



ENTERED
10/08/2008

**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)
	§	

**CONFIDENTIALITY AGREEMENT AND
AGREED PROTECTIVE ORDER**

WHEREAS, the undersigned ASARCO LLC (the "Debtor") has served upon ASARCO Incorporated and AMC (collectively, the "Parent") certain Requests for Documents and related discovery (the "Discovery") in connection with the confirmation hearings related to the plans of reorganization in these proceedings, and

WHEREAS, the Parent (and/or its agents, custodians, consultants, accountants, attorneys, or representatives) through its responses to the Discovery (formally or informally) may be divulging certain other information that it considers highly sensitive and/or Confidential Information and asserts there is a need for confidentiality, secrecy and preservation of privileges with respect to any such information or documents produced or given to the Debtor, and

WHEREAS, the Parent has produced countless other documents to the Debtor in connection with other adversary proceedings and contested matters in these proceedings (the "Previously Produced Documents"), and

WHEREAS, the Parent asserts that irreparable harm will result to the Parent if the requested Discovery, including the Previously Produced Documents, is produced or otherwise utilized by the Debtor without the entry of a protective order,

THEREFORE, to protect the confidentiality of any such information, prevent irreparable harm and preserve all applicable privileges and rights of the Parent, the Parties agree as follows:

**I.
DEFINITIONS**

1. "Agreement" shall mean this Confidentiality Agreement and Agreed Protective Order.
2. "AMC" shall mean Americas Mining Corporation.
3. "Party" or "Parties" shall mean ASARCO Incorporated, AMC and ASARCO LLC.
4. "Information" means any material produced in connection with the Discovery, as well as any material derived from such Discovery, whether written, oral, or visual, whether contained in documents, transcripts, or in any other form, including the contents of any writing or printing of any form, document, record, report, discovery response, oral testimony (including deposition testimony), computer or other printout, tangible thing, videotape, photographs, audio tape (including, but not limited to, taped or transcribed telephone conversations), data stored by electronic means, numbered material, discussions, conversations, interviews, negotiations, correspondence, cablegrams, mailgrams, telegrams, telexes, cables, emails, or other forms of written or verbal exchange, however transmitted, including, but not limited to, reports, notes, memoranda, lists, and agendas, regardless of the form or manner in which the Information is kept or how it is recorded, or by whom or when it was prepared, or the purpose for which it was prepared.
5. "Confidential Information" shall include all nonpublic information subject to non-disclosure restrictions pursuant to contract or applicable law, commercially sensitive information, proprietary information and/or other valuable information of a non-public nature

including, but not limited to, information subject to any duties of confidentiality owed to a non-Party to this Agreement, business forecasts or strategy, trade secrets, financial information (including, but not limited to, non-public information on profits, sales, costs, or budgets), non-public customer information, sales and marketing plans, formulae, patterns, devices, programs, techniques, processes, research and development, agreements, records, reports, data, forecasts, projections, interpretations, and all other information, written or visual regardless of how transmitted (including any transcript, photocopy, microfiche, microfilm, computer disk, tape or printout tape recording, compilation, synopsis, summary, quotation, digest or notes (or any portion thereof) of the foregoing created by the recipient thereof), that have value to the Designating Party (or to any third party to which the Designating Party owes a duty of confidentiality), at least in part, by virtue of the fact that they are not publicly known; and that the Designating Party has taken steps appropriate under the circumstances to protect from public disclosure. Confidential Information shall also include such Previously Produced Documents that were designated as "Confidential" at the time of production. To the extent that any Previously Produced Documents were not designated as "Confidential", however, they retain their original designations. Further, to the extent that any Previously Produced Documents were originally designated as "Confidential" but have subsequently been filed publicly, they shall not be considered Confidential Information.

6. "Designating Party" means the Party that produces the Confidential Information.
7. "Receiving Party" means the Parties other than the Designating Party.
8. "Bankruptcy Court" and "Court" mean The United States Bankruptcy Court For The Southern District Of Texas, Corpus Christi Division.

**II.
CONFIDENTIALITY AGREEMENT**

9. Confidential Information shall only be used for purpose of litigating over the issue of whether the plans of reorganization proposed by Debtor and by ASARCO Incorporated and AMC should be confirmed (the "Confirmation Hearing"). Confidential Information shall not be used for any other purpose whatsoever. Confidential Information shall not be disclosed except in accordance with the terms, conditions, and restrictions of this Agreement. Nothing in this Agreement shall limit or restrict a Receiving Party's rights, if any, to use its own Information obtained independent of the Discovery in any manner that the Party deems appropriate.

10. Any document that the Parent seeks to designate as Confidential Information shall be so designated by clearly marking "CONFIDENTIAL" on each page thereof.

