and are guaranteed by Sterlite Industries (India) Ltd.

- Interests in the Liquidation Trust, which is formed to hold miscellaneous avoidance claims and other claims of the Debtor.

87. Under the Debtor's Plan, the treatment of creditors' claims and interests is as follows:

- Unclassified Claims, including Administrative Claims and Priority Tax Claims, are paid in full in cash on the effective date.

- Classes 1, 2, and 5 allowed claims are paid in full in cash as of the effective date of the plan.[27]

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[26] This figure is derived from the sum of $1.1 billion in proceeds of the asset sale, $224.8 million representing monetization of the Class 3 interest in the previously-provided-for Sterlite Copper Note, and $83 million representing monetization of the Class 4 interest in the previously-provided-for Sterlite Copper Note. (*See* Ex. D471, the waterfall included in presentation of the Debtors' closing argument, as corrected on the record during closing arguments); *see also* Confirmation Hr'g Tr. at 189, 195.

[27] The Debtor's Plan provides for Class 2 (Secured Claims) to receive, at the election of the Debtor, a cash payment of the Allowed Amount of such holder's claim, together with any post-petition interest available under

- Class 3 allowed claims (General Unsecured Claims) receive distribution of: (i) their principal claim amount in cash on the effective date, (ii) interests in the Liquidation Trust; and (iii) interests in the SCC Litigation Trust up to the amount required for allowed claims to be Paid in Full, *i.e.*, to pay post-petition interest and attorneys' fees and other costs and expenses as permitted by applicable law. As noted above, Sterlite has agreed to monetize the Class 3 SCC Litigation Trust interests for approximately $722 million in cash.[28] As a result, Class 3 creditors effectively will be paid in full in cash on the effective date of the plan.

- The Debtor's Plan establishes an Asbestos Trust for the benefit of Class 4 Claims (Unsecured Asbestos Personal Injury Claims) and Demands. The Asbestos Trust is funded with (i) $700 million in cash on the effective date; (ii) certain insurance proceeds; (iii) 100 percent of the interests in ASARCO's subsidiary Covington Land Company, as it exists in reorganized form on the effective date of the plan ("Reorganized Covington"); (iv) interests in the Liquidation Trust; and (v) interests in the SCC Litigation Trust up to the amount required for this Class to be Paid in Full. The Debtors' Plan provides $27.5 million in cash for purposes of administrative expenses of the Asbestos Trust.

- Depending on the value of the SCC Litigation Trust Interests as determined by the Bankruptcy Court, the Debtor's Plan also provides for distribution of interests in the SCC Litigation Trust to Classes 6, 7 and 8.

88. Under the Debtor's Plan, all Asbestos Personal Injury Claims and Demands are channeled to the Asbestos Trust in accordance with section 524(g) of the Bankruptcy Code.

89. Sterlite also agreed to provide the asbestos claimants a "put option," exercisable at any time between two and four years after the effective date of the Debtor's Plan. The put option gives the Asbestos Trust the one-time right, but not the obligation, to sell all or a portion of its pro-rata interest in the SCC Litigation Trust to Sterlite for consideration of up to

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section 506(b) of the Bankruptcy Code, or to be reinstated. The Debtor intends to elect the cash payment option as to all Class 2 claims.

[28] This monetization payment was based upon the estimate of known and preliminary claims. In the event actual claims as allowed exceed the known and preliminary estimates, those amounts will be assumed by Sterlite.

$160 million. The purchase price under the put option is $160 million less any actual amount of recovery or receipt the Asbestos Trust has received on account of its SCC Litigation Trust interest at the time of exercise of the option. According to the ASARCO Asbestos Committee, the present value of the put option is $134 million.

90. To ensure that the Debtor's Plan comports with the absolute priority rule, the Debtor's Plan requests that the Court determine the total amount of claims, and the value of the SCC Litigation Trust Interests, and the percentage of SCC Litigation Trust Interests to be distributed to each Class. Class 3 and Class 4 will be distributed only sufficient percentage interests in the SCC Litigation Trust to be Paid in Full and no more. To the extent there is sufficient value in the SCC Litigation Trust, as determined by the Court, it will be distributed to the holders of Class 6 (Late-Filed Claims), Class 7 (Subordinated Claims), and Class 8 (Interests in ASARCO) so that such holders may, after General Unsecured Claims are Paid in Full and the distributions to the Asbestos Trust are made, become entitled to receive distributions from the SCC Litigation Trust.[29]

91. In addition, the Debtor's Plan creates a Liquidation Trust to hold certain pending litigation claims that have not been reduced to judgment, and interests in the Liquidation Trust also are distributed to Class 3 creditors and the Asbestos Trust (on behalf of Class 4 creditors).

[29] The SCC Litigation Trust Agreement provides for the appointment of three members to constitute the SCC Litigation Trust Board. Two of these will be appointed by Sterlite and one by the Asbestos Claimants' Committee and the FCR. The Debtor's Plan and the SCC Litigation Trust Agreement provide that the Parent will be invited to bid on equal terms in connection with any auction, sale or similar disposition of the SCC Judgment. Settlement of the SCC Judgment requires unanimous approval of the SCC Litigation Trust Board. Absent unanimity, settlement would require Bankruptcy Court approval.

92. If the Debtor's Plan is confirmed and the Sterlite transaction is consummated, Sterlite will be released from liability related to its breach of the original purchase and sale agreement.

93. In accordance with the global settlement of environmental claims, under the Debtor's Plan, certain of ASARCO's owned and non-operating properties will be transferred to Environmental Custodial Trusts for remediation and restoration, and in return, the Estates will receive covenants not to sue.

94. The Debtor recommends appointment of Joseph Lapinsky as Plan Administrator. Under the Debtor's Plan, Reorganized ASARCO and the Plan Administrator will make distributions to the Trusts established under the Debtor's Plan, prosecute objections to Claims (other than objections to Asbestos Personal Injury Claims and Demands and objections to Claims that have been Allowed) and the Vested Causes of Action, and supervise the Plan Administration Reserve for disposition in accordance with the Debtor's Plan. The Plan Administrator also will hold all of the interests in Reorganized ASARCO for the benefit of the interest owners and will manage Reorganized ASARCO's business operations.

95. One of ASARCO's subsidiary debtors, Covington Land Company, will reorganize and own certain income-producing property. The Asbestos Trust will receive 100 percent of the interests in Reorganized Covington.

96. Under the Debtor's Plan, Sterlite assumes ASARCO's employee benefit and retirement plans. Under its collective bargaining agreement with the Union, Sterlite has agreed to fund such of these benefit plans that relate to ASARCO's unionized workforce through December 2013. (Ex. D184)

97. As discussed below, the Debtor's Plan provides for the Subsidiary Debtors (other than Covington) to be substantively consolidated with and into ASARCO.

98. As a good-faith deposit, Sterlite deposited direct-pay letters of credit in the amount of $125 million, forfeitable if the Debtor's Plan is confirmed and Sterlite fails to perform its obligations under the New Plan Sponsor PSA. If the Bankruptcy Court had issued a recommendation for confirmation of the Debtor's Plan, Sterlite had committed to deposit additional letters of credit in the aggregate amount of $500 million, bringing Sterlite's total deposit to $625 million. *See* Dkt 12648, Amendment No. 7.

V. OBJECTIONS TO THE DEBTOR'S PLAN ARE WITHOUT MERIT.

99. All objections to the Debtor's Plan that have not been withdrawn, waived, or resolved are overruled, other than the 11 U.S.C. §1129(c) objection. Because the Court is not recommending approval of the Debtor's Plan, it will give summary treatment to those objections.

A. The Debtor's Plan Does Not Violate the Absolute Priority Rule.

100. To ensure that creditors receive the full value of their claims but no more, the Debtor's Plan calls for the Court to determine the value of SCC Litigation Trust Interests. Creditors would then receive interests in the SCC Litigation Trust no greater than the amount necessary for them to be paid in full, based upon the Court's valuation of the SCC Litigation Trust at confirmation. Any excess of that amount will be distributed to equity in accordance with the absolute priority rule.

101. The possibility that, in time, creditors eventually might, through settlement, monetization, or payment of the SCC Judgment, realize more as a result of owning interests in the SCC Litigation Trust than the value determined at confirmation does not render the Debtors' Plan unconfirmable. Bankruptcy courts regularly value an asset at confirmation—

including, for example, interests in litigation or securities—even though that asset might appreciate or depreciate in value after confirmation.

102. Courts recognize that the value of assets like the SCC Judgment must be determined based on the best evidence available at the time of the valuation. It would be improper to equate the value of a legal claim to the amount of a potential but uncertain future recovery for purposes of confirmation. *See In re Polis*, 217 F.3d 899, 903(7th Cir. 2000); *Smith v. Commissioner,* 198 F.3d 515, 521-25(5th Cir. 1999); *In re Tex. Extrusion Corp.*, 844 F.2d 1142, 1158-59 (5th Cir. 1988); *In re Solly*, 392 B.R. 692, 695-96(Bankr.S.D.Tex.2008). As the Fifth Circuit has recognized,

> [T]he value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money that it would bring in the market. Like all values, . . . it depends largely on more or less certain prophecies of the future; and the value is no less real at that time if later the prophecy turns out false than when it comes out true.

Smith v. Commissioner, 198 F.3d at 522 (quoting *Ithaca Trust Co. v. United States*, 279 U.S. 151, 155 (1929)).

103. The Parent relies on *In re MCorp Fin., Inc.*, 137 B.R. 219 (Bankr. S.D. Tex. 1992). *MCorp*, however, does not preclude the Debtors' Plan's treatment of the SCC Litigation Trust Interests and is distinguishable from the circumstances at hand. *MCorp* involved a cram-down plan, and the court applied a clear and convincing standard of proof that the Fifth Circuit later rejected. *Compare MCorp*, 137 B.R. at 225, *with In re Briscoe Enters.*, 994 F.2d 1160, 1163-65 (5th Cir. 1993). In *MCorp*, unlike here, the debtor failed to sustain its burden to show that at least one impaired class had voted to accept the plan. In addition, the litigation in question in *MCorp* was a summary judgment against the FDIC, not a judgment against the objecting equity holder. Finally, the plan in *MCorp* neither called for the court to determine the value of the litigation asset as of confirmation nor provided that any excess value above the

amount needed to pay creditors in full be distributed to equity. The Debtor's Plan includes provisions addressing both of these issues, thereby protecting the interests of equity and abiding by the absolute priority rule.

B. The Debtor's Plan Is Proposed In Good Faith.

104. For the reasons stated previously, the Court finds that the Debtor's Plan is proposed in good faith. Throughout this bankruptcy, the Debtor and its directors have acted reasonably, in good faith, with diligence, in accordance with all applicable fiduciary duties, and in the best interests of the Estates. Likewise, the Debtor's directors and officers have, throughout this bankruptcy, fully discharged and complied with their fiduciary duties under applicable law. The Parent's appointed ASARCO director, Mr. Ruiz, confirmed that he knew of no instances where the other directors had violated fiduciary duties to ASARCO. 8/19/09 Tr. at 93. Mr. Ruiz also confirmed that the three-member board had worked cooperatively on issues relating to operation of the company and generally reached a consensus on decisions regarding operational issues. *Id.* at 91-92; *see also* 8/17/09 Tr. at 156-157 (Lovett). The Board's decisions contributed to the company's success over the past four years. 8/17/09 Tr. at 156-157 (Lovett); 8/19/09 Tr. at 91-92 (Ruiz); Lovett Rebuttal Proffer ¶ 13 (Dkt 12530, Ex. D294).

105. The remarkable success of this bankruptcy case resulting in the generation of $1.4 billion in cash and two competing plans of reorganization which pay creditors in full with interest is a direct result of the cooperative efforts of the board of director, the management, and the employees of the Debtor. Such efforts were guided and facilitated by the estate professionals and fiduciaries. The culmination of these efforts tangibly benefited the estate and its creditors, as well as equity.

106. In particular, in connection with the Parent's various proposed plans, the ASARCO Board of Directors acted at all times in good faith and in conformity with their

fiduciary duties under applicable law and in accordance with all orders of the Bankruptcy Court. In the April 22, 2009, Order Pursuant to §§ 363, 105 and Fed. R. Bankr. P. 9019 Approving Settlement and Release and Revised Bid Protections Contained in the New Purchase and Sale Agreement Between ASARCO LLC and Certain of Its Subsidiaries, and Sterlite (USA) Inc. and for Related Relief (Dkt 10935, Ex. 270), the Bankruptcy Court ordered that "ASARCO and its Board are specifically prohibited from taking any action in support of an Alternative Plan without prior approval of this Court . . . " *Id.* at p. 7. The purpose of this order was twofold: (i) to insure that Sterlite was not released from liability associated with its original purchase and sale agreement in the event of confirmation of a plan other than the Debtor's Plan, and (ii) to maintain the competition between plans that has subsequently proved to be of significant benefit to the Estates.

C. The Debtor's Plan Does Not Transfer Property In Violation of Nonbankruptcy Law.

107. Under the Debtor's Plan, Sterlite will acquire the Copper Basin Railway ("CBRY"), a Class III short-line freight railroad located in South Central Arizona. Evidence produced at the confirmation hearing proved that it is likely that Sterlite will be able to obtain regulatory approval to transfer ownership and operate the CBRY.

D. The Debtor's Plan Is Feasible.

108. The Parent argues that Debtor's Plan is not feasible because the letter of credit is too low in light of Sterlite's previous default on the original PSA and because Sterlite Industries (India) Ltd. expression of capital support is merely a verbal expression and not a contractual obligation. While the Debtor's Plan is not without risk, the Debtors have proven feasibility by a preponderance of the evidence.

E. The Debtor's Plan Does Not Permit Governmental Environmental Claimants to Recover Amounts to Which They Are Not Legally Entitled.

109. The Parent objects to the Debtor's Plan on the ground that the United States should not be entitled to any distribution from the SCC Judgment due to a 2003 consent decree it entered in Arizona District Court (the "Consent Decree"). This objection is not supported by the law or the facts.

F. The Debtor's Plan Does Not Improperly Grant Interest on Future Response Cost Claims.

110. The Debtor's Plan properly allows for post-petition interest on the claims of the United States and other environmental claimants, just as it does for other Class 3 unsecured creditors. The amount of a claim generally is determined "as of the date of the filing of the petition." 11 U.S.C. § 502(b). Section 726(a)(5) of the Bankruptcy Code provides for payment of post-petition interest on unsecured claims. 11 U.S.C. § 726(a)(5) The interplay between sections 502(b) and 726(a)(5) of the Bankruptcy Code assures fair and equitable treatment of unsecured creditors, in that all claims are valued as of the petition date and interest due runs from that date.

G. The Debtor's Plan Satisfies the Best Interests of Creditors Test.

111. The Debtor's Plan satisfies the "best interests of creditors" test.

H. The Release, Exoneration and Exculpation Provisions of the Debtor's Plan Are Not Improper and Do Not Violate Section 1129(a)(1) of the Bankruptcy Code.

112. The exoneration and release provisions in Article XI of the Debtor's Plan do not impermissibly discharge nondebtors. The Parent's objection to the contrary is overruled. As reflected in the record, the release and exoneration provisions in the Debtor's Plan were modified in response to objections by the U.S. Trustee. 08/13/09 Tr. at 116-117. The modifications resolved the U.S. Trustee's objections. *Id.*

I. The Discharge Provisions of the Debtor's Plan are Proper and Do Not Violate Section 1129(a)(1) of the Bankruptcy Code.

113. The Debtor's Plan provides for the discharge of all prepetition liabilities of the Debtor. The Parent's objection to the discharge of the Reorganized Debtor under the Debtor's Plan is overruled. Confirmation generally discharges a debtor's pre-confirmation debts. 11 U.S.C. § 1141(d)(1). The circumstances in which confirmation does not provide a discharge are not present here. Section 1141(d)(3) of the Bankruptcy Code provides that confirmation does not discharge a debtor only if, among other things "the debtor does not engage in business after consummation of the plan." 11 U.S.C. § 1141(d)(3).

114. A debtor "engages in business" after plan consummation even if the focus of the reorganized debtor's business is management of assets pending their sale to third parties. *See, e.g., In re T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 803-04 (5th Cir. 1997) (discharge granted where plan provided for the debtor to operate its hotel property for only 24 months or until the hotel was sold or otherwise disposed of, whichever occurred first); *In re River Capital Corp.*, 155 B.R. 382, 387 (Bankr. E.D. Va. 1991) (discharge granted where debtor small business investment company would continue in business post-confirmation, which business consisted of liquidation of the debtor's assets, including loans and investments in closely held and financially fragile businesses).[30]

J. Other Objections Have Been Resolved.

115. The objection filed by Montana Resources Inc. was resolved by agreement announced on the record during the Confirmation Hearing. 8/17/09 Tr. at 11-12, 72.

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[30] *In re Enron Corp.*, Case No. 01-16034 (AJG), Findings of Fact and Conclusions of Law Confirming Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, and Related Relief, at 125-26 (Bankr. S.D.N.Y. July 15, 2004) (citations omitted).

116. The objection of the U.S. Trustee was resolved by modifications to the Debtor's Plan. *See* 8/13/09 Tr. at 116-117.

117. The objection of Mitsui & Co. (U.S.A.), Inc., was resolved by a stipulation between the parties that has been entered by the Bankruptcy Court. (Dkt 12591)

118. The objection of Plainfield Special Situations Master Fund Ltd. was resolved by agreement of the parties.

119. The objection of Halcyon Master Fund L.P. was resolved by an agreement announced on the record. 8/13/09 Tr. at 112-114.

120. The objections of Mt. McKinley Insurance Co., Everett Reinsurance Co., Fireman's Fund Insurance Co., First State Insurance Co. et al, Certain London Market Companies, Century Indemnity Co., American Home Assurance Co., Lexington Insurance Co., and AIG have been resolved through agreements that will be reflected in the Confirmation Order.

121. The objection of the Texas Comptroller of Public Accounts has been resolved through an agreement that will be reflected in the Confirmation Order.

122. The objection of Ron and Linda Deen has been resolved through an agreement announced on the record during the Confirmation Hearing. 8/13/09 Tr. at 122-123.

123. The objection of the Arizona State Land Department was resolved through an agreement reflected in a plan modification.

124. The objection of the Asbestos Judgment Creditors represented by Martin Berks and Roger Lucas (the "Berks and Lucas Claimants") was resolved through an agreement reflected in a plan modification.

VI. THE PARENT'S PLAN.

125. Under the Parent's Plan, the Parent will continue as the owner of ASARCO. The Parent's Plan was proposed in good faith and is the direct result of extensive negotiations with key constituents.[31] The Parent's Plan was amended several times in order to address and resolve concerns raised by the various creditor groups.

A. The Parent's Plan Offers Full Payment, in Cash, of Principal and Interest to Creditors

126. The Parent's Plan provides for the Parent to provide the following: (a) a contribution by the Parent of $2.2051 billion in Cash upon close to the Debtor's estate,[32] (b) a guaranty by AMC of a $280 million promissory note of Reorganized ASARCO issued to a trust for the benefit of asbestos claimants (AMC's guaranty is in turn guaranteed by Grupo México),[33] (c) a forfeitable deposit in the amount of $2.2051 billion, to be obtained from shares of SCC stock having a value of $2.2051 billion, plus an additional $500 million in Cash in U.S. Dollar currency, to ensure the Parent's performance of its obligations under the Parent's Plan;[34] (d) a Working Capital Facility of $200 million for the post-confirmation operations of Reorganized ASARCO,[35] and (e) a waiver of all claims of the Parent and its affiliates against the Debtor (including tax reimbursement claims that the Debtor has quantified at $161.7 million, which including interest is approximately $190 million, and a claim of ownership of a tax refund in the

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[31] (Proffer of Jorge Lazalde Psihas in Support of ASARCO Incorporated and Americas Mining Corporation's Modified Sixth Amended Plan of Reorganization for the Debtors Under Chapter 11 of the United States Bankruptcy Code (Docket No. 12391, "Lazalde Proffer") at ¶ 27.)

[32] (Lazalde Proffer, ¶ 6; Supp. de la Parra Proffer at ¶ 3; Confirmation Hr'g Tr. 8/20/2009 at 151: 25, 152: 1-3 (De La Parra Test.).)

[33] (Parent's Plan, Ex. 23 at ¶ 1.)

[34] Notice of Filing Fully Executed Exhibits 24 and 25 to ASARCO Incorporated and Amreicas Mining Corporation's Seventh Amended Plan of Reorganization for the Debtors Under Chapter 11 of the United States Bankruptcy Code, as Modified on August 20, 2009, ("Executed Escrow Agreement," Docket No. 12592), Exhibit 25.)

[35] (Parent's Plan, Ex. 10, at § 1.)

approximate amount of $60 million (the "Tax Refund")).[36] In addition, the Parent's ultimate owner, Grupo México has guaranteed the Parent's payment of the Parent Contribution, the Working Capital Facility, and (following the Effective Date) the timely payment of Reorganized ASARCO's $280 million promissory note, and has voluntarily waived service of process and submitted to the continuing jurisdiction of the courts in the Southern District of Texas for the limited purpose of enforcing its obligations under the Grupo México Guarantee Agreement.[37]

127. Cash and other forms of value available for distribution under the Parent's Plan are sufficient to satisfy all Claims in full.[38] Nevertheless, the Parent's Plan also provides that, to the extent all of the foregoing consideration proves insufficient to pay all allowed claims in full, the holders of allowed claims will have recourse against Reorganized ASARCO to make up any deficiency.[39]

128. AMC, the entity providing the Parent's Contribution, the issuer of the Working Capital Facility, and the guarantor of the $280 million promissory note, is a Delaware corporation valued at approximately $20 billion.[40]

129. Under the Parent's Plan, creditors other than Class 4 Asbestos Claimants will receive 100% of the principal on their claims in Cash; additionally, all claimants will receive

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[36] (Parent's Plan, Arts. 10.1, 10.8; Supplemental Proffer of Carlos Ruiz in Support of ASARCO Incorporated and Americas Mining Corporation's Seventh Amended Plan or Reorganization for the Debtors Under Chapter 11 of the United States Bankruptcy Code (Docket No. 12582, "Supp. Ruiz Proffer,") at ¶¶ 5-7; Second Supplemental Proffer in Support of ASARCO Incorporated's and Americas Mining Corporation's Seventh Amended Plan of Reorganization for the Debtors Under Chapter 11 of the United States Bankruptcy Code and in Opposition to Confirmation of the Debtors' Plan of Reorganization ("Second Supp. Poulin Proffer," Docket No. 12570), at ¶ 8; (as to(b)); Supp. de la Parra Proffer at ¶ 3.)

