No. 14-___

IN THE
Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,
Petitioners,

v.

ASARCO LLC,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 330(a) of the Bankruptcy Code grants discretion to bankruptcy judges to award "reasonable compensation for actual, necessary services rendered by" an attorney or other professional employed by the estate. 11 U.S.C. §330(a)(1). Before any compensation may be awarded, the Code requires professionals to complete a detailed fee application, to which any party in interest may object. It is undisputed that the *preparation* of such a fee application is compensable. But the circuits have now divided over whether *defending* it is likewise compensable. The Ninth Circuit, like the vast majority of lower courts, has held that bankruptcy judges may award compensation for the defense of a fee application, at least when the defense is meritorious and successful. It so held in part because categorically denying compensation would undermine the statutory requirement that bankruptcy professionals' compensation not be diluted compared to that of non-bankruptcy practitioners. But the Fifth Circuit, in the judgment below, held that such compensation is never authorized by §330(a).

The question presented is whether §330(a) grants bankruptcy judges discretion to award compensation for the defense of a fee application.

PARTIES TO THE PROCEEDINGS BELOW

Baker Botts L.L.P. was the fee applicant in the bankruptcy court, the appellee in district court, and the appellee in the court of appeals.

Jordan, Hyden, Womble, Culbreth & Holzer, P.C. was the fee applicant in the bankruptcy court, the appellee in district court, and the appellee in the court of appeals.

ASARCO LLC was the debtor in the bankruptcy court, the appellant in the district court, and the appellant in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioner Baker Botts L.L.P. states that it is a limited liability partnership, which has no parent company. Petitioner Jordan, Hyden, Womble, Culbreth & Holzer, P.C. states that it is a professional corporation, which has no parent company, and no publicly held company owns 10%.

Respondent ASARCO LLC is wholly owned, directly or indirectly, by Americas Mining Corporation, which in turn is wholly owned by Grupo Mexico, which is publicly traded in Mexico.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Baker Botts L.L.P. and Jordan, Hyden, Womble, Culbreth & Holzer, P.C., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-21a) is reported at 751 F.3d 291. The district court's opinion (App., *infra*, 22a-54a) is reported at 477 B.R. 661. The bankruptcy court's opinion (App., *infra*, 55a-145a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on April 30, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

11 U.S.C. § 330(a) provides:

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—

> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and
>
> (B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for—

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

(7) In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326.

PRELIMINARY STATEMENT

This statutory-construction case presents a pure question of law that now divides the circuits: Under § 330(a) of the Bankruptcy Code, do bankruptcy judges possess discretion to award compensation to a professional for successfully defending a fee application?

Section 330(a) provides for the "reasonable compensation" of attorneys and other professionals who work on behalf of an estate. To receive compensation, professionals must submit a detailed fee application, which may be extensively challenged by interested parties who were not the professional's client, including the U.S. Trustee. Congress thereby provided for careful monitoring of fees, and gave bankruptcy judges broad discretion to make appropriate awards. But Congress simultaneously adopted the principle of "parity," under which bankruptcy professionals' compensation may not be diminished compared to practitioners in other areas of law. This marked a major change from pre-Code practice, which authorized lesser comparative fees so as to preserve the economy of the estate. Congress changed direction largely to ensure participation of competent counsel in all bankruptcy proceedings, for if fees remained systematically lower than elsewhere, it concluded, the most qualified practitioners would abandon bankruptcy practice. Bankruptcy compensation may not be diluted, therefore, without violating the parity principle.

The background of this case illustrates how the competing interpretations of § 330(a) generate irreconcilable outcomes. This was one of the largest and most successful Chapter 11 bankruptcies in history. But Reorganized ASARCO is now controlled by a parent company that had sought to defraud ASARCO and that bitterly but unsuccessfully fought the exposure of that fraud by ASARCO's bankruptcy counsel, Baker Botts. Exacting revenge, Reorganized ASARCO attacked all of Baker Botts' fees with

such a barrage of objections that, as is undisputed, petitioners reasonably spent over $5 million solely to defend their fee applications. Ultimately, *every single objection* was overruled, and Reorganized ASARCO pursued *none* of them in the district court, much less the court of appeals. The bankruptcy court awarded Baker Botts compensation for its defense costs, none of which would be borne by creditors, and the district court affirmed.

In reversing, the Fifth Circuit held that § 330(a) *never* authorizes such compensation, even though bankruptcy practitioners' recoveries will necessarily be diluted as a result. By contrast, the Ninth Circuit long has read § 330(a) to authorize discretion to grant awards, partly because of that provision's parity and anti-dilution principle. The conflict is outcome determinative here. This issue recurs repeatedly in bankruptcy courts nationwide, which overwhelmingly have adopted the construction of § 330(a) that permits defense fees in appropriate circumstances. The question for this Court is which circuit's construction of § 330(a) is correct.

STATEMENT

I. BACKGROUND

A. The statutory framework

A debtor-in-possession in a Chapter 11 bankruptcy, "with the court's approval, may employ one or more attorneys * * * to represent [it] in carrying out [its] duties under this title." 11 U.S.C. §§ 327(a), 1107(a).[1] Any bankruptcy professional seeking compensation or expenses from the estate must file a fee application including "a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the

[1] Statutory citations, unless otherwise indicated, refer to the Bankruptcy Code, Title 11 of the U.S. Code.

amounts requested." Fed. R. Bankr. P. 2016.[2] Compensation requires "notice to the parties in interest and the United States Trustee and a hearing," § 330(a)(1), and any party, including the Trustee and the court itself, may object and ask the court to award "less than the amount of compensation that is requested," § 330(a)(2).

Section 330(a) guides the determination of whether services are compensable and any resulting amounts. Bankruptcy courts may broadly award "reasonable compensation for actual, necessary services rendered." § 330(a)(1)(A). The statute enunciates only two prohibitions on compensation: for (1) "unnecessary duplication of services" and (2) services that were neither "reasonably likely to benefit the debtor's estate" nor "necessary to the administration of the case." § 330(a)(4)(A).

For everything else, "[i]n determining the amount of reasonable compensation to be awarded," bankruptcy judges must consider "the nature, the extent, and the value of such services, taking into account all relevant factors," § 330(a)(3). They must also consider six express but non-exhaustive factors. § 330(a)(3)(A)-(F). The statute directs a specific method of assessing compensation for only one service: Courts must base "compensation awarded for the preparation of a fee application * * * on the level and skill reasonably required to prepare the application." § 330(a)(6).

B. The "most successful Chapter 11" case in history

ASARCO, "an integrated copper mining, smelting, and refining company," App., *infra*, 2a, entered Chapter 11 bankruptcy in 2005. It faced cash-flow deficiencies; billions in asbestos, environmental, and toxic-tort liability; corporate-governance and tax problems; a striking workforce; and a litigious parent company, Americas

[2] References to "compensation" include both fee compensation and expense reimbursement, both of which are involved in this case.

Mining Corporation. *Id.* at 62a-66a. When Baker Botts became counsel to the ASARCO estate, chances of reorganization appeared "slim." *Id.* at 62a.[3] But by the end of the case, ASARCO had been successfully reorganized. All three lower courts agreed that Baker Botts' efforts transformed "ASARCO * * * from a broke and broken company to a reorganized ASARCO, cleansed of its historical liabilities and well-positioned to compete effectively in the world of commerce." *Id.* at 65a. The results were "nothing short of extraordinary," providing *full* payment (with interest and attorneys' fees) to creditors, totaling $3.56 billion. *Id.* at 62a, 70a. It was "probably the most successful Chapter 11 of any magnitude in the history of the Code." *Id.* at 12a, 23a, 100a.

Predictably, it was also among the most complex. App., *infra*, 88a. The turning point was Baker Botts' "successful prosecution of an action to recover ASARCO's crown jewel—its controlling interest in SCC." *Id.* at 68a. Two years before the bankruptcy, the parent had directed the financially-distressed ASARCO to transfer its controlling interest in Southern Copper Corporation (SCC) to the parent. *Id.* at 64a. Baker Botts' fraudulent-transfer prosecution resulted in a judgment against the parent valued at between $7 and $10 billion—the largest in Chapter 11 history and possibly the largest unreversed actual-damages award in American history. *Id.* at 43a & n.11, 68a-69a. The SCC judgment led to the full-payment plan of reorganization, while the parent received release of the judgment and regained control of the newly viable ASARCO. *Id.* at 70a, 84a.

Throughout the bankruptcy, Baker Botts filed thirteen interim fee statements, all of which were paid by the debtor and none of which drew objection from the parent,

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[3] Petitioner Jordan, Hyden, Womble, Culbreth & Holzer, P.C., served as co-counsel; references to Baker Botts include both petitioners.

the U.S. Trustee, or anyone else.

C. Reorganized ASARCO's fee attack

ASARCO ceased being the debtor (and Baker Botts' client) once the plan of reorganization took effect. It became Reorganized ASARCO, controlled by the parent. App., *infra*, 3a. When Baker Botts thereupon filed its final fee application, Reorganized ASARCO launched a massive assault on it—and on *all* previously-approved fees, too. It attacked everything—time-entry descriptions, task codes in invoices, staffing choices, and the necessity and quality of various legal services. *Id.* at 58a, 106a-130a.

Reorganized ASARCO stonewalled every effort at efficiently resolving its objections. It refused, for instance, to specify *which* time entries it found "vague" or improperly "block billed," forcing Baker Botts to self-audit thousands of pages of invoices, culminating in a 1160-page supplement. C.A. Rec. 7469-7470, 34615-35774. Yet less than a month before the fee trial, Reorganized ASARCO served Baker Botts a 104-page report accompanied by a 16-foot-tall stack of schedules containing thousands of pages of individual billing entries alleged to be non-compliant with the U.S. Trustee's guidelines and local rules. C.A. Rec. 7873-74, 8476-34437; Sealed C.A. Rec. 770-1592. Tellingly, the U.S. Trustee joined *none* of these objections, nor indeed *any* objections to Baker Botts' core fees, which totaled about $113 million for the duration of the case. App., *infra*, 58a.

Reorganized ASARCO also demanded immense discovery, forcing production of *every single document* that hundreds of professionals created or received during the 52-month bankruptcy. App., *infra*, 3a. Baker Botts retrieved hundreds of boxes of documents from offsite storage facilities. Reviewing them just to avoid revealing privileged information required 2,440 hours from teams

of lawyers and staff. It ultimately produced 2,350 boxes of hard-copy documents (nearly six million pages) and 189 GB of electronic data (approximately 325,000 documents). *Ibid.* Baker Botts then reserved large conference rooms in its Dallas and Houston offices to permit Reorganized ASARCO's lawyers and experts to review the produced material. Reorganized ASARCO sent just *two* lawyers to review the massive results of discovery it had demanded. They spent only five days and copied 1% of the material. Sealed C.A. Rec. 1918.

II. Proceedings Below

A. Proceedings in the bankruptcy court

The bankruptcy court conducted a six-day fee trial. App., *infra*, 3a. In a detailed opinion, *id.* at 55a-145a, it rejected as meritless *all* of Reorganized ASARCO's objections to Baker Botts' core fees and found Baker Botts entitled to a $4.1 million enhancement of those fees for extraordinary performance and results. *Id.* at 144a. The enhancement, limited to the work done in the SCC litigation, corresponded to the court's finding that Baker Botts' standard rates during the bankruptcy were "approximately 20% lower than an appropriate market rate." *Id.* at 96a, 144a & n.103.

Finally, the court awarded Baker Botts $5 million for the fees it incurred successfully defending its fee application against Reorganized ASARCO's barrage of empty objections. App., *infra*, 144a. It concluded that defense fees were compensation for services that were necessary to the administration of the bankruptcy case and beneficial to the estate. It also concluded that defense fees were essential to prevent dilution of Baker Botts' core fees. *Id.* at 138a.

B. Proceedings in the district court and on remand

On appeal to the district court, Reorganized ASARCO

completely abandoned its objections to the $113 million core fee award, and challenged *only* the enhancement and defense-fee awards. App., *infra*, 4a. The district court affirmed the enhancement, calling the SCC judgment "a once in a lifetime result." *Id.* at 45a.

Following the "vast majority" of lower courts and the Ninth Circuit, it also affirmed fees for defending Baker Botts' core fees (but not for pursuing a fee enhancement). App., *infra*, 45a-46a, 49a. The district court remanded to determine whether any of the $5 million defense-fee award related to the enhancement; the bankruptcy court confirmed that it did not. *Id.* at 4a, 50a, 149a-150a. The district court affirmed the final fee award. *Id.* at 4a, 157a-166a.[4]

C. The court of appeals' decision

The court of appeals affirmed the lower courts' fee enhancement award, agreeing that "'[a] seven billion dollar judgment, which is recoverable, which saves a company, and funds a 100% recovery for all concerned is a once in a lifetime result.'" App., *infra*, 9a (quoting *id.* at 44a). It found that "the results" were due to Baker Botts' "'creativity, tenacity and talent,'" not weak adversaries or good luck. *Id.* at 12-13a (quoting *id.* at 68a).

Nonetheless, the Fifth Circuit reversed the award of compensation to Baker Botts for defending its core-fee application. It held that, as a matter of law, bankruptcy courts lack discretion to award such fees. App., *infra*, 15a-16a. The court recognized that the relevant facts were undisputed and one-sided: Baker Botts' performance was "'exemplary * * * in a wide spectrum of legal specialties,'" *id.* at 12a (quoting *id.* at 62a), and "[t]he results [it achieved] were * * * 'probably the most success-

[4] Like the bankruptcy court, the district court noted that the same principles supporting trial-level defense fees would justify an eventual award of appellate defense fees.

ful Chapter 11 [bankruptcy] in the history of the [Bankruptcy] Code,'" *ibid.* (quoting *id.* at 100a). It acknowledged that Reorganized ASARCO's "large scale" fee challenge was wholly unsuccessful yet was incredibly burdensome. *Id.* at 3a. The court conceded that the "huge cost" Baker Botts incurred "defending [its] core fees" was "a drastic reduction in absolute terms." *Id.* at 18a-19a. Yet, it concluded, litigating the fee application *never* "benefit[s] a debtor's estate" and thus is *never* compensable under § 330(a). *Id.* at 15a-16a.

The Fifth Circuit recognized that the circuits were divided. It expressly rejected a Ninth Circuit decision that read § 330(a) as placing fee-defense compensation "within the bankruptcy court's discretion to award fees for 'reasonable and necessary work.'" App., *infra*, 16a-17a (quoting *In re Smith*, 317 F.3d 918, 929 (9th Cir. 2002)). But it endorsed an Eleventh Circuit decision—albeit one decided under a materially different prior version of § 330(a)—as "more closely reflecting the statute's plain meaning." *Ibid.* (citing *Grant* v. *George Schumann Tire & Batt. Co.*, 908 F.2d 874, 882-883 (11th Cir. 1990)).