11. Subject to the exceptions set forth in Paragraph 5, the Debtor agrees to add the appropriate marking as described in Paragraph 10 above to any Previously Produced Documents that it uses in connection with the Confirmation Hearing (if such documents are not otherwise marked "Confidential") and otherwise treat such documents pursuant to the terms of this Agreement.

12. Except as related to the Previously Produced Documents, which may be marked as set forth in Paragraph 11 and treated as confidential in accordance with Paragraph 5 above, the Designating Party shall designate documents as "Confidential" at the time of production (or, in the case of any inadvertent failure to designate, subject to Paragraphs 22 and 23.

13. Any document that contains Confidential Information of a third party to which the Designating Party owes a duty of confidentiality may be redacted to the extent necessary to uphold that duty.

14. In the case of depositions, designation of the transcript or the portion of the transcript (including exhibits) containing Confidential Information shall be made by a statement on the record designating the transcript as "Confidential." Within ten (10) business days after receipt of the final transcript, the specific pages and lines of the transcript that are designated as "Confidential" shall be identified by the Party claiming such confidential treatment. Any pages and lines not designated as "Confidential" within ten (10) business days after receipt of the final transcript will not be treated as Confidential Information. Use of deposition testimony designated as Confidential is addressed below (See, e.g., Paragraph 20). Counsel for any Party or witness may exclude from the room during a deposition, hearing, or other proceeding any person (other than the witness who is then testifying) who would not be entitled pursuant to this Agreement to receive Confidential Information.

15. In the case of any Information stored or recorded in the form of electronic or magnetic media (including information, databases or programs stored on computers, discs, networks or tapes) ("Computerized Information") that is produced in such form, the producing Party shall electronically mark such Computerized Information as "Confidential" or shall designate such Computerized Information as "Confidential" by cover letter referring to such Computerized Information. Whenever any person to whom Computerized Information designated as Confidential Information is produced reduces such Computerized Information to hard copy form, such person shall mark such hard copy as provided in Paragraph 10 above.

16. Absent prior written consent of the Designating Party, and subject to Paragraph 9 above, Confidential Information shall not be disclosed to any person or entity except the following:

- a. Attorneys for any Party to this Agreement who are actively engaged in the prosecution or defense of the Confirmation Hearing (including in-house counsel of any Party);
- b. Secretaries, paralegal assistants, and clerical personnel employed by such attorneys who are actively engaged in assisting them with the prosecution or defense of the Confirmation Hearing, and whose functions require access to Confidential Information;
- c. Directors, officers and employees of any Party to this Agreement who (i) are actively engaged in assisting counsel with the prosecution or defense of the Confirmation Hearing, or (ii) are being advised by counsel regarding the Confirmation Hearing, and the particular disclosure is reasonably necessary in connection with the legal advice being rendered;
- d. Third party vendors retained by the Parties or their counsel who are involved in one or more aspects of recording deposition testimony, copying, reproducing, coding, or storing Confidential Information;
- e. Experts or consultants retained by counsel for any Party in connection with the Confirmation Hearing, and the employees of such experts or consultants who are actively providing assistance in connection with the Confirmation Hearing;
- f. The Court and its support personnel; and
- g. Witnesses or potential witnesses who are reasonably believed to have relevant knowledge concerning the Confidential Information;

provided that Paragraph 17 hereof is satisfied; and that no Confidential Information contained therein may be disclosed to any person other than the persons identified in Paragraph 16(a), 16(b), 16(e) or 16(f).

17. Information designated as Confidential Information may not be disclosed to a person identified in Paragraphs 16(c), 16(e), or 16(g) unless such person has signed a statement, in the form attached hereto as Exhibit A, that he or she has read this Agreement and agrees to be bound by its terms.

18. Before disclosing any Confidential Information to any person or entity identified in Paragraph 16(c), 16(d) or 16(e), counsel shall instruct such person not to use or disclose such Confidential Information for any purpose other than as counsel directs.

19. Confidential Information, including any copies or extracts thereof, or references thereto, shall not be introduced or admitted into evidence (or otherwise disclosed) without first specifically identifying the Confidential Information by Bates number and notifying the Designating Party of the Party's intent to use and/or disclose such Confidential Information. In the event that any Confidential Information is used at the Confirmation Hearing, the Parties shall meet and confer before the hearing in an attempt to agree on the procedures for which Confidential Information may be introduced into evidence or otherwise used, and the Parties shall seek Court approval of such procedures. If the Parties do not agree on the use of the Confidential Information, the Party seeking to use the Confidential Information shall submit the Confidential Information to the Bankruptcy Court for an in camera review and a determination by the Court stating whether and under what terms and conditions the Confidential Information may be used or disclosed. A Party shall provide notice to the producing party of potential use of any Confidential Information prior to using such Confidential Information in any court hearing, and shall indicate a document's status as "Confidential" on any exhibit list.