[37] (Parent's Plan Ex. 24 at ¶ 1; Notice of filing (i) Amended Grupo Mexico Guarantee Agreement and (ii) Form of Revised Escrow Agreement with Respect to ASARCO Incorporated and Americas Mining Corporation's Seventh Amended Plan of Reorganization for the Debtors under Chapter 11 of the United States Bankruptcy Code, as Modified on August 20,2009, August 23, 2009, and August 27, 2009 (Docket No. 12726, the "Guarantee Escrow Notice"), Ex. A.).

[38] (Second Supp. Poulin Proffer at ¶ 8 and Ex. A; *see also* Supp. Ruiz Proffer at ¶ 7.)

[39] (Parent's Plan at Arts. 10.3(f), 11.1.)

[40] (Confirmation Hr. Tr. 8/20/2009 at 160:14-2 (de la Parra Test.).)

interest on their Claims through the date of payment in cash.[41] The Class 4 Asbestos Claimants will receive, through a section 524(g) trust, a $500 million Cash payment at Confirmation, a $280 million one-year secured, interest-bearing promissory note, plus approximately $140.6 million in post-petition interest, together with $27.5 million paid as an allowed administrative claim, and the right to pursue certain insurance coverage actions.[42] The Parent has waived repayment of outstanding amounts under the intercompany DIP that was provided to the Asbestos Subsidiaries.[43] Bondholders will receive interest at the contract rate (per the agreed term sheet),[44] as will any other claimant who is entitled to a contract rate.[45] All other claimants, including the Class 4 Asbestos Claimants, will receive interest at the federal judgment rate.[46] There will be $336.4 million excess Cash availability in the "Known Claims Case" for the operation of Reorganized ASARCO.[47] On the "High Claims Case," Reorganized ASARCO will have $211 million excess cash availability.[48] The Debtor has been involved in the claim resolution process for several years, and their Director in charge of the process, Chuck Watson, stated the following in Paragraph 9 of his Proffer dated August 7, 2009:

> For the reasons stated above and articulated in the various pleadings filed by the Debtors in connection with these large disputed claims, I believe that it is more likely than not that actual recoveries to creditors from cash and the Plan Sponsor's note will be much closer to the recoveries estimated under the Likely [Known] Claims Scenario than under the High Claims Scenario.[49]

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41 (Parent's Plan, Art. 4.2; Second Supp. Poulin Proffer at ¶ 8 and Ex. A.)

42 (Parent's Plan, Art. 4.2(d); Second Supp. Poulin Proffer, ¶ 8 and Ex. A.)

43 (Notice of Technical Amendments To ASARCO Incorporated and Americas Mining Corporation's Seventh Amended Plan of Reorganization for the Debtors Under Chapter 11 of The United States Bankruptcy Code, As Modified On August 20, 2009 ("Technical Amendments Notice," Docket No. 12617), at ¶ 1.)

44 (Technical Amendments Notice at ¶ 2.)

45 (Parent's Plan at Art. 4.4.; Second Supp. Poulin Proffer at ¶ 8.)

46 (Parent's Plan at Art. 4.4; Second Supp. Poulin Proffer at ¶ 8.)

47 (Second Supp. Poulin Proffer at ¶ 8 and Ex. A.)

48 (Second Supp. Poulin Proffer at ¶ 8 and Ex. A)

49 (Second Supp. Poulin Proffer at ¶ 8)

130. In the Known Claims Analysis and the High Claims Analysis, Lisa Poulin – a Partner at CRG Partners Group, LLC ("CRG Partners") and an expert hired by the Parent to test the feasibility of the Plans – analyzed the claim amounts prepared by the Debtor and made certain adjustments based on her analysis, conversations with representatives of the Debtor and other constituents, including Chuck Watson, Barclays, FTI, and others, and her understanding of those claims.[50] She determined that the better "Known Claims" number is $3.5287 billion, a downward adjustment to the Debtor's analysis of $54.2 million. On the "High Claims," she adjusted the Debtor's number downward by $164.9 million, to $3.6542 billion.[51]

131. The High Claims estimate is subject to a further downward adjustment to $3.586 billion after the announcement of the Montana Resources, Inc. settlement, reducing the High Claims estimate by approximately $60 million.[52]

132. Regarding available sources of funds, Barclays has provided sworn testimony that the Debtor is expected to have $1.4 billion in available Cash as of December 31, 2009, and assumes $1.4 billion in Cash will be available for the purposes of the Debtor's waterfall and feasibility analysis.[53]

133. In addition, there are other sources of Cash that must be considered and that would provide additional cushion, in particular the $50 million Letter of Credit deposit that Sterlite posted in 2008 in connection with the Original Plan Sponsor PSA.[54] The Debtor can

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50 (Second Supp. Poulin Proffer at ¶ 11.)

51 (Second Supp. Poulin Proffer at ¶ 11.)

52 (Second Supp. Poulin Proffer at ¶ 1; Supplemental Proffer of George M. Mack in Support of Confirmation of the Debtors' Joint Plan of Reorganization and in Opposition to Confirmation of the Parent's Plan of Reorganization (Docket No. 12386, "Supp. Mack Proffer") Ex. C).)

53 (Second Supp. Poulin Proffer at ¶ 1; Mack .)

54 (Second Supp. Poulin Proffer at ¶ 13.)

draw on Sterlite's $50 million Letter of Credit should the Parent's Plan, rather than the Debtor's Plan, be confirmed.[55]

134. The ongoing obligations of Reorganized ASARCO include Reinstated Environmental Claims, pension and other post-retirement benefit obligations, litigation costs, capital expenditures, ordinary operating costs, tax payments, and its obligations under the ASARCO Note.[56] The projections in the Debtor's 5-Year Plan, subject to copper price update and adjustments, are reasonable in light of the circumstances under which they were prepared and demonstrate the feasibility of the Parent's Plan.[57]

135. Reorganized ASARCO's operations will generate sufficient cash flow, as projected in the Debtor's 5-Year Plan, to pay its obligations under the Parent's Plan.[58] The Parent's Plan provides further support by the provision of the $200 million Working Capital Facility that has an initial term of two years and may be renewed annually thereafter by the Parent and Reorganized ASARCO.[59]

136. As shown above, the Parent's Plan provides payment in full of principal plus interest to all creditors in cash at the effective date.[60] The Parent's Plan does not require any recovery from any litigation, or from any source other than the Parent Contribution and, to the

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55 (Second Supp. Poulin Proffer at ¶ 13.)

56 (Proffer of Lisa M. Poulin in Support of ASARCO Incorporated and Americas Mining Corporation's Modified Fifth Amended Plan of Reorganization for the Debtors Under Chapter 11 of the United States Bankruptcy Code ("Poulin Proffer," Docket No. 11938), at ¶ 20.)

57 (Poulin Proffer at ¶ 20.)

58 (Poulin Proffer at ¶ 21.)

59 (Poulin Proffer at ¶ 21.)

60 (Supplemental Ruiz Proffer at ¶ 7; Second Supplemental Poulin Proffer at ¶ 10; Waterfall, Exhibit P433.)

limited extent described above, from Reorganized ASARCO itself, to guarantee payment in full of principal plus interest to creditors.[61]

137. The Union has threatened to strike Reorganized ASARCO if the Parent's Plan is confirmed.[62] The Parent has demonstrated that it has the capability to address a strike should that occur.[63] Reorganized ASARCO has sufficient financial resources such that the Confirmation and consummation of the Parent's Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of Reorganized ASARCO.[64]

B. Treatment of Priority, Secured, and General Unsecured Claims

138. Under the Parent's Plan, holders of Priority Claims will receive cash in the allowed amount of their claims and post-petition interest.[65]

139. Under the Parent's Plan, holders of Secured Claims, at the Parent's election, will either: (1) receive cash in the Allowed Amount of their Claim and Post-Petition Interest; (2) be reinstated; (3) receive from Reorganized ASARCO all collateral securing such Allowed Secured Claim; or (4) receive such other treatment as may be agreed upon between the Parent and the holder of such Allowed Secured Claim.[66]

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61 (Second Supp. Poulin Proffer at ¶ 10.)

62 (Supp. de la Parra Proffer at ¶ 15; Proffer of Carlos Ruiz in Support of ASARCO Incorporated and Americas Mining Corporation's Modified Sixth Amended Plan of Reorganization for the Debtors Under Chapter 11 of the United States Bankruptcy Code (Docket No.12388, "Ruiz Proffer") at ¶ 14-15.)

63 (Supp. de la Parra Proffer at ¶ 15.)

64 (Poulin Proffer at ¶¶ 19-21; *see also* Second Supp. Poulin Proffer at ¶ 12-13.)

65 (Parent's Plan at Art. 4.2(a).)

66 (Parent's Plan at Art. 4.2(b).)

140. Under the Parent's Plan, each holder of an Allowed General Unsecured Claim will receive cash in an amount equal to the Allowed Amount of such Claim plus post-petition interest.[67]

141. If the Parent's Plan is confirmed, the Parent will withdraw its appeals with respect to the Environmental Custodial Trusts and the Environmental Unsecured Claims.[68] The Governmental Environmental Claimants will receive the treatment they negotiated with the Debtor and that has been approved by the Bankruptcy Court.[69] If the Parent's Plan is not confirmed, the Parent will continue to pursue its appeals of the Debtors' Environmental 9019 Motion and the District Court Order denying withdrawal of the reference to the Bankruptcy Court as to the Residual Superfund and the Custodial Trust Settlement Agreements.[70] As a good faith gesture, the Parent has abated the schedule with respect to these appeals, pending this Court's submission of its report and recommendation regarding Plan confirmation.

C. Treatment of Asbestos Subsidiary Committee's and FCR's Claims

142. On April 12, 2009, the Asbestos Claimants' Committee, the FCR, AMC, and the Parent executed the Asbestos/AMC/Parent Agreement in Principle, providing that:[71]

a. The Asbestos Subsidiary Committee and the FCR will oppose the sale of the Debtors' operating assets to Sterlite and confirmation of the Debtor's Plan;

b. The FCR will not deliver, and the Asbestos Subsidiary Committee will not recommend that their constituents deliver, sufficient votes to support a Bankruptcy Code section 524(g) injunction under the terms of the Debtor's Plan;

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67 (Parent's Plan at Art. 4.2(c).)

68 (Parent's Plan at Art. 2.1.)

69 (Parent's Plan at Art. 2.1.)

70 (*See* Disclosure Statement Supplement.)

71 (Disclosure Statement § 2.32.)

c. The Parent will deposit the sum of $1.3 billion in cash or cash equivalents (which may include the shares of SCC stock) into an escrow account on or before June 13, 2009;

d. The Parent will propose a chapter 11 plan of reorganization providing for the treatment of all claims in the bankruptcy and the retention of the Parent's equity ownership in ASARCO;

e. The Parent's Plan will release all claims against the Parent, Grupo México, and affiliates, including the multi-billion dollar SCC Final Judgment;

f. The Parent's Plan will allow contingent asbestos claims in the aggregate amount of $1.0 billion; and

g. Asbestos claims will be channeled to a trust and such trust will be funded with (1) cash in the amount $527.5 million, $27.5 million of which is earmarked for administrative costs of the trust;[72] (2) a one-year, $250 million promissory note (which was subsequently increased to $280 million) from reorganized ASARCO bearing interest at six percent and secured by a first lien on all of reorganized ASARCO's assets and a pledge from the Parent of 51 percent of the equity in reorganized ASARCO;[73] and (3) rights to insurance proceeds with respect to asbestos claims.[74]

143. On June 12, 2009, the Asbestos Claimants' Committee and the FCR informed the Parent that they were exercising their fiduciary out under the Asbestos/AMC/Parent Agreement in Principle and intend, instead, to enter into the Asbestos Settlement with the Debtors and Sterlite.[75]

144. The Parent, the Asbestos Claimants' Committee, and the FCR have subsequently entered into the Amended Asbestos/AMC/Parent Agreement in Principle which provides, among other things, that the asbestos representatives will exercise the Fiduciary Out as

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[72] (Poulin Proffer at ¶ 14(c).)

[73] (Parent's Plan Ex. 14; Supplemental Proffer of Jorge Lazalde Psihas in Support of ASARCO Incorporated and Americas Mining Corporation's Seventh Amended Plan of Reorganization for the Debtors Under Chapter 11 of the United States Bankruptcy Code (Docket No. 12546, "Supp. Lazalde Proffer") at ¶ 6.)

[74] Lapinsky Proffer at ¶ 37.

[75] (Disclosure Statement § 2.32; Lapinsky Proffer at ¶ 39.)

that term is defined in the Sterlite Plan Agreement in Principle Term Sheet and will (a) recommend that holders of Asbestos Claims vote to accept both the Parent's Plan and the Debtor's Plan; (b) not recommend that holders of Asbestos Claims indicate a preference for any Plan; (c) inform the Bankruptcy Court that the asbestos representatives are neutral or have no preference between confirmation of the Parent's Plan or the Debtor's Plan, but prefer confirmation of the Parent's Plan or the Debtor's Plan over any other plans for the Debtor's reorganization; and (d) recommend that the holders of asbestos Claims vote to reject all plans other than the Parent's Plan and the Debtor's Plan.[76] The Asbestos Representatives agreed that, even if any other plan of reorganization is proposed that increases the aggregate consideration payable to the holders of Asbestos Claims and/or to the holders of Unsecured Claims over the amounts set forth in the Parent's Plan or the Debtor's Plan, the Asbestos Representatives shall continue to recommend that the holders of Asbestos Claims vote in favor of the Parent's Plan and the Debtor's Plan and support the section 524(g) channeling injunction set forth in such Plans.[77]

145. In addition, pursuant to the Amended Asbestos/AMC/Parent Agreement's "fiduciary out" clause, the Section 524(g) Trust shall receive the same consideration set forth under the original Asbestos/AMC/Parent Agreement in Principle, except that the one-year, six percent promissory note to be issued to the trust shall be increased from $250 million to $280 million and shall be guaranteed by AMC and secured by a first lien on all of Reorganized ASARCO's assets and a pledge by the Parent of 51% of the equity of Reorganized ASARCO.[78] AMC's guarantee of this note subsequently was included as an obligation to be guaranteed by

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[76] (Disclosure Statement § 2.32; Parent's Plan Ex. 27.)

[77] (Disclosure Statement § 2.32; Parent's Plan Ex. 27.)

[78] (Disclosure Statement § 2.32; Parent's Plan Ex. 27; Second Supp. Poulin Proffer at ¶ 8; Lapinsky Proffer at ¶ 42.)

Grupo México. In addition, the Section 524(g) Trust will now receive post-petition interest, calculated at the federal judgment rate upon $780 million through the date of payment, for an aggregate interest payment projected to be $140.6 million if the closing occurs on December 31, 2009.

D. Late Filed and Subordinated Claims

146. Holders of Late Filed and Subordinated Claims will, in full satisfaction, settlement, release, extinguishment, and discharge of such Claims, receive the Allowed Amount of such Claim plus post-petition interest.[79]

E. The SCC Litigation

147. The Parent's Plan does not rely on recovery from the SCC Judgment to compensate creditors, and releases the SCC Judgment on the Effective Date once the Parent Contribution has been made and the Parent's Plan has become effective.[80]

F. The Sterlite Litigation

148. Under the Parent's Plan, the right to pursue litigation against Sterlite and various other parties will revest in Reorganized ASARCO The Parent is not relying on any recovery from the Sterlite Litigation to compensate ASARCO's creditors in the Parent's Plan.[81]

G. Financing

149. AMC has negotiated and executed a Commitment Letter providing a $1.3 billion senior secured term financing facility with several prominent internationally-recognized lending institutions, including Banco Inbursa, S.A., Institucion de Banca Multiple, Grupo Financiero Inbursa (together with its affiliates, "Inbursa"), BBVA Securities Inc. (together with

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79 (Parent's Plan, Arts. 4.2(f) and (g).)

80 (Parent's Plan, Ex. 2; Second Supp. Poulin Proffer at ¶ 10.)

81 (Second Supp. Poulin Proffer at ¶ 7.)

its affiliates, including BBVA Bancomer, "BBVA"), Calyon New York Branch ("Calyon"), Credit Suisse Securities (USA) LLC (together with its affiliates, "CS", and together with Inbursa, BBVA and Calyon, the "Joint Lead Arrangers"), Credit Suisse, Cayman Islands Branch ("Credit Suisse") and BBVA Bancomer S.A., Institución de Banca Múltiple, Grupo Financiero BBVA Bancomer (together with its affiliates, "BBVA Bancomer", and together with Credit Suisse, Inbursa and Calyon, the "Initial Lenders").[82]

150. The Commitment Letter provides the Parent with a commitment consisting of a three-year tranche and a five-year tranche from the Initial Lenders.[83] Each Lender has advised that its commitment shall be as follows:[84]

	3 Year Tranche	**5 Year Tranche**
Inbursa		US$ 600,000,000
Credit Suisse	US$ 250,000,000	
BBVA Bancomer		US$ 250,000,000
Calyon	US$ 200,000,000	

The Parent has provided for ample security such that the Lenders will hold a perfected first priority security interest in the Collateral.[85] The Parent has paid a $21 million commitment fee, and all commitments will be obtained by the Effective Date of the Parent's Plan.[86]

151. The Commitment Letter has many standard provisions, but it has four provisions that are better for the Parent compared to typical lender commitment letters. Unlike most standard letters, the Committee Letter does not contain an "out" excusing the Initial

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82 (Supp. de la Parra Proffer at ¶ 7.)

83 (*Id.* at ¶ 8.)

84 (*Id.*)

85 (*Id.* at ¶ 9.)

86 (Confirmation Hr'g Tr. 8/20/2009 at 242:10-24 (De La Parra Test.).)

Lenders from performing due to a material adverse change (in the assets, operations, financial condition, or otherwise), due diligence, market flex, or syndication provision.[87]

152. The Parent has had a relationship with each of the Lenders on prior occasions.[88] These relationships have proven to be sound. History between the Parent and the Lenders shows that these Lenders are reliable, and neither the Parent nor any other party has any reason to doubt these Lenders' full and timely performance.[89]

153. The Parent's financial projections demonstrate that the Parent will be able to repay this facility.[90]

154. In addition to the financing represented by the fully-executed Commitment Letter, the Parent Contribution under the Plan requires additional cash of $905.1 million.[91] Grupo México has sufficient cash to meet this obligation.[92]

155. The Parent and Grupo México have entered into the Guarantee Agreement, dated August 19, 2009, and subsequently amended August 29, 2009, and September 5, 2009[93] (the "Guarantee Agreement"), pursuant to which Grupo México has agreed to provide the Parent with the funds required to permit the Parent to deliver the Parent Contribution in full ($2.2051 billion), as well as to fund the revolving Working Capital Facility ($200 million) and, following the Effective Date, has guaranteed AMC's guarantee of the $280 million promissory note to the Section 524(g) Asbestos Trust.[94] The Guarantee Agreement amends and

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87 (Supp. de la Parra Proffer at ¶ 10.)

88 (*Id.* at ¶ 11.)

89 (*Id.*)

90 (*Id.*)

91 (*Id.* at ¶ 13.)

92 (*Id.*; Confirmation Hr'g Tr. 8/12/2009 at 130:5-13 (Mack Test.).)

93 (docket No. 12726; Docket No. 12806.)

94 (Supp. de la Parra Proffer at ¶ 13.)

supplements the Grupo México Support Agreement dated as of July 30, 2009.[95] The Guarantee Agreement is enforceable against Grupo México by the ASARCO Committee (after consultation with the Asbestos Representatives).[96] The Guarantee Agreement has been further amended to include AMC's guaranty of the ASARCO Note ($280 million) and to provide that, following the Effective Date, the guarantee is enforceable by the note payee of the ASARCO Note. Pursuant to the terms of the Grupo México Guarantee Agreement, each of the parties thereto submits to the personal jurisdiction of the U.S. District Court for the Southern District of Texas, with respect to claims by parties and third party beneficiaries to the Guarantee Agreement seeking to enforce its terms.[97] The parties to the Guarantee Agreement waive personal service of process and consent to service of process by certified or registered mail.[98]

156. In addition, the Parent has previously established an Escrow Account funded with 83,710,000 shares of stock of SCC and has prepared a Fourth Amended and Restated Escrow Agreement under which Grupo México has agreed to advance $500 million in U.S. Dollar currency to AMC for deposit into the Escrow Account on account of the $905.1 million Cash required to fund the Parent Contribution in addition to proceeds from the Commitment Letter financing. On August 28, 2009, the Parent filed a document purporting to evidence the transfer of $500 million from BBVA Bancomer to an escrow account at Bank of New York. Thus, the Fourth Amended Escrow Agreement provides that shares worth $2.2051 billion are forfeitable if the Parent withdraws or adversely amends the Parent's Plan after the Bankruptcy Court enters a report and recommendation in favor of confirming the Parent's Plan.[99]

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95 (*Id.*)

96 (Supp. de la Parra Proffer at ¶ 13.)

97 (*Id.*)

98 (*Id.*)

99 (*Id.*)

That right is enforceable by the ASARCO Committee (after consultation with the Asbestos Representatives).[100]

157. Grupo México, separate and apart from its subsidiaries, presently has free cash in excess of $1.5 billion.[101]

158. The evidence supports a finding that Grupo México and the Parent have resources and creditworthiness to satisfy their financial obligations with regard to the Parent's Plan.[102]

159. The Parent has shown its financial strength and support. The Parent has proven its financial commitment to fund the Parent's Plan and to provide the best option for the Debtors' creditors.[103]

H. Post-Effective Date Management.

160. The Parent's officers and directors have given full authority to enforcement of the Parent's Plan.[104]

161. The Parent will appoint the following individuals to serve as directors of Reorganized ASARCO:[105]

a. Carlos Ruiz Sacristan

b. Agustin Santamarina

c. Jorge Lazalde Psihas

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[100] The Parent has represented that, subject to Lender consent, the Escrow Agreement will be amended to make the Debtors parties thereto, with rights of enforcement in the Bankruptcy Court.

[101] (de la Parra Proffer at ¶ 4.)

[102] (*Id.* at ¶ 6)

[103] (*Id.* at ¶ 17.)

[104] (*Id.* at ¶ 19.)

[105] (Technical Amendments Notice at ¶ 7; Supp. de la Parra Proffer at ¶ 20.)