The court acknowledged that other areas of the law commonly allow fee-defense compensation. "In bankruptcy," it postulated, "the equities are quite different." App., *infra*, 17a. And "requiring professionals to defend their fee applications as a cost of doing business is consistent with the reality of the bankruptcy process." *Id.* at 17a-18a. Thus, it invoked the default "American Rule that each party to litigation bears its own costs." *Id.* at 17a, 19a-20a. True, it agreed, Congress wrote a "comparability factor" into § 330(a) to avoid "a professional firm's compensation [being] unfairly diluted below what comparably skilled practitioners receive in non-bankruptcy case. * * * The Bankruptcy Code plainly intended to * * * raise [bankruptcy] professional fees." *Id.* at 18a. Nonetheless, a parity argument, even in the face of

an admittedly "drastic reduction in absolute terms," was "difficult to analyze," and so parity was deemed met whenever *pre-dilution* "hourly rates" were "comparable" to non-bankruptcy rates. *Id.* at 18a-19a.

The court finally turned to policy considerations, proclaiming that "[t]he perverse incentives that could arise from paying the bankruptcy professionals to engage in satellite fee litigation are easy to imagine." App., *infra*, 18a. It discounted the bankruptcy court's countervailing policy argument that, without compensation for defending fees, "there will be an incentive for parties in interest, any of which can object to professional fees, to 'mount objections to extract a fee reduction,'" which, "in turn, might discourage competent counsel from handling bankruptcy cases." *Id.* at 20a (quoting *id.* at 138a). The Fifth Circuit did not reject this point as unreasonable, but found that allowing defense fees at all could incentivize exorbitant litigation. *Id.* at 21a. Nor did it assert that this concern has come to pass in the Ninth Circuit or other jurisdictions that have long left fee-defense compensation within the bankruptcy courts' discretion.

REASONS FOR GRANTING THE PETITION

This case provides as clean a vehicle as imaginable to resolve the pure question of law presented here. It turns on no factbound issues, but solely on whether bankruptcy judges *ever* have discretion to award bankruptcy professionals compensation for successfully defending applications for core fees. That question divides the circuits and is of substantial practical importance. The Fifth Circuit's construction of § 330(a) contravenes the provision's text and purpose and invites negative consequences.

I. THE FIFTH CIRCUIT'S JUDGMENT DIVIDES THE CIRCUITS ABOUT AN IMPORTANT QUESTION OF LAW

The Fifth and the Ninth Circuits—two of the largest for Chapter 11 bankruptcies—have squarely divided over

whether bankruptcy professionals' defense of core-fee applications may ever be compensated under § 330(a). This case presents a binary and outcome-dispositive question—either such fees are always barred as a matter of law, or they are not.

A. The courts are divided

1. *Statutory background*

Ensuring compensation parity between bankruptcy and non-bankruptcy practitioners was a central objective of the Bankruptcy Code of 1978. See Springer, Damned If You Do, Damned If You Don't—Current Issues for Professionals Seeking Compensation in Bankruptcy Cases Under 11 U.S.C. § 330, 87 Am. Bankr. L.J. 525, 529 (2013). Until then, bankruptcy practitioners labored under a compensation regime predicated not on parity, but on subordinating their compensation to the "economy of the estate." The old Bankruptcy Act's policy required bankruptcy attorneys "to be paid * * * appreciably less than [they] could command for similar services" outside of bankruptcy. *Jacobowitz* v. *Double Seven Corp.*, 378 F.2d 405, 407 (9th Cir. 1967).

In enacting the 1978 Code, Congress affirmatively altered that policy so as to forestall the attendant risk of driving the most qualified counsel from bankruptcy practice. "Bankruptcy specialists," it recognized, "if required to accept fees in all their cases that are consistently lower than fees they would receive elsewhere, will not remain in the bankruptcy field." See H.R. Rep. No. 95-595, at 330 (1977). It therefore "instructed" bankruptcy courts "to level the compensation with [that of] non-bankruptcy attorneys." Springer, *supra*, at 529. The Code authorized "reasonable compensation for actual, necessary services," and mandated that, in fixing such compensation, courts consider "the cost of comparable services other than in a case under this title." 11 U.S.C. § 330(a)(1)

(1982). See also 3 Collier on Bankruptcy ¶¶ 330.03[3], 330.03[12], 330.LH[3] (16th ed. 2013) (hereinafter Collier) (discussing how the Code "abandoned" the "spirit of economy" principle).

Yet the Code provided little specific guidance to achieve this important policy shift, such as how to determine which services to compensate and in what way. Various compensation issues inevitably divided courts; some embraced the parity principle and others honored it in the breach. For example, whether the preparation of a fee application was compensable generated division. See Collier ¶ 330.03[16][a][i]; Springer, *supra*, at 530. Fee applications are highly formalized, labor-intensive efforts that far exceed merely recording time and sending an invoice. See App., *infra*, 17a. Some courts believed that such compensation-focused activities could not be a "benefit to the estate," particularly where the estate had terminated and no longer existed. Others found that a categorical denial of such fees violated the Code's text and its parity policy by diluting a nominally equal fee through time-consuming but Code-mandated tasks.

Congress responded by clarifying its commitment to the parity and non-dilution principle. In 1994, it amended § 330(a), rejecting the unduly narrow constructions of some courts and providing more detailed guidance. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994). Because parity and non-dilution were impossible if services uniquely required by the bankruptcy process were deemed non-compensable, Congress expressly expanded the compensation standard from services with direct "benefit to the estate" to include services that "were necessary to the administration of * * * a *case* under [the Bankruptcy Code]" or that were "beneficial at the time at which the service was rendered toward the completion of" such a "*case*." § 330(a)(3)(C) (emphasis added). Thus, "benefit[ing] the estate" was no longer

the *sine qua non* of compensability.

Likewise, showing by negative implication the breadth of services that are in fact compensable, Congress for the first time enumerated situations where compensation was expressly *disallowed*—duplicative services and services that were neither "reasonably likely to benefit the debtor's estate" nor "necessary to the administration of the case." § 330(a)(4). And, referencing compensation for the "preparation" of a fee application, it mandated a particular method for setting that single service's compensation. § 330(a)(6).

Against this backdrop, all now agree that *preparing* fee applications is compensable. But the judgment below has again divided the courts of appeals, this time about whether professionals may ever be compensated for successfully *defending* those applications.

2. *Ninth Circuit case law enforced Congress's parity principle*

In cases that paralleled the increasing statutory emphasis on parity, the Ninth Circuit developed a jurisprudence supporting the discretion of bankruptcy judges to award fees for essential services—including the successful defense of fee applications.

a. The Ninth Circuit first addressed, under the pre-1994 version of § 330(a), whether professionals could be "compensat[ed] for time devoted to the preparation and presentation of [their] fee applications." *In re Nucorp Energy, Inc.*, 764 F.2d 655, 656 (9th Cir. 1985). Even in the era when compensation was tethered to "benefit[ing] the estate," *Nucorp* rejected as "unpersuasive the * * * suggestion that time devoted to the preparation of attorneys' fee applications is not compensable because such services benefit only the law firm and not the estate." *Id.* at 659. The court found that these "statutorily required" services were not only uniquely burdensome but were

necessary precisely because the Code itself demanded them. *Ibid.*

The Ninth Circuit examined non-bankruptcy contexts where fees are likewise "expressly provided for by statute." *Nucorp*, 764 F.2d at 659. In such contexts, "time devoted *to litigating the propriety of the fee award* is compensable," in part because "[i]t would be inconsistent to dilute an award of fees by refusing to compensate an attorney for time spent to establish a reasonable fee." *Id.* at 660 (emphasis added; internal citations and quotations omitted). "Were we to affirm" the denial of fees, it concluded, "we would, in effect, be reducing the fees that bankruptcy counsel may earn to a level that fails to provide full compensation for their services." *Id.* at 662.

b. The Ninth Circuit later clarified in *In re Riverside-Linden Investment Co.* that, when fee applications are deficient, § 330(a) does not require compensation for defense fees. 945 F.2d 320, 323 (9th Cir. 1991) (affirming bankruptcy court's denial of fees for a failed defense). *Riverside-Linden*, linked with *Nucorp*, reinforced bankruptcy courts' affirmative duty to exercise sound discretion in advancing the Code's parity policy.

c. The Ninth Circuit squarely resolved the issue of compensation for *successful* fee defenses under the current statute—the issue presented in this case—in *In re Smith*, 317 F.3d 918 (9th Cir. 2002) (abrogated in part on other grounds by *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 531-539 (2004)). There, the court analyzed the clarified text of post-1994 § 330(a) and reaffirmed *Nucorp*'s analysis, holding that the Code's text and policy embraced defense fees under appropriate circumstances.

Like this case, *Smith* involved unjustified objections to core fees that the bankruptcy court roundly rejected. 317 F.3d at 921, 922. And, as here, Smith did "not challenge the reasonableness of the amount of the [defense]

fee awards, but rather the legal basis for the awards." *Id.* at 922, 923, 927. The only issue in both cases was whether courts may assess defense fees at all.

On that legal question, *Smith* reiterated its loyalty to the statute's parity principle and held that bankruptcy courts have discretion to award defense fees. "To deny [counsel] reasonable compensation for *successfully* defending its fee awards would dilute its compensation for 'actual and necessary services.'" *Smith*, 317 F.3d at 929. Whether to grant defense fees, and at what amount, "depends on the circumstances and is largely a matter within the informed discretion of the bankruptcy court." *Ibid.* The court of appeals affirmed the bankruptcy court's award of defense fees in *Smith* as a reasonable exercise of discretion. *Id.* at 929-931.

d. The Ninth Circuit subsequently reaffirmed the "common sense principles of *Nucorp*, *Smith*, and *Riverside-Linden* * * *." *In re Wind N' Wave*, 509 F.3d 938, 945 (9th Cir. 2007). There, the bankruptcy appellate panel reversed the bankruptcy court's refusal to award core fees, yet denied compensation for successfully defending those fees. *Id.* at 941. The court of appeals reversed.

It first gave a detailed explanation of § 330(a)'s parity and anti-dilution principle. The Code, it reiterated, was framed with the "intent to avoid dilution of the effective rate for bankruptcy counsel that would result if fees incurred in successfully obtaining or defending an award were not compensated." 509 F.3d at 945. It thus concluded that the availability of compensation for successful defenses "is necessary to prevent the dilution that would result if * * * attorneys were forced to absorb the time devoted to successfully litigating a fee award—an outcome that would be contrary to Congressional intent against fee award dilution." *Id.* at 945-946.

Wind N' Wave also repeated that courts must ensure

that fee-defense litigation is "necessary" under § 330(a)(1). The *Wind N' Wave* litigation, as in *Smith*, was "necessary because * * * the attorneys * * * did not frivolously appeal the lower court's decision merely to acquire litigation fees." 509 F.3d at 946. The Ninth Circuit's practice of compensating only necessary and successful defenses, therefore, functions as a built-in disincentive to running up the tab on meritless demands, while simultaneously discouraging wasteful, baseless fee challenges.

3. *The Fifth Circuit's holding conflicts with the Ninth Circuit's legal standard*

a. The judgment below has created an irreconcilable circuit conflict over § 330(a)'s proper scope. Justifiable defense fees under § 330(a) are available in the Ninth Circuit, but the Fifth Circuit flatly held that "Section 330(a) does not authorize compensation for the costs counsel or professionals bear to defend their fee applications." App., *infra*, 14a.

The Fifth Circuit recognized that the Ninth Circuit in *Smith* "ultimately held that such compensation rests within the bankruptcy court's discretion to award fees for 'reasonable and necessary' work." App., *infra*, 16a. But the Fifth Circuit disagreed, interpreting § 330(a) instead to categorically deny bankruptcy courts such discretion: "Section 330 is not fairly read to include 'fees for defense of fees' either as reasonable, necessary costs of case administration or to prevent dilution of the professional firm's core fees." *Id.* at 20a.

The Fifth Circuit's ultimate conclusion does not merely conflict with the Ninth Circuit's. Its entire opinion systematically rejects each textual and policy argument embodied in Ninth Circuit case law. Specifically, the Fifth Circuit:

- Held that defending fee applications never benefits the estate. App., *infra*, 15a-16a. Cf. *Smith*,

317 F.3d at 929 (successful fee defense "provided a benefit to the debtor's estate in determining the amount of the administrative fees that the estate owed").

- Rejected the Ninth Circuit's reasoning that "because resolving professional fees is required to close a case, their litigation is a reasonable and necessary aspect of estate administration." App., *infra*, 16a (citing *Smith*, 317 F.3d at 929).
- Dismissed the analogy to availability of defense fees under other fee-shifting statutes. App., *infra*, 17a-18a. Cf. *Nucorp*, 764 F.2d at 659-660.
- Rejected the Ninth Circuit's observation that categorically denying defense fees dilutes bankruptcy compensation relative to non-bankruptcy compensation—or at least that it materially does so. App., *infra*, 18a-19a. Cf. *Smith*, 317 F.3d at 928, 929.
- Rejected the prognosis that denying defense fees will incentivize meritless objections to extract fee reductions. App., *infra*, 20a-21a. Cf. *Smith*, 317 F.3d at 929.

The split could not be starker. Defense fees are never available in the Fifth Circuit as a matter of law; within the Ninth Circuit, courts have discretion to award them when deemed reasonable and necessary.

b. The Fifth Circuit contended that it did not *create*, but only deepened, a split. "The Eleventh Circuit," it said, "adopted [the same] interpretation in a factually similar case * * * ." App., *infra*, 15a (citing *Grant* v. *George Schumann Tire & Batt. Co.*, 908 F.2d 874, 882-883 (11th Cir. 1990)). Even if so, that would only expand the circuit division. Nor does *Grant* provide any cover for the Fifth Circuit.

First, far from being "factually similar," *Grant*'s facts

are markedly different. The court there faulted the fee applicant for an "appalling waste of time and resources," which flowed from "a breakdown in the chain of responsibility * * * from the district court through the bankruptcy court to the trustee and his attorney." 908 F.2d at 884. Unlike Baker Botts, counsel in *Grant* received only a small portion of the core fees requested, and the Eleventh Circuit chastised him and the trustee for their "abuses." *Ibid.*

The Fifth Circuit provided none of this context before declaring this case "factually similar" to *Grant*. App., *infra*, 15a. But its quotation from *Grant*—that "'[t]he appeals brought absolutely no benefit to the estate, the creditors, or the debtor,'" *ibid.* (quoting 908 F.2d at 882-883)—inescapably depends on that context. The Ninth Circuit could have made the same statement; *no* court awards defense fees when professionals are wasteful or abusive. *Grant* had no occasion to address whether fee litigation under *any* circumstances could *ever* benefit an estate.

Second, *Grant* (unlike *Smith*) preceded the 1994 amendments. The Fifth Circuit's purported "agree-[ment] with *Grant*'s view as more closely reflecting the statute's plain meaning," App., *infra*, 16a, would be more plausible had the statute not substantially changed.