20. Subject to Paragraph 19, Confidential Information, including deposition transcripts, may be referred to in the Confirmation Hearing and in any briefs or other filings related to the Confirmation Hearing; and, subject to Paragraphs 14, 16, 17, 18, and 19, may be used at or in depositions related to the Confirmation Hearing; provided, however, that any paper filed with the Court that discloses the contents of Confidential Information shall itself be marked as "Confidential" as appropriate, and shall be separately filed under seal with the Clerk of the

Court, in sealed envelopes or other appropriate sealed containers on which shall be endorsed the caption and index number of this action and a statement substantially in the following form:

This envelope (or container) is sealed pursuant to Order of the Court and contains confidential information and is not to be opened or the contents thereof to be displayed or revealed except to the Court and Court personnel.

The Parties will consent to whatever orders are necessary to accomplish the filing of particular papers under seal.

21. Any person in possession of Confidential Information who receives a subpoena or other lawful process from any person or entity who is not a party to this Agreement that seeks production or other disclosure of such Confidential Information shall promptly give written notice by telephone and/or email, as well as by overnight delivery and/or facsimile to counsel for the Designating Party, enclosing a copy of the subpoena or other lawful process. It shall be the obligation of the Designating Party to obtain a court order to preclude or restrict production of any Confidential Information requested pursuant to such subpoena or other compulsory process. In the event that the Designating Party advises the Receiving Party that it intends to promptly move for such a court order, the Receiving Party shall not produce or divulge the contents of any Confidential Information until such motion is resolved, unless otherwise required by applicable law or court order. Unless the Designating Party obtains an order directing that the subpoena not be complied with, and serves such order upon the Party subject to the subpoena prior to the response date set forth in the subpoena, the party subject to the subpoena shall be permitted to produce documents in response to the subpoena on the subpoena response date and such production shall not constitute a violation of this Agreement.

22. The inadvertent production or disclosure of any Information protected by the attorney-client privilege, the attorney work product doctrine, or any other applicable privilege or

protection (hereinafter referred to as "Protected Information"), shall not constitute, or be considered as a factor suggesting, a waiver or impairment of any claims of such privilege or protection. No later than five (5) business days after the actual discovery of an inadvertent production of such Protected Information, the producing Party may provide written notice that Protected Information, or discovery material that contains such Protected Information, has been inadvertently produced or disclosed. Within five (5) business days of receipt of such notice, any individual or entity who has received such Protected Information shall return to the producing person, or certify destruction of, all such Protected Information and copies thereof in its possession, and shall make reasonable efforts to reclaim and return any such Protected Information. In the event of a good faith dispute between the Parties as to any matter discussed in this paragraph, the Parties shall either resolve the matter between themselves or shall submit the matter to the Bankruptcy Court for resolution.

23. Any inadvertent failure by the producing Party to designate Confidential Information as "Confidential" shall not constitute a waiver of that Party's right to so designate such documents at a later date by sending notice to the Receiving Party and causing such documents to be marked according to the provisions of this Agreement. In such case, any person receiving notice from the Designating Party shall, within five (5) business days of receipt of such notice, either (a) return all such Information (including all copies thereof within its custody and control) to the Designating Party so that such Information may be marked appropriately and promptly re-produced, or (b) if the Designating Party has so requested, mark all such Information (including all copies thereof within its custody and control) appropriately. Nothing in this paragraph shall be construed to limit the Receiving Party's right to object to the designation of Information as Confidential Information.

**III.
NON-WAIVER**

24. Nothing in this Agreement shall prevent any Party from exercising its rights to object to a Designating Party's designation of any Information as "Confidential" pursuant to this Agreement.

25. Nothing in this Agreement shall prevent any Party from using in any manner, or disclosing the contents of, publicly available documents, its own documents, or copies of documents obtained from any source other than through discovery in connection with the Confirmation Hearing. If a Designating Party should, at a later date, publicly disclose the Confidential Information, then the non-disclosing party shall also have a right to disclose that information.

26. Nothing in this Agreement shall prevent any Party from seeking, by written agreement of the signatories hereto or court order, further, greater, or lesser protection with respect to the use of any Confidential Information. Nothing herein shall waive the right of any Party to apply to the Court for a further protective order relating to any Confidential Information or for an order permitting the disclosure of Confidential Information. Nothing herein shall be construed to limit in any way any Party's use of its own Confidential Information.