162. The Parent will appoint the following individuals to serve as officers of Reorganized ASARCO:[106]

d. Manuel E. Ramos Rada – Chief Executive Officer/Chief Operating Officer

e. Oscar González Barron – Chief Financial Officer

163. Mark Roberts of Alvarez & Marsal has been designated as the Parent's Plan Administrator.[107]

164. The trustees responsible for the Section 524(g) Trust include Steve Baron (co-chair), Steve Kazan (co-chair), Robert Phillips, Al Brayton, and Bryan Blevins, who shall be the members of the Section 524(g) Trust Advisory Committee. In addition, three of the four Environmental Custodial Trustees have been identified. Le Petomane XXV, in its representative capacity, is appointed as Custodial Trustee for the Multi-State Custodial Trust to administer the Custodial Trusts and the Custodial Trust Accounts, by and through Jay A. Steinberg, not individually but solely in his representative capacity as president of the Custodial Trustee. Montana Environmental Trust Group, LLC, in its representative capacity, is appointed as the Custodial Trustee to administer the Custodial Trust and the Custodial Trust Accounts for the Montana Custodial Trust. Dan Silver is appointed as the Trustee to administer the Successor Coeur d' Alene Custodial and Work Trust. The trustee for the Texas Custodial Trust and any other Environmental Custodial Trusts shall be the entities designated by the Department of Justice or other appropriate governmental entity after consultation with the Texas Commission on Environmental Quality no later than 10 days before the Effective Date, in accordance with the Parent's Plan and the Environmental Custodial Trust Agreements.

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106 (Technical Amendments Notice at ¶ 7.)

107 (Technical Amendments Notice and ¶ 7; Supp. de la Parra Proffer at ¶ 18; Supp. Lazalde Proffer at ¶ 10.)

VII. THE PARENT'S PLAN SATISFIES THE REQUIREMENTS OF 11 U.S.C. §1129

A. Standing

165. Section 1121 of the Bankruptcy Code provides who may file a plan of reorganization. Pursuant to Section 1121(b) of the Bankruptcy Code, the debtor has the exclusive right to file a plan during the first 120 days of the case commencing on the Petition Date. In this case, the Court terminated exclusivity for certain parties in interest, including the Parent. Pursuant to the Court's Exclusivity Termination Order, the Parent has standing, and is authorized, to file a plan and disclosure statement in the Debtor's chapter 11 case.

B. 11 U.S.C. § 1129(a)(1)

166. The Parent's Plan complies with all applicable provisions of the Bankruptcy Code.

1. Classification of Claims – 11 U.S.C. §1122

167. The Parent's Plan satisfies Section 1122 of the Bankruptcy Code. Each Claim or Interest placed in a particular Class under the Parent's Plan is substantially similar to the other claims or interests in that Class. In addition, valid business, legal and factual reasons exist for the separate classification of each of the Classes of Claims and Interests created under the Parent's Plan and set forth in Sections 4.2 of the Parent's Plan. There is no improper gerrymandering or unfair discrimination between or among holders of Claims and Interests.

168. In particular, and without limiting the preceding, reasonable business reasons, including the minimization of administrative expenses associated with distributions to the holders of Convenience Claims, exist for separately classifying General Unsecured Claims in Class 3 and Convenience Claims in Class 5. Valid business reasons and legal requirements exist separately classifying General Unsecured Claims in Class 3 and Asbestos Claims in Class 4. The nature of the Asbestos Claims and provision of Section 524(g) of the Bankruptcy Code require

the creation of the Section 524(g) Trust, the assumption of the Asbestos Claims by such trust, and the establishment of a channeling injunction under Section 524(g) of the Bankruptcy Code; all of these requirements are inapplicable to the General Unsecured Claims in Class 3. The classification scheme in the Parent's Plan was not an attempt to obtain an Impaired consenting Class.

2. 11 U.S.C. § 1123

a. 11 U.S.C. § 1123(a)(1)

169. The Parent's Plan satisfies Section 1123(a)(1) of the Bankruptcy Code, which requires that a plan designate classes of claims, other than claims of a kind specified in Sections 507(a)(2) (administrative expense claims), 507(a)(3) (claims arising during the "gap" period in an involuntary case), or 507(a)(8) (priority tax claims) of the Bankruptcy Code.[108] Articles III and IV of the Parent's Plan classify Claims and Interests other than Administrative Claims and Priority Tax Claims into eight Classes of Claims and one Class of Interests, and therefore the Parent's Plan complies with Section 1123(a)(1) of the Bankruptcy Code.

b. 11 U.S.C. § 1123(a)(2)

170. The Parent's Plan satisfies Section 1123(a)(2) of the Bankruptcy Code. Section 1123(a)(2) of the Bankruptcy Code requires that a plan "specify any class of claims or interests that is not impaired under the plan."[109] Article IV of the Parent's Plan specifies that the following Classes are classified as Unimpaired under the Parent's Plan: Class 1 Priority Claims; Class 2 Secured Claims; Class 3 General Unsecured Claims; Class 5 Convenience Claims; Class

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[108] *See* 11 U.S.C. § 1123(a)(1); *see also In re Eagle Bus. Mfg., Inc.*, 134 B.R. 584, 596 (Bankr. S D. Tex. 1991), *aff'd*, 158 B.R. 421 (S.D. Tex. 1993) ("Administrative and Priority Tax Claims are not classified because Section 1123(a)(1) of the Bankruptcy Code does not require the classification of such Claims, and because they must receive the treatment specified in Section 1129(a)(9) of the Bankruptcy Code and cannot be otherwise impaired.").

[109] 11 U.S.C. § 1123(a)(2).

6 Late-Filed Claims; Class 7 Subordinated Claims; Class 8 Environmental Reinstated Claims; and Class 9 Equity Interests in ASARCO. The requirements of 11 U.S.C. § 1123(a)(2) are therefore satisfied by the Parent's Plan.

c. 11 U.S.C. § 1123(a)(3)

171. The Parent's Plan satisfies Section 1123(a)(3) of the Bankruptcy Code. Section 1123(a)(3) of the Bankruptcy Code requires that a plan "specify the treatment of any class of claims or interests that are impaired under the plan."[110] Class 4 (Asbestos Personal Injury Claims) is the only Class of Claims that is Impaired under the Parent's Plan, and Article 4.2(d) of the Parent's Plan specifies the treatment provided to Class 4. Therefore, the Parent's Plan satisfies Section 1123(a)(3) of the Bankruptcy Code.

d. 11 U.S.C. § 1123(a)(4)

172. The Parent's Plan satisfies Section 1123(a)(1) of the Bankruptcy Code. Section 1123(a)(4) of the Bankruptcy Code requires that a plan provide "the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest."[111] This provision provides creditors of the same class with a right to equality of treatment. Article IV of the Parent's Plan provides for equality of treatment for each Claim or Interest within a particular Class. The Parent's Plan therefore complies with Section 1123(a)(4) of the Bankruptcy Code.

173. While Article 4.2(b) of the Parent's Plan provides that the Parent may elect, prior to the Confirmation Hearing, different treatment to different secured claims, such provision does not violate Section 1123(a)(4) because each secured Claim constitutes its own

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[110] 11 U.S.C. § 1123(a)(3).

[111] 11 U.S.C. § 1123(a)(4).

sub-Class, and the votes of the holders of Claims in each such sub-Class are considered separately. Moreover, no such election was made by the Parent.

e. Implementation - 11 U.S.C. § 1123(a)(5)

174. Section 1123(a)(5) of the Bankruptcy Code requires that a plan provide "adequate means" for its implementation and sets forth specific examples of such adequate means, including, but not limited to: cancellation or modification of indentures or other instruments, amendment of the debtor's charter, issuance of new securities, retention by the debtor of all or any part of property of the estate, sales of the debtor's property, extension of maturity dates or changes in interest rates or other terms of outstanding securities.[112] The Parent's Plan meets this requirement.

175. The Parent's Plan provides adequate and proper means for its implementation, to wit:

> (i) Section 10.3 provides that, upon approval by the Bankruptcy Court in the Confirmation Order, the Parent's Plan Administrator will be appointed, and thereafter, the Parent's Plan Administrator will perform all of the estates' obligations under the Parent's Plan.[113]
>
> (ii) Section 10.1 provides that the Parent's Plan Administrator will be adequately funded as of the Effective Date by (a) the Parent delivering to the Parent's Plan Administrator Cash in the aggregate amount of $2.2051 billion, (b) Reorganized ASARCO delivering to the Parent's Plan Administrator the Distributable Cash, and (c) the Parent's waiver of its claim as to the approximately $60 million Tax Refund, and (d) the delivery to the Section 524(g) Asbestos Trust of a promissory note in the face amount of $280 million secured by the assets of Reorganized ASARCO, together with a guaranty by the Parent and pledge of a majority of the equity in Reorganized ASARCO.[114]
>
> (iii) Article 10.3(f) further provides that, to the extent there is any Distribution Deficiency, the Plan Administrator will, on behalf of all holders of Allowed

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112 11 U.S.C. § 1123(a)(5).

113 (Parent's Plan Art. 10.3.)

114 (Parent's Plan Art. 10.1.)

Claims, have recourse against Reorganized ASARCO for any amount of such Distribution Deficiency.[115]

(iv) Section 10.1 also provides that, on the Effective Date, (a) the Parent will provide the $200 million Working Capital Facility to Reorganized ASARCO, and (b) those Claims that are being Reinstated will be paid out of the operating cash flow of Reorganized ASARCO.[116]

(v) Section 10.2 provides that Grupo México has agreed to provide the Parent with funds in an amount equal to the amount required to permit the Parent to deliver the Parent Contribution in full and fund the borrowings under the Working Capital Facility, and guaranty Reorganized ASARCO's obligations under the $280 million promissory note to the Section 524(g) Trust.[117]

(vi) the Parent has established an Escrow Account funded with 83,710,000 shares of stock of SCC and $500 million in U.S. Dollar currency and has put in place an escrow agreement for the Escrow Account to demonstrate its intention to fully and timely consummate the Parent's Plan.[118] Before the Parent's Plan is recommended for Confirmation by the Bankruptcy Court, stock in the Escrow Account worth $125 million will act as a forfeitable deposit ensuring that the Parent's Plan is not terminated, withdrawn, or amended or modified in a manner that would effect a material adverse change in the treatment of general unsecured creditors prior to the conclusion of the Confirmation Hearing.[119] After the Parent's Plan has been recommended by the Bankruptcy Court for confirmation by the District Court, stock in the Escrow Account worth $2.2051 billion and U.S. Dollar currency in the amount of $500 million will continue to act as forfeitable deposit, ensuring that the Parent will timely consummate the confirmed Parent's Plan.[120]

(vii) Articles VI and VII provide, respectively, that on the Effective Date the Section 524(g) Trust and the Environmental Custodial Trusts will be established and properly funded to resolve and pay Allowed Claims in their respective jurisdictions.[121]

(viii) Section 10.6 provides that the Prepetition ASARCO Environmental Trust will remain in existence and continue to have access to the funds currently

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115 (Parent's Plan Art. 10.3(f).)

116 (Parent's Plan Art. 10.1.)

117 (Parent's Plan Art. 10.3.)

118 (Supp. de la Parra Proffer at ¶ 14.)

119 (Supp. de la Parra Proffer at ¶ 5.)

120 (Supp. de la Parra Proffer at ¶ 5.)

121 (Parent's Plan Arts. VI and VII.)

available to it.[122] It further provides that the Parent will make any remaining required contributions to the Prepetition ASARCO Environmental Trust in the ordinary course.[123]

176. Thus, the Parent's Plan meets the requirements of Section 1123(a)(5).

f. 11 U.S.C. § 1123(a)(6)

177. Section 1123(a)(6) of the Bankruptcy Code requires that the plan provide for the inclusion in a corporate debtor's charter provisions (i) prohibiting the issuance of nonvoting equity securities, and (ii) providing for an "appropriate distribution" of voting power among those securities possessing voting power.[124] The Parent's Plan meets this requirement: Section 10.9 provides that the Amended LLC Agreement that is to be filed with the Secretary of State of the State of Delaware on or as soon as practicable after the Effective Date, will "prohibit the issuance of nonvoting equity securities and provide for an appropriate distribution of voting power among classes of securities."[125]

g. 11 U.S.C. § 1123 (a)(7)

178. Section 1123(a)(7) of the Bankruptcy Code requires that the plan's provisions with respect to the manner of selection of any director, officer, or trustee, or any successor thereto, be "consistent with the interests of creditors and equity security holders and with public policy . . . ."[126] The Parent's Plan complies with this provision by providing, in Section 10.10, that the initial board of directors of Reorganized ASARCO will consist of up to five directors, each of them nominated by the Parent, who will serve from and after the Effective

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122 (Parent's Plan Art. 10.6.)

123 (Parent's Plan Art. 10.6.)

124 11 U.S.C. § 1123(a)(6).

125 (Parent's Plan Art. 10.9.)

126 11 U.S.C. § 1123(a)(7).

Date in accordance with the Amended LLC Agreement and applicable law.[127] The Parent has identified the director, officers and individual designated to serve as the Parent's Plan Administrator.[128]

h. Assumption or Rejection of Executory Contracts - 11 U.S.C. § 1123(b)

179. The Parent's Plan satisfies Section 1123(b) of the Bankruptcy Code. Section 1123(b) of the Bankruptcy Code sets forth the permissive provisions that may be incorporated into a chapter 11 plan. The Parent's Plan contains permissive provisions which are appropriate pursuant to Section 1123(b) of the Bankruptcy Code, and which are not inconsistent with the Bankruptcy Code. As contemplated by Section 1123(b)(2) of the Bankruptcy Code, Article VIII of the Parent's Plan provides for the assumption or rejection of the executory contracts and unexpired leases of the Debtors not previously assumed or rejected under Section 365 of the Bankruptcy Code. The Parent's Plan's provisions are not inconsistent with the Bankruptcy Code and are consistent with Section 1123(b) of the Bankruptcy Code.

3. 11 U.S.C. § 1124

180. The Parent's Plan satisfies Section 1124 of the Bankruptcy Code. The Parent's Plan does not artificially "manufacture" the impairment of any Class of Impaired Claims or Interests under the Parent's Plan.

C. 11 U.S.C. § 1129(a)(2)

181. Section 1129(a)(2) of the Bankruptcy Code requires that the plan proponent "comply with the applicable provisions of [title 11]."[129] The primary purpose of

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[127] (Parent's Plan Art. 10.10.) The Parent intends to assume the CBA, pursuant to which, upon assumption, the Unions have the right to designate one member of the Board of Directors.

[128] (Supp. de la Parra Proffer at ¶¶ 19-21.)

[129] 11 U.S.C. § 1129(a)(2).

Section 1129(a)(2) is to ensure that the plan proponents have complied with the requirements of Sections 1125 and 1126 of the Bankruptcy Code.

182. As noted earlier, this Court has approved the Disclosure Statement and the Disclosure Statement Supplement pursuant to Section 1125 of the Bankruptcy Code as containing "adequate information" of a kind and in sufficient detail to enable hypothetical reasonable investors typical of the Debtor's creditors to make an informed judgment whether to accept or reject each of the Plans.[130] In addition, this Court approved the proposed form and manner of notice of the Disclosure Statement and the Disclosure Statement Supplement on August 4, 2008, by the Order Granting Emergency Motion of ASARCO Incorporated And Americas Mining Corporation to Supplement Joint Disclosure Statement and Modify Solicitation Procedures.[131]

183. Section 1126 of the Bankruptcy Code specifies the requirements for acceptance of a plan of reorganization.[132] Under Section 1126, only holders of allowed claims and allowed equity interests in impaired classes of claims or equity interests that will retain property under a plan on account of such claims or equity interests may vote to accept or reject such plan. Class 4 (Asbestos Personal Injury Claims) and Class 9 (Interests in ASARCO) have voted to accept the Parent's Plan;[133] all other Classes of Claims and Interests are unimpaired and deemed to have accepted the Parent's Plan.[134] Based upon the foregoing, the requirements of Section 1129(a)(2) have been satisfied.

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130 *See, e.g.*, *In re Cajun Elec. Power Co-Op, Inc.*, 150 F.3d 503, 512 n.3 (5th Cir. 1998); *In re Texaco Inc.*, 84 B.R. 893, 906-07 (Bankr. S.D.N.Y. 1988); *In re Prudential Energy Co.*, 58 B.R. 857, 867 (Bankr. S.D.N.Y. 1986).

131 (Docket No. 12252.)

132 11 U.S.C. § 1126.

133 (*See* Chart, Monger Proffer at 5).

134 11 U.S.C. § 1126(f).

D. Good Faith - 11 U.S.C. § 1129(a)(3)

184. Section 1129(a)(3) provides that a court shall confirm a plan only if the "plan has been proposed in good faith and not by any means forbidden by law." While the Bankruptcy Code does not define "good faith," the standard of good faith under Section 1129 applied by many courts, including Texas courts, is whether there is a reasonable likelihood that the plan will achieve a result consistent with the objectives and the purposes of the Bankruptcy Code.[135] In this vein, the Fifth Circuit has repeatedly noted that the "requirement of good faith must be viewed in light of the totality of the circumstances surrounding establishment of a Chapter 11 plan, keeping in mind the purpose of the Bankruptcy Code is to give debtors a reasonable opportunity to make a fresh start."[136] "The standard of proof required by the debtor to prove a Chapter 11 plan was proposed in good faith is by a preponderance of the evidence."[137]

185. The Parent's Plan is proposed in good faith because it achieves the two ultimate objectives of the Bankruptcy Code: (a) paying creditors the maximum amounts to which they are entitled, and (b) enabling ASARCO to reorganize successfully and emerge from bankruptcy. In addition, the Parent's Plan preserves value in the estate for shareholders.

186. The Debtor objects to the Parent's Plan, claiming it is not made in good faith because it includes a release of certain claims by the Debtor against the Parent and its affiliates. In exchange for the releases, the Parent is contributing over $2.2 billion in cash to the Debtor's Estates—enough to ensure cash payment of full principal and interest on all claims at their allowed or agreed-upon amounts and in conformity with the absolute priority rule of

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135 *In re Texas Extrusion Corp.*, 68 B.R. 712, 723 (N.D. Tex. 1986); *aff'd*, 844 F.2d 1142 (5th Cir. 1988).

136 *Financial Security Assurance, Inc. v. T-H New Orleans Limited Partnership (In re T-H New Orleans Ltd. P'ship)*, 116 F.3d 790, 802 (5th Cir. 1997); *see also Public Finance Corp. v. Freeman (In re Public Finance Corp.)*, 712 F.2d 219, 221 (5th Cir. 1983).

137 *In re T-H New Orleans Ltd. P'ship*, 116 F.3d at 802.

distribution in chapter 11—and will grant a release of the Parent's claims against the Debtor.[138] The Parent has exhibited a commitment to consummate fully and timely the Parent's Plan and reorganize and continue the operations of the Debtor.

187. The Debtor relies on the SCC Final Judgment as evidence that the Parent's Plan is not proposed in good faith. The Debtor argues that "the Parent's past behavior in conspiring with faithless fiduciaries ought to prevent confirmation of the Parent's Plan."[139] The Section 1129 good faith analysis applies only to the plan and its acceptance, and does not apply to the plan proponent's pre-petition behavior.[140]

188. For example, the District Court for the Northern District of Texas has affirmed a bankruptcy court's finding that a plan proposed by a fraudulent conveyance defendant was proposed in good faith, noting: "All the evidence that appellants cite concerns acts allegedly committed prior to the filing for bankruptcy and is hence not relevant to the plan."[141] Similarly, the Bankruptcy Court for the Southern District of Texas has rejected allegations that a plan was not proposed in good faith because of pre-petition misdeeds in connection with a failed attempt to restructure the debtors outside of bankruptcy.[142]

189. The Debtor also suggests that the Parent's desire to release the SCC Final Judgment in the Plan's releases, means that the Plan is proposed in bad faith. This argument is inconsistent with cases holding that settling fraudulent transfer liability under a plan is

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138 (Supp. de la Parra Proffer at ¶ 3; Parent's Plan Art. 11.7.)

139 (*Id.* at 18.)

140 *See, e.g.*, *In re Machine Menachem, Inc.*, 371 B.R. 63, 69 (Bankr. M.D. Pa. 2006) (finding debtor's pre-petition corporate law violations not a factor in determining whether plan is proposed in good faith).

141 *In re Texas Extrusion Corp.*, 68 B.R. 712, 723 (N.D. Tex. 1986) ("The test for good faith is not based on what the plan proponents' behavior prior to petition was. It is only based on the Plan itself and its acceptance."), *aff'd.*, 844 F.2d 1142 (5th Cir. 1988).

142 *In re General Homes Corp.*, 134 B.R. 853, 862 (Bankr. S.D. Tex. 1991) ("The evaluation of good faith is not based on the plan proponents' behavior prior to the filing of the bankruptcy petition. It is only based on the Plan and its acceptance.")

permissible under Section 1123(b)(3)(A), and that there is nothing inherently impermissible about a plan proponent proposing to settle claims against itself. For example, in *Texas Extrusion Corp.*, the Fifth Circuit Court of Appeals affirmed confirmation of a plan proposed jointly by the debtors' largest secured creditor and the creditors committee, which plan included a release of fraud and fraudulent conveyance claims against the secured creditor in exchange for a release of a majority of secured creditor's claims against the debtors.[143] In affirming confirmation of the plan, the Fifth Circuit affirmed the bankruptcy court's finding that the plan was proposed in good faith under Section 1129(a)(3).[144]

190. The Debtor relies on the case of *In re Unichem Corp.* for the proposition that "Congress did not intend the objectives and purposes of the Bankruptcy Code to include rewarding [a shareholder] for breaching his fiduciary duty."[145] In *Unichem*, the court refused to approve a disclosure statement describing a plan proposed by the debtor's former president who had been found liable for breach of fiduciary duties to the debtor. The Court denied approval of the former president's disclosure statement on the grounds that: (a) it did not adequately disclose that the plan would release the president's liability for breach of fiduciary duty, or that the plan would likely result in a liquidation of the debtor; and (b) the plan was proposed with the goal of eliminating the debtor as a business competitor, and therefore was not proposed in good faith. *Unichem* is distinguishable from this case. First, the Court did not address the plan's release of fiduciary duty liability as an element of its good faith analysis; rather, the release was an element

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143 *In re Tex. Extrusion Corp.*, 844 F.2d 1142, 1157-60 (5th Cir. 1988).

144 *Id.*; *see also In re BBL Group, Inc.*, 205 B.R. 625, 633 (Bankr. N.D. Ala. 1996) (confirming a Chapter 11 plan proposed by a creditor / fraudulent transfer defendant and noting that, under 11 U.S.C. § 1123(b)(3)(A), "a plan may provide for the settlement or adjustment of any claim belonging to the debtor or to the estate"); *In re Cellular Information Systems, Inc.*, 171 B.R. 926, 945 (Bankr. S.D.N.Y. 1994) ("The evaluation of good faith is not based on the plan proponents' behavior prior to the filing of the bankruptcy petition, but instead, in light of the totality of the circumstances surrounding confirmation.") (citations omitted).