It is, therefore, hardly surprising that after the 1994 amendments, no court within the Eleventh Circuit appears to have cited *Grant* as prohibiting fee-defense compensation. If *Grant* is relevant at all, its role in the circuit split is, at best, ambiguous. And *even if* it arguably supports the Fifth Circuit's holding, that only underscores that the division is even deeper, and the need for this Court's guidance all the more imperative.

4. *Most lower courts have rejected the Fifth Circuit's categorical prohibition*

Courts and scholars recognize the conflict among lower courts on the question of law presented here. See Collier ¶ 330.03[16][a][ii]. The Fifth Circuit agreed that "[c]ase law addressing this question is divided." App., *infra*, 14a; see also, *e.g.*, *In re Worldwide Direct Inc.*, 334 B.R. 108, 111 (D. Del. 2005) (noting the conflict while rejecting construction later adopted by the Fifth Circuit).

The conflict is lopsided. As the district court observed below, "[t]he vast majority of courts find that compensating bankruptcy lawyers for the preparation of and the successful defense of their fee applications is necessary to avoid unfair dilution of their fees." App., *infra*, 46a. Only "[a] minority of courts generally deny all defense costs incurred defending fee applications based on the so-called 'American Rule,' as well as the same competing policy goals pre-dating the 1994 Amendments." Springer, *supra*, at 540.

Almost one-third of the 94 bankruptcy courts have considered this issue.[5] Many cases have exercised discretion to award fees for successful defenses.[6] When courts deny defense fees, it is ordinarily a matter of *discretion*, not because of perceived legal *preclusion*. Thus, even fee denials typically are consistent with the Ninth Circuit's approach, not the Fifth Circuit's. For instance, courts readily deny defense fees when the fee-application defense was unsuccessful or for some other reason did not

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[5] Other courts have addressed the issue in orders that are not readily available in online databases.

[6] At least thirty-six cases from twenty-nine courts in ten different circuits have acknowledged bankruptcy courts' discretion to award compensation for successful fee defenses. Many are cited in this petition; Appendix G, *infra*, contains petitioners' complete current list.

warrant compensation.[7] Even courts that initially appear to embrace the Fifth Circuit's rule have granted defense fees in subsequent cases.[8] Only two bankruptcy courts—in the Northern District of Texas and Western District of New York—consistently deny defense fees as a matter of law after 1994.[9] And, so far as petitioners are aware, the Northern District of Texas bankruptcy court alone has denied defense fees when, as here, creditors received 100 cents on the dollar.[10]

B. The issue is important and recurring and arises in an especially good vehicle

1. *Fee assessment is central to bankruptcy*

The circuit split about fee-defense compensation creates disorder in routine bankruptcy practice. Core-fee

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[7] See, *e.g.*, *In re Wireless Telecomms. Inc.*, 449 B.R. 228, 238 (Bankr. M.D. Pa. 2011) (denying compensation for defense fees because court could articulate "no benefit to the estate or necessity as it relates to the unsecured creditors"); *In re Erewhon, Inc.*, 21 B.R. 79, 89-90 (Bankr. D. Mass. 1982) (denying compensation for "time spent by counsel seeking to justify its own request for an excessive fee").

[8] Compare, *e.g.*, *In re Brous*, 370 B.R. 563, 572 (Bankr. S.D.N.Y. 2007) (citing the American Rule for an apparently *per se* prohibition of defense fees), and *In re New Boston Coke Corp.*, 299 B.R. 432, 443 (Bankr. E.D. Mich. 2003) (similar), with *In re Quigley Co., Inc.*, 500 B.R. 347, 366 (Bankr. S.D.N.Y. 2013) (awarding defense fees); *In re CCT Commc'ns, Inc.*, 07-10210 SMB, 2010 WL 3386947 (Bankr. S.D.N.Y. Aug. 24, 2010) (citing the non-dilution principle when awarding defense fees), and *In re Moss*, 320 B.R. 143, 160 (Bankr. E.D. Mich. 2005) (awarding defense fees).

[9] See, *e.g.*, *In re Teraforce Tech. Corp.*, 347 B.R. 838, 867 (Bankr. N.D. Tex. 2006); *In re St. Rita's Assocs. Private Placement, L.P.*, 260 B.R. 650, 652 (Bankr. W.D.N.Y. 2001). A few courts have categorically denied fees for both preparation and defense of fee applications, see App. G, *infra*, an indefensible position after the 1994 amendments.

[10] See *Frazin* v. *Haynes & Boone LLP*, 413 B.R. 378, 407 (Bankr. N.D. Tex. 2009), aff'd in part and rev'd in part on other grounds, 732 F.3d 313 (5th Cir. 2013).

litigation—the defense of a fee application—is common. The bankruptcy estate's professionals are required to publicly file a fee application. Fed. R. Bankr. P. 2016. Any party in interest may object. See Collier ¶ 330.08[2][b][ii] (listing eight possible parties in interest who might challenge a fee award). The defense of fees is thus a potential issue in *every* bankruptcy case involving estate-paid professionals.

The importance of uniformity is magnified by the risk of distorting § 330(a)'s "unambiguous policy" of parity, *i.e.*, "'that professionals and para-professionals in bankruptcy cases should earn the same income as their non-bankruptcy counterparts.'" *Worldwide*, 334 B.R. at 111 (quoting *In re Busy Beaver Bldg. Ctrs. Inc.*, 19 F.3d 833, 849 (3d Cir. 1994)). Yet lawyers in Texas, Louisiana, and Mississippi now necessarily earn less than their intra-circuit non-bankruptcy colleagues *and* their bankruptcy counterparts in other circuits.

The Fifth Circuit's rule permits disgruntled litigants or creditors to raise fee-application objections risk-free. It required little effort for Reorganized ASARCO to demand *every* written and electronic document that Baker Botts' 695 timekeepers had generated in this massive, four-year bankruptcy case; but it took 2,440 man-hours to comply with that demand. Nor did Reorganized ASARCO inconvenience itself once Baker Botts complied; it sent only two lawyers to review the documents for a combined total of five days, and they copied only 1% of the demanded material. In the Ninth Circuit and most other courts, by contrast, Reorganized ASARCO would have borne the cost of its onerous and pointless discovery request once Baker Botts prevailed. The Fifth Circuit rule misaligns the risks. It was not idle speculation when the bankruptcy court below warned that "[d]enying fees incurred in defending fee applications would provide an incentive for parties in interest to mount objections to

extract a fee reduction." App., *infra*, 138a.

2. *The issue affects all professionals*

The Fifth Circuit's decision affects the entire bankruptcy system, not just lawyers. All estate-paid professional fees are regulated by the bankruptcy court even when there is no challenge to the fee request. Any application can draw objections, and a defense must then be mounted. Collier ¶ 330.08[2][b][ii]. Challenges to trustees' and accountants' fees are common. See, *e.g.*, *In re Chavez*, 157 B.R. 30, 33 (D. Colo. 1993), aff'd, 13 F.3d 404 (10th Cir. 1993) (affirming defense fees to trustee); *In re Geneva Steel Co.*, 258 B.R. 799, 802 (Bankr. D. Utah 2001) (awarding defense fees to accounting firm).

Nor is the judgment below limited to large bankruptcies or firms. Baker Botts was awarded $5 million for defense fees, and a bit more for expenses, causing dilution of about 4.4%. That amount is large in absolute, but less so in relative, terms; more commonly, defense fees will be smaller in absolute, but considerably larger in relative, terms. For example, in *Smith*, defense fees were about 25% of core fees. 317 F.3d at 922 (firm "recovered approximately $175,000" in core fees and over $47,000 in defense fees and costs). See also, *e.g.*, *In re Walters*, No. BKR-04-06902-JM7, 2006 WL 6589027 at *7-8 (Bankr. S.D. Cal. May 30, 2006) (fee-defense award equaling 27% of core fees). After all, objections may require substantial defense efforts even for small core-fee awards. Courts would not accept a formal 25% reduction in bankruptcy professionals' compensation vis-à-vis non-bankruptcy lawyers. But the Fifth Circuit effectively achieves this result through automatic denial of fees for successfully defending fee applications against meritless attacks.

3. *This case is an especially good vehicle*

The Fifth Circuit's categorical holding barring defense fees is an outcome-dispositive construction of § 330(a).

No court below—bankruptcy, district, or court of appeals—expressed any doubt that, if defense fees are *ever* authorized, then they are merited here. No party disputed the amount of defense fees. All that is at issue here is whether § 330(a) ever permits discretion to award defense fees.

The split is equally clear. Two appellate courts (or, perhaps three, depending on one's view of *Grant*) with especially heavy bankruptcy dockets have made matter-of-law rulings, which reflects ample conflict for this Court's review.[11] It is not uncommon for this Court to resolve a 1-1 bankruptcy split, as it did just this past Term in *Clark* v. *Rameker*, 573 U.S. __ (2014) (slip op. at 4) ("We granted certiorari to resolve a conflict between the Seventh Circuit's ruling and the Fifth Circuit's [prior] decision * * * ."). It should do so here.

II. The Judgment Below Is Wrong And Should Be Reversed

The Fifth Circuit's construction of § 330(a) violates the provision's text, history, and essential purpose. Moreover, despite the court's policy claims, its holding invites undesirable consequences that Congress sought to avoid.

A. Section 330(a)'s text includes discretion to award compensation for defending fee applications

Multiple features of § 330(a)'s text demonstrate that the statute permits fee-defense compensation.

1. *The statute grants broad discretion to award "reasonable compensation"*

Congress could have limited bankruptcy professionals'

[11] According to annual statistics published by the Administrative Office of the U.S. Courts, the Fifth, Ninth, and Eleventh Circuits are three of the five busiest for Chapter 11 cases, collectively accounting for nearly half of such filings in 2013, with the Ninth Circuit alone exceeding 25%.

compensation to tasks expressly enumerated by statute. It instead gave bankruptcy judges wide latitude to determine and award "reasonable compensation for actual, necessary services" performed by a professional. § 330(a)(1)(A); see *ASARCO, L.L.C.* v. *Barclays Capital, Inc.*, 702 F.3d 250, 260 (5th Cir. 2012) ("broad discretion"). The structure of § 330(a) implements this generous grant of authority:

- *Broad discretion.* Courts must "tak[e] into account all relevant factors, including," but not limited to, six factors that Congress specified. § 330(a)(3).
- *Minimal express limits on discretion.* Courts' consideration of those factors is limited for just one kind of service: "Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." § 330(a)(6).
- *Minimal exclusion from compensability.* Rather than listing services that *can* be compensated, § 330(a)(4) enumerates two circumstances in which they *cannot*: (1) "unnecessary duplication of services" and (2) services that were neither "reasonably likely to benefit the debtor's estate" nor "necessary to the administration of the case." § 330(a)(4).

These provisions form a practical regime in which, subject to multiple stages of appellate review, bankruptcy judges who supervise cases must exercise sound discretion in ordering fees.

Further textual indications of broad discretion abound. One enumerated factor, for instance, clarifies Congress's view that services supporting "the administration of * * * a *case*," or that are "beneficial * * * toward the completion of [such] a *case*," are compensable. § 330(a)(3)(C) (emphases added). The textual focus on the "case," rather than the pre-1994 focus on the "es-

tate," demonstrates a conscious decision to eliminate textual barriers to full compensation for services that contribute to the case, but may not directly benefit the estate.

Likewise, § 330(a)(4)'s exclusion of compensability for *some* services indicates Congress's ability to expressly limit the otherwise-broad scope when it so desires. Tellingly, the restrictions in § 330(a)(4) largely track § 330(a)(1) itself. It is hard to imagine many services falling within subsection (a)(1) yet denied compensability solely because of subsection (a)(4). Congress believed it worthwhile to make such exclusions unmistakably clear, and it both could and would have expressly enacted the Fifth Circuit's categorical ban if it had wished to do so. It is implausible, absent such express direction, to assume that Congress nonetheless intended to deny compensability in the common situation of fee defenses, which fall comfortably within (a)(1)'s authorization and outside (a)(4)'s exclusions.

2. *Fee defense is "necessary" for case administration and beneficial to the estate*

Despite the textual indications of statutory breadth, the Fifth Circuit believed that fee-application defenses categorically fall within § 330(a)(4)(A)(ii)'s prohibition. It correctly explained that professional services "are compensable only if they are likely to benefit a debtor's estate *or* are necessary to case administration." App., *infra*, 15a (emphasis added). But it wrongly concluded, with little explanation, that defending fee applications never qualifies under either prong.

a. Most courts, however, readily appreciate how the defense of fee applications can benefit an estate. For instance, administrative-expenses priority must be established, see § 503(b)(2); additionally, any objections to fee applications further generate unavoidable defense work. Thus, one court recently observed that the "estate has an

interest in obtaining a just determination of the amount it should pay its professionals." *In re First State Bancorp.*, No. 7-11-11916-JA, 2014 WL 1203141, at *2 n.10 (Bankr. D.N.M. Mar. 24, 2014). Such work is "necessary and beneficial to the bankruptcy system as a whole, and indirectly, to each estate participating in the system." *Boyd* v. *Engman*, 404 B.R. 467, 483 (W.D. Mich. 2009). Accord *Smith*, 317 F.3d at 927, 928-929, 930.

b. With the 1994 amendments, it became all the more evident that defending fee applications against objections is "beneficial * * * toward the completion of" a bankruptcy "case." § 330(a)(3)(C). No case can be "complet[ed]" until the bankruptcy court makes an order allocating compensation, which requires considering *both* a fee application *and* any objections. Without this fee-related litigation, as the district court below explained, "the bankruptcy case cannot be put to bed." App., *infra*, 47a; accord *id.* at 110a-111a (bankruptcy court's similar observation).

In short, fee-defense litigation is necessary to a case's completion because it is an indivisible part of a complex fee-assessment process that the Code specifically mandates. As the Ninth Circuit observed, such litigation often satisfies *both* § 330(a)(3)(C) factors—that it is "necessary for the administration of the case *and* provide[s] a benefit to the debtor's estate in determining the amount of administrative fees that the estate owed." *Smith*, 317 F.3d at 928-929 (emphasis added).

3. *Preparation and defense serve the same function*

The compensability of fee-application preparation is undisputed. With respect to the only variable that matters—how it benefits the estate or the case's administration—preparation and defense are indistinguishable. It thus follows that the latter is equally entitled to compen-

sation.

a. To the Fifth Circuit, however, § 330(a)(6)'s reference to fee applications, but not fee defense, supports categorically excluding fee-defense compensation. App., *infra*, 16a. But § 330(a)(6) is not a textual grant, much less an implicit denial, of authority. It does not determine whether, but *how much*, to compensate for preparation: "Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." § 330(a)(6). *If* compensation is awarded for preparation, this specific metric must be used. But fee-application preparation, like every other compensable service, must be authorized by § 330(a)(1) and not be precluded by § 330(a)(4). Section 330(a)(6) merely eliminates any possible doubt that preparation can survive those requirements, and provides a metric for setting fee-preparation compensation.