27. Nothing in this Agreement shall affect the right of any Party to oppose production of any documents on any ground permitted by the Federal Rules of Civil Procedure, including any applicable privilege.

28. Nothing in this Agreement shall operate as an admission of any fact by a Party, and the Parties agree that nothing contained in this Agreement shall be used or characterized by any party as an admission by a party opponent.

**IV.
RETURN OF CONFIDENTIAL INFORMATION**

29. Upon the entry of a final, non-appealable order on confirmation of any plan in these proceedings, the Debtor and every other person subject to the terms hereof, shall assemble and either destroy or return to the Designating Party all Confidential Information obtained in connection with the Discovery and all copies thereof, and destroy or return all other materials, including, but not limited to, memoranda, documents, data, studies, analyses, or reports, that were created or derived from such Confidential Information or that relate or pertain to such Confidential Information; provided, however, that a Party's attorney may retain his or her work product, motions, briefs, correspondence, and affidavits; except that the treatment of the Previously Produced Documents shall be pursuant to the terms of the relevant confidentiality agreements entered into by the Debtor in connection with its access to the Previously Produced documents. If the Debtor, any other Receiving Party, or other persons subject to the terms hereof elect to destroy all Confidential Information in their possession rather than return it, then the Debtor or such other persons must certify in writing to counsel for the Parent to having destroyed the Confidential Information. In addition, upon the request of any Party hereto, upon reasonable notice, each Party and its attorney and every other Party subject to the terms hereof shall be required to set forth in a sworn affidavit that they have fully complied with the provisions as set forth in this Agreement with respect to the destruction and/or return of the aforementioned Confidential Information and documents derived therefrom. The Parties shall have thirty (30) days from the date of final adjudication on the Confirmation Hearing to comply with this paragraph.

30. The duration of this Agreement shall be perpetual, irrespective of whether the Confirmation Hearing has been resolved or whether all Confidential Information has been

returned to the Designating Party or destroyed. All persons receiving Confidential Information pursuant to this Agreement shall continue at all times hereafter to treat such Confidential Information in strict accordance with this Agreement.

**V.
APPLICABLE LAWS**

31. This Agreement will be construed in accordance with the laws of the state of Texas, except for the application of privilege assertions based on federal common law, statutes, case law and other applicable sources of federal law.

**VI.
VIOLATION OF THIS AGREEMENT**

32. This Agreement shall be binding upon the Parties and shall continue to be in full force and effect from the time of its execution by the Parties, regardless of the status of any motion before the Court seeking an Order approving this Agreement.

33. If a Party learns of a violation of this Agreement by any other Party, such Party will notify the other Party (through counsel) in writing of the alleged violation hereof and the Party receiving notice shall use its best efforts within seven (7) business days of such notice to obtain from the person or entity to whom the Confidential Information was disclosed the return of any and all such Confidential Information and also shall use its best efforts to obtain an Affidavit that such person or entity is aware of this Agreement, agrees to be bound by it, and has not released or distributed any Confidential Information to any other person(s) or entities at any time, and that all Confidential Information has been returned. Absent such an affidavit, the Party receiving notice may represent in writing to the Party whose Confidential Information was disclosed that, to the best of the former's knowledge, the violation has been remedied.

**VII.
SIGNATURES**

34. Copies of emailed or faxed signatures on this Agreement of any or all signatories shall be effective and binding for all purposes.

SIGNED this 2nd day of October, 2008.



UNITED STATES BANKRUPTCY JUDGE

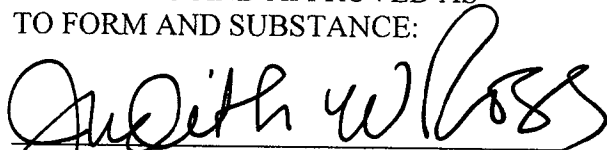
October 8, 2008

AGREED TO AND APPROVED AS
TO FORM AND SUBSTANCE:



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COUNSEL TO ASARCO LLC

Exhibit A

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)
	§	

I hereby certify (i) my understanding that Confidential Information will be provided to me pursuant to the terms and restrictions of the Confidentiality Agreement (the "Agreement") entered in connection with the confirmation hearings related to the plans of reorganization in these proceedings (ii) that I have reviewed the Agreement. I understand the terms of the Agreement. I agree to be fully bound by the Agreement, and I hereby submit to the jurisdiction of the United States Bankruptcy Court for the Southern District of Texas for purposes of enforcement of the Agreement (and only for such purposes). I understand that any violation of the terms of the Agreement shall be punishable by money damages, interim or final injunctive or other equitable relief, sanctions, contempt of court citation, or such other or additional relief as deemed appropriate by the Bankruptcy Court.

SIGNATURE: _____

DATE: _____