145 *In re Unichem Corp.*, 72 B.R. 95, 100 (Bankr. N.D. Ill. 1987)

of the court's adequate information analysis. Thus, the plan was not found to be proposed in bad faith on the grounds that the proponent sought to eliminate his breach of fiduciary duty liability. Second, the court found that the plan was proposed in bad faith because the former president sought to eliminate the debtor as a business competitor, noting that the objectives of the Bankruptcy Code do not include: "allowing an individual to utilize the Bankruptcy Code to drive a competitor out of business."[146] Moreover, here the Parent is not motivated to eliminate ASARCO as a business competitor, but rather seeks to reorganize ASARCO as a viable and profitable entity. Finally, as the District Court confirmed, the Parent does not owe fiduciary duties to ASARCO.[147] Therefore, *Unichem* does not support the conclusion that the Parent's Plan is proposed in bad faith.

191. In addition, the SCC Litigation arose out of events that occurred over six years ago. The District Court concluded that AMC paid ASARCO reasonably equivalent value for the SCC Shares. Moreover, the purpose of Section 550 is to avoid transfers "for the benefit of the estate," which is uniformly interpreted to mean only until the allowed claims of creditors have been paid in full.[148] Here, the estate has been made whole, and thus there is no cause for referring to the SCC Final Judgment as grounds for denying the Parent's Plan.

192. Further, nothing in the District Court opinion indicates that the District Court intended to prohibit the Parent's participation in the bankruptcy. Indeed, it is likely that the District Court joined the Bankruptcy Court and possibly the majority of professionals in this case in wondering why it took the Parent so long to propose a serious full payment plan.

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146 *Id.* at 100.

147 *ASARCO LLC v. Americas Mining Corp.*, 396 B.R. 278, 415-16 (S.D. Tex. 2008).

148 *ASARCO LLC v. Americas Mining Corp.*, 404 B.R. 150, 161 (S.D. Tex. 2009); *Adelphia Recovery Trust v. Bank of America, N.A.*, 390 B.R. 80 (S.D.N.Y. 2008); *Murphy v. Town of Harrison (In re Murphy)*, 331 B.R. 704, 714-15 (S.D.N.Y. 2005).

193. Therefore, the release of the SCC Litigation and other litigation is a settlement permissible under Section 1123(b)(3)(A), and for which the Parent will provide consideration of $2.4799 billion ($2.2051 billion in Cash, a $274.8 million present value promissory note), plus the AMC Guarantee Agreement and the Grupo México Guarantee Agreement. Given the testimony of the Debtor's expert witness that the enterprise value of ASARCO is between $950 million and $1.25 billion, value well in excess of $1 billion is being paid for the release.[149]

194. The Debtor and the Union also claim that the lack of a new collective bargaining agreement with the Union is an indication that the Parent's Plan is not proposed in good faith. Not so. The Parent has repeatedly expressed its intent to abide by the CBA after confirmation, and the Parent's Plan assumes the existing CBA will remain in effect and that Reorganized ASARCO will continue to honor that agreement, including the provision providing for the Union to occupy one seat on Reorganized ASARCO's Board of Directors.[150] Moreover, although the parties have not yet been able to reach a new labor agreement, the Court believes that a new labor agreement can be reached. This finding is supported by the Parent's offer, during the confirmation hearing, to extend the term of the existing CBA by one year.[151] In addition, as explained herein, the lack of an agreement with the Union does not prevent confirmation of the Parent's Plan based on the Special Successorship Clause. Therefore, the lack of a new CBA between the Parent and the Union does not support a finding that the Parent's Plan is not proposed in good faith.

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149 (Proffer of George M. Mack in Support of Confirmation of the Debtors' Joint Plan of Reorganization and in Opposition to Confirmation of Parent's and Harbinger's Plans of Reorganization (Docket No. 11936, "Mack Proffer") at 5.)

150 (Docket No. 12620; *see also* Supp. Lazalde Proffer at ¶17; confirmation Hr'g Tr. 8/25/09 at 60:11-13.)

151 (Confirmation Hr'g Tr. 8/25/09 at 60:11-13 [Statement of Mr. Brimmage]; *see also* Docket No. 12806.)

195. The Parent's Plan achieves good objective consequences because it provides a cash recovery in full satisfaction of creditor's claims, the greatest immediate recovery to various constituencies, and certainty of funding. In short, lack of "good faith" in filing a bankruptcy or confirming a plan can always be overcome by providing enough cash to pay all of the claims in full. For these reasons, Section 1129(a)(3) has been satisfied.

E. Payment Approval - 11 U.S.C. § 1129(a)(4)

196. The Parent will not make any payments "for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case," unless such payments either have been approved by the Court as reasonable or are subject to approval of the Court as reasonable, thus satisfying the requirements of Section 1129(a)(4) of the Bankruptcy Code.[152] This Section has been construed to require that all payments of professional fees that are made from estate assets be subject to review and approval by the Court as to their reasonableness.[153]

197. Section 2.1 of the Parent's Plan provides for the payment of only "Allowed" Administrative Claims, and specifically provides that "Allowed Administrative Claims of Professional Persons shall be paid pursuant to a Final Order of the Bankruptcy Code."[154] In addition, Section 15.2(q) of the Parent's Plan provides that the Court will retain jurisdiction after the Effective Date to hear and determine all applications for compensation of Professional Persons and reimbursement of expenses under Sections 330, 331, or 503(b) of the

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[152] *See* 11 U.S.C. § 1129(a)(4); *see also In re Resorts Int'l, Inc.*, 145 B.R. 412, 475-76 (Bankr. D.N.J. 1990).

[153] *See In re Chapel Gate Apartments, Ltd.*, 64 B.R. 569, 573 (Bankr. N.D. Tex. 1986) (noting that before a plan may be confirmed, "there must be a provision for review by the Court of any professional compensation").

[154] *See In re Elsinore Shore Assocs.*, 91 B.R. 238, 268 (Bankr. D. N.J. 1988) (holding that requirements of Section 1129(a)(4) were satisfied when the plan provided for payment of only "allowed" administrative expenses).

Bankruptcy Code. Accordingly, the Parent's Plan fully complies with the requirements of Section 1129(a)(4) of the Bankruptcy Code.

F. Disclosure of Directors, Officers, and Trustees - 11 U.S.C. § 1129(a)(5)

198. Section 1129(a)(5) of the Bankruptcy Code requires that the plan proponent disclose the identity of certain individuals who will hold positions with Reorganized ASARCO after the Effective Date.[155] As set forth *supra*, the Parent has disclosed the identity and affiliations of any person proposed to serve as a director or an officer of Reorganized ASARCO and thus the Parent's Plan complies with 11 U.S.C. 1129(a)(5).

G. Rate Changes - 11 U.S.C. § 1129(a)(6)

199. Section 1129(a)(6) of the Bankruptcy Code requires, with respect to a debtor whose rates are subject to governmental regulation following confirmation, appropriate governmental approval has been obtained for any rate change provided in the plan, or that such rate change be expressly conditioned on such approval.[156] Because the Debtor does not conduct operations in a regulated industry, Section 1129(a)(6) is inapplicable to the Parent's Plan.

H. Best Interest of Creditors - 11 U.S.C. § 1129(a)(7)

200. Section 1129(a)(7) of the Bankruptcy Code provides protection to creditors and interest holders who are impaired under a plan and who have not voted to accept such plan by imposing on any plan a "best interests of creditors" requirement. Under this requirement, holders of impaired claims and interests who do not vote to accept the plan must:

> receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if

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155 11 U.S.C. § 1129(a)(5).

156 11 U.S.C. § 1129(a)(6).

> the debtor were liquidated under chapter 7 [of the Bankruptcy Code] on such date.[157]

Under the Parent's Plan there is only one impaired class of creditors (Class 4 (Asbestos Personal Injury Claims)).

201. The analysis requires that each holder of a claim or interest either accept the plan or receive or retain under the plan property having a present value, as of the effective date of the plan, not less than the amount such holder would receive or retain if the debtor were liquidated under chapter 7 of the Bankruptcy Code.[158]

202. In a liquidation under chapter 7, the value of the Estates would diminish substantially due to, among other things: (a) the increased costs and expenses of liquidation under chapter 7 arising from fees payable to the chapter 7 trustee and attorneys and other professional advisors to such trustee; (b) additional expenses and claims, some of which would be entitled to priority, which would be generated during the liquidation; (c) further erosion of the value of the Debtor's assets in the context of an expedited liquidation required under chapter 7; and (d) cost and expense attributable to the time value of money resulting from what is likely to be a more protracted proceeding.

203. By comparison, the Parent's Plan provides that creditors in all Classes other than Class 4 will receive payment in full, in cash, with post-petition interest. No greater recovery is possible, so the best interests test is satisfied as to creditors in such Classes. As to holders of Claims in Class 4, such holders are receiving the benefit of the bargain negotiated between the Parent and the Asbestos Representatives, and that treatment results in demonstrably greater recovery than that provided under the Debtor's Plan, let alone in a liquidation.

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[157] 11 U.S.C. § 1129(a)(7)(A)(ii).

[158] *In re Briscoe Enters.*,, 994 F.2d at 1167 (the best interests of creditors test "requires that each holder of a claim in a class either accept the plan or receive at least as much as it would receive in a chapter 7 liquidation").

Consequently, the Court concludes that confirmation of the Parent's Plan will provide each holder of a Claim in an Impaired Class with a greater recovery than such holder would have received under a chapter 7 liquidation of the Debtor.

204. Holders of Allowed Secured Claims will either (a) receive (i) cash equal to the principal amount of such Allowed Secured Claim and (ii) post-petition interest on such claim, (b) be reinstated, (c) receive the collateral securing such Secured Claims, or (d) receive other treatment as may be agreed upon between the Parent and the holder of the Allowed Secured Claim.

205. Holders of Asbestos Personal Injury Claims and Demands will be channeled to, and assumed and satisfied by, the Section 524(g) Trust funded with the Section 524(g) Trust Assets (consisting of (a) cash in the amount of $500 million and cash in an amount representing post-petition interest calculated at the Plan Rate on a principal amount of $780 million; (b) the ASARCO Note; (c) the ASARCO Security Agreement; (d) the ASARCO Deed of Trust; (e) the Parent Pledge Agreement; (f) directly or indirectly, the Asbestos Insurance Recoveries; (g) cash in the amount of $27.5 million to administer the Section 524(g) Trust); and (h) rights to enforce the Parent Pledge Agreement against Grupo México pursuant to the Guarantee Agreement).

206. Holders of General Unsecured Claims will receive cash equal to the principal allowed amount of such claim plus post-petition interest.

207. Holders of Late Filed and Subordinated Claims, in full satisfaction, settlement, release, extinguishment, and discharged of such Claim, will receive cash equal to the principal allowed amount of such claim plus post-petition interest.

208. Interests in ASARCO will be, as of the Effective Date, retained by ASARCO USA, Incorporated.

I. Acceptance or Non-Impairmment - 11 U.S.C. § 1129(a)(8)

209. Section 1129(a)(8) of the Bankruptcy Code requires that a plan must, with respect to each class of claims or interests, either provide for the non-impairment of such class or be accepted by each impaired class.[159] Pursuant to Section 1126(c), a class of impaired claims has accepted a plan if the holders of at least two-thirds in dollar amount and more than one-half in number of claims in that class actually voting in connection with the plan vote to accept the plan.

210. Class 4 (Asbestos Personal Injury Claims) is the only Impaired Class under the Parent's Plan. Its impairment relates, *inter alia,* to the agreement of its constituent holders to accept a $280 million interest-bearing, secured one-year promissory note as part of its distribution in satisfaction of the claims of its holders. The holders of Asbestos Personal Injury Claims have voted in sufficient number and amount to accept the Parent's Plan. Holders of Claims representing 89.78% in dollar amount and 84.16% in number of voting Claims in Class 4 voted to accept the Parent's Plan.[160] Thus, the Parent's Plan satisfies the requirements of Section 1129(a)(8) of the Bankruptcy Code.

211. All other Classes are unimpaired under the Parent's Plan. Accordingly, they are deemed to have accepted the Parent's Plan pursuant to Section 1126(f) of the Bankruptcy Code.

212. The Court determines that even if another Class that has not accepted the Parent's Plan is impaired, the Parent's Plan, the Parent's Plan may nevertheless be confirmed

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[159] 11 U.S.C. § 1129(a)(8)(A).

[160] (Monger Proffer at ¶ 10.)

pursuant to Section 1129(b) of the Bankruptcy because the Parent's Plan does not discriminate unfairly and is fair and equitable to each rejecting Class.

J. Treatment of Administrative and Priority Tax Claims - 11 U.S.C. § 1129(a)(9)

213. Section 1129(a)(9) of the Bankruptcy Code contains a number of requirements concerning the payment of priority claims. *See* 11 U.S.C. § 1129(a)(9). The Parent's Plan meets the requirements of all three subsections of Section 1129(a)(9). Specifically, the treatment of Administrative Claims and Priority Claims satisfies the requirements of Section 1129(a)(9)(A) and (B) of the Bankruptcy Code, and the treatment of Priority Tax Claims satisfies the requirements of Section 1129(a)(9)(C) of the Bankruptcy Code.[161]

K. At Least One Impaired Class of Claims has Accepted the Plan (Excluding Insiders) - 11 U.S.C. § 1129(a)(10)

214. If a plan has any impaired class of claims, Section 1129(a)(10) of the Bankruptcy Code requires that at least one such impaired class of claims vote to accept the plan, determined without including the acceptance of the plan by any insider.[162] The holders of Asbestos Personal Injury Claims, an impaired class of claims, have voted in sufficient number and amount to accept the Parent's Plan.

L. Feasibility - 11 U.S.C. § 1129(a)(11)

215. Section 1129(a)(11) of the Bankruptcy Code requires the Court to find that the Parent's Plan is feasible, and that "[c]onfirmation of the plan is not likely to be followed by liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."[163] The

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161 (*See* Parent's Plan, §§ 2.1, 2.2 and 4.2(a).)

162 11 U.S.C. § 1129(a)(10); *see also In re Anderson Oaks (Phase I) Ltd. P'ship*, 77 B.R. 108, 111 (Bankr. W.D. Tex. 1987).

163 11 U.S.C. § 1129(a)(11).

feasibility requirement involves two determinations: (i) that the provisions of the plan can realistically be consummated, and (ii) if consummated, the plan will enable the debtor to emerge from bankruptcy as a viable entity.[164] The Parent has satisfied both elements.

1. The Parent's Plan can be consummated according to its provisions.

216. The first element of feasibility requires the court to examine whether, as a practical matter, the plan can be performed according to its provisions.[165] The funding for the Parent's Plan is to be provided in cash or cash equivalents. This includes a binding commitment from the Parent to deposit $2.2051 billion in shares of stock of SCC and $500 million in U.S. Dollar currency into an escrow account to demonstrate its commitment to confirmation and consummation of the Parent's Plan, and provision of a $200 million Working Capital Facility.[166] The shares of SCC stock that will be deposited into the escrow account are not the same SCC shares that currently secure the SCC Final Judgment.[167] The funding also includes the $280 million ASARCO Note, guaranteed by AMC and Grupo México and fully secured by a first lien on Reorganized ASARCO's assets and a pledge of 51 percent of the New Equity Interests in Reorganized ASARCO.[168] In addition, the Parent has paid over $21 million to obtain a binding commitment with a consortium of lenders to provide $1.3 billion senior secured term financing facility with several prominent, internationally-recognized lending institutions.[169] The Parent has also obtained a guarantee by Grupo México to provide the other $905.1 million, $500 million of

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164 *See In re Lakeside Global II, Ltd.*, 116 B.R. 499, 506-07 (Bankr. S.D. Tex. 1989).

165 *See In re Clarkson*, 767 F.2d 417, 420 (8th Cir. 1985); *see also In re Seatco, Inc.*, 259 B.R. 279, 288 (Bankr. N.D. Tex. 2001) (noting that feasibility means that "the reorganized debtor can perform the plan and make those payments promised to it under the plan").

166 (Supp. de la Parra Proffer at ¶ 13; Executed Escrow Agreement, Ex. 25.) .

167 (Confirmation Hr'g Tr. 8/27/2009 at 95:10-25, 96:1-5 (Statements of Mr. Winter and Mr. Antweil).)

168 (Parent's Plan Exhibit 23.)

169 (Supp. de la Parra Proffer at ¶ 7 and Ex. A.)

which has been pre-funded into the Escrow Account, thus ensuring the Parent's ability to fund its obligations.[170]

217. The evidence therefore supports the conclusion that the Parent's Plan can realistically be consummated according to its provisions.

2. Under the Parent's Plan, it is likely that Reorganized ASARCO will continue as a successful and viable entity.

218. The second element, which requires that the court determine that it is likely that the reorganized company continue as a successful and viable entity, is also satisfied. To satisfy this element, the success of the reorganized entity need not be guaranteed.[171] "Only a reasonable assurance of commercial viability is required."[172] This requirement is not meant to prohibit the confirmation of plans that have a reasonable likelihood of success. Instead, "[t]he purpose of the feasibility requirement is 'to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation.'"[173]

219. As described above, Reorganized ASARCO will have more than adequate funding to succeed as a viable entity after confirmation of the Parent's Plan.

220. Following confirmation, the Parent's Plan contemplates that Reorganized ASARCO will have certain ongoing obligations, including pension and other post-retirement benefit obligations, Reinstated Environmental Claims, litigation costs, ordinary operating costs, tax payments, and obligations under the ASARCO Note.[174] Further, the Parent intends to

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170 (Supp. de la Parra Proffer at ¶¶ 19-20, Ex. A.)

171 *See In re Lakeside Global II, Ltd.*, 116 B.R. at 507.

172 *Id.*

173 *Id.* (quoting *Pizza of Hawaii, Inc. v. Shakey's Inc. (In re Pizza of Hawaii, Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985)).

174 (Poulin Proffer at ¶ 15.)

operate Reorganized ASARCO in accordance with the Five Year Business Plan prepared by ASARCO and as contemplated by the Proffer and Rebuttal Proffer of Lisa Poulin.[175]

221. Reorganized ASARCO is projected to generate sufficient cash flow to satisfy its obligations, resulting in positive EBITDA for each year of the Plan.[176] According to the Poulin Proffer, and as updated in the financial presentation submitted on August, 29, 2009, the projections in the Parent's Plan are reasonable under the circumstances.[177] Furthermore, the feasibility of the Parent's Plan is enhanced by a renewable two-year term $200 million working capital facility provided by the Parent—which, pursuant to the Guarantee Agreement, is fully backed by Grupo México. The $200 million working capital facility will ensure that Reorganized ASARCO has sufficient resources to pay its obligations as they come due.[178] In addition, the Parent, a U.S. corporation, possesses approximately 680 million shares of Southern Peru Copper Corporation Stock with an aggregate market value of in excess of $20 billion.[179]

222. The Parent has obtained the services and expertise of several professionals to make certain that the Parent's Plan is the best alternative and most feasible plan, particularly in regard to creditor, labor, asbestos, and environmental issues.[180] To evaluate the feasibility of the Parent's Plan and the Debtors' Plan, the Parent has engaged CRG Partners to analyze not only the feasibility of each Plan, but also to conduct a liquidation analysis of each Plan. Based on its expertise, CRG Partners concluded that cash and other forms of value available for

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175 (Poulin Proffer at ¶ 20-21; Poulin Rebuttal Proffer at ¶ 14; Lazalde Proffer at ¶ 30.)

176 (Poulin Proffer, Ex. C).

177 (Poulin Proffer at ¶ 20; Notice of Informational Filing with Respect to ASARCO Incorporated and Americas Mining Corporation's Seventh amended Plan of Reorganization for the Debtors under Chapter 11 of the United States Bankruptcy Code, as Modified on August 20,2009, august 23, 2009, and August 27,2 009, Docket No. 12725, "Informational Notice", Ex. 1).

178 (Poulin Proffer at ¶ 21).

179 (de la Parra Proffer at ¶ 9.)

180 (*See, e.g.,* Travers Proffer; *see also* Brown Proffer; Evaluation of Environmental Obligations and Costs at ASARCO Operating Sites, July 10, 2009 (Docket No. 11937).)

distribution under the Parent's Plan are sufficient to satisfy all Claims and even more certain under the Parent's Plan, as modified. Moreover, CRG Partners has concluded that the confirmation and consummation of the Parent's Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of Reorganized ASARCO.

3. The possible loss of the CBA and possible resulting strike does not render the Parent's Plan unfeasible.

223. The Debtor and the Union assert as grounds for rejecting the Parent's Plan that the ASARCO employees may strike if the Parent's Plan is confirmed. The risk of a Union strike is overstated and does not undermine the feasibility of the Parent's Plan.

224. The Chairman of the ASARCO Board, Ruiz, testified that "[c]oncerns about a strike if the Parent's Plan is confirmed in the absence of a deal with the labor union are unfounded."[181] His testimony is particularly credible because he helped resolve the 2005 strike, and has been with ASARCO since that time.[182]

225. The Union's own witnesses acknowledged that the Union routinely secures a strike authorization as a "pre-negotiation" bargaining tactic, and that in many cases where strike authorization has been obtained, strikes never occur.[183] For example, when the Union has been highly critical of an employer, as evidenced by its views of Rio Tinto (a company with a supposed history of labor and environmental abuses) and whom it describes in

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181 (Ruiz Proffer at ¶ 15; *see also* Supp. Lazalde Proffer at ¶ 37 ("I agree with Mr. Ruiz.").)

182 (Confirmation Hr'g Tr. 8/19/09 at 78-81 (Ruiz Test.).)

183 (Confirmation Hr'g Tr. 8/11/2009 at 132 (Mack Test.) (acknowledging that it is possible that a strike will not occur); Confirmation Hr'g Tr. 8/12/2009 at 100, 181 (Armenta Test.); Confirmation Hr'g Tr. 8/13/2009 at 26, 28, 31-35 (LaVenture Test.); *see also* Supp. Alberto de la Parra Proffer at ¶ 15; Supp. Lazalde Proffer at ¶ 39.)

the same terms as the Parent, it has not struck in the face of very difficult negotiations even though armed with a strike vote.[184]

226. The Union cites to the 2005 ASARCO strike as evidence that they will strike despite the associated hardships.[185] But the circumstances in 2009 are materially different.[186] In 2005, about half of the workers had been operating under an expired CBA for approximately two years, and they were facing cuts in wages and benefits.[187] In contrast, here the Parent has not proposed to cut wages or benefits.[188] ASARCO employees are all covered under a CBA that is still in effect and which provides substantial benefits to employees.[189] Therefore, the fact of the strike in 2005 does not necessarily support a finding that the Union would strike in 2009.

227. There are several legal and practical impediments to any strike.[190] Legally, the Union is barred from striking by the CBA's "no-strike" clause, and are further constrained from striking by the notice requirements of section 8(d) of the NRLA.[191] Because the Court can reject the SSC while leaving the CBA intact, the Union will not have the right to strike.[192]

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184 (Exhibit 60 (reflecting Unions' antipathy for Rio Tinto, and yet no strike); Confirmation Hr'g Tr. 8/13/2009 at 28:20-23, 31:22-25, 32:1-7 (LaVenture Test.); Confirmation Hr'g Tr. 8/12/2009 at 100-01 (Armenta Test.).)