That conclusion makes it easier, not harder, to justify fee-defense compensation. Whether services are "necessary" or "beneficial" under § 330(a)(1) and (a)(4) are inherently functional questions, and there is no functional distinction between the utility of a fee application's preparation and its reasoned defense. Both equally contribute to the ultimate resolution of an accurate allocation of payments. A well-grounded defense is "part and parcel" of the administration of the estate. *Boyd*, 404 B.R. at 482-483. The Fifth Circuit itself acknowledged the point: "Implicit in" the "procedure" for assessing bankruptcy fees "is the possibility of fee litigation." App., *infra*, 15a. A successful defense is certainly no less beneficial to the estate or the administration of the case than the initial application. The "case" cannot be finally closed without all objections to the application being resolved.

The only statutory distinction between preparation and defense is the method for computing the *amount* of compensation. That has nothing to do with *compensabil-*

ity itself. And it is a distinction not between preparation and defense, but between preparation and *every other kind of service*. Fee preparation alone has a uniquely specified method for assessment, § 330(a)(6), whereas all other assessments are subject only to § 330(a)(3). This is not especially surprising. The Fifth Circuit noted that § 330(a)(6)'s requirement of "tailoring the award [for preparing an application] to the 'level and skill reasonably required to prepare the application' emphasizes scrivener's skills over other professional work." App., *infra*, 15a-16a. Exactly—while *preparing* an application may justifiably limit compensation to the use of "scrivener's skills," *defending* it does not, because defense is the sort of litigation service that § 330(a)(3)'s general provisions adequately address.

b. The Fifth Circuit also sought to discredit defense fees by contending that "[t]he primary beneficiary of a professional fee application, of course, is the professional." App., *infra*, 15a. Believing that compensability was affected by the unremarkable point that "the debtor's estate, and therefore normally the creditors, bear the cost," it concluded that "fees for defense of a fee application are not compensable from the debtor's estate." *Ibid.*

That nontextual rationale is deeply flawed. It ignores that the 1994 amendments compensate work that benefits the administration and completion of "the case," regardless of who is the primary beneficiary. And it "proves too much," as the District of Delaware observed in rejecting the same logic about the professional being the "primary beneficiary," because

> [b]y definition, every fee petition is for the benefit of the petitioning professional. It is not that the professional benefits that is of consequence; *what matters is whether the professional's obtaining of reasonable compensation is also a benefit to the estate.*

Worldwide, 334 B.R. at 111-112 (emphasis added). Moreover, the Fifth Circuit's critique applies equally to a fee application's preparation as to its defense, a sure sign it is not interpretively sound.

c. Finally, the Fifth Circuit invoked the "American Rule." See App., *infra*, 19a-20a. That default principle requires parties to bear their own fees, but is inapplicable here because the Code displaces it.

Comprehensive statutory fee-determination regimes are not governed by the American Rule because "[t]he American rule is merely a default rule; it is often changed by statute." *J.R. Cousin Indus., Inc.* v. *Menard, Inc.*, 127 F.3d 580, 583 (7th Cir. 1997). The whole point of § 330(a) is to thoroughly regulate bankruptcy fees, leaving no vacuum for the default to fill. This Court has recognized that even the Bankruptcy Act of 1898 departed from the American Rule. See *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 260 n.33 (1975). The Fifth Circuit observed that "the Bankruptcy Act's compensation provision was significantly reworked by the more elaborate framework of Section 330," App., *infra*, 20a—but that is *more* reason, not less, to find that statutory text has displaced the American Rule.

The statutory discretion to award "reasonable compensation" that Congress afforded bankruptcy judges in § 330(a) displaces the American Rule, not the other way around.

B. Congressional purposes, as reflected in the text and history of the Code, support compensability for successful fee defenses

The parity and non-dilution purpose of § 330(a) has been addressed at length. It is reinforced by the statutory text, especially after the 1994 amendments. The judgment below thwarts Congress's clear purpose.

1. To effectuate its goal, Congress mandated consid-

eration of "the customary compensation charged by comparably skilled practitioners in cases other than cases under this title." § 330(a)(3)(F). This statutory purpose is widely recognized. See, *e.g.*, *In re UNR Indus., Inc.*, 986 F.2d 207, 209 (7th Cir. 1993); *supra* Part I.A.1-2. The Fifth Circuit did not dispute that parity is an important statutory purpose or that the arithmetic consequence of categorical defense-fee denial is the dilution of core fees. App., *infra*, 18a. It instead sought to bypass the issue. Complaining that parity is "difficult to analyze," the court replaced it with a proxy under which parity is deemed satisfied whenever pre-dilution "hourly rates" are comparable. *Id.* at 18a-19a.

But that is not parity. Comparable hourly rates are merely a *starting point*—they are necessary, but not sufficient. Parity can evaporate through fee dilution caused by costs imposed uniquely in bankruptcy practice, which is effectively the same as openly permitting disparate hourly rates in the first place. "[R]equiring counsel who has successfully defended a fee claim to bear the costs of that defense *is no different than cutting counsel's rate.*" *Worldwide*, 334 B.R. at 112 (emphasis added).

There is, of course, no escaping dilution under the Fifth Circuit's rule. "If compensation is not permitted for fees incurred in defending a fee application, creditors" (or any objecting party, like Reorganized ASARCO) "could negotiate reductions in [core] fee awards knowing full well that the attorney is in a no-win situation. Even if the attorney prevails, he or she will in effect have financed the litigation without any hope of surviving it whole." *Worldwide*, 334 B.R. at 111 (citations and quotations omitted); accord *Smith*, 317 F.3d at 928 (categorical denial of defense fees "would dilute fee awards * * * reduc[ing] the effective compensation of bankruptcy attorneys to levels below the compensation available to attorneys generally").

By *ensuring* systematic dilution of bankruptcy fee awards whenever any objector so desires, the judgment below sets the Code at war with itself. While paying lip service to parity, the Fifth Circuit's version of § 330(a) implacably impedes it. It converts § 330(a) into the opposite of Congress's purpose—a tool to penalize Baker Botts for practicing in the bankruptcy area by diluting its core fees through bankruptcy-specific burdens.

2. The court of appeals sought to diminish the importance of § 330(a)'s anti-dilution principle by suggesting that it was no big deal here: "In this case, the huge cost of defending Baker Botts' core fees seems a drastic reduction in absolute terms, but it amounts to only about 4.4% of the core fee." App., *infra*, 18a-19a. The Fifth Circuit's approach is doubly wrong. It has no authority to cavalierly disregard categorical dilution of any amount (even if "only" 4.4%). But dilution through automatic defense-fee denial is especially threatening for professionals serving small bankruptcies. See *supra* Part I.B.2 (discussing how smaller bankruptcies easily could experience dilution of 25% or more). Given Congress's objectives, it would be perverse to adopt a rule that is especially burdensome on the bulk of smaller bankruptcies, which rarely involve the substantial amounts in this case.

3. The Fifth Circuit acknowledged that successful civil-rights plaintiffs are entitled to compensation for defending fee applications because this prevents fee dilution which would deprive litigants of qualified counsel. App., *infra*, 17a. But it failed to recognize that this exact concern prompted § 330(a)'s enactment. The court dismissed the analogy to civil-rights fee-defense practices because (it thought) bankruptcy, unlike civil-rights litigation, is often consensual, and "[n]o side wears the black hat for administrative fee purposes." *Ibid.* But contrary to the "black hat" implication, civil-rights fee awards are "not meant as a 'punishment' for 'bad' defendants" but

instead are "meant to compensate civil rights attorneys who bring civil rights cases and win them." *Williams* v. *Hanover Hous. Auth.*, 113 F.3d 1294, 1302 (1st Cir. 1997). Defense fees there, as in bankruptcy, prevent "dilut[ing] the fee award," *Cruz* v. *Hauck*, 762 F.2d 1230, 1234 (5th Cir. 1985) (civil-rights context). Nor is bankruptcy uniformly consensual; disputes that require litigation are no less adversarial in bankruptcy than elsewhere. This case proves as much. Even if bankruptcy sometimes is consensual, that hardly justifies the Fifth Circuit's blanket denial of fees when proceedings are not.

C. Policy concerns cut against the Fifth Circuit's categorical rule

1. Much of the Fifth Circuit's analysis is predicated on its concern that ordinarily "'almost everyone loses something'" in bankruptcy, and so sound policy requires minimizing costs to the estate at the expense of counsel. App., *infra*, 16a. But this analysis is a throwback to the era in which "economy of the estate" reigned supreme. See *supra* Part I.A.1. As discussed above, Congress has selected a different policy—one where preservation of the estate must coincide with ensuring competent representation. Congress surely knows that unsecured creditors are rarely made whole in bankruptcy, yet it still departed from the "economy of the estate" approach. If defense fees were nonetheless categorically excluded, Congress would surely have said so.

2. The Fifth Circuit's focus on "ordinary cases," App., *infra*, 17a, shows why its blanket rule is ill-advised—*this case* is hardly "ordinary." The Fifth Circuit acknowledged as much. *Id.* at 3a-4a, 9a, 12a-13a. Even if unsecured creditors' rights justified limiting (or even denying) defense fees in many cases, that concern cannot be invoked here—every creditor was paid in full, and Reorganized ASARCO shed the weighty environmental, tort, and labor liability it once faced. *Id.* at 3a.

Nothing justifies a *categorical* ban when there are cases like this one to which the Fifth Circuit's policy rationales simply do not apply. If other circumstances in other cases make defense fees inappropriate, that is why bankruptcy judges have discretion—and why there are three levels of further appeals (district, court of appeals, and this Court).[12]

3. The Fifth Circuit also thought that the incentive structure of § 330(a) justified categorically barring defense fees. "The perverse incentives that could arise from paying the bankruptcy professionals to engage in satellite fee litigation are easy to conceive." App., *infra*, 18a. If defense fees were awarded regardless of merit, it would indeed be easy to imagine a deluge of frivolous fee demands. But the Fifth Circuit attacked an imaginary rule; *no* court compensates meritless "satellite fee litigation." The solution is not to ban even unquestionably meritorious defense fees like Baker Botts', but to charge bankruptcy courts with separating the wheat from the chaff. Nothing suggests that the Ninth Circuit, which denies compensation for meritless and unnecessary fee defenses, has experienced an explosion of unjust fee demands and satellite litigation. Professionals there, and in other jurisdictions authorizing defense fees, are properly deterred from ginning up litigation.

The Fifth Circuit's approach, therefore, will prevent no "perverse incentives," App., *infra*, 18a; just the opposite, it *creates* perverse incentives to engage in meritless litigation. Categorically denying defense fees "would be to provide an unhealthy incentive for persons opposed to professional fees to mount spurious objections as a means

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[12] Similarly, the court's belief that there is sometimes a "conspiracy of silence" between fee applicants and potential objectors, App., *infra*, 20a, cannot support categorically denying defense fees in cases where the fee-application process was highly contentious.

of extracting fee reductions, rather than because the work done for the estate was genuinely not for the benefit of the estate." *Worldwide*, 334 B.R. at 112; accord *Smith*, 317 F.3d at 929. Reorganized ASARCO's conduct will be replicated and magnified now that objectors know that meritless objections will impose disproportionate cost on fee applicants. And professionals can be expected to surrender to demands for reduced core fees—and then often to exit the bankruptcy field, which is what Congress wished to avoid.

4. The court of appeals concluded by suggesting that, if objectors' conduct was truly egregious, it could be deterred via the threat of sanctions, including shifting attorney's fees. App., *infra*, 20a-21a. But this misses the point. While it is certainly true that if professionals can prove violations of Bankruptcy Rule 9011 (analogous to Federal Rule of Civil Procedure 11), then objectors would face sanctions that might include attorney's fees. That is true in any case. But lawyers can be savvy enough to avoid sanctions while nonetheless imposing unreasonable burdens that dilute core fees. While "sanctions provide some protection against harassment, a fee objection is a gambit easily veiled in a policy of economy." Springer, *supra*, at 539 n.101. Guaranteeing objectors a free ride so long as they do not cross the line into sanctionable conduct is an unmistakable invitation to abuse.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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July 2014

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-40997

IN THE MATTER OF: ASARCO, L.L.C.,
Debtor

ASARCO, L.L.C.,
Appellant

v.

JORDAN HYDEN WOMBLE CULBRETH & HOLZER, P.C.,
Appellee

Consolidated with
Case Nos. 12-40998 & 13-40409

IN THE MATTER OF: ASARCO, L.L.C.,
Debtor

ASARCO, L.L.C.,
Appellant

v.

BAKER BOTTS, L.L.P.,
Appellee

(April 30, 2014)

Appeals from the United States District Court
for the Southern District of Texas

Before STEWART, Chief Judge, and HIGGINBOTHAM and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Baker Botts and Jordan, Hyden, Womble, Culbreth & Holzer, P.C. ("Jordan Hyden") served as debtor's counsel to ASARCO LLC ("ASARCO") during its Chapter 11 bankruptcy and helped ASARCO confirm a reorganization plan that paid all of its creditors in full. The firms were well compensated pursuant to 11 U.S.C. § 330(a) for their fees and expenses for representing ASARCO. What remains to be decided, however, are two fee-related issues: whether the bankruptcy court abused its discretion in authorizing a 20% premium to Baker Botts and 10% premium to Jordan Hyden for their unusually successful fraudulent transfer litigation; and whether the bankruptcy court was authorized, consistent with 11 U.S.C. § 330, to award attorneys' fees to the firms for defending their fee applications in court. We affirm the awards of fee enhancements but reverse the awards of fees for litigating the firms' fee applications.

I. Background

ASARCO is an integrated copper mining, smelting, and refining company.[1] ASARCO entered Chapter 11 bankruptcy in 2005 facing cash flow deficiencies, various environmental liabilities, and tax and labor problems. Two years before ASARCO commenced its bankruptcy case, its Parent company directed ASARCO to transfer a controlling interest in Southern Copper Corporation

[1] ASARCO LLC is owned by ASARCO Incorporated, which is owned by Americas Mining Corporation, which is in turn owned by Grupo Mexico (collectively, ASARCO's "Parent").

("SCC") to the Parent despite ASARCO's financial distress.

Baker Botts and Jordan Hyden successfully prosecuted complex fraudulent transfer claims to recover ASARCO's controlling interest in SCC (the "SCC Litigation"). The judgment against ASARCO's Parent, valued at between $7 and $10 billion, was the largest fraudulent transfer judgment in Chapter 11 history. After 52 months in bankruptcy, ASARCO emerged pursuant to a plan of reorganization in late 2009 (funded by its Parent as a result of the SCC Litigation) with little debt, $1.4 billion in cash, and the successful resolution of its environmental, asbestos and toxic tort claims.

In their final fee applications, Baker Botts and Jordan Hyden sought lodestar fees, expenses, a 20% fee enhancement for the entire case, and fees and expenses for preparing and litigating their final fee applications. ASARCO, now once again controlled by its Parent, challenged the fees on a large scale (a challenge that included a discovery request covering every document Baker Botts produced during the 52-month bankruptcy, resulting in the production of 2,350 boxes of hard copy documents and 189 GB of electronic data).[2] None of the objections to Bakers Botts's core fees were joined by the United States Trustee.