185 (Supp. Lazalde Proffer at ¶ 41.)

186 (*Id.*)

187 (*Id.*)

188 (*Id.*; Confirmation Hr'g Tr. 8/12/2009 at 168-171; 177 (Armenta Test.).)

189 (Supp. Lazalde Proffer at ¶ 41; Confirmation Hr'g Tr. 8/12/2009 at 168-171; 177 (Armenta Test.).)

190 (Supp. Lazalde Proffer at ¶ 37; Confirmation Hr'g 8/19/09 at 69:12-14.; 70:10-11 (Ruiz Test.).)

191 (Second Stipulation ¶ C.)

192 (CBA at Art. 5, § K ("There shall be no strikes, sympathy strikes, or other work stoppages or the interruption or impeding of work); *see also* Supp. Lazalde Proffer at ¶ 38.)

228. Practically speaking, the fact that a CBA is currently in place, and the parties have one to two years to negotiate a new CBA, supports a finding that a strike is unlikely. As Carlos Ruiz noted, the current CBA "with the union has not expired, leaving adequate time for negotiations" for a new CBA after confirmation.[193] If the Parent's Plan is consummated, the Parent and Union will have every incentive to work together before the CBA terminates in June, 2010.[194]

229. Employees under the current CBA are not facing proposed wage and benefit reductions but, instead, are drawing some of the highest wages and benefits ever paid in the copper industry.[195] The CBA contains "substantial economic gains," including an upcoming $1/hour wage increase, copper price bonuses, comprehensive employer-paid health benefits, pension benefits, and 401(k) – all of which the Parent has offered to assume. [196]

230. Striking employees would no longer be entitled to these wages and benefits provided for in the CBA.[197] Nor would they be entitled to unemployment benefits or food stamps. Striking employees would be forced to live off of whatever savings they have and strike benefits provided by the Union, which currently average $150 per employee per week, based on need, and which only start being paid after a 3 week waiting period.[198] Striking employees would be subject to termination if the strike was illegal, or permanent replacement if

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193 (Ruiz Proffer at ¶ 15; *see also* Supp. de la Parra Proffer at ¶ 16; Confirmation Hr'g Tr. 8/20/2009 at 232:2-20 (de la Parra Test.).) The fact that the Parent has unilaterally offered to extend the CBA for one year, until June 30, 2011, further supports the finding that will be ample time for the parties to pursue a New CBA after confirmation, and outside the context of adversarial litigation.

194 (Ruiz Proffer ¶¶ 13-14, Supp. de la Parra Proffer ¶ 16.)

195 (Supp. Lazalde Proffer at ¶ 40; *see also generally* Confirmation Hr'g Tr. 8/12/2009 at 100-101, 111-112 (Armenta Test.).)

196 (Exhibits 63, 65; Supp. Lazalde Proffer at ¶40; Confirmation Hr'g Tr. 8/12/2009 at 168-81 (Armenta Test.)

197 (Supp. Lazalde Proffer at ¶ 40; Confirmation Hr'g Tr. 8/12/2009 at 178 (Armenta Test.).)

198 (Supp. Lazalde Proffer at ¶ 40; Confirmation Hr'g Tr. 8/12/2009 at 180:18-25, 181:1-2 (Armenta Test.).)

the strike was lawful.[199] The Union has acknowledged that any strike would necessarily harm the communities in which the employees live.[200]

231. The harm that the employees (and their families and communities) would suffer during any strike therefore decreases the likelihood of a strike.[201]

232. Both the likelihood and the impact of a strike would be minimized by economic realities in the communities surrounding ASARCO's facilities.[202] As Union Representative Manuel Armenta admitted, a factor that the Union would take into account in calling a strike is unemployment and the availability of replacement workers.[203] The Union further admitted there are currently many unemployed workers in and around Arizona from which replacements could be sought, including many employees who have been laid off by competing (mostly non-union) mining operations.[204] As of June 2009, the unemployment rate in Arizona was 8.7%, and mining employment was down nearly 20% from a year earlier.[205] ASARCO's copper mining competitors in the area, most of which are nonunion, have recently laid off more than 2,000 employees.[206] Due to the recession and high unemployment rates, it is in the interest of all parties to negotiate in good faith and arrive at a consensual arrangement.

233. Any reasonable cost-benefit analysis of a strike would include a consideration of whether there are available, experienced workers that the employer can hire in

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199 (Supp. Lazalde Proffer at ¶ 40.)

200 (Confirmation Hr'g Tr. 8/12/2009 at 181:8-12 (Armenta Test.).)

201 (*See generally* Confirmation Hr'g Tr. 8/12/2009 at 178-83 (Armenta Test.).) *See* 29 U.S.C. 158(d); *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *Laidlaw,* 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970).

202 (Exhibits 75-77 (reflecting mining job losses); Supp. Lazalde Proffer at ¶ 42.)

203 (Confirmation Hr'g Tr. 8/12/2009 at 108-109 (Armenta Test.).)

204 (Exhibits 74-77; Confirmation Hr'g Tr. 8/12/2009 at 108-109 (Armenta Test.); *see also* Supp. Lazalde Proffer at ¶ 43.)

205 (Exhibit 77; Confirmation Hr'g Tr. 8/12/2009 at 108-09 (Armenta Test.).)

206 (Exhibits 74-77; Confirmation Hr'g Tr. 8/12/2009 at 106-07 (Armenta Test.).)

an effort to weather the strike.[207] The fact, therefore, that there is a large pool of available, qualified miners in the area from which replacements can be hired should make a strike less likely in this case.

234. Based on the practical impediments to a strike, in addition to the legal impediments discussed above, and the economic consequences the Union and the employees might suffer with any strike, it is not reasonable to assume that the Union will actually strike.[208]

235. The Parent presented evidence supporting a finding that, even if the Union and employees do strike, the Parent is capable of withstanding, and is prepared to minimize, the impact the operations of Reorganized ASARCO.[209] The Parent has begun to make strike preparations, both internal and external, regarding the operations and financial well-being of the company.[210]

236. The Parent's ability to hire sufficient replacements to continue to operate the business is not remote or speculative.[211] To ensure minimal disruption of ASARCO's operations, ASARCO would be able to draw from the available and experienced pool of mining workers in and around Arizona, including many employees who have been laid off by competing (mostly non-union) mining operations.[212] It is foreseeable, therefore, that the presence of a large pool of available, qualified miners who can be hired as replacement workers would mitigate the

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[207] (Confirmation Hr'g Tr. 8/20/2009 at 122:5-14 (Poulin Test.); *see also generally* Confirmation Hr'g Tr. 8/12/2009 at 192 (Armenta Test.).)

[208] (Supp. Lazalde Proffer at ¶¶ 37, 42.)

[209] (Supp. Lazalde Proffer at ¶¶ 37, 42; Supp. Alberto de la Parra Proffer at ¶¶ 15-17; *see also generally* Confirmation Hr'g Tr. 8/20/2009 (Poulin Test.).)

[210] (Supp. de la Parra Proffer at ¶ 15.)

[211] (Supp. Lazalde Proffer at ¶ 43; Confirmation Hr'g Tr. 8/20/09 at 122 (Poulin Test.)

[212] (Supp. Lazalde Proffer at ¶ 43; *see also* Confirmation Hr'g Tr. 8/12/2009 at 182-183 (Armenta Test.); *see also* Confirmation Hr'g Tr. 8/20/2009 at 104 (Poulin Test.)

impact a Union Strike would have on Reorganized ASARCO's operations and, because parties can anticipate such effects, would decrease the probability of a Union strike altogether.

237. The Parent also presented evidence that any challenges resulting from a strike could be addressed without undue strain on the company due to Reorganized ASARCO's reserve capital resources. Reorganized ASARCO could draw on the $50 million in retained working capital, the $200 million Working Capital Facility, the $50 million Sterlite Letter of Credit, and the additional cash that the Parent anticipates will remain even after the "high side" of creditor claims are satisfied.[213] In terms of labor resources, the depressed labor market in the Arizona mining industry, as discussed above, would offer management low-cost solutions to temporary labor shortages.[214] Therefore, the Court is confident that in the event of a strike, Reorganized ASARCO would have sufficient resources to address reduced production.

238. The Parent has also begun preparations for the possibility of a strike. The Parent would secure workers who are already familiar with ASARCO's mines, facilities and Unions, and if necessary could reduce production at certain facilities.[215] The Parent has also contacted Andrews International, a labor strike and security management firm that specializes in assisting companies with labor disruption issues, including replacement workforce and security issues.[216] Personnel at Andrews have personal experience with ASARCO's facilities and have assisted with ASARCO strikes in the past, and they are ready and available to assist ASARCO should there be a strike.[217]

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[213] (Supp. de la Parra Proffer at ¶ 15; Confirmation Hr'g Tr. 8/20/2009 at 103-104 (Poulin Test.).)

[214] (Confirmation Hr'g Tr. 8/20/2009 at 104 (Poulin Test.); Supp. Lazalde Proffer at ¶ 43; Confirmation Hr'g Tr. 8/12/2009 at 182-183 (Armenta Test.).)

[215] (Supp. de la Parra Proffer at ¶ 15.)

[216] (Supp. de la Parra Proffer at ¶¶ 15-17.)

[217] (*Id.*)

239. Finally, CRG Partners has independently concluded that the confirmation and consummation of the Parent's Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of Reorganized ASARCO.[218]

240. The Union cites to the 2005 strike as evidence that a post-confirmation strike would undermine the feasibility of Reorganized ASARCO. The Union's claim that ASARCO's bankruptcy filing resulted from the 2005 strike is overstated. It is clear that ASARCO was headed for bankruptcy long before the strike occurred. The vast majority of ASARCO's current creditors are environmental and asbestos claimants. The ASARCO bankruptcy was precipitated by these liabilities as well as the strike. *See, e.g.*, *ASARCO LLC v. Americas Mining Corp.*, 396 B.R. 278, 315 (S.D. Tex. 2008) ("By the time ASARCO was looking seriously at bankruptcy in 2005, there were thousands of asbestos claims involving ASARCO or its subsidiaries and they were increasing on a daily basis.").

241. The 2005 strike is described in the Disclosure Statement,

> Unionized workers, represented primarily by the USW, and certain other hourly paid employees representing nearly 1500 employees in total (about 70 percent of the workforce), went on strike beginning on July 2, 2005. The plants affected by the strike were ASARCO's refinery in Amarillo, Texas, its smelter in Hayden, Arizona, as well as ASARCO's Ray, Mission, and Silver Bell copper mines and associated mills. At the center of the strike were nine collective bargaining agreements. Eight of these agreements, covering about 750 workers at ASARCO's Mission and Silver Bell mines and its smelters in Hayden and Amarillo, had expired in 2004. The ninth contract, which expired on June 30, 2005, covered about 800 workers at the Ray mine. ASARCO used salaried employees and some temporary workers to operate these plants during the period of the strike.[219]

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[218] (Poulin Proffer at ¶ 4; Second Supp. Poulin Proffer at ¶¶ 12-31; *see also* Confirmation Hr'g Tr. 8/20/09 at 122-23 (Poulin Test.)

[219] (*See* Disclosure Statement at 51.)

Therefore, the 2005 labor strike began in July, 2005 – *after* the asbestos subsidiaries filed for bankruptcy – and lasted only a few months.[220] *ASARCO LLC*, 396 B.R. at 315 ("ASARCO put its subsidiaries, Capco and LAQ, into a prepackaged 524(g) bankruptcy on April 11, 2005. Ultimately (and reluctantly), on advice of counsel, ASARCO followed these subsidiaries into Chapter 11 on August 9, 2005.").

242. In the clash of bankruptcy law and labor law, Congress has limited the power of a Debtor to reject union contracts. 11 U.S.C. §1113. Likewise, nothing in the bankruptcy code or any cited law grants a union the unlimited right to displace equity or prevent the confirmation of a plan of reorganization. Although the efforts of Union members made a substantial contribution to this Estate, their efforts have not gone unrewarded. Through the efforts of the Union leadership and professionals, the workers have progressed from a strike, to a temporary agreement, to the existing bargaining agreement which is the "crown jewel" of the copper industry. The contract has many favorable wage and benefit provisions for its members and many other beneficial provisions such as "card check" in union recognition votes. All of these provisions would be lost if the Union fails to accept the contract. Moreover, upon consummation of the Parent's plan, not only would the Union keep all of the current provisions in the CBA but would also have the right under Article 11 of the CBA to designate one board member of the reorganized Debtor. At the end of the contract, the Union would retain all of the protection afforded by the various labor laws regarding the negotiation of a new contract.

243. During closing arguments on plan confirmation, the Parent orally offered to extend the existing CBA on year. This offer was subsequently extended to the Union in

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[220] (*See* Exhibit 72; Confirmation Hr'g Tr. 8/19/09 at 80 (Ruiz Test.).) A Memorandum of Agreement reflecting the agreement of the Unions and ASARCO was filed with the Court on November 7, 2005. (Docket No. 852-1.)

writing on September 3, 2009.[221] The Court therefore concludes that the Parent's Plan is feasible, and the requirements of Section 1129(a)(11) of the Bankruptcy Code are satisfied.

M. Payment of All Fees Under 28 U.S.C. §1930 - 11 U.S.C. § 1129(a)(12)

244. Section 1129(a)(12) of the Bankruptcy Code requires that certain fees listed in 28 U.S.C. § 1930, determined by the Court at the hearing on confirmation of a plan, be paid or that provision be made for their payment.[222] Such fees incurred through confirmation of the Parent's Plan have either been paid by the Debtor during the pendency of this case or will be paid on or before the Effective Date in accordance with Section 9.3(d) of the Plan.[223] Thus, the requirements of Section 1129(a)(12) of the Bankruptcy Code have been satisfied.

N. Continuation of Benefits - 11 U.S.C. § 1129(a)(13)

245. Section 1129(a)(13) of the Bankruptcy Code requires that the plan provide for the continuation of retiree benefits at levels established pursuant to Section 1114 of the Bankruptcy Code for the duration of the period that the debtor has obligated itself to provide such benefits.[224] Section 8.7(d) of the Parent's Plan satisfies this requirement.[225]

O. 11 U.S.C. § 1129(a)(14), (15) and (16)

246. Since none of the Debtors is an individual, Section 1129(a)(14) is not applicable.

247. Since none of the Debtors is an individual, Section 1129(a)(15) is not applicable.

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221 (Docket No. 12806.)

222 11 U.S.C. § 1129(a)(12).

223 (Parent's Plan Art. 9.3.)

224 11 U.S.C. § 1129(a)(13).

225 (Parent's Plan Art. 8.7(d).)

248. Although none of the Debtors is a nonprofit entity, and the Parent does not anticipate that any transfers of property under the Parent's Plan will be made by a nonprofit corporation or trust, to the extent that any such transfers are contemplated by the Plan, they will be made in accordance with applicable nonbankruptcy law. Accordingly, the Parent's Plan satisfies the requirements of Section 1129(a)(16) of the Bankruptcy Code.

VIII. IN THE ALTERNATIVE, THE PARENT'S PLAN SHOULD BE CONFIRMED UNDER 11 U.S.C. § 1129(b)

249. The Parent's Plan satisfies Section 1129(b) of the Bankruptcy Code. Under the Parent's Plan, the Parent will not receive or retain any property unless and until each holder of an Impaired Claim has been paid in full (including Post-Petition Interest), consented to a different treatment, or appropriate provisions are made to ensure such payment following the Effective Date. Thus, the Parent's Plan is "fair and equitable" and does not violate the absolute priority rule as codified pursuant to Section 1129(b)(1) and (2) of the Bankruptcy Code.

250. The Parent's Plan satisfies Section 1129(b) of the Bankruptcy Code. The Parent's Plan does not unfairly discriminate with respect to the only class that is impaired, Class 4 (Asbestos Personal Injury Claims), which class has accepted the Parent's Plan by the requisite numbers and amounts. Thus, the Parent's Plan does not unfairly discriminate against any Claim pursuant to Section 1129(b)(1) of the Bankruptcy Code.

IX. OBJECTIONS TO THE PARENT'S PLAN ARE WITHOUT MERIT

A. The Special Successorship Clause of the Collective Bargaining Agreement Does Not Prohibit Confirmation of the Parent's Plan

251. The Union objects to the confirmation of the Parent's Plan raising two principal arguments: (1) the Parent's Plan may not be confirmed because the Parent has not secured a new collective bargaining agreement (a "New CBA") with the Union; and (2) if the

Parent's Plan is confirmed, the Union has threatened possibly to strike, which they believe will undermine the feasibility of the Parent's Plan.[226]

252. The Debtor and the Union argue that the Special Successorship Clause (the "SSC") contained in Article 1, Section D of the CBA dated June 1, 2007, as further modified by a Letter of Understanding ("LOU") between the Debtor and the Union dated January 18, 2007, prohibits the Parent from confirming a plan of reorganization without an agreement with the Union. Article 1, Section D of the CBA states as follows:

> 1. The Company agrees that it will not sell, convey, assign or otherwise transfer, using any form of transaction, any plant or significant part thereof covered by this Agreement (any of the foregoing, a Sale) to any other party (Buyer), unless the following conditions have been satisfied prior to the closing date of the Sale:
>
> a. the Buyer shall have entered into an Agreement with the Union recognizing it as the bargaining representative for the Employees working at the plant(s) to be sold; and
>
> b. the Buyer shall have entered into an Agreement with the Union establishing the terms and conditions of employment to be effective as of the closing date of the Sale.
>
> 2. This Section is not intended to apply to any transactions solely between the company and any of its Affiliates.
>
> 3. This Section shall not apply to a public offering of registered securities.
>
> 4. Notwithstanding the provisions of the Term of Agreement, this Section shall expire on (1) year after the Termination Date.

Paragraph 2 of the LOU states as follows:

> 2. Special Successorship Provision: Notwithstanding the successorship agreement that is set forth at Article 2, Section D of the CBA, the Special Successorship Provision set forth in this paragraph 2 of

[226] (*See, e.g.*, Docket No. 1261 at 15-16 (Debtors' argument that the lack of New CBA renders Parent's Full Payment Plan less feasible than Debtors' Plan); Docket No. 1214 (same – Environmental Agencies); Docket No. 12612 (Committee admitting that Parent's Full Payment Plan is confirmable but noting that the possibility of a strike renders the Debtors' Plan more feasible).)

the LOU shall apply until the effective date of any plan of reorganization in the Company's Case:

a The Company agrees that it will not consummate any transaction resulting in a Change of Control of the Company, nor will it sell, convey, assign or otherwise transfer, using any form of transaction, any operating plant or significant part thereof covered by the Agreement (any of the foregoing, a "Sale") to any other party ("Buyer"), unless the following conditions have been satisfied prior to the closing date of the Sale:

i. the Buyer shall have entered into an Agreement with the Union recognizing it as the bargaining representative for the Employees working at the plant(s) to be sold, and

ii. the Buyer shall have entered into an Agreement with the Union establishing the terms and conditions of employment to be effective as of the closing date of the Sale.

b The Union agrees to negotiate in good faith for collective bargaining agreements with, and to offer fair and reasonable terms and conditions of employment to, each and every prospective Buyer. The Union will offer each Buyer terms and conditions of employment which are substantially the same as those it has offered to any other prospective Buyer, provided, however, that the Union may offer non-identical terms and conditions to a prospective Buyer so long as such non-identical terms and conditions reflect differences in the nature of the prospective Buyer. For instance, and as an example only, the Union may offer different non-economic terms to financial Buyers than strategic Buyers but may not insist on terms that would prevent a Buyer from operating its non-Company facilities with either a work force represented by unions other than the Union or operating such non-Company facilities with a non-union work force. The Union's commitment to offer fair and reasonable and substantially similar terms, as described above, is expressly conditioned upon the prospective Buyer bargaining in good faith and providing relevant information reasonably requested.

c. If upon motion of the Company or the Official Committee of Unsecured Creditors, which shall be heard on an expedited basis, the Bankruptcy Court finds that the Union has breached any of its obligations under subparagraph b of this Paragraph 2, or if the Bankruptcy Court finds, in light of exigent circumstances, that it is necessary to the success of the Chapter 11 process, the Bankruptcy Court shall authorize the company to terminate application of the Special Sucessorship provision under Paragraph 2 of this LOU without liability or recourse to the estate and shall order that any pending Sale(s) may continue without any

limitation or condition that would have attached under this Paragraph 2. The parties agree that the proceedings pursuant to this Paragraph 2(c) may take place without any need for the requirements of Section 1113 to be met and that the Section 1113 standard is not relevant, and to the extent that Section 1113 may be relevant, the Union, waives any requirements of Section 1113 that might arguably be necessary in order for proceedings pursuant to this Paragraph 2(c) to take place.

d. In order to give effect to the provisions of Paragraph 2(c), the Union agrees, upon reasonable request of the Company and/or the Official Committee of Unsecured Creditors, to provide copies of all offers and counter-offers provided to each prospective Buyer. In the event that the Union furnishes copies of said offers and counter-offers, the Company and the Official Committee of Unsecured Creditors agree not to distribute such copies to any party, including, but not limited to, any prospective Buyer other than the prospective Buyer to which the offer has been made.

e. Change of Control as used in Paragraph 2(a) above is defined as any of the following: (i) a plan of reorganization; (ii) the purchase or acquisition by any person, Group (as defined under Section 13(d) of the Securities Exchange Act of 1934, as amended) or entity of securities that constitute or are exchangeable for a majority of the common equity or voting securities of the Company; (iii) the exchange or conversion of securities or claims by any person, Group or entity for securities that constitute or are exchangeable for a majority of the common equity or voting securities of the Company; or, (iv) in the case of a merger, in which the holders of the Company's equity prior to the merger hold less than fifty percent (50%) of the common equity and voting shares of the succeeding entity.

f. The Company shall furnish the Union with the names of all prospective Buyers who have provided to the Company Letters of Intent or similar expressions of interest and, further, shall furnish any other relevant information reasonably requested by the Unions concerning the sale process.

253. On January 22, 2007, the Debtor filed a Motion seeking the Court's approval the Existing CBA between ASARCO and the Unions.[227] At the hearing on the approval of the CBA the Bankruptcy Court expressed reservations about the Union's and the Debtor's

[227] (*Id.*)

ability to bind the Parent against its will and force it to secure a new CBA with the Union before it could confirm a plan.[228]

254. In response to these concerns, counsel for the Debtor and the Union repeatedly reassured the Bankruptcy Court that the CBA and the SSC do not bind the Parent prior to confirmation. As Debtor's counsel told the Bankruptcy Court, "one of the first principals [sic] of this agreement...and of the Debtor's decision to enter into it, [is] that we can't bind Grupo." (CBA Hearing at 11 [remarks of Mr. Kinzie, counsel to the Debtor]). Moreover, the Bankruptcy Court specifically asked Mr. Kinzie, "assuming there's equity, do I have to decide today whether you can propose a plan where Grupo is forced to either take this agreement or give up its ownership?" Mr. Kinzie responded, "Absolutely, I think you do not have to decide that today." (*Id.* at 41-42).

255. The Debtor later made the same assurances to Judge Head during the appeal of the CBA order: "I was intimately involved in drafting this, [and] my view is that the debtor and the union can't impose liability on a third party as a matter of law, and so the language says what it says....But I know of no principle of law that any two parties can sit down and through their agreement impose liability on a third party that neither of them controls." (See Case No. Ca-07-133, May 30, 2007 hearing transcript at 106 [statement of Mr. Kinzie]; see also CBA Hearing transcript at p. 13 "[T]he parent is not a party to the agreement during the bankruptcy period." [statement of Mr. Selzer, counsel to the Union]).

256. Additionally, the Debtor and the Union entered in a stipulation concerning the SSC. The Second Stipulation provides in relevant part:

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[228] See, March 7, 2007 transcript (the CBA Hearing) at 127 (comments of the Court): "I do have a problem with altering the rights of ...interest holders of this case prior to confirmation"

C. The Parties, by and through their respective counsel, hereby stipulate as follows:

That, notwithstanding anything to the contrary in the CBA, prior stipulations or any other agreements between the Parties:

(I) Prior to the effective date of any plan or reorganization of or for the Debtor, and provided that the Parent does not exercise control of the Debtor, the Parent (a) is not a signatory to the CBA, (b) is not a party to the CBA and (c) is not bound by any of the terms of the CBA regardless of its status as a direct or indirect owner of the equity in the Debtor;

(II) Under any proposed plan of reorganization that would be a Parent Retained Equity Plan, the Special Successorship Clause shall apply and the obligations of the USW, the Debtor and the Parent shall be governed by such Special Successorship Clause; however, (a) application of the Special Successorship Clause in these circumstances shall be subject to the provisions of Section III, *infra*, and (b) if the court determines that (i) the USW has failed to satisfy its obligations arising under the Special Successorship Clause, including, as defined therein, the obligation to negotiate in good faith, or, (ii) in light of exigent circumstances, that it is necessary to a successful chapter 11 process, then the court may order that the Special Successorship Clause, including but not limited to its provisions limiting a Sale (as the term is defined herein) or plan of reorganization, does not apply; and

(III) The Court shall retain jurisdiction to determine at any hearing on confirmation of any Parent Retained Equity Plan whether an provision of the CBA would violate the rights of the Parent under 11 U.S.C. § 1129(a) or (b) and if the court so finds the court shall have the authority to terminate the CBA.[229]

257. In the Bankruptcy Court's Order approving the CBA, the Bankruptcy Court stated:

14. The court also finds that the objections of ASARCO Incorporated that the CBA improperly binds ASARCO Incorporated and its affiliates are not well founded. The special successorship provision in the CBA provides that the Debtor will not consummate any sale of any operating plan, transfer its equity or confirm a plan of reorganization unless the buyer (or if ASARCO Incorporated retains its equity, the owner of the equity*) has entered into an agreement with the USW (a) recognizing it as the

[229] (Docket No. 4177.)

bargaining agent for the employees and (b) establishing the terms and conditions of employment to be effective on the closing date of the sale (or any other change of control event). *fn – Because "change of control" is defined in the CBA to include confirmation of a plan of reorganization, these provisions apply to ASARCO Incorporated if it retains the equity of the reorganized ASARCO.

15. On March 12, 2007, the Debtor and the USW entered into the Second Stipulation and Order Regarding Modification to Collective Bargaining Agreement (the "Second Stipulation") addressing this court's concerns about the potential effect of certain provisions of the CBA on Grupo Mexico and all of its remaining affiliates (collectively, the "Parent"), if the Parent were to retain the majority of equity or controlling equity in the reorganized Debtor (as opposed to the purchase of the assets or equity of the company). The Second Stipulation provides that, before the effective date of any plan of reorganization of or for the Debtor, the Parent is not a signatory or a party to the CBA and is not bound by any of the terms of the CBA, regardless of the Parent's status as owner of the equity in the Debtor, provided that the Parent does not exercise control of the Debtor.

16. The special successorship clause is applicable only until the effective date of a plan. Whoever is to own or control the reorganized ASARCO or its operating plant(s) may negotiate a new labor agreement with the USW as part of the plan confirmation process. However, if the parties are unable to reach agreement on the terms of a new collective bargaining agreement, and if upon motion by the Debtor or the Official Committee of Unsecured Creditors, this court finds that the USW has failed to honor its obligations as set forth in the special successorship clause (including, if the Parent retains the majority or controlling equity in the case, the obligation to negotiate in good faith with the Parent), or in light of exigent circumstances it is necessary to the success of the chapter 11 process, the court may terminate the special successorship provision and allow the sale and/or confirmation to go forward without liability or recourse on the part of the Debtor.

17. Additionally, under the Second Stipulation, the Debtor and the USW have agreed that this court will retain jurisdiction to determine, at any hearing on confirmation of a plan where the Parent retains the majority of equity or controlling equity in the reorganized Debtor, whether any provision of the CBA would violate the rights of the Parent under 11 U.S.C. §1129(a) or (b) and, if the court so finds, the court will have the authority to terminate the CBA.

18. The effect of the special successorship provision is to put the Parent in substantially the same position as the creditors of this estate, should they own the company in a stand alone plan, or a buyer of the Debtor's assets or equity.[230]

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[230] (docket No. 4177.)

258. The Debtor and the Union now argue that the SSC should be read to apply to a plan proposed by someone other than the Debtor. However, considering the language and history of the provision, this Court believes and holds that the SSC only binds the Debtor in proposing a plan of reorganization.

259. First, the SSC was approved in March of 2007, at a time when the Debtor had the exclusive right to file a plan. Exclusivity was not lifted until July of 2008. At the time the SSC was approved, Debtor was entering a plan selection process to determine the best possible plan for the Debtor, be it sale of assets, a stand alone plan or a plan where the Parent retained equity. At that time, only the Debtor could propose a plan of reorganization. Thus, under the SSC, the Debtor could only propose a plan which complied with the SSC. The SSC and the Bankruptcy Court's order approving the SSC make sense only when understood in light of the application of exclusivity.

260. Further, since the SSC could not bind third parties such as the Parent, the LOU specifically provided a remedy for the Union. Paragraph 3(a) provided that the Union has the sole and exclusive right to terminate the CBA upon the entry of an order terminating the Debtor's exclusive right to file a plan. This provision makes no sense if the CBA and the SSC applied to someone other than the Debtor proposing a plan.

261. This position is further supported by a Third Stipulation which attempted to modify the Second Stipulation by stating that while the Parent is not bound by the CBA, it is bound by the SSC. This stipulation, while agreed to by the Debtor, was never approved by the Court.

262. Finally, this interpretation of the SSC is consistent with the provision which limits the parties who can complain of the failure to bargain in good faith to the debtor and

the creditors' committee. Since the Debtor is the only party who can propose a plan during the exclusivity period, it is logical that only the Debtor (the plan proponent) and the creditors' committee (the primary fiduciary to the creditors) would have the power to complain of bad faith. Limiting such power after exclusivity terminated would create an uneven playing field for competing plan proponents.

B. Even if Applicable to the Parent's Plan, the Special Successorship Clause of the Collective Bargaining Agreement does not prohibit confirmation of the Parent's Plan

263. The Second Stipulation states that the SSC does not apply "if the court determines" that the Union did not negotiate in good faith, or that exigent circumstances exist, or if the Court "finds" that the CBA would violate the rights of the Parent under 11 U.S.C. §1129. Although the Second Stipulation limits the parties who may challenge the Union's lack of good faith in bargaining to the Debtor and the creditors' committee, it states no similar limitation for "exigent circumstances" or violation of 11 U.S.C. §1129.

264. The history of negotiations between the Parent and the Union may support the allegation that the Union did not offer the Parent terms that were "substantially the same" as those offered Sterlite.[231] However, the facts do not support a finding of bad faith by either side. In the short time the Parent and the Union negotiated, they were unable to reach an agreement, but they never reached impass. Instead, they simply ran out of time. The Court believes that, given enough time, the Parent and the Union would reach an agreement. After all, the Union and the Debtor reached an agreement after the 2005 strike while the Parent was still in control of the Debtor.

[231] See, LOU at ¶2(b).

265. The Court declines to enforce the SSC because it finds "exigent circumstances" exist and "it is necessary to the success of the Chapter 11 process." As the Union told the Court on March 2, 2007, exigent circumstances "could mean many things," but at the very least "in the event that equity was retaining equity, that...would have some application to the, what was necessary to the success of the process." (CBA Hearing at 16 [statement of Mr. Selzer, counsel to the Union]; see also CBA Hearing at 17 "I think exigent circumstance means whatever you decide it means" [statement of Mr. Kinzie, counsel to the Debtor]).

X. THE REQUIREMENTS OF SECTION 1129(C) OF THE BANKRUPTCY CODE FAVOR THE PARENT'S PLAN OVER THE DEBTOR'S PLAN

266. The Bankruptcy Code provides that a "court may confirm only one plan. 11 U.S.C. §1129(c). Because the Court finds that the Parent's Plan and the Debtor's Plan are confirmable, the Court must choose which one of them to confirm. The Court finds that the Parent's Plan should be confirmed.

267. Section 1129(c) of the Bankruptcy Code provides that when two plans meet the requirements for confirmation, "the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm."[232] Due to the limited guidance provided by Section 1129(c), courts have developed multiple factors to determine which plan should be confirmed. These factors include: "(1) the type of plan; (2) the treatment of creditors and equity security holders; (3) the feasibility of the plan; and (4) the preferences of creditors and equity security holders." *In re River Valley Fitness One L.P.*, 2003 Bankr. LEXIS 1252, *29 (Bankr. D.N.H. 2003)(citing *In re Internet Navigator Inc.*, 289 B.R. 128, 131 (Bankr. N.D. Iowa 2003)); *In re Holley Garden Apartments, Ltd.,* 238 B.R. 488, 493 (Bankr. M.D. Fla. 1999).

[232] 11 U.S.C. §1129(c). In this regard, Bankruptcy Rule 3018 provides that, when creditors and equity holders vote to accept more than one plan, they "may indicate a preference or preferences among the plans so accepted." Rule 3018(c), F.R.Bankr.Pro.

A. Type of Plan

268. With respect to the first factor, "[a] reorganization plan is usually preferable to a liquidation plan." *In re Holley Garden Apartments, supra.* at 495. This preference is justified based on the policies of chapter 11 - - the successful rehabilitation and the prevention of the liquidation of the debtor. *Nat'l Labor Relations Bd. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984)(citing H.R.Rep. No. 95-595, p. 220 (1977)). At least one court has stated that the type of plan is determinative: a reorganization plan is preferable to a liquidation plan. *In re Valley View Shopping Center*, L.P., 260 B.R. 10, 40 (Bankr. D.Kan. 2001).

269. Both plans are reorganization plans. While the Debtor's plan provides for the sale of the Debtor's assets and distribution of the proceeds to creditors, the business of the Debtor will continue intact as Sterlite, USA. Because both plans accomplish the fundamental goals of bankruptcy through a reorganization and maximization of benefit to the estate, the Court finds no significant difference between the plans under the first factor.

B. The Treatment of Creditors and Equity Security Holders.

270. The second factor examines the treatment of creditors and equity. This requires that "[t]he Court must make the choice that is most beneficial to all creditors and equity security holders." *River Valley Fitness*, 2003 Bankr. LEXIS 1252, *29(*citing In re Sound Radio*, Inc., 93 B.R. 849, 859 (Bankr. D.N.J. 1988)). While the mechanics of the competing plans differ, both plans purport to pay allowed claims in full with interest. Despite the beneficial treatment to creditors, the plans provide dramatically different treatment for the second class of interests – equity. While the Debtor's Plan provides that equity receive only the possibility of a portion of its interest in the SCC Judgment, the Parent's Plan provides for the payment of allowed claims in full and then retention of equity.

271. The Parent argued that the Bankruptcy Code requires confirmation of any plan which pays the creditors in full and retains equity. To hold otherwise, they argue, would create a bidding war for equity. However, that is precisely what is intended by the Bankruptcy Code. A debtor only has the limited exclusivity period to propose a full payment equity retention plan and have it confirmed without competition from other bidders. Following termination of exclusivity, the Bankruptcy Code contemplates allowing interested parties to bid on assets of the company. However, as in any other auction, the winner is the high bidder.

272. The Bondholders in this case argued that a "tie" should not go to equity. Here sound reason exists to agree - - for example, the Parent's delay tactics throughout the case and their last minute, eleventh-hour proposal of a full payment plan. However, the Parent's "bid" is significantly higher than the Sterlite "bid". Ultimately the Parent is paying approximately $184.5 million more in consideration.[233] This consideration is actually higher when the Parent's waiver of claims against the Debtor is included. While the Debtor objected to and sought subordination of those claims, since no decision has been made, their release has some value.

273. In determining which plan to confirm, the Court should seek to benefit both creditors and equity. Because the competing plans are substantially equal in their treatment of creditors and the Parent's Plan pays more for equity, the Court finds that the second factor strongly favors confirmation of the Parent's Plan over the Debtor's Plan.

[233] The Court arrives at this number by subtracting the total consideration paid by the Parent of $2.4799 billion ($2.2051 billion cash + $274.8 million present value of asbestos note) from the total consideration paid by Sterlite of $2.2954 billion ($1.4394 billion cash + $722 million cash purchase of class 3 interests in SCC Trust + $134 million present value of asbestos put).

C. Feasibility of the Plans

1. Likelihood of Arriving at Consummation.

274. The Parent has funded an Escrow Account with $500 million in cash and SCC share values sufficient to guarantee payment of the Plan consideration. In contrast, Sterlite's obligation to close under the Debtor's Plan is backstopped with $625 million in letters of credit. Without considering Sterlite's previous breach of the First PSA, obviously the $2.2051 billion escrow is more favorable than $625 million in letters of credit. Moreover, Sterlite USA has no hard assets and Sterlite, India, the parent of Sterlite USA is an India company with no assets in the United States. There is no treaty between the United States and India for collection of foreign judgments.

2. Likelihood of Consummation.

275. Both the Parent and Sterlite amply demonstrated their ability to consummate their respective plans. Both have highly motivated backing from their respective parent companies. Both have sufficient means in cash or financing commitments to close and consummate their plans. This factor favors both plans of reorganization.

3. Likelihood Creditors Will be Paid in Full

276. Both plans create mechanisms to insure that if the plan is funded, claims will be paid. Both plans have independent professional plan administrators to insure payment.[234] The Debtor's Plan relies upon prosecution of the SCC Judgment for payment of some creditors and therefore involves more risk than the Parent's Plan. Because both the amount and risk is small, the Court gives little weight to this factor.

[234] The Parent's Plan appoints Mark A. Roberts, CPA, of Alvarez & Marsal as plan administrator.

4. Likelihood of Success of the Reorganized Debtor.

277. In assessing the relative likelihood that the Debtor might need further reorganization, the Court must look to the financial structure of the reorganized Debtor under each plan. Both resulting Debtors would be supported by highly motivated and well-capitalized parents. The balance sheet of either Debtor would be free of environmental, asbestos, and other pre-bankruptcy debt, other than Environmental Reinstated Claims and certain other assumed liabilities, including but not limited to the Hayden Consent Order obligations.[235] Reorganized ASARCO would owe the $280 million Asbestos Note. Sterlite USA would have the asbestos put liability of potentially $160 million. Both would have the same fixed assets. Reorganized ASARCO would have access to more cash. However, with the investments made pursuant to either of the plans, it is not likely that either parent of the reorganized entity would fail to support their subsidiary.

278. The Debtor argued that the Grupo credit facility and payment of over $900 million for its plan consideration would reduce Grupo's liquidity and leave it unable to support the reorganized debtor. Confirmation of the Parent's Plan will not only release the SCC Judgment, but will release $8 billion in SCC shares securing the SCC Judgment and $2 billion in SCC shares securing confirmation. The Parent will have sufficient holdings to obtain cash if necessary to support the Debtor.

[235] (In Re Asarco Hayden Plant Site, Hayden, Gila County, AZ., Administrative Settlement Agreement on Consent, Docket No. CERCLA 2008-13 (Apr. 15, 2008); Order Approving Settlement Agreement Among ASARCO LLC, The U.S. EPA and the Arizona Department of Environmental Quality Regarding the Hayden Plant Cite, Docket No. 7902 (May 7, 2008).)

279. Sterlite USA, on the other hand, has no legal commitment from its parent for support after confirmation. However, Sterlite's parent is well-capitalized and motivated to succeed in their investment.

280. Finally, the Parent's Plan has risks associated with labor unrest. The Parent has no CBA beyond June 30, 2010. While the Parent offered to extend the CBA for one year, the offer has not yet been accepted. As discussed above, the threat of strike and labor unrest constitute feasibility risks. However, Mr. Ruiz was Chairman of the Board and in control of the Debtor at the time it settled the 2005 strike. Mr. Ruiz will be Chairman of the Board during the negotiations for a new CBA. Grupo and AMC have 2.2 billion reasons to maintain the viability of the reorganized Debtor. The Union has at least 1500 reasons to reach agreement. Ultimately this Court believes that the integrity, professionalism, and good sense shown by both Mr. Ruiz and Union officials will lead to an agreement.

D. Preference of Creditors and Equity Security Holders.

281. Obviously the equity security holders unanimously prefer the Parent's Plan. In the confirmation of a solvent debtor plan, the preference of equity must be considered. *In re Internet Navigator, Inc.*, 289 B. R. 128, 131 (Bankr. N.D. Iowa 2003). The vote taken pursuant to the Plans noticed in connection with balloting indicated that creditors strongly supported the Debtor's Plan. Eight-three percent of the Class 3 and 4 creditors preferred the Debtor's Plan. The balloted plans, however, were significantly different from the plans proposed and litigated at confirmation. Moreover, the Creditors' Committee had reached agreement with the Debtor prior to solicitation which required recommendation of the Debtor's Plan. Thus it is difficult to predict whether creditors would prefer the current Debtor Plan over the current Parent Plan because the Parent's Plan now pays creditors in full with interest, at consummation. Of

course, it was the Parent's delay in proposing its Plan that kept its current Plan from being balloted. Moreover, there were many sophisticated creditors represented in the confirmation hearing. None asked to change their preference to the Parent's Plan.[236] Among the creditors were the United States and eleven States who expressed their preference for the Debtor's Plan at closing argument.

282. Equity strongly supports the Parent's Plan. Creditors strongly support the Debtor's Plan. The plain language of Section 1129(c) only requires a bankruptcy court "to consider the preferences of the creditors and equity interest, not obey them." *River Village Assoc.*, 181 B.R. 795, 807 (E.D. Pa. 1995). Ultimately, this Court believes that the dominant factor in this case in the context of 1129(c) analysis is the treatment of equity. The Parent has out "bid" Sterlite.

283. Considering the totality of circumstances, there is insufficient difference in feasibility or type of plan to allow the will of creditors to outweigh the difference in treatment of equity. Section 1129(c) compels confirmation of the Parent's Plan.

XI. FINDINGS RELATING TO ASBESTOS TRUST AND RELATED INJUNCTIONS

A. The Section 524(g) Trust, The Permanent Channeling Injunction And The Asbestos Insurance Company Injunction Comply With Sections 105(a) and 524(g) Of The Bankruptcy Code.

284. The Debtor was first named as defendants in asbestos-related personal-injury actions in the mid-1970s, and asbestos-related personal-injury claims against the Debtor have risen dramatically in recent years. More than 102,000 asbestos-related claims have been

[236] The Creditors' Committee agreement with the Debtor and Sterlite prohibited the committee from changing its preference.

filed against one or more of the Debtor in this bankruptcy proceeding.[237] Neither the Debtor nor the Parent have reason to expect that asbestos claims will cease, and industry experts have forecasted continued increases in the rates of asbestos claims to be brought against similar defendants over the next several decades.[238] Although ASARCO contends that it never manufactured or sold asbestos, various alter ego theories asserted by many asbestos claimants leave ASARCO vulnerable to claims arising out of the activities of LAQ and CAPCO, ASARCO's asbestos-related subsidiaries, as well as to claims arising for ASARCO's direct liability for asbestos claims.[239]

285. The Parent's Plan provides in Article 11.3 for issuance of a Permanent Channeling Injunction and Asbestos Insurance Company Injunction pursuant to Section 524(g)(1) of the Bankruptcy Code. The Parent's Plan comports with the Bankruptcy Code's requirements for issuance of the Permanent Channeling Injunction and Asbestos Insurance Company Injunction.

286. The Parent has provided proper notice of the Confirmation Hearing and the terms of the Permanent Channeling Injunction. The Parent published notice of the Confirmation Hearing in numerous local and national newspapers.[240] In addition, the terms of the Permanent Channeling Injunction are set forth in the Parent's Plan and the Disclosure Statement.[241]

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237 (Lapinsky Proffer at ¶ 31 (Dkt 12387, Ex. D170).)

238 (Proffer of Dr. Francine F. Rabinovitz Regarding Projected Asbestos-Related Liabilities (Docket No. 11925, "Rabinovitz Proffer") at ¶¶ 30-31.)

239 (Rabinovitz Proffer at ¶¶ 6, 11, 23.)

240 (Proffer of Adam B. Levin Regarding Publication of the Confirmation, Asbestos, and Mission Notices (Docket No. 12340, "Levin Proffer") at ¶ 2.)

241 (Parent's Plan Art. 11.3; Disclosure Statement § 3.10(c)(1).)

287. The Permanent Channeling Injunction and Asbestos Insurance Company Injunction enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under the Parent's Plan, is to be paid in whole or in part by the Section 524(g) Trust, except as otherwise expressly allowed by the Parent's Plan.[242]

288. The Permanent Channeling Injunction and the Asbestos Insurance Company Injunction are to be implemented in connection with the Section 524(g) Trust, which assumes the Debtor's liabilities for Debtors who have been named as defendants in personal injury, wrongful death, or property damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products.[243] Pursuant to the Parent's Plan, on the Effective Date, the Section 524(g) Trust will assume all of the Debtors' Asbestos Personal Injury Claims and Demands which represent its liabilities arising from the personal injury, wrongful death, and property damage actions, and the Section 524(g) Trust shall receive all transfers and assignments as set forth in the Parent's Plan.[244]

289. As of the Petition Date, ASARCO and the Asbestos Subsidiary Debtors have each been named as a defendant in personal injury, wrongful death, or property damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products.[245]

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242 (Parent's Plan Art. 11.3.)