After a six-day fee trial, the bankruptcy court rejected all of ASARCO's objections to the core fee request and awarded more than $113 million to Baker Botts and $7 million to Jordan Hyden for core fees and expenses. Approving percentage fee enhancements only for the work they performed on the SCC Litigation (rather than, as requested, on the entire case), the court awarded Baker

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[2] ASARCO did not challenge Jordan Hyden's core fee application.

Botts an additional $4.1 million and Jordan Hyden over $125,000. The court's calculation was based on "rare and exceptional" performance and results in the adversary proceeding and a finding that the standard rates charged by Baker Botts were approximately 20% below the appropriate market rate. Finally, the court authorized fees and expenses for the firms' litigation in defense of their attorneys' fee claims, resulting in another $5 million (plus expenses) to Baker Botts and over $15,000 to Jordan Hyden.

On appeal to the district court, ASARCO abandoned its objections to the Baker Botts core fee award. The same judge who had presided over the SCC Litigation heard the appeal. The district court affirmed the fee enhancements, stating that "there is an abundance of evidence which supports [the bankruptcy] court's enhancement award . . . . A seven billion dollar judgment, which is recoverable, which saves a company, and funds a 100% recovery for all concerned is a once in a lifetime result." The district court agreed that Baker Botts's and Jordan Hyden's fees to defend their core fees were compensable, and it did not disturb the bankruptcy court's authorization to seek an award of appellate fees for the same purpose. Because the court also held that attorneys' fees were improperly awarded for Baker Botts's pursuit of its fee enhancement,[3] it remanded to the bankruptcy court to determine whether any of the firm's $5 million defense-fee award related to the enhancement.

On remand, the bankruptcy court concluded that all of the defense-fee award compensated Baker Botts for defending core fees incurred in connection with the case. On appeal, the district court affirmed the final award.

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[3] Baker Botts did not appeal this ruling.

The district court also held that the firms' appellate fees was permissible but premature. ASARCO has appealed.

II. Standard of Review

A bankruptcy court has "broad discretion" to determine reasonable attorneys' fees, as the "bankruptcy court is more familiar with the actual services performed and has a far better means of knowing what is just and reasonable than an appellate court can have." *In re Lawler*, 807 F.2d 1207, 1211 (5th Cir. 1987) (internal quotation marks and citation omitted). Accordingly, we disturb a fee award only if the bankruptcy court abused its discretion. *Id.* "An abuse of discretion occurs where the bankruptcy court (1) applies an improper legal standard or follows improper procedures in calculating the fee award, or (2) rests its decision on findings of fact that are clearly erroneous." *In re Cahill*, 428 F.3d 536, 539 (5th Cir. 2005) (citation omitted). Under the clear error standard, we disturb factual findings only if "left with a firm and definite conviction that the bankruptcy court made a mistake." *Id.* at 542 (internal quotation marks and citation omitted).

We review a "district court's decision by applying the same standard of review to the bankruptcy court's conclusions of law and findings of fact that the district court applied." *Id.* at 539 (citation omitted).

III. Discussion

A. Fee Enhancement

Section 330(a)(3) of the Bankruptcy Code provides a non-exclusive list of factors that bear on a court's determination of the reasonable compensation for actual, necessary services and expenses rendered by attorneys and other court-supervised bankruptcy professionals. *See* 11 U.S.C. § 330(a)(1)(A). Thus,

> [T]he court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. § 330(a)(3).

Elaborating on this provision, bankruptcy courts use the lodestar method, multiplying the number of hours of work performed by attorneys and paraprofessionals by the hourly rates of each. The total yields a lodestar amount. *In re Pilgrim's Pride Corp.*, 690 F.3d 650, 654–55 (5th Cir. 2012) (citing *Lawler*, 807 F.2d at 1211). "[A]fter calculating the lodestar, bankruptcy courts retain[ ] the discretion to adjust the lodestar upwards or downwards to reflect their consideration of the *Johnson* factors." *Id.*; *Johnson v. Ga. Highway Express, Inc.*, 488

F.2d 714, 717–19 (5th Cir. 1974). *See also* 11 U.S.C. § 330(a)(2). The twelve *Johnson* factors are:

> (1) The time and labor required; (2) The novelty and difficulty of the questions; (3) The skill requisite to perform the legal service properly; (4) The preclusion of other employment by the attorney due to acceptance of the case; (5) The customary fee; (6) Whether the fee is fixed or contingent; (7) Time limitations imposed by the client or other circumstances; (8) The amount involved and the *results obtained*; (9) The experience, reputation, and ability of the attorneys; (10) The "undesirability" of the case; (11) The nature and length of the professional relationship with the client; (12) Awards in similar cases.

Pilgrim's Pride, 690 F.3d at 654 (citations omitted) (emphasis added).

This court has clarified that Section 330(a), the lodestar method, and the *Johnson* factors work in conjunction with each other to guide the court's discretion. *Id.* at 656 (citing *Cahill*, 428 F.3d at 539–40). Because the four *Johnson* factors related to attorney skill and legal complexity are presumably fully reflected in the lodestar, those four factors can only form the basis for a fee enhancement in "rare and exceptional circumstances." *Id.* (citations omitted).

Although these general, well understood standards cover nearly all bankruptcy fee applications, the bankruptcy court here broke out of the usual lodestar mode by authorizing fee enhancements equal to 20% and 10%, respectively, of each firm's attorneys' fees for pursuing the SCC Litigation. ASARCO takes a swipe at arguing that bankruptcy fee enhancements are never allowable solely for extraordinary attorney performance and results obtained. More pointedly, ASARCO challenges the

lower courts' additional findings of fact and their degree of articulation of the basis for the additurs. We address each of appellant's arguments.

ASARCO argues that the Supreme Court decision in *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010) prohibits court awarded fee enhancements subject to only three exceptions, and that neither law firm's enhancement request satisfies any of the exceptions.[4] *Perdue* dealt with fee-shifting in civil rights cases. 42 U.S.C. § 1988. In *Pilgrim's Pride*, however, this court stated explicitly that *Perdue* did not overrule this circuit's bankruptcy precedent authorizing fee enhancements under other, albeit limited circumstances pursuant to Section 330(a). *Pilgrim's Pride*, 690 F.3d at 660–67. Nowhere does *Pilgrim's Pride* indicate that *Perdue* removes the discretion of bankruptcy courts to award a fee enhancement in rare and exceptional circumstances. The only relevant distinguishing factor that ASARCO points to is that in *Pilgrim's Pride* the debtor's board recommended paying the enhancement, while in this case ASARCO's board did not.[5] The Supreme Court in *Perdue* was greatly concerned with protecting the taxpayers who would fund any enhanced fees, 559 U.S. at 559, 130 S. Ct. at 1677, but this court in *Pilgrim's Pride*

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[4] The three exceptions are: (1) the hourly rate used for the lodestar does not adequately measure the attorneys' "true market value"; (2) the attorneys' performance included an "extraordinary outlay of expenses and the litigation is exceptionally protracted"; (3) the attorneys' performance involved an "exceptional delay in the payment of fees." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 554–56, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010).

[5] Before the Parent regained control of reorganized ASARCO, ASARCO's board voted to consent to an enhancement, but the board did not have the authority to approve payments exceeding $1 million without the Parent's approval and that approval was never granted.

rejected the Trustee's argument that the creditors would fund the enhanced fees in a similar fashion because the creditors were paid in full. 690 F.3d at 666. Here, too, the creditors have been or will be paid in full. The real difference, then, is that the Trustee here did not object and the debtor did not consent. That is an inconsequential distinction. *Pilgrim's Pride* is controlling in bankruptcy fee matters, at least where a reorganization plan pays creditors' claims in full.

ASARCO's contention that the judgment the firms achieved in the fraudulent transfer litigation was not "rare and exceptional" falls flat. In affirming the bankruptcy court's fee enhancement, the district court, which tried and rendered judgment in the SCC Litigation, stated that "there is an abundance of evidence which supports [the bankruptcy] court's enhancement award . . . . A seven billion dollar judgment, which is recoverable, which saves a company, and funds a 100% recovery for all concerned is a once in a lifetime result." We do not disagree with the lower courts' effusive evaluations of the results obtained.

Irrespective of exceptional results, ASARCO maintains that this court has never affirmed such a fee enhancement without some additional compelling factor. ASARCO argues, for instance, that the fees in *Pilgrim's Pride* were consented to, that the attorneys demonstrated exceptional efficiency, and that they had otherwise been compensated at below market rates. *See id.* at 653. The enhancement in *Rose Pass Mines* was also allegedly based on below market rates. *See Rose Pass Mines, Inc. v. Howard*, 615 F.2d 1088, 1092 (5th Cir. 1980). ASARCO further argues that the enhancement in *Lawler* was justified by a risk of non-payment. *See Lawler*, 807 F.2d at 1212–13. As discussed above, consent does not materially

distinguish *Pilgrim's Pride*, especially where that lack of consent issued from an adversary Parent. The court in *Pilgrim's Pride* did note how quickly Pilgrim's Pride emerged from bankruptcy, but immediately before doing so it observed that "[o]ne hundred percent dividend cases are rare in Chapter 11, and rarer still in large cases such as this." *Pilgrim's Pride*, 690 F.3d at 653. The *Rose Pass Mines* court pointed out that the hourly rate used to calculate the lodestar was at "the lower limit of fees customarily charged," but it also approved the bankruptcy court finding that the "unusually good result" was due to "excellent services" rendered by the attorneys. *Rose Pass Mines*, 615 F.2d at 1090, 1092 (internal quotation marks and alteration omitted). While this court reduced, but did not eliminate, the enhancement awarded in *Lawler* based on the bankruptcy court's finding that the fee was substantially contingent, it commended the attorneys as "well entitled under the application of the *Johnson* factors to an award significantly above the lodestar" based on "outstanding professional accomplishment in this case." *Lawler*, 807 F.2d at 1213. In none of the three cases did this court state that some "plus factor" beyond exceptional performance and results was required for a fee enhancement. Indeed, doing so would be unnecessarily redundant of the *Johnson* factors.

In further critique of the enhancements for the SCC Litigation, ASARCO challenges the bankruptcy court's finding that Baker Botts's rates were "below-market," a fact that reinforced the court's fee enhancement decision. The court, however, amply documented its finding by reference to Baker Botts's customary practices, the charges of competitive firms in Texas, and the charges by comparable firms when representing parties to Chapter 11 cases pending in Texas. Because this court, like the

Supreme Court, has not held that reasonable attorneys' fees in federal court have been "nationalized," the bankruptcy court's charts comparing general hourly rates of out-of-state firms and rates charged in cases pending in other circuits are not relevant. *Cf. Perdue*, 557 U.S. at 551 (the lodestar looks to "the prevailing market rates in the relevant community"); *McClain v. Lufkin Indust., Inc.*, 649 F.3d 374, 381 (5th Cir. 2011) (court can look to the market rate for fees outside the forum only where attorneys from outside the forum are necessary). The court's findings, however, were premised on sufficient probative and relevant data to withstand ASARCO's clear error challenge.

ASARCO next contends that its arguments apply equally to Jordan Hyden and that, even if exceptional performance and results alone could justify an enhancement, Jordan Hyden's role in the SCC Litigation was largely administrative and undeserving of an enhancement. Jordan Hyden counters that it played an integral role in the SCC Litigation. While Jordan Hyden served as local counsel, the enhancement it received was less than 3% of that awarded to Baker Botts. The district court also addressed Jordan Hyden's importance at length, finding that its services were "necessary to the trial," "essential to the overall result," "necessary to the result," and "part and parcel of the same team effort that achieved an extraordinary result." There is no clear error.

ASARCO finally asserts that the fee enhancement was not "supported by both specific evidence on the record and detailed findings by the lower courts." *Pilgrim's Pride*, 690 F.3d at 656 (internal quotation marks and citations omitted). We disagree. The bankruptcy court explained in detail how "rare and exceptional" the circum-

stances are. The bankruptcy court found that "Baker Botts's services were instrumental in producing the exceptional results." Baker Botts addressed "an array of challenging legal issues with sophistication, creativity, and skill," something for which the court considered "[f]ew firms in the country to have the breadth and depth of experience in different disciplines necessary." "Baker Botts performed at an exemplary level in a wide spectrum of legal specialties." The results were "nothing less than extraordinary," that is, "probably the most successful Chapter 11 of any magnitude in the history of the [Bankruptcy] Code." Baker Botts "contributed significantly" by performing in "an extraordinary fashion in numerous areas." The court added that "[s]uch an extraordinary result would have seemed far fetched at the outset" of the bankruptcy as "[c]reditors were expected to receive cents on the dollar." The result was that "ASARCO was transformed from a broke and broken company to a reorganized ASARCO, cleansed of its historical liabilities and well-positioned to compete effectively in the world of commerce." While pouring accolades on the firm's overall representation of the debtor, however, the bankruptcy court did not award Baker Botts (or Jordan Hyden) an enhancement for most of its work because, as the court found, a number of factors converged to enable a successful reorganization.

The court singled out the firms' prosecution of the SCC Litigation for fee enhancement precisely because it ascribed success to their efforts alone. The court described the SCC Litigation as ASARCO's "crown jewel." "Baker Botts was able to quickly and efficiently" prevail "[t]hrough its creativity, tenacity, and legal talent." The court found the results "were due to Baker Botts's performance and not to inferior performance by opposing

counsel, unanticipated defense concessions, unexpectedly favorable rulings, a sympathetic fact-finder, or simple luck." Most impressive, Baker Botts won the trial "by deciphering millions of pages of documents and using those documents to tell a compelling story primarily out of the mouths of adverse witnesses." The result was a judgment "valued in excess of $6 billion" that was "most likely the largest fraudulent transfer verdict in United States history." That judgment "promised a far more meaningful recovery for creditors than originally anticipated" because of results achieved by Baker Botts that were "without question, rare and extraordinary by any possible measure." The bankruptcy court could hardly have been more specific and detailed as to Baker Botts's "rare and exceptional" performance than it was while placing this description in the context of its 85-page opinion on fees.

The bankruptcy court also found that Jordan Hyden was "involved in the overall planning and strategy with Baker Botts" and active at both the "top strategy level" and in the "day-to-day, often emergency, work" of the bankruptcy. Regarding the SCC Litigation, Jordan Hyden was "not an active trial participant" but prepared "twice-daily summaries of the trial" that "kept the entire Chapter 11 teams of lawyers and staff up to date on the SCC Litigation" and "assisted in the physical planning of [the] trial." Consequently, Jordan Hyden's attorneys were an integral part of a successful team effort that was central to the success of the bankruptcy, and the bankruptcy court was within its discretion to award Jordan Hyden the modest fee enhancement.

B. Fees for Defense of Fees

The parties debate at length the bankruptcy court's award of counsel fees for counsel's defense of their fees

for representing the debtor. The issues presented transcend debtor's counsel, because Section 330(a) governs compensation of all professionals whose fees are paid by the bankruptcy estate.[6] Case law addressing this question is divided, *see generally* 3 COLLIER ON BANKRUPTCY ¶ 330.03[16][a] (16th ed. 2013). We conclude that, correctly read, Section 330(a) does not authorize compensation for the costs counsel or professionals bear to defend their fee applications.