243 (Lapinsky Proffer at ¶ 44(i).)

244 (*See* Parent's Plan Art. 6.3; Lapinsky Proffer ¶ 44(iii).)

245 (Disclosure Statement at 51.)

290. The Parent's Plan establishes Class 4 (Asbestos Personal Injury Claims) for claims to be addressed by the Section 524(g) Trust, and 84.16% of voting Class 4 Claim holders voted to accept the Parent's Plan.[246]

291. On the Effective Date of the Parent's Plan, the Section 524(g) Trust shall assume the liabilities of the Debtor with respect to the Asbestos Personal Injury Claims and Demands and shall receive all transfers and assignments as set forth in the Parent's Plan.[247]

292. As of the Petition Date and as of the Confirmation Date, there were no pending or known property damage actions seeking damages as a result of property damage allegedly caused by or arising out of asbestos or asbestos-containing products.

293. The Section 524(g) Trust is to be funded in part by securities of Reorganized ASARCO and by its obligation to make future payments. In addition, the Section 524(g) Trust documents provide that, upon the occurrence of specified events, the Section 524(g) Trust would be entitled to own a majority of the voting shares of ASARCO LLC.[248]

294. The Debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the Asbestos Personal Injury Claims, which are addressed by the Permanent Channeling Injunction and the Asbestos Insurance Company Injunction.

295. In accordance with Section 524(g)(2)(B)(ii)(II) of the Bankruptcy Code, the actual amounts, numbers, and timing of future demands cannot be determined.[249]

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246 (Parent's Plan Art. 3.1(d); *see also* Monger Proffer at 5.)

247 (Parent's Plan Art. 6.3.)

248 (Parent's Plan, §9.1(b)(6).)

249 (Rabinovitz Proffer at ¶¶ 38-40.)

296. The Debtor's asbestos-estimation expert, Dr. Francine Rabinovitz, estimated the range of the Debtors' asbestos-related liability as between $938.3 million and $1,009.3 million.[250] The Asbestos Subsidiary Committee's asbestos-estimation expert, Dr. Mark Peterson, estimated the range of the Debtor's asbestos-related liability as between $1.3 billion and $2.1 billion.[251] Dr. Peterson's estimation does not include ASARCO's liability for premises and other direct asbestos claims against ASARCO. Furthermore, as noted by the FCR, "ASARCO's prior history of increasing asbestos litigation, the lengthy and unpredictable latency period associated with various asbestos diseases, and evolving medical technology make it virtually impossible to predict with certainty the timing or the extent of Future Asbestos Claims that may be asserted against ASARCO."[252] Although the estimates regarding future claims are reasonable, they are only estimates; the actual amount, number, and timing of future asbestos-related claims and demands against the Debtors cannot be determined.[253]

297. The Section 524(g) Trust shall operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of asbestos personal injury claims and demands, or other comparable mechanisms, that provide reasonable assurance that the Section 524(g) Trust shall value, and be in a financial position to pay, all Asbestos Personal Injury Claims and Demands in substantially the same manner.

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250 (Rabinovitz Proffer at ¶ 7.)

251 (Proffer of Mark A. Peterson Regarding the Liability of ASARCO LLC and its Subsidiaries for Asbestos Bodily Injury Claims and Estimations of those Liabilities (Docket No. 12383, "Peterson Proffer"); *see also* Declaration of Future Claims Representative Robert C. Pate in Support of Confirmation of the Respective Reorganization Plans Proposed By (i) the Debtors' and (ii) ASARCO Incorporated and Americas Mining Corporation ("Pate Declaration") ¶ 30 (Docket 12381).)

252 (Pate Declaration at ¶ 49.)

253 (Rabinovitz Proffer at ¶¶ 39-40.)

298. The Section 524(g) Trust Agreement contains mechanisms such as the creation of the Section 524(g) Trust Advisory Committee, the appointment of successor future claims representatives, and ongoing Bankruptcy Court oversight that will ensure both long-term viability of the Section 524(g) Trust and fairness to claimants over the life of the trust.[254]

299. The Bankruptcy Court appointed Robert C. Pate as the FCR as part of the proceedings leading to the issuance of the Permanent Channeling Injunction and the Asbestos Insurance Company Injunction for the purpose of, among other things, protecting the rights of persons that might subsequently assert demands of the kind that are addressed by those injunctions and that are to be assumed and paid by the Section 524(g) Trust under the Parent's Plan. The FCR has approved the Section 524(g) Treatment under the Parent's Plan.

300. The provisions of the Parent's Plan establishing the Section 524(g) Trust and Permanent Channeling Injunction accord with Section 524(g)(4)(B) of the Bankruptcy Code. The FCR participated throughout the plan process and engaged in negotiations with the Parent, the Asbestos Subsidiary Committee, and the Asbestos Claimants' Committee to ensure that substantial contributions were made on behalf of all parties that will benefit from the Permanent Channeling Injunction ("the ASARCO Protected Parties," as defined in the Parent's Plan). As a result of these negotiations and in light of the contributions that the Parent will make to the Section 524(g) Trust, the extension of these benefits to the ASARCO Protected Parties is fair and equitable to holders of future demands. Moreover, the evidence presented at the Confirmation Hearing shows that the Parent, the Asbestos Subsidiary Committee, the Asbestos Claimants' Committee, and the FCR all have conducted extensive negotiations and due diligence and all have concluded, and the Bankruptcy Court finds, that extending the Permanent Channeling

[254] (*See* Parent's Plan, Ex. 11 (Section 524(g) Trust Agreement, §§ V, VI, and 7.14).)

Injunction to future claimants is fair and equitable in light of the substantial contributions being made to the Section 524(g) Trust by or on behalf of the ASARCO Protected Parties.

301. In light of the respective benefits provided, or to be provided, to the Section 524(g) Trust by, or on behalf of, each ASARCO Protected Party, the Permanent Channeling Injunction is fair and equitable with respect to the persons that might subsequently assert demands against any ASARCO Protected Party.

302. In light of the respective benefits provided, or to be provided, by a Settling Asbestos Insurance Company in order to receive the benefits of the Asbestos Insurance Company Injunction, the Asbestos Insurance Company Injunction is fair and equitable with respect to the persons who might subsequently assert demands against any Settling Asbestos Insurance Company.

303. The Settling Asbestos Insurance Companies are alleged to be directly or indirectly liable for the Asbestos Personal Injury Claims and Demands for one or more of the reasons set forth in Section 524(g)(4)(A)(ii) of the Bankruptcy Code.

304. The Permanent Channeling Injunction and the Asbestos Insurance Company Injunction are integral parts of the Parent's Plan and may not be vacated, amended, or modified after Confirmation except to the extent expressly provided in Article 11.3(a) and (b) of the Parent's Plan.

B. Tax Treatment of the Section 524(g) Trust

305. The Section 524(g) Trust shall be treated as a "qualified settlement fund" within the meaning of Treasury Regulation Section 1.468B-1, and the Section 524(g) Trustees shall be the "administrator" of the Section 524(g) Trust pursuant to Treasury Regulation Section 1.468B-2(k)(3). No election shall be made to treat the Section 524(g) Trust as a grantor trust for

U.S. federal income tax purposes. Accordingly, the Section 524(g) Trust shall be treated as a taxable entity for federal income tax purposes. The Section 524(g) Trustees shall cause all taxes imposed on the Section 524(g) Trust to be paid using assets of the Section 524(g) Trust and shall comply with all tax reporting and withholding requirements imposed under applicable tax laws. Any amount so withheld from a distribution or payment by the Section 524(g) Trust to a Claimant or other payee shall be treated as having been paid to, and received by, such payee for purposes of the Parent's Plan and the Parent's Plan Documents.

306. Any and all Claims of the Asbestos Subsidiary Debtors against ASARCO, including any and all Derivative Asbestos Claims, shall be deemed satisfied by the funding of the Section 524(g) Trust as contemplated under the Parent's Plan. Any and all Administrative Claims under the Secured Intercompany DIP Credit Facility shall be waived on the Effective Date of the Parent's Plan.[255]

XII. NOTICE TO CREDITORS

A. Notice of Commencement of Bankruptcy Cases and Bar Dates.

307. On June 8, 2005, the Asbestos Subsidiary Debtors filed a certificate of mailing stating that they had caused to be served a copy of the notice of the commencement of the Asbestos Subsidiary Cases and the section 341 meeting of the Asbestos Subsidiary Debtors' creditors. (Dkt 92 in Case No. 05-20521)

308. On August 12, 2005, the Bankruptcy Court authorized ASARCO to file a consolidated list of creditors in lieu of a creditor matrix and to serve on these creditors a notice of ASARCO's bankruptcy filing and the section 341 meeting. (Dkt 49) ASARCO filed various

[255] (Parent's Full Payment Plan Art. 4.2(d).)

certificates of service evidencing service of these notices. (Dkt 311, 406, 461, 494, 539, 562, 582, 689, 692, 701, 742, 844, 986, 1103, 1104)

309. On February 21, 2006, Trumbull Group, LLC ("Trumbull"), the Debtor's former claims agent, filed an affidavit of service stating that, on February 7, 2006, it caused to be served, via first class mail, electronic mail, or facsimile, the notice of the 2005 Subsidiary Debtors' section 341 meeting on the 2005 Subsidiary Debtors' creditors. (Dkt 1731)

310. On February 13, 2007, Trumbull filed two affidavits of service stating that, on February 2, 2007 it caused to be served, via first class mail, electronic mail, or facsimile the notice of the 2006 Subsidiary Debtors' section 341 meeting on the 2006 Subsidiary Debtors' creditors. (Dkt 3814, 3817)

311. On May 30, 2008, Trumbull filed an affidavit of service stating that, on May 29, 2008, it caused to be served, via first class mail, electronic mail, or facsimile the notice of the 2008 Subsidiary Debtors' section 341 meeting on the 2008 Subsidiary Debtors' creditors. (Dkt 7968)

312. By order entered on April 28, 2006, the Bankruptcy Court set August 1, 2006, as the general claims bar date, and September 30, 2006, as the asbestos claims bar date, for the Debtors other than the 2006 Subsidiary Debtors and the 2008 Subsidiary Debtors. An asbestos-related Proof of Claim form was approved for use in connection with all Proofs of Claim for asbestos claims. Pursuant to the Bar Date Order, asbestos claimants were permitted to obtain an exemption from filing a Proof of Claim by supplying ASARCO's asbestos claims-data management consultants, The Claro Group, LLC, with certain information on the asbestos claims electronic database prior to June 30, 2006. (Dkt 2076)

313. On May 10, 2006, Trumbull filed an affidavit of service stating that it caused to be served by first class mail, the "Asbestos-Related Bar Date Notice Package" which contained (i) the notice of the deadline to file asbestos-related Proofs of Claim (the "Asbestos Bar Date Notice"), (ii) the asbestos-related Proof of Claim form, and (iii) the notice of the option to submit asbestos claims data in electronic format in lieu of the Proof of Claim (the "May 2006 Affidavit of Service"). (Dkt 2164) The May 2006 Affidavit of Service also stated that Trumbull caused to be served by first class mail the "Non-Asbestos-Related Bar Date Notice Package" which included the (i) the notice of the deadline to file non-asbestos-related Proofs of Claim (the "General Bar Date Notice") and (ii) non-asbestos-related Proof of Claim form. (*Id.*) The Asbestos-Related Bar Date Notice Package and the Non-Asbestos-Related Bar Date Notice Package were served on parties listed on various exhibits to the May 2006 Affidavit of Service.

314. The Bar Date Order provided that ASARCO may serve the Asbestos-Related Package on attorneys of record for creditors holding asbestos-related claims, if known, in lieu of serving the individual creditors. (Dkt 2076)

315. On June 20, 2006, Trumbull filed an affidavit of service stating that it caused to be published the Asbestos Bar Date Notice and the General Bar Date Notice on various dates throughout May and June 2006 in newspapers and magazines listed in an exhibit attached to that affidavit. (Dkt 2375) On December 4, 2007, Trumbull filed an amended affidavit of service attaching a list of publications that had been omitted from the exhibit accompanying the original affidavit. (Dkt 6429)

316. The Bar Date for filing Proofs of Claim against the 2006 Subsidiary Debtors was May 21, 2007, for non-governmental creditors and June 25, 2007 for governmental creditors. On March 15, 2007, Trumbull filed an affidavit of service stating that it caused to be

served by first class mail, the notice of the deadline to file Proofs of Claim in the 2006 Subsidiary Debtors' cases and the Proof of Claim form on parties listed on various exhibits to the affidavit. (Dkt 4182)

317. The Bar Date for filing Proofs of Claim against the 2008 Subsidiary Debtors was September 16, 2008, for non-governmental creditors and October 21, 2008, for governmental creditors. On August 15, 2008, Trumbull filed an affidavit of service stating that it caused to be served by first class mail, the notice of the deadline to file proofs of claim in the 2008 Subsidiary Debtors' cases and the proof of claim form on parties listed on various exhibits to the affidavit. (Dkt 8742)

B. Solicitation of the Debtor's and Parent's Plans and Notice of the Confirmation Hearing and Objection Deadline.

318. Notice of the scheduled Confirmation Hearing was provided according to the July 2, 2009, Order Approving the Disclosure Statement ("Disclosure Order"). Notice of the Confirmation Hearing and the opportunity of any party in interest to object to confirmation of any Plan was adequate and appropriate as to all parties affected.

319. The Disclosure Order approved the Disclosure Statement as having "adequate information" pursuant to 11 U.S.C. § 1125 and authorized the Balloting Agent to serve it on all those entitled to vote on the plans according to the procedures approved by the order.

320. The Disclosure Order approved the "Notice of (i) Confirmation Hearing and Objection Deadline With Respect to Plans of Reorganization and (ii) Solicitation and Voting Procedures" (the "Confirmation Notice") that advised all parties that were listed on the Debtor's Schedules, filed a Proof of Claim, or filed a notice of appearance in the Reorganization Cases of the Confirmation Hearing date as well as the deadline for filing objections to the Plans.

321. Pursuant to the Bankruptcy Court's Order, the Debtor caused the Confirmation Notice to be published on various dates between July 13, 2009 and July 17, 2009 in the *Wall Street Journal*, *Seattle Times*, *Houston Chronicle*, *Chicago Tribune*, *Denver Post*, *San Francisco Chronicle*, *Arizona Republic*, *Tulsa World*, *Albuquerque Journal*, *Star-Ledger*, *The Kansas City Star*, *The News Tribune*, *The Columbus Dispatch*, *Knoxville News-Sentinel*, *The Salt Lake Tribune and Desert News*, *Omaha World Herald*, *The Evansville Courier & Press*, *Hammond Times*, *Arizona Daily Star*, *El Paso Times*, *El Diario*, *Idaho Statesman*, *Corpus Christi Caller Times*, *Amarillo Globe News*, *The Herald*, *Fort Smith Times Record*, *Coeur D' Alene Press*, *The Missoulian*, *Brownsville Herald*, *Register-Mail*, *Helena Independent Record*, *Grove Sun*, *Daily Journal*, *St. Clair News Aegis*, *Leadville Herald Democrat*, *Columbus Daily Advocate*, and *Copper Basin News*. Levin Proffer ¶ 2. (Dkt 12340, Ex. D169) Notice of the Confirmation Hearing and the opportunity of any party in interest to object to confirmation of any Plan was adequate and appropriate as to all parties affected.

322. The Disclosure Order also approved a notice of the Confirmation Hearing tailored to asbestos claimants (the "Asbestos Notice"). In addition to notice of the Confirmation Hearing and the deadline to object to the Plans, the Asbestos Notice contained a general description of the treatment of asbestos claims under the three Plans. The Debtor, the Parent, Harbinger, the Asbestos Subsidiary Committee, and the FCR all commented on and agreed to the form of the Asbestos Notice. The Asbestos Notice was published in the weekday edition of the *Wall Street Journal* on July 13, 2009. Levin Proffer ¶ 3. (Dkt 12340, Ex. D169)

323. The Disclosure Order also approved a notice of the Confirmation Hearing tailored to individual owners or allottees of the land affected by the Mission Mine Settlement Agreement (the "Mission Notice"). In addition to notice of the Confirmation Hearing and the

deadline to object to the Plans, the Mission Notice contained a brief description of the Mission Mine Settlement Agreement. The Debtor caused the Mission Notice to be published once on various dates from July 13, 2009 to July 17, 2009 in the *Arizona Daily Star*, the *Green Valley News*, and the *Tohono O'odham Runner*. Levin Proffer ¶ 4 (Dkt 12340) The Debtor also caused a notice containing a brief description of the Mission Mine Settlement Agreement, the Confirmation Hearing, and the objection deadline to the Plans to be advertised on the local radio station on the San Xavier Reservation in the native language of the Tohono O'odham Nation. (Dkt 12622) The Debtor's service of the Mission Notice, via mail, publication, and radio advertisement complied with the Debtor's obligation to advertise confirmation of the Debtor's Plan under the terms of the Mission Mine Settlement Agreement and was reasonable.

324. The Balloting Agent mailed out the solicitation packages (the "Solicitation Packages") that were approved by the Disclosure Order on July 2, 2009 by first class mail to all parties entitled to vote on the Plans pursuant to the Solicitation Order. Monger Proffer ¶ 5. (Dkt 12551, Ex. D168) The Solicitation Package contained, among other things, the Disclosure Statement, the Plans, the Confirmation Notice, recommendation letters from various parties (including the Asbestos Subsidiary Committee and the FCR), and the Master Ballots and Ballots for voting to accept or reject the Plans. Affidavit of Mailing ¶ 3. (Dkt 12542) The Master Ballots and Ballots were drafted with input from the Asbestos Subsidiary Committee. 6/30/09 Tr. at 103-108. Pursuant to the Disclosure Order, the Balloting Agent caused the Solicitation Package to be served, via first class mail, on each attorney of record representing asbestos claimants and directly on asbestos claimants not represented by counsel. Affidavit of Mailing ¶ 3. (Dkt 12542) Approximately 150 law firms or attorneys and 50 asbestos claimants were served with the Solicitation Packages. *See id.* Ex. O. The law firms and attorneys were served

with a Master Ballot and the unrepresented asbestos claimants were served with an individual Ballot. *See id.* ¶ 3

325. On August 4, 2009, the Bankruptcy Court entered the Re-Solicitation Order that established August 17, 2009 at 4:00 p.m. (Central time) as the new deadline to submit Ballots to accept or reject the Plans. The Balloting Agent mailed amended solicitation packages (the "Amended Solicitation Packages") on August 5, 2009 to the same parties that were served with the original Solicitation Packages. Monger Proffer ¶ 5. (Dkt 12551, Ex. D168) The Amended Solicitation Packages contained, among other things, the Supplemental Disclosure Statement, the Plans (including the Parent's modified Sixth Amended Plan), recommendation letters by various parties, and the Ballot for voting to accept or reject the Plans. Affidavit of Mailing ¶ 3. (Dkt 12543) All parties entitled to vote to accept or reject the Plans, including asbestos claimants, were given the opportunity to change their vote if already cast and were given an extended period of time in which to cast their Ballots if they had not yet voted. Voters also were given the option of voting electronically or submitting a paper Ballot. (Dkt 12252) Both the Master Ballots and the individual Ballots clearly stated that completed Ballots had to be received by the Balloting Agent by 4:00 p.m. (Central time) on August 17, 2009, to be counted. (Dkt 12252-4) Accordingly, Claimants and their counsel were given approximately 40 days from service of the original Solicitation Package in which to vote. The voting period is reasonable and sufficient to conform to the requirements of Federal Bankruptcy Rule of Procedure 3018.

C. Good Faith Solicitation

326. Based on the record in the case, votes for acceptance and rejection of the Parent's Plan and indications of preference were solicited and sought in good faith and in compliance with the Bankruptcy Code (including Sections 1125, 1126 and 1129 of the

Bankruptcy Code), the Bankruptcy Rules (including Bankruptcy Rules 3017 and 3018), the Disclosure and Solicitation Order, and all other applicable statutes, rules, laws and regulations by the Parent and all of its officers, directors, members, partners, employees, affiliates, agents, counsel, and advisors (including, without limitation, all of the Parent's attorneys, financial advisors, investment bankers, accountants, solicitation agents and other professionals retained by the Parent) and all of the foregoing have acted in "good faith" and in compliance with the applicable provisions of the Bankruptcy Code, within the meaning of Section 1125(e) of the Bankruptcy Code, and are entitled to the protections thereof, and are entitled to the protections contained in Article XI of the Parent's Plan, which are reasonable and appropriate under the circumstances.

XIII. GENERAL CONCLUSIONS

A. Venue; Core Proceeding; Exclusive Jurisdiction

327. The Debtor was qualified and is qualified to be a debtor pursuant to Section 109(d) of the Bankruptcy Code. Venue was proper as of the Petition Date and continues to be proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409. The Debtor continues to manage and operate its respective businesses and properties as debtors in possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code. Confirmation of the Parent's Plan is a core proceeding under 28 U.S.C. § 157(b)(2). The Court has jurisdiction over the Cases pursuant to 28 U.S.C. §§ 157 and 1334, and the Court has exclusive jurisdiction to determine whether the Parent's Plan complies with the applicable provisions of the Bankruptcy Code and should be confirmed.

B. Judicial Notice

328. The Court takes judicial notice of the Docket in the case maintained by Clerk of the Court and/or its duly-appointed agent, including all pleadings and other documents

filed, all Orders entered, and all evidence introduced (unless withdrawn) and arguments made at the hearings held before the Court during the case, including the hearings to consider the adequacy of the Disclosure Statement and the Confirmation Hearing.

C. Parent's Plan Modifications

329. Section 1127(a) of the Bankruptcy Code provides, with respect to chapter 11 plan modifications, as follows:

> The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of Sections 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.[256]

In addition, Bankruptcy Rule 3019 provides as follows:

> In a chapter 9 or chapter 11 case, after a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.[257]

330. The only substantive modifications to the Parent's Plan improve the treatment for the holders of certain Allowed Claims, and such changes do not materially adversely affect or change the treatment of any other Claims or Interests under the Parent's Plan. All other modifications to the Parent's Plan constitute non-material changes. Accordingly, pursuant to Section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, the modifications

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[256] 11 U.S.C. §1127(a).

[257] FED. R. BANKR. P. 3019.

to the Parent's Plan do not require additional disclosure under Section 1125 of the Bankruptcy Code or re-solicitation of votes under Section 1126 of the Bankruptcy Code, nor do they require that holders of claims be afforded an opportunity to change any previously cast acceptances or rejections of the Parent's Plan.

D. Acceptances of the Parent's Plan

331. The holders of claims in Class 4 accepted the Parent's Plan by more than one-half in number of those voting and by holders of claims totaling at least two-thirds in amount of Class 4 Claims voting.[258] The other classes of claims are deemed to have accepted the Parent's Plan because they are being paid in full, with post-petition interest, at the allowed or agreed-upon amount.[259]

E. Assumption, Assumption and Assignment, and Rejection of Executory Contracts and Unexpired Leases

332. The provisions of Article VIII of the Parent's Plan governing the assumption, assumption and assignment, or rejection of executory contacts and unexpired leases, including without limitation, the right of the Parent and Reorganized ASARCO, at any time prior to the Effective Date, to amend the Parent's Plan to: (a) delete any Assumed Contract listed therein, thus providing for its rejection pursuant to the Parent's Plan; or (b) add any executory contract or unexpired lease thereto, thus providing for its treatment as an Assumed Contract pursuant to the Parent's Plan, satisfy the requirements of all applicable provisions of Section 365 of the Bankruptcy Code. Under the Parent's Plan, reasonable business judgment has been exercised in determining whether to assume, assume and assign, or reject each of the Debtors' executory contracts and unexpired leases as set forth in the Parent's Plan.

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258 (Monger Proffer at 5.)

259 *See* 11 U.S.C. § 1126(f).

333. The Parent or Reorganized ASARCO, as applicable, have cured, or provided adequate assurance that Reorganized ASARCO will cure, defaults (if any) under or relating to each of the Assumed Contracts.

334. The Parent has provided adequate assurance of future performance by Reorganized ASARCO under each of the Assumed Contracts.

F. Section 524(g) Injunctions

335. The Permanent Channeling Injunction and Asbestos Insurance Company Injunction comply with Section 524(g)(1) of the Bankruptcy Code. They enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under the Parent's Plan, is to be paid in whole or in part by the Section 524(g) Trust, except as otherwise expressly allowed by the Parent's Plan.

336. The Permanent Channeling Injunction and Asbestos Insurance Company Injunction comply with Section 524(g)(2)(B)(i)(I) of the Bankruptcy Code. These injunctions are to be implemented in connection with the Section 524(g) Trust, which assumes the Debtors' liabilities for Debtors who have been named as defendants in personal injury, wrongful death, or property damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products.[260] Pursuant to the Parent's Plan, on the Effective Date, the Section 524(g) Trust will assume all of the Debtor's Asbestos Personal Injury Claims and Demands which represent its liabilities arising from the personal injury, wrongful death, and property damage actions, and the Section 524(g) Trust shall receive all transfers and

[260] (Lapinsky Proffer at ¶ 44(i).)

assignments as set forth in the Parent's Plan. See Parent's Plan Art. 6.3; Lapinsky Proffer ¶ 44(iii) (Docket 12387, Ex. D170).

337. The Parent's Plan satisfies Section 524(g)(2)(B)(ii)(IV)(bb) of the Bankruptcy Code.

338. The Parent's Plan has been approved by creditors in Class 4 under the Parent's Plan in the requisite numbers and amounts required by Sections 524(g), 1126, and 1129 of the Bankruptcy Code.

339. Section 524(g)(2)(B)(ii)(IV)(bb) requires establishment of a separate class of claimants whose claims are to be addressed by a trust and "votes, by at least 75 percent of those voting, in favor of the plan."[261] The Parent's Plan establishes Class 4 (Asbestos Personal Injury Claims) for claims to be addressed by the Section 524(g) Trust, and 84.16% of voting Class 4 Claims voted in favor of the Parent's Plan.[262]

340. The Permanent Channeling Injunction and the Asbestos Insurance Company Injunction comply with Section 524(g)(2)(B)(i)(II) of the Bankruptcy Code because the Section 524(g) Trust is funded in whole or in part by the securities of one or more Debtors and its obligations to make future payments, including dividends.

341. The Parent's Plan complies with Section 524(g)(2)(B)(i)(IV) of the Bankruptcy Code because the Section 524(g) Trust will use its assets and income to pay the Asbestos Personal Injury Claims and Demands.[263]

342. The Parent's Plan satisfies the requirements of Section 524(g)(2)(B)(ii) of the Bankruptcy Code regarding the necessity of injunctive relief and the operation of the trust.

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261 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb).

262 (*See* Chart, Monger Proffer at 5.)

263 (*See* Parent's Plan Art. 6.5; Section 524(g) Trust Agreement § 1.2.)

343. The Parent's Plan provides in Article 11.3 for issuance of a Permanent Channeling Injunction and Asbestos Insurance Company Injunction pursuant to Section 524(g)(1) of the Bankruptcy Code.[264] The Parent's Plan comports with the Bankruptcy Code's requirements for issuance of the Permanent Channeling Injunction and Asbestos Insurance Company Injunction.

344. Pursuit of asbestos-related demands outside the procedures prescribed by the Parent's Plan is likely to threaten the Parent's Plan's purpose to deal equitably with claims and future demands. Accordingly, the requirements of Section 524(g)(2)(B)(ii)(III) of the Bankruptcy Code are met.

345. Section 524(g)(2)(B)(ii)(IV)(aa) of the Bankruptcy Code is satisfied with respect to the Parent's Plan because the terms of the Permanent Channeling Injunction and the Asbestos Insurance Company Injunction, including any provisions barring actions against third parties, are set out in the Parent's Plan and in the Disclosure Statement.

346. The Parent's Plan Documents which relate to the Section 524(g) Treatment are approved in all respects, and all parties thereto are authorized and directed to perform all of their obligations thereunder. The Section 524(g) Trust will operate in conformity with Section 524(g)(2)(B)(ii)(V) of the Bankruptcy Code.

G. Section 524(g) Trust

347. The creation of the Section 524(g) Trust is an essential element of the Parent's Plan. Entry into the Section 524(g) Trust Agreement and the Section 524(g) Trust Distribution Procedures is in the best interests of the Debtors, their Estates and all holders of asbestos Claims and Demands. The establishment of the Section 524(g)Trust, the selection of Al

[264] (Parent's Plan Art. 11.3.)

Wolin, David Levi, and Ellen Pryor to serve as Section 524(g) Trustees, the selection of Steve Baron (co-chair), Steve Kazan (co-chair), Robert Phillips, Al Brayton, and Bryan Blevins as members of the Section 524(g) Trust Advisory Committee, and the form of the proposed Section 524(g) Trust Agreement, as the same may subsequently be amended or modified, are appropriate and in the best interests of creditors. Upon its execution, the Section 524(g) Trust Agreement and the Section 524(g) Trust Distribution Procedures shall be valid, binding and enforceable in accordance with its terms. The vesting in the Section 524(g) Trust of the Section 524(g) Trust Assets, as specified in the Parent's Plan, is a material component of the Parent's Plan, and nothing in this opinion, the Parent's Plan, or the Disclosure Statement shall be deemed or construed to prejudice or preclude the full assertion of such rights.

H. Deemed Substantive Consolidation Permissible

348. The deemed substantive consolidation of the Debtors solely for the limited purposes of voting and distributions, as provided by Article 10.21 of the Parent's Plan, is in the best interest of the Debtors and their Estates and creditors, is within the powers of the Bankruptcy Court to grant under Section 105 of the Bankruptcy Code, does not violate any Sections of the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure.

I. Environmental Custodial Trust

349. The creation of the Environmental Custodial Trusts is an essential element of the Parent's Plan. Entry into the Environmental Custodial Trust Agreements is in the best interests of the Debtors, their Estates and their creditors. The establishment of the Environmental Custodial Trust, the selection by the DOJ pursuant to the provisions of Section 7.2 of the Parent's Plan of the Environmental Custodial Trustees, and the form of the proposed Environmental Custodial Trust Agreements, as the same may subsequently be amended or modified, are appropriate and in the best interests of creditors. Upon their execution, the

Environmental Custodial Trust Agreements shall be valid, binding and enforceable in accordance with their terms. The vesting in the Environmental Custodial Trust of the Environmental Custodial Trust Assets, as specified in the Parent's Plan, is a material component of the Parent's Plan, and nothing in this opinion, the Parent's Plan, or the Disclosure Statement shall be deemed or construed to prejudice or preclude the full assertion of such rights.

J. Working Capital Facility

350. Entry into the Working Capital Facility is in the best interests of the Debtors and their Estates and creditors.

XIV. THE DISCLOSURE, RELEASE, EXCULPATIONS, INJUNCTIONS AND RELATED PROVISIONS IN THE PARENT'S PLAN ARE APPROPRIATE

351. Pursuant to section 1123(b)(3) of the Bankruptcy Code, the discharges, releases, exculpations and injunctions set forth in the Parent's Plan, including, without limitation, Article X of the Parent's Plan, and implemented by the Confirmation Order, constitute good faith compromises and settlements of the matters covered thereby. Such compromises and settlements are made in exchange for substantial consideration and are hereby approved as fair, equitable, reasonable and in the best interests of the Debtor, the Estates, Reorganized ASARCO, the Parent, Creditors and Equity Interest Holders. The releases contained in Article X of the Parent's Plan are, under the circumstances presented, fair, reasonable and necessary to the successful effectuation of the Parent's Plan and justified by the substantial consideration contributed under the Parent's Plan for the benefit of the Holders of Allowed Claims. Each of the discharge, release, indemnification, and exculpation provisions set forth in the Plan:

- is within the jurisdiction of the Court under 28 U.S.C. §§ 1334(a), (b), and (d);
- is an essential means of implementing the Parent's Plan pursuant to section 1123(a)(5) of the Bankruptcy Code;

- is an integral element of the settlements and transactions incorporated into the Parent's Plan;
- confers material benefit on, and is in the best interests of, the Debtors, their estates, and the holders of Claims and Interests;
- is important to the overall objectives of the Parent's Plan to finally resolve all Claims among or against the parties-in-interest in the Cases with respect to the Debtors, their organization, capitalization, operation, and reorganization; and
- is consistent with 11 U.S.C. §§ 105, 1123, and 1129, and other applicable provisions of the Bankruptcy Code.

352. The failure to effect the discharge, release, indemnification, and exculpation provisions described in Article X of the Parent's Plan would seriously impair the Parent's ability to confirm the Parent's Plan.

353. Accordingly, the discharges, and the releases of the Released Parties and the exculpation of the Exculpated Parties as set forth in the Parent's Plan are consistent with sections 105, 524, 1123, and 1129 of the Bankruptcy Code and applicable law in the Fifth Circuit.

XV. CONFIRMATION OF THE PARENT'S PLAN

354. The Parent's Plan complies with all of the requirements of the Bankruptcy Code and should be confirmed.

355. Confirmation of the Debtor's Plan should be denied.

356. A Table of Contents is attached hereto.

XVI. SUPPLEMENTAL RECOMMENDED FINDINGS AND CONCLUSIONS

A. Compliance with the Court's *Sua Sponte* Order

357. Pursuant to that certain *Sua Sponte* Order in Furtherance of Plan Confirmation that was entered by the Court on September 2, 2009 (the "*Sua Sponte* Order"),[265] the Court directed the Parent to file certain documents related to the Parent's Plan, including (1)

[265] (Docket No. 12778.)

the fully executed Fourth Amended and Restated Escrow Agreement and the Amended Grupo México Guarantee Agreement, (2) proof of funding of the Fourth Amended and Restated Escrow Agreement, and (3) a formal offer to extend the Collective Bargaining Agreement with the Union for one year as stated orally on the record.

358. On August 31, 2009, the Parent filed the fully executed Fourth Amended and Restated Escrow Agreement.[266]

359. On September 1, 2009, the Parent filed a Notice of Filing Certain Escrow Agreement Documents, Pursuant to Report and Recommendation with Respect to ASARCO Incorporated and Americas Mining Corporation's Seventh Amended Plan of Reorganization for the Debtors under Chapter 11 of the United States Bankruptcy Code, as Modified on August 20, 2009, August 23, 2009, and August 27, 2009.[267] Attached to this Notice was (1) a Letter from Bank of New York Mellon as Escrow Agent, acknowledging the receipt of the cash in the amount of $500,000,000 and (2) the Initial Post-Recommendation Certification of the value of Southern Copper Corporation stock held in the escrow account.

360. The Parent filed its Second Amended Grupo México Guarantee Agreement, which (i) clarifies that Grupo México not only consents to the jurisdiction of courts in the Southern District of Texas but that the third party beneficiaries thereto are empowered to enforce the guarantee, and (ii) incorporates certain other non-substantive, clarifying comments received from the ASARCO Committee and the Asbestos Representatives.[268]

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266 (Docket No. 12738.)

267 (Docket No. 12765.)

268 (Docket No. 12806, Ex. A.)

361. The Parent filed a letter from Jorge Lazalde to Robert LaVenture and Manuel Armenta, dated September 3, 2009, reaffirming and formally extending to the Union the Parent's offer to extend the Collective Bargaining Agreement with the Union for one year.[269]

362. Based on the above, the Court concludes that the Parent has fully complied with the Sua Sponte Order.

B. Approval of the 9019 Asbestos Settlement

363. The Parent's Plan reflects certain settlements resolving the claims of particular credit groups. The treatment of these settled claims is discussed above and meets all the statutory requirements for confirmation. In addition, to the extent that settlements embodied in the Parent's Plan have not been previously approved by the Bankruptcy Court, they are hereby approved.

364. Pursuant to Bankruptcy Rule 9019(a), the Court may approve a compromise and settlement of claims against the bankruptcy estate. FED. R. BANKR. P. 9019(a); *Connecticut Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortg. Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995).

365. "Compromises are a 'normal part of the process of reorganization.'" *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) (quoting *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 130 (1939)). Compromises are "desirable and wise methods of bringing to a close proceedings otherwise lengthy, complicated and costly." *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980) (citation omitted). All that is required is a showing that a compromise falls within the "'range of reasonable litigation alternatives.'" *In re Roqumore*, 393 B.R. 474,

[269] (Docket No. 12806, Ex. B.)

480 (Bankr. S.D. Tex. 2008) (quoting *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d 1983), *cert. denied*, 464 U.S. 822 (1983)).

366. Approval of a compromise lies within the sound discretion of the bankruptcy court. *United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 297 (5th Cir. 1984); *In re Jackson Brewing Co.*, 624 F.2d at 602-03. A bankruptcy court should approve a settlement when it is fair, equitable, and in the best interests of the estate. *In re Foster Mortgage Co.*, 68 F.3d at 917.

367. A factor weighing on the wisdom of compromise is the extent to which the settlement is a product of arm's-length negotiations, and not fraud or collusion. *Id.* at 918 (noting that a settlement between insiders—the debtor and its parent company—reached without the participation of creditors required careful scrutiny). Another factor weighing on the wisdom of compromise is the interests of the creditors, with proper deference to their reasonable views. *Id.* at 917. In evaluating the interests of the creditors, the court must take into account the consideration offered by the settling party and the degree to which the creditors object to determine whether the settlement furthers their best interests. *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop., Inc. (In re Cajun Elec. Power Coop, Inc.)*, 119 F.3d 349, 358 (5th Cir. 1997) (noting that although a numerical majority of the creditors opposed the settlement, the overall interests of the creditors were well served because the settlement ridded the estate of property that was a "major impediment to reorganization").

368. In evaluating the probability that the debtor would have prevailed in litigation, "it is unnecessary to conduct a mini-trial to determine the probably outcome of any claims waived in the settlement," *Id.* at 356. The court need not resolve disputed issues but should apprise itself of the relevant facts and law so that it can make an informed and intelligent

decision as to the reasonableness of the settlement. *Id.*; *In re Drexel Burnham Lambert Group Inc.*, 138 B.R. 723, 759 (Bankr. S.D.N.Y. 1992) ("Rather than being forced to decide all questions of law and fact that are settled, a Court need only canvas the issues [to] see whether the settlement fall[s] below the lowest point in the range of reasonableness.") (internal quotes and citations omitted). It is sufficient for the court to conclude that a substantial controversy with an uncertain outcome exists. *In re Jackson Brewing Co.*, 624 F.2d at 610 (affirming approval of settlement where "the Court concluded that there was a substantial controversy between the Trustee and the [defendant] with an uncertain resolution").

369. In approving the settlements embodied in the Parent's Plan, the Court has considered all of the standards applicable under Bankruptcy Rule 9019.

370. Pursuant to the Parent's Plan, the Parent, the Asbestos Subsidiary Committee, the Asbestos Claimants' Committee, and the FCR entered into the Amended Asbestos/AMC/Parent Agreement in Principle (the "Amended Agreement in Principle") as part of a global resolution of the Debtors' potential asbestos-related liability and subsequently modified the treatment of asbestos claims as provided in the Parent's Plan to include approximately $140.6 million in post-petition interest.[270] As detailed below, the Amended Agreement in Principle, as modified (the "Asbestos Settlement") meets all the requirements for approval under the Bankruptcy Code.

371. The Asbestos Settlement resolves over 102,000 asbestos-related products liability and/or premises claims asserted against LAQ, CAPCO, and ASARCO. As part of the alter ego estimation proceeding, the Asbestos Subsidiary Committee and the FCR (as plaintiffs in the adversary proceeding to estimate ASARCO's derivative liability) and ASARCO each

[270] (*See* Parent's Plan Ex. 17.)

retained econometricians to estimate the pending and future liability of LAQ and CAPCO. ASARCO's expert, Dr. Rabinovitz, estimated that the Asbestos Subsidiary Debtors' total present and future asbestos liability would be between $267 million and $433 million.[271] The plaintiff's expert, Dr. Peterson, estimated that the liability was between $1.3 billion and $2.1 billion.[272] Both experts projected that new asbestos claims would continue to be asserted for decades,

372. Dr. Rabinovitz excluded premises liability cases from her work on the estimation proceeding in reaching the $267-$433 estimation. When she included premises liability, her estimate of the asbestos liability was $473 million to $506 million, exclusive of defense costs.[273] Dr. Peterson's rebuttal report filed on July 20, 2009, derives the ratio of premises to non-premises claims from Dr. Rabinovitz's work and applies it to Dr. Peterson's estimates. He states that "ASARCO's added liability for its premises claims will likely exceed the range of $206 to $382 million," which would bring his estimates to a range of $1.5 billion to $2.5 billion.[274]

373. The Asbestos settlement contemplated by the parties is well within the range of reasonableness, amply supported by the evidence, fair and equitable, and in the best interests of the Estate. It allows ASARCO to settle all of its potential asbestos liability – tens of thousands of claims—for consideration that is reasonable given the applicable law, the evidence, and the risk that damages substantially higher than the settlement would be awarded after the estimation or determination of ASARCO's potential asbestos liability.

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271 (Rabinovitz Proffer ¶ 6.)

272 (Ex. DA78 at 3.)

273 (Rabinovitz Proffer ¶ 7.)

274 (Ex. DA80 at 26.)

374. The settlement resolves uncertain litigation and protects the Debtor against extraordinary potential liability. ASARCO's chances of prevailing in this litigation with asbestos claimants are uncertain. The complexity, length, and expense of the litigation also favor the settlement. Both the liability and damages issues raised by the claims against ASARCO are very complex. The underlying facts span 60 years and involve tens of thousands of tort plaintiffs who were exposed to asbestos under different circumstances and at different times over a period of several decades. Deciding the alter ego claims would require the Court to determine numerous complicated issues, some of which would be questions of first impression.

375. The estimation case also is complicated by the number of documents involved. Over three million pages of documents have been produced in the case. The exhibit list for the Asbestos Subsidiary Committee included over 23,000 documents. There are dozens of deposition and other transcripts in the case. The parties were planning to present testimony from at least five experts.

376. All issues in the case would require numerous pre- and post-trial motions and substantial briefing. And unless the Court's ruling resulted in the same balance represented by the Asbestos Settlement, it is likely that one side or the other would appeal. The case already has been pending for years and could drag on for several more. ASARCO's bankruptcy estate has spent significant amounts of money in connection with asbestos estimation. In light of the favorable settlement, continued litigation would waste the Estates' resources that could be used to satisfy ASARCO creditors and hinder ASARCO's ability to finalize its reorganization and exit from bankruptcy.

377. The Asbestos Settlement is the product of four and a half years of litigation, mediation, negotiations, and arms-length bargaining by sophisticated parties, and

benefits creditors and the estates by providing certainty, protection against up to $2.5 billion of liability, and the critical 524(g) injunction. Accordingly, the Asbestos Settlement is reasonable under the circumstances and in the best interest of the creditors.

378. The only objection to the settlement was asserted by the ASARCO Committee, which has subsequently withdrawn the objection. As discussed above, there is a valid basis for classifying asbestos claims separately from other general unsecured claims, the Asbestos Settlement is fair and equitable, the treatment of asbestos claims is reasonable and fair, and the Parent's Plan does not discriminate in its treatment in favor of the Asbestos Claimants. In any event, Class 3 is unimpaired under the Parent's Plan and Class 4 has voted to accept the Parent's Plan.

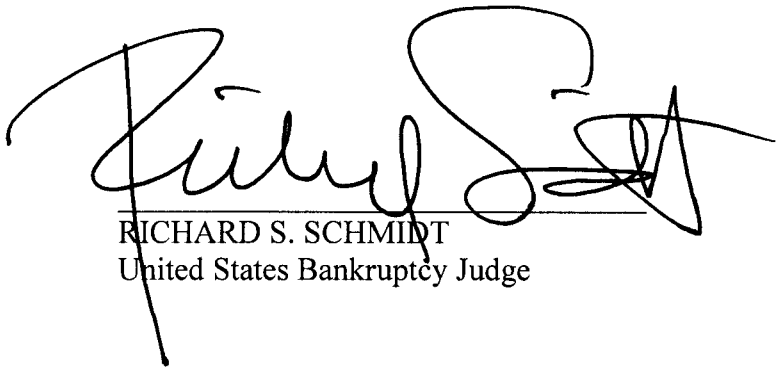
379. The Asbestos Settlement resolves premises claims (present and future), as well as other direct claims (present and future) against ASARCO, including claims based on importing, distributing, selling, marketing, or any other activity or theory of liability regarding asbestos or asbestos-containing products. In addition, the Asbestos Settlement resolves multi-million dollar intercompany claims. Based upon the Asbestos Settlement, the Parent was able to obtain the requisite vote from asbestos claimants and the requisite support of the FCR for a 524(g) injunction, which is a condition of the confirmation of the Parent's Plan. Without a 524(g) injunction, the Debtors' defense costs in the tort system would be approximately $500,000,000.[275]

380. Approval of the settlements and compromises referred to in Articles 10.18 and 10.23 of the Parent's Plan and Exhibits 17 and 21 of the Parent's Plan is appropriate under

[275] (Rabinovitz Proffer ¶ 44.)

Bankruptcy Rule 9019 and applicable law governing approval of such settlements and compromises, and should be ordered as part of the Confirmation Order.

DATED: September 11, 2009.



RICHARD S. SCHMIDT
United States Bankruptcy Judge

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