Relevant here, Section 330(a)(3) instructs the court to consider "all relevant factors" concerning the professional services rendered, "including" "whether their services were necessary for the administration of, or beneficial . . . toward the completion of a case . . . ," and "whether the compensation is reasonable" based on charges by comparable practitioners in non-bankruptcy cases. Section 330(a)(3)(C), (F). Compensation is not allowed for services that were not reasonably likely to benefit the debtor's estate *or* necessary to case administration. Section 330(a)(4)(with immaterial exceptions). Finally, "[a]ny compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." Section 330(a)(6).

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[6] After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103–(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and (B) reimbursement for actual, necessary expenses.

11 U.S.C. § 330(a)(1).

Parties in interest as well as the United States Trustee are entitled to receive notice and the opportunity for a hearing to question bankruptcy professional fees. Section 330(a)(1). Implicit in this procedure is the possibility of fee litigation. Nevertheless, Section 330 states twice, in both positive and negative terms paraphrased above, that professional services are compensable only if they are likely to benefit a debtor's estate or are necessary to case administration. *Matter of Pro-Snax Distributors, Inc.*, 157 F.3d 414, 418 n.7 (5th Cir. 1998). The primary beneficiary of a professional fee application, of course, is the professional. While the debtor's estate or its administration must have benefitted from the services rendered, the debtor's estate, and therefore normally the creditors, bear the cost. This straightforward reading strongly suggests that fees for defense of a fee application are not compensable from the debtor's estate. The Eleventh Circuit adopted this interpretation in a factually similar case, holding that ". . . the issue is whether the services rendered were reasonable and necessary to the administration of the estate. [internal citation omitted] The answer to this question is no. The subject of the [appeal and cross-appeal] was the fee to be paid to Bergwerk for his services rendered in the administration of the estate. The appeals brought absolutely no benefit to the estate, the creditors, or the debtor." *Grant v. George Schumann Tire & Batt. Co.*, 908 F.2d 874, 882-83 (11th Cir. 1990).

Further supporting this interpretation is Section 330(a)(6), which limits potential professional fees in two ways. First, the specification of an award for "preparation of a fee application" is clearly different from authorizing fees for the defense of the application in a court hearing. Second, tailoring the award to the "level and

skill reasonably required to prepare the application" emphasizes scrivener's skills over other professional work. It is untenable to construe this language alone to encompass satellite litigation over a fee application. Had Congress intended compensation for professional fee applications to be allowable as "reasonable and necessary" under Section 330(a)(3)(C), there would have been no need to create the limits specified in subdivision (4). The broad reading of Section 330(a)(3)(C) urged by Baker Botts would render Section 330(a)(4) superfluous.

Several arguments are made in favor of reimbursing fees for the defense of fees from the debtor's estate. One argument is that because resolving professional fees is required to close a case, their litigation is a reasonable and necessary aspect of estate administration. *See In re Smith*, 317 F.3d 918, 929 (9th Cir. 2002). The *Smith* court ultimately held that such compensation rests within the bankruptcy court's discretion to award fees for "reasonable and necessary" work, but it also recognized circumstances, such as counsel's failure in defending its fees, where awards would not be permissible. *In re Smith*, 317 F.3d at 927-929. The *Smith* court posited a broader scope for the Section 330(a) test for the reasonableness and necessity of services to the debtor's estate than does *Grant*, but we agree with *Grant*'s view as more closely reflecting the statute's plain meaning.

In re Smith actually demonstrates the tension in applying the test of reasonableness and necessity *to the debtor's estate* when it comes to litigation over fee applications in bankruptcy. It cannot be denied that in bankruptcy, "almost everyone loses something." *Grant*, 908 F.2d at 882 (internal quotation omitted). In ordinary cases, where there is no 100% payout to creditors, every dollar paid for administrative expenses including profes-

sional fees detracts from the unsecured creditors' recovery. Litigation of professionals' fee applications may become substantial, costly and time-consuming if counsel can be compensated for their self-interested efforts. Such litigation is detrimental for the debtor if it simply increases the overall administrative costs of the bankruptcy. Moreover, bankruptcy rules require professionals to justify their fee applications with detailed, itemized billing records precisely to assure their integrity and sharpen any potential disputes. *See, e.g.*, Fed. R. Bankr. P. 2016; Bankr. S.D. Tex. R. 2016-1. Compliance with the rules should ordinarily reduce the need for or likelihood of success of satellite litigation over fees.

Baker Botts analogizes granting "fees for fee defense" in bankruptcy to the procedure under federal fee shifting statutes, where counsel's time spent to prepare, litigate and appeal a fee award is often compensable. *See, e.g.*, *Cruz v. Hauck*, 762 F.2d 1230, 1233-34 (5th Cir. 1985)(interpreting 42 U.S.C. § 1988). We disagree. These fee shifting statutes create an incentive for otherwise financially disadvantaged plaintiffs to obtain legal redress. Because Congress designed fee shifting provisions in express derogation of the American Rule that each party to litigation bears its own costs, the losing party should bear the full costs of counsel for the winner. In bankruptcy, the equities are quite different. Both the debtor and creditors have enforceable rights, and there is a limited pool of assets to satisfy those rights and compensate court-approved professionals; in certain cases, moreover, professionals paid from the debtor's estate represent competing interests. No side wears the black hat for administrative fee purposes. In the absence of explicit statutory guidance, requiring professionals to defend their fee applications as a cost of doing business is con-

sistent with the reality of the bankruptcy process.[7] The perverse incentives that could arise from paying the bankruptcy professionals to engage in satellite fee litigation are easy to conceive.

Another argument favoring compensation for "fees for fee defense" rests on Section 330(a)(4), the comparability factor. Without reimbursement for "defense fees," it is contended, a professional firm's compensation will be unfairly diluted below what comparably skilled practitioners receive in non-bankruptcy cases. This case, in which Baker Botts expended $5 million to defend its core fee award of over $113 million (excluding the enhancement), allegedly epitomizes such dilution. The claim for comparability is easily made but difficult to analyze. The Bankruptcy Code plainly intended to erase the "economy of the estate" rule under pre-existing law and thus raise the professional fees. *In re Pilgrim's Pride*, 690 F.3d at 654-55. Beyond that, there is no litmus test to determine the comparability of professional services in bankruptcy and other practice areas. Applying reasonably comparable hourly rates and adjusting professional compensation in light of specific circumstances maintain rough comparability in practice. More cannot easily be demanded. Some courts, under the aegis of enforcing comparability, have even withheld fee enhancements to bankruptcy firms because they are not customary in transactional representation, *see Matter of UNR Industries, Inc.*, 986 F.2d 207, 209-210 (7th Cir. 1993). Others have noted that professional bankruptcy rates have sometimes outpaced those of other practice areas. 3 COLLIER ON BANKRUPTCY ¶ 330.03[12] (16th ed. 2013). In this case, the huge

[7] When firms become aware that they may not be reimbursed for defending core fee applications, they can anticipate this possibility in their hourly rates and by thoroughly documenting fee applications.

cost of defending Baker Botts's core fees seems a drastic reduction in absolute terms, but it amounts to only about 4.4% of the core fee. Whether a deduction of this percentage renders the core fee non-comparable to charges by equally skilled practitioners in other types of legal practice is in the eye of the beholder.

One astute bankruptcy court turned a claim of dilution for non-comparable fees against the professional fee applicant with the following reasoning: "Because the American Rule applies absent explicit statutory or contractual authority, and because the Code contains no statutory provision for the recovery of attorney fees for *defending* a fee application, counsel should *not* normally be able to recover fees for defending a fee application in the bankruptcy court." *In re Teraforce Tech. Corp.*, 347 B.R. 838, 867 (Bankr. ND Tex. 2006) (emphasis added). *See also In re Frazin*, 413 B.R. 378, 400-07 (Bankr. N.D. Tex. 2009), *In re JNS Aviation, LLC*, No. 04-21055-RLJ-7, 2009 WL 80202 (Bankr. N.D. Tex. 2009) (adopting *Teraforce*). In federal court, the American Rule prohibits awards of counsel fees to a prevailing party absent statutory authority, contractual authorization, or "special circumstances." *In re Teraforce*, 347 B.R. at 866 n.64. Baker Botts asserts that the American Rule is inapplicable in bankruptcy, because the statutory provision for professional compensation overrides the American Rule. The only authority cited for this proposition is a footnote in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y.*, 421 U.S. 240, 260 n.33, 95 S. Ct. 1612, 1623 n.33, 44 L. Ed. 2d 141 (1975) (citing the Bankruptcy Act of 1898 as an example of an explicit statutory fee provision to which the American Rule did not apply). More important than the extensive list of federal statutes cited by the Court in that footnote, however, is the accompanying text:

> What Congress has done, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights. [fn. omitted]. These statutory allowances are now available in a variety of circumstances, *but they also differ considerably among themselves*.

Id. (emphasis added). The Court in *Alyeska* was hardly endorsing the interpretation of Section 330 fee compensation that Baker Botts persuaded the bankruptcy court to adopt. In any event, the Bankruptcy Act's compensation provision was significantly reworked by the more elaborate framework of Section 330, and, as has been discussed, Section 330 is not fairly read to include "fees for defense of fees" either as reasonable, necessary costs of case administration or to prevent dilution of the professional firm's core fees.

Finally, the bankruptcy court here repeatedly expressed concern that if "fees for defense of fees" cannot be awarded to professionals under Section 330, there will be an incentive for parties in interest, any of which can object to professional fees, to "mount objections to extract a fee reduction." The prospect of such objections, in turn, might discourage competent counsel from handling bankruptcy cases. This court, in contrast, observed years ago that, "Too frequently, court-appointed counsel for debtor['s] and the official creditor committees' interests in a case, sharing the mutual goal of securing approval for their fees, enter into a conspiracy of silence with regard to contesting each other's fee applications." *In re Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1255 (5th Cir. 1986).

Be that as it may, this opinion should not be read as encouraging tactical or ill-supported objections to fee ap-

plications. The Bankruptcy Code and rules require ample documentation of fee requests in part to deter satellite litigation. Section 330's capacious reasonableness and necessity standards shield even many unsuccessful professional actions in bankruptcy from attempts at fee reduction. We are confident that bankruptcy courts, practicing vigilance and sound case management, can thwart punitive or excessively costly attacks on professional fee applications. Where appropriate, the courts should not hesitate to implement the exception to the American Rule that allows fee shifting where an adverse party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 111 S. Ct. 2123 (1991); *In re Frazin*, *supra*, 413 B.R. at 403. (No issues falling within *Chambers* were raised in response to reorganized ASARCO's fee objections here.)

Conclusion

For the foregoing reasons, the judgment of the district court is AFFIRMED as to fee enhancements awarded to Baker Botts and Jordan Hyden but REVERSED as to additional fee awards for litigation concerning their fee applications.

AFFIRMED IN PART, REVERSED IN PART.

APPENDIX B

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

Case No. 2:11-CV-290
Bankruptcy Case No. 05-21207

IN RE:
ASARCO LLC,
Debtor.

ASARCO LLC,
Appellant.
v.
BAKER BOTTS, L.L.P. and JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,
Appellees.

(August 8, 2012)

MEMORANDUM OPINION AND ORDER ON THE FEE APPLICATION OF BAKER BOTTS, L.L.P

The primary issue in this case presents the Court with a somewhat unusual, but, in substance, a very simple question. Its answer is not nearly so simple. The answer is complex in legal terms and has competing equitable arguments that make this Court's ruling somewhat harsh

or conversely somewhat generous depending on one's point-of-view. The primary question before the Court is:

> Should a well-compensated law firm that performed superbly in a hotly contested adversary proceeding, and whose client, the debtor, received an extremely favorable result, receive compensation in addition to its agreed upon and approved professional rates, due to the benefit the result conferred upon the estate?

ASARCO, the debtor in the bankruptcy and the plaintiff in the adversary case, was represented by Baker Botts, L.L.P. (hereinafter "Baker Botts") and Jordan, Hyden, Womble, Culbreth & Holzer, P.C., its local/co-counsel (hereinafter "Jordan Hyden") in Corpus Christi and Brownsville.[1] This Court has on more than one occasion described this case as perhaps the most successful outcome in bankruptcy history. The Bankruptcy Court has also used glowing terms to describe the overall results achieved, including the fact that ASARCO exited bankruptcy with approximately $1.4 billion in cash and with comparatively little outstanding debt. This result includes the resolution of very serious environmental, asbestos, and toxic tort issues.

All parties have conceded in one forum or another and the Bankruptcy Court found that an integral, if not the critical factor of the overall success was the judgment entered by this Court in Civil Action No. B-07-018; ASARCO LLC; Southern Peru Holdings, LLC vs.

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[1] ASARCO will be referred to merely as "ASARCO" if the reference pertains to ASARCO prior to plan confirmation, but it will be referred to as "Reorganized ASARCO" if the reference is to the post-confirmation entity. Additionally, the Court will refer to the parties in bankruptcy ASARCO and its various subsidiaries in the singular either as "ASARCO" or "Debtor."

Americas Mining Corporation (hereinafter the "SCC" case). This adversary trial resulted in a verdict returning all of the transferred stock in Southern Peru Copper Company to ASARCO along with over a billion dollars in cash. The value of this stock was estimated by the parties to be in excess of $6 billion with some estimates going as high as $9 billion. This judgment directly led to the overall resolution of the bankruptcy on terms favorable to the debtor and resulted in a 100% payment (including interest and attorneys' fees) to all creditors. This verdict was the result of a hard fought case that was tried to the Bench over a period of four (4) weeks. Both sides were represented by competent counsel and the performance of all counsel involved would rank them in the highest echelon of the nation's legal community. The lawyers for both sides, while adversaries, worked together in a manner which represented the best traditions of the legal profession. In fact, it is a tribute to the professionalism of both sides that the attorneys were able to compact their presentations of quite complicated issues into the four (4) week trial period allotted by this Court.

Not only was the trial complicated, but the pre-trial and post-trial issues were also quite complex. There were five (5) causes of action involving multiple states with various conflict of laws and choice of law issues. The discovery in this case was intense and the Court, given the ongoing bankruptcy, instituted a somewhat shortened time schedule in order to accommodate a quicker resolution. The lawyers had to work diligently to accomplish the needed discovery and timely prepare the case for trial. After the trial, there were multiple post-trial issues, including the issue of how to structure the judgment and the posting of an appellate bond in

preparation for the appeal.[2] In all, this Court wrote opinions on various issues totaling hundreds of pages. A review of the preparation and actual trial of this matter would lead any reasonable person to conclude that the lawyers involved in the case performed superbly, professionally, and that they diligently prosecuted and/or defended the case. These conclusions are unavoidable and, quite frankly, are not seriously contested in this appeal.

The primary contested issue in this matter is whether the lawyers representing ASARCO are entitled to an enhancement of their fees based upon the result they achieved for the Debtor's estate. The Court notes that while the Bankruptcy Court's opinion goes to great lengths to praise Baker Botts's overall representation of the Debtor, the fee enhancement in this appeal is based solely on its handling of the SCC case in this Court. The Bankruptcy Court did not award any enhancement based upon the overall handling of the protracted bankruptcy proceedings, holding, in effect, that Baker Botts's performance was superb, but was the quality to be expected from well-trained, hard-working, and well-compensated professionals. Thus, this Court has not only the record before it from the Bankruptcy Court below, but also has intimate knowledge of the case that is the basis of the enhancement. While it has such knowledge and may, in the following pages below, reference that knowledge for the purpose of context (or to set the scene of certain issues), it will limit its consideration of this appeal to that of any district court sitting as an appellate court in a bankruptcy proceeding. In other words, it will

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[2] A bond was posted and an appeal was initiated. The appeal was ultimately dismissed after the Parent's Plan was confirmed by this Court.

not substitute its own factual knowledge or beliefs for the findings of the court below. The Court therefore will:

> . . . review the bankruptcy court's award of attorneys' fees for abuse of discretion. *In re Coho Energy, Inc.*, 395 F.3d 198, 204 (5th Cir. 2004); *In re Barron*, 325 F.3d 690, 692 (5th Cir. 2003). An abuse of discretion occurs where the bankruptcy court (1) applies an improper legal standard or follows improper procedures in calculating the fee award, or (2) rests its decision on findings of fact that are clearly erroneous. *In re Evangeline Refining Co.*, 890 F.2d 1312, 1325 (5th Cir. 1989). Accordingly, we review the bankruptcy court's legal conclusions de novo and its findings of fact for clear error. *Coho Energy*, 395 F.3d at 204; *Barron*, 325 F.3d at 692.

In re Cahill, 428 F.3d 536, 539 (5th Cir. 2005).

I. Background and Issues Presented

As stated earlier, the issues presented on this appeal are fairly straightforward: (1) did the Bankruptcy Court err in awarding the fee enhancement; (2) did the Bankruptcy Court err in awarding attorneys' fees and expenses for the preparation and defense of the fee application (which included the prosecution of the request for the fee enhancement); and (3) was the Bankruptcy Court's award of post-judgment interest on these amounts in error?

The pertinent background in this matter is also straightforward, especially when one considers how complicated and protracted some of the bankruptcy issues in the underlying case actually were. The Debtor hired Baker Botts as Debtor's counsel initially for some of its subsidiaries and then later for itself. Baker Botts was initially engaged in 2005. Jordan Hyden served as

counsel for ASARCO's subsidiaries which preceded ASARCO into bankruptcy, as local counsel in Corpus Christi where the ASARCO bankruptcy was actually filed, and also as local counsel in the SCC litigation in Brownsville. The bankruptcy continued for a number of years and included a variety of legal, factual, and economic hurdles until finally a plan of reorganization was confirmed by this Court in November of 2009. The bankruptcy result was a resounding success regardless of the measurement used. The debtor emerged as a financially sound, functioning entity. All of the creditors were completely paid (including interest and attorneys' fees). Potential creditors such as possible asbestos or environmental claimants were protected by well-funded trusts. The ultimate success of this bankruptcy process can be attributed to a number of factors, but regardless as to how one analyzes these, one cannot escape the conclusion that the SCC judgment was the single biggest factor that led to this success.

In its final fee application to the Bankruptcy Court, Baker Botts asked the Court to approve $135,870,714.58 in fees and $6,046,135.06 in expenses of which $113,074,527.74 had already been approved on an interim basis under § 331. The unapproved amounts were categorized by the Bankruptcy Court as follows:

1. $263,994.74 - additional unpaid fees (between November 1, 2009 and December 8, 2009).
2. $22,645,119.10 - fee enhancement to fees already charged based upon a § 330 and lodestar analysis.
3. Minus $112,927.00 as a voluntary credit.
4. $8,004,920.50 in fees and $457,443.83 in expenses incurred by the firm in preparing and defending the fee application through July 13, 2010

(comprised of $5,042,001.50 in fees and $199,900.60 in expenses defending the fees that had been approved on an interim basis and those sought through December 8, 2009; $2,684,243.50 in fees and $252,883.23 in expenses for pursuing its 20% enhancement request; $42,845.50 in fees incurred for non-working travel time through July 6; and $235,830.00 in fees and $4,660.00 in expenses estimated to carry it through the fee application process).

The Bankruptcy Court held multiple hearings, heard testimony and argument, and ultimately in a thorough opinion, ruled that Baker Botts should recover:

1. $117,387,304.44 in fees and $6,046,135.06 in expenses (comprised of $113,074,527.74 in fees already approved on an interim basis); (2) $263,994.74 unpaid fees incurred between November 1, 2009 and December 8, 2009 plus a $4,161,708.96 enhancement based upon its services in a rare and extraordinary circumstance; *minus* the $112,927.00 voluntary credit. The $6,046,135.06 figure was comprised of: (1) 6,065,598.58 of expenses already approved *minus* $19,463.52 voluntary credit.
2. $5,000,000.00 in fees and $457,443.83 in expenses for preparing and defending its fee application.
3. Post-judgment interest on all accrued amounts.

As stated above, Reorganized ASARCO, the United States Trustee, and the Plan Administrator complain in varying degrees that the Bankruptcy Court erred in including in the above awards the following items:

1. A $4,161,708.96 enhancement for the SCC litigation.

2. The $5,457,443.83 in fees and expenses for the preparation and defense of its fee application.
3. The award of post-judgment interest.

Finally, both the office of the United States Trustee and Reorganized ASARCO joined in an additional argument. They argue that the Court should apply the same test for approving a fee enhancement that the Supreme Court set forth in *Perdue v. Kinney*, _ U.S. _, 130 S.Ct. 1662, 176 L.Ed. 2d 494 (2010). They assert that if this Court does that, it will be forced to conclude that the award of the enhancement made by the Bankruptcy Court was in error.

The response by Baker Botts is likewise simple. Initially, by national standards, it claims it was undercompensated by up to 20%. The Bankruptcy Court made a finding of under-payment and there is evidence to support it. Secondly, it argues that it successfully prosecuted the largest fraudulent transfer case in United States history. That judgment proved to be the decisive factor in having two 100% payment reorganization plans. The Bankruptcy Court found that the Parent effectively paid $1 billion for the judgment by virtue of its reorganization plan. Consequently, if there was ever a case where a fee enhancement is appropriate, this is it.

Baker Botts also argues that *Perdue v. Kinney* was a fee-shifting case and that the entire rationale underlying the majority opinion is the concept of shifting fees. Consequently, Baker Botts concludes it has no application in a bankruptcy context. Lastly, it argues that even if one applies the guidelines set out in *Perdue v. Kinney*, the record before the Bankruptcy Court supports the enhancement.

II. The Application of Perdue v. Kinney to this Case

The Trustee and the Reorganized Debtor argue that the dictates of the Supreme Court in *Perdue v. Kinney* control the outcome of this fee application. *Perdue* was a case involving the award of a fee enhancement in a federal fee-shifting context. Appellant argues here that had the Bankruptcy Court followed the rules set out in *Perdue*, it would have been forced to deny the fee enhancement. This Court has delayed its ruling in hopes that the Fifth Circuit would resolve the issue of the application of *Perdue* to bankruptcy cases. The Circuit has heard oral argument, but not issued a ruling, in *CRG Porters L.L.C. v. United States Trustee*, 445 B.R. 667 (N.D. Tex. 2011), in which the District Court held that *Perdue* did not apply to bankruptcy cases. The resolution of that case will in all likelihood resolve this legal issue.

Baker Botts claims that it is entitled to the fee enhancement regardless of the application of *Perdue*. It claims that the evidence adduced by the Bankruptcy Court satisfies the stricter standards for fee enhancements set out in *Perdue*.

The majority opinion in *Perdue* severely restricts the award of fee enhancements. The guidelines it sets out are as follows:

1. A reasonable fee is that sufficient to induce a capable attorney to undertake the case.
2. The lodestar method yields a fee that is presumptively sufficient to reach this objective

3. Enhancements may be awarded in "rare" and "exceptional" circumstances.[3]
4. A "lodestar" calculation includes most, if not all, of the relevant factors constituting reasonable attorney fees *and* an enhancement may not be based upon a factor already subsumed in the lodestar calculation.
5. The burden of proof is always on the proponent of the enhancement.
6. One seeking an enhancement must produce specific evidence to support the award.

It is certainly important to note that the Court introduced these guidelines by describing them as being gleaned from their prior *fee-shifting* cases. *Perdue v. Kinney*, 130 S.Ct. at 1672-73.

Having delineated these instructive principles, the Court then described a few factual scenarios which would support a fee enhancement in excess of the lodestar calculation, only the first of which arguably applies. They include cases:

1. Where the method used to calculate the hourly rate in the lodestar calculation does not adequately measure the attorney's true market value (as demonstrated during the litigation);[4]

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[3] Interestingly, this guideline was preceded by the Court's aside that it had never yet affirmed an enhancement.

[4] Baker Botts argues, based upon the results, that it fits under this exception. In doing so, however, it ignores crucial passages in the majority opinion. The first was the discussion immediately following the Court's announcement of this exception. The Supreme Court included the caveat that skill and experience are factors considered in the hourly rate. It hypothesized that an enhancement situation might occur when the hourly rate was based solely upon a single factor-such as years in practice, but it mandated that a court must

2. Where an attorney's performance includes an extraordinary outlay of expenses and the litigation is protracted;[5]
3. Where extraordinary circumstances delay payment.[6]

The Court, more importantly for this case, engaged in two specific discussions. First, it specifically rejected the concept that an enhancement is appropriate merely because departures from hourly fees are becoming more frequent. The second discussion, and more importantly one that Baker Botts seems to gloss over, centered on whether the quality of an attorney's performance and/or the results obtained may provide a basis for an enhancement. The Court first decided to treat these two factors as one since superior results are only relevant to fee enhancements to the extent that they are the result of outstanding attorney performance (as opposed to luck,

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make specific findings concerning that lawyer and the prevailing market rate. Baker Botts contends that this case is an example of what the Supreme Court was anticipating. There was testimony that Baker Botts's rates were 20% below competitive national firms, and arguably this evidence could have been used, under non-*Perdue* case law, to adjust the lodestar calculation. Nevertheless, no findings, such as those contemplated by the Supreme Court's opinion in *Perdue*, exist here. Baker Botts used its regular rates. It did not bill ASARCO, as it has to other clients, a premium or discount rate. Further, the uncontroverted testimony indicates that multiple factors went into the establishment of Baker Botts's standard rates in this case such as the skill of the lawyer; the ability of the lawyer to handle novel and complex issues; the location of the lawyer; the creativity, skill, and experience of the lawyer; the ability to make critical legal maneuvers and deliver whatever brilliance the individual has to offer. (*See* testimony of Jack Kinzie).

[5] The enhancement must be reasonable and objective, and limited to compensation for the delay in reimbursement.

[6] Again, the Court suggested that the delay in certain fee-shifting cases is usually taken into consideration by a rate adjustment.

inferior performance by defense counsel, unexpectantly favorable court rulings, etc.). The Court then held:

> We conclude that there are few such circumstances, but these circumstances are "rare" and "exceptional" and *require specific evidence that the lodestar fee would not have been "adequate to attract competent counsel*" [citing *Blum v. Stenson*, 465 U.S. 886, 897 (1984)].

Id. at 1674 [emphasis added].

This Court finds that if *Perdue* applies to this case, the enhancement of the SCC fees cannot stand. There is no proof in the record that would support a finding that the approximately $20 million ($354 per hour blended rate) paid to Baker Botts, pursuant to the lodestar calculation for the SCC case, would not have attracted other competent counsel.[7] Clearly, for a blended rate (which included non-lawyers) of $354 competent lawyers could have been found to try the SCC case. The result may not have been the same, but that does not change a *Perdue* analysis.

Having found that *Perdue* would require a reversal of the enhancement award if applied, this Court hereby declines to apply *Perdue* in this case. There are any number of reasons, both factual and legal, why the rules espoused in the *Perdue* case should not apply to bankruptcy cases—not the least of which is the very limiting language used by the Supreme Court itself. This language (and many other reasons) have been articulated by the Bankruptcy Court, and other courts cited in that opinion, and need not be reiterated here. This Court

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[7] Not surprisingly, given the lack of evidence on this topic, there is no finding by the Bankruptcy Court that adequate counsel could not have been hired for this amount.

agrees with the general reasoning outlined in those decisions.

There is an additional reason that this Court will not apply *Perdue* to this case. This Court would not hesitate to apply Supreme Court precedent—even if it effectively overruled Fifth Circuit precedent—where it clearly applies. Here, however, it does not clearly apply and any expansion of the *Perdue* rulings should be left to the Circuit. The new application of law to a different category of cases—especially when it would contravene the spirit, if not the exact holding, of a multitude of Fifth Circuit cases resides solely within the province of the Circuit itself.

The Fifth Circuit has written on multiple occasions on the topic of fee awards in bankruptcy cases.

> The Fifth Circuit has traditionally used the lodestar method to calculate "reasonable" attorneys' fees under § 330. *In re Fender*, 12 F.3d 480, 487 (5th Cir. 1994). A court computes the lodestar by multiplying the number of hours an attorney would reasonably spend for the same type of work by the prevailing hourly rate in the community. *Shipes v. Trinity Indus.*, 987 F.2d 311, 319 (5th Cir. 1993). A court then may adjust the lodestar up or down based on the factors contained in § 330 and its consideration of the twelve factors listed in *Johnson*, 488 F.2d at 717-19. *See Fender*, 12 F.3d at 487. While the bankruptcy court has considerable discretion in applying these factors, *In re First Colonial Corp. of America*, 544 F.2d 1291, 1298 (5th Cir. 1977), it must explain the weight given to each factor that it considers and how each factor affects its award. *Fender*, 12 F.3d at 487; *Evangeline Refining Co.*, 890 F.2d at 1327-28 ("If a court awards fees but fails to explain why

> compensation was awarded at the level it was given, it is difficult, if not impossible, for an appellate court to engage in meaningful review of a fee award.").

In re Cahill, 428 F.3d 536, 539-40 (5th Cir. 2005). *See also*, *In the Matter of Bacock & Wilcox Company*, 526 F.3d 824 (5th Cir. 2008); *In re Fender*, 12 F.3d 480 (5th Cir. 1994).

While these cases obviously predate *Perdue*, they set out a general procedure that district and bankruptcy courts in this Circuit have followed for decades. District courts are bound by the law of their circuit. *Campbell v. Sonat Offshore Drilling Inc.*, 979 F.2d 1115, 1121 n.8 (5th Cir. 1992); *Sturgeon v. Struchan Shipping Co.*, 698 F.2d 798, 800 (5th Cir. 1983). That being the case, the Court will not apply *Perdue* outside the fee-shifting factual scenario for which it was written unless so directed by the Circuit.

Therefore, the Court finds as a matter of law that *Perdue* does not apply to this case. Nevertheless, if it had to apply *Perdue* to this case, this Court would find as a matter of law that the evidence is insufficient to support the award of the enhancement for the SCC litigation. If *Perdue* controls, the Bankruptcy Court abused its discretion in awarding the fee enhancement and made a mistake of law in not actually applying *Perdue*, as opposed to merely referencing the principles espoused therein.

III. The Fee Enhancement Award

The fee opinion authored by the Bankruptcy Court sets out in exacting detail the overall history of the bankruptcy, the ultimate success, and the role played by the lawyers at Baker Botts. This Court sees no need to duplicate that Court's factual recitation. That Court's

conclusion that the results in this case "are nothing short of extraordinary" has already been echoed by this Court in several prior orders. For example, in its confirmation order, this Court described this bankruptcy proceeding as "one of the most successful bankruptcy proceeds in recent history" [Doc. No. 79-9 CV 00177 at p. 4]. Not only are the results in this case phenomenal, but the results actually are benefitting Reorganized ASARCO, the appellant, on a daily basis. It went from a near Chapter 7 state to a thriving company freed not only from the overwhelming burdens placed upon it by environmental, asbestos, and toxic tort litigation, but also freed from the labor strife which had plagued it for years.

Counsel for Reorganized ASARCO are willing to concede, while perhaps in less superlative terms, the overall success of the process. They are also willing to concede, and have on other occasions conceded, the role played by the SCC judgment. Their argument against the fee enhancement focuses on two main points. The first point is quite legalistic. Each time Baker Botts received an interim payment, they represented to the Bankruptcy Court, prior to its approval, that the fees were fair compensation for the work performed. That being the case, Reorganized ASARCO argues that Baker Botts cannot now, after the completion of the case, complain that it was underpaid.

A separate, but perhaps overlapping point put forth by Reorganized ASARCO is less steeped in legalistic terms and more based in common everyday parlance. It argues that Baker Botts agreed to work for these fees and they have been paid the agreed upon fees. In fact, they have been paid in excess of $100 million. As with any quality law firm, it was expected that they would provide quality legal services. The fact that it achieved superlative

results should not be grounds for a court to second guess the fee arrangement. Put another way, if the results were merely good, mediocre, or bad, Baker Botts was not going to pay Reorganized ASARCO back the agreed-upon fees—so why should Reorganized ASARCO pay more merely because the results were better than expected? (A subtext of this argument would also be to question the reasons for the good results: was it great legal work or the rise in the price of copper that ultimately proved to be the critical factor? If the latter, then why should Baker Botts collect a premium?) Underlying both points is also the basic tenant of bankruptcy law that while a professional performing in a bankruptcy context should be paid comparable to when that professional performs in a non-bankruptcy context, a professional should not be overpaid merely because a judge has the ability to readjust income levels at the end of the case.

A. The Law Concerning Fee Enhancements

The Bankruptcy Court awarded a 20% enhancement for the extraordinary success Baker Botts achieved in the SCC case. The law concerning attorneys' fees in bankruptcy is quite established. The Fifth Circuit has summarized it as follows:

> Calculation of Attorneys' Fees
>
> Section 330 of the Bankruptcy Code gives bankruptcy courts discretion to award reasonable compensation to debtors' attorneys in bankruptcy cases. 11 U.S.C. § 330(a)(l)(A). This authority includes the discretion, upon motion or *sua sponte*, to "award compensation that is less than the amount requested." *Id.* § 330(a)(2). Section 330(a)(3) further directs courts to "consider the nature, the extent, and the value of" the legal services provided when determining the amount

of reasonable compensation to award, taking into account "all relevant factors," including, but not limited to:

> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
>
> (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Id. § 330(a)(3).

The Fifth Circuit has traditionally used the lodestar method to calculate "reasonable" attorneys' fees under § 330.[8] *In re Fender*, 12 F.3d 480, 487 (5th Cir. 1994). A court computes the lodestar by multiplying the number of hours an attorney would reasonably spend for the same type of work by the prevailing hourly rate in the community. *Shipes v. Trinity Indus.*, 987 F.2d 311, 319 (5th Cir. 1993). A court then may adjust the lodestar up or down based on the factors contained in § 330 and its consideration of the twelve factors listed in *Johnson*, 488 F.2d at 717-19.[9]

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[8] The lodestar method is traditionally attributed to the Third Circuit in *Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3rd Cir. 1973).

[9] The *Johnson* factors are as follows:

> *See Fender*, 12 F.3d at 487. While the bankruptcy court has considerable discretion in applying these factors, *In re First Colonial Corp. of America*, 544 F.2d 1291, 1298 (5th Cir. 1977), it must explain the weight given to each factor that it considers and how each factor affects its award. *Fender*, 12 F.3d at 487; *Evangeline Refining Co.*, 890 F.2d at 1327-28 ("If a court awards fees but fails to explain why compensation was awarded at the level it was given, it is difficult, if not impossible, for an appellate court to engage in meaningful review of a fee award.").

In re Cahill, 428 F.3d at 539-40.

The burden of proving reasonableness of compensation and reimbursement is on the applicant. *In re Babcock & Wilcox Co.*, 526 F.3d 824, 827 (5th Cir. 2008). There is a strong presumption that the lodestar amount is reasonable. *Saizan v. Delta Concrete Products Company, Inc.*, 448 F.3d 795, 800 (5th Cir. 2006). The lodestar may be adjusted according to a *Johnson* factor only if that factor is not already taken into consideration

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(1) the time and labor required;
(2) the novelty and difficulty of the questions;
(3) the skill requisite to perform the legal service properly;
(4) the preclusion of other employment by the attorney due to acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or circumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation, and ability of the attorneys;
(10) the "undesirability" of the case;
(11) the nature and length of the professional relationship with the client; and
(12) awards in similar cases.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974).

by the lodestar calculation. *In re Fender*, 12 F.3d 480, 487 (5th Cir. 1994). At least four (4) of the *Johnson* factors—the novelty and complexity of the issues, the special skill and experience of counsel, the quality of the representation, and the results obtained are presumably included in the lodestar calculation. *Shipes v. Trinity Industries*, 987 F.2d 311, 320 (5th Cir. 1993). Upwards adjustments in bankruptcy cases are permissible provided the application shows rare and exceptional circumstances. *In re El Paso Refinery, L.P.*, 257 B.R. 809, 835 (Bankr. W.D. Tex. 2000).

Thus, an upward adjustment from the lodestar amount may be made if the applicant proves the existence of "rare and extraordinary" circumstances and that these circumstances have not already been included in the lodestar calculation. Various courts have analyzed this in a multitude of ways. Some have suggested that rare and exceptional circumstances exist if there is a full payment of creditors. *In re DWGK Restaurants*, 106 B.R. 194, 197 (Bankr. S.D. Cal. 1989). Other courts look for some special facts that set the case apart from others and whether non-bankruptcy professionals given those same special facts would be able to recover a higher fee for those results. *In re El Paso Refinery, L.P.*, 257 B.R. at 837. That Court emphasized:

> The precise wording is important. The issue is not whether a comparable *firm* would reward its partners and employees for bringing in a good "result" (defined usually in terms of enhanced revenues for the firm) but whether the *client* would feel obliged to pay the *firm* a higher rate in return for a "rare and exceptional" result. In the usual case, it is this court's understanding that such "kickers" are negotiated in advance of the engagement. To the extent that a

> similar "advance agreement" might be seen as a prerequisite, in order to bring our analysis into line with what happens in the marketplace outside of bankruptcy, the facts show that VL "negotiated" for just such a "kicker" in its original retention papers.

Id. at 837-38 n.55. The *El Paso* Court concluded:

> The thrust of the inquiry, then, is whether the surrounding factors of the case are such that, even after having arrived at an appropriate lodestar, a court would still be constrained by the facts to conclude that the resulting hourly rate is *still* too low to fairly compensate the professional, as that professional would be compensated in the non-bankruptcy context for delivering a similar outcome.

Id. at 837.

It suggested a three (3) factor test: (1) whether the professionals encountered unique and unforseen obstacles; (2) whether the results far exceeded expectations at the onset; and (3) whether the party paying for the fee agreed to it.[10] *In re El Paso Refinery L.P.*, 257 B.R. at 839. There seems to be no fixed standard by which a court measures a request for an enhancement. The two rules that seems to appear consistently in all enhancement cases is that the circumstances must be rare and extraordinary and that the court should not double count any factor in the enhancement that was used in the lodestar calculation.

B. The Appropriateness of the Fee Enhancement

In this case, the Bankruptcy Court found that Baker Botts was "underpaid" according to the prevailing rates

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[10] The last factor may be in dispute in this case. At one point, the ASARCO board, by a split vote, voted to support the law firms' enhanced fee requests. Reorganized ASARCO obviously opposes it.

for national firms handling large, complex Chapter 11 cases. The evidence suggested that it was underpaid approximately 20% compared to other national firms in similar cases. This underpayment effectively matched the 20% enhancement Baker Botts requested on its entire fee application. Despite the fact that the end results were superior, the Bankruptcy Court denied this 20% enhancement to Baker Botts. It denied the enhancement due to the fact that Baker Botts's legal work, although outstanding, was the type of legal work expected of a national law firm of its caliber. An enhancement should reward rare and exceptional work and should be tied to both "the effort and the outcome." (Bankr. Opinion ¶ 216).

Nevertheless, the Bankruptcy Court did find that the SCC result was rare and extraordinary and awarded an enhancement solely for Baker Botts's representation in that case. The details of that case are briefly recounted in the opinion of the Bankruptcy Court. Additionally, the issues, results, and complexities of the SCC litigation can be gleaned from the various opinions of this Court. These can be found at *ASARCO LLC v. Americas Mining Corp.*, 382 B.R. 49 (S.D.Tex. 2007); *ASARCO LLC v. Americas Mining Corp.*, 396 B.R. 278 (S.D.Tex. 2008); *ASARCO LLC v. Americas Mining Corp.*, 404 B.R. 150 (S.D.Tex. 2009); *ASARCO LLC v. Americas Mining Corp.*, 419 B.R. 737 (S.D.Tex. 2009); *In re ASARCO LLC*, 420 B.R. 314 (S.D.Tex. 2009). Consequently, there is no need for this Court to rehash that case more than it already has.

The Bankruptcy Court found the extraordinary results were due to the performance of Baker Botts, and not due to any factors that might otherwise make a substantial victory easier (such as those delineated in the

Perdue opinion). It also noted that the task was made even more complicated because Baker Botts had to decipher millions of documents in order to prove its case, and that it had to prosecute the case almost solely without the aid of any friendly company witnesses. The witnesses at the fee hearing uniformly praised the verdict and conceded its role in resolving the bankruptcy. Even Reorganized ASARCO's expert, when testifying against Baker Botts's fee request, agreed the SCC result was "rare" and "extraordinary." Whether it is the largest or second largest unreversed actual damage finding in United States history is debatable.[11] Whether it is actually the largest fraudulent transfer judgment ever, as was suggested by the witnesses, may also be debatable. What is not debatable is that it was, as some testified, the "game-changer." This judgment created the situation where ASARCO went from no plan to two plans that returned the debtor to solvency and paid all creditors 100% of their debt, plus interest and attorneys' fees. It allowed ASARCO to not merely survive, but also to prosper. Its ultimate effect is contained throughout the record and is detailed throughout the opinion of the Bankruptcy Court below.

This Court finds that the recovery of stock and cash worth at least seven billion dollars is both rare and extraordinary. It finds that the Bankruptcy Court did

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[11] Depending on what valuation was placed on the value of the stock of Southern Peru Cooper Company (SPCC) in 2009, the judgment entered by this Court was worth between $7 and $10 billion dollars. At the higher end of this range, this judgment would exceed the prior actual damage figure in the Texas-Pennzoil litigation in which the jury found actual damages of $7.53 billion. At the time that verdict was the largest in United States' history. Counsel has also pointed out that, unlike the judgment in *Pennzoil v. Texaco*, this judgment had a bond protecting it on appeal.

not abuse its discretion in its findings of fact, and that there is an abundance of evidence which supports that court's enhancement award. The trickier question is really one that pertains primarily to a question of law. If a significant result and outstanding attorney performance are always included in the lodestar calculation, then the Bankruptcy Court's conclusion that an enhancement is warranted may be incorrect. Nevertheless, if there is ever a circumstance where attorney performance and significant results can justify an enhancement, this case is it. No lodestar, especially with rates established before the result, contains a built-in factor for a seven billion dollar judgment. A seven billion dollar judgment, which is recoverable, which saves a company, and funds a 100% recovery for all concerned is a once in a lifetime result.[12] This Court hereby affirms the Bankruptcy Court's enhancement of the fees expended in the trial of the SCC case. It realizes that many courts have postulated that good results and legal skills are part and parcel of a lodestar calculation, but these courts also (whether they grant or refuse a fee enhancement) without fail repeat the proposition that an enhancement is still available in rare and extraordinary circumstances. This general proposition is also supported by the law in this Circuit. This Court finds the SCC judgment to be just the rare and extraordinary circumstance that these courts refer to, but rarely find. No one anticipated a judgment as large as this one.

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[12] The Court notes that given the testimony it is arguable that the Bankruptcy Court could have merely adjusted the lodestar amount 20% and reached the same result. Had that scenario occurred, the overall result might have been the same, but the factual attack and legal issues here might have been different. The Court will not directly address this proposition as the Bankruptcy Court made no specific ruling that it adjusted the lodestar.

Consequently, if, as a general proposition, a lodestar calculation in fact includes anticipated results, this lodestar could not have anticipated the SCC result.[13]

IV. Fees of the Preparation and Defense of the Fee Application

Baker Botts sought $8,004,920.50 in fees and $457,443.84 in expenses it incurred in defending its final application for fees. Included in this amount are $2,684,243.50 in fees and $252,883.23 in expenses for Baker Botts's pursuit of the enhancement. The Bankruptcy Court found that the fees requested, while reflecting the actual time billed as per their records, exceeded an amount that would reflect reasonable compensation. It approved $5,000,000.00 in fees and $457,443.83 in fees. The Bankruptcy Court, however, did not delineate what fees of those it awarded were attributable to the preparation and defense of its fee application from those expended on the pursuit of a fee enhancement.

This Court notes that there is not unanimity among courts as to whether debtors' counsel can recover fees for

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[13] This Court's holding that at some level the results obtained here have to be so extraordinary that there is no way they are subsumed in the lodestar rate is limited to the facts of this case. No court has been able to delineate an exacting standard as to where to draw the "rare and extraordinary" line. This Court cannot draw that line so as to make it generally applicable either, but regardless of where any court draws that line, this verdict has to be considered rare. This Court suggests that it is not all that farfetched to make the analogy to Justice Stewart's concurrence in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring). In that concurrence, he wrote the often repeated phrase about his inability to define pornography: "I know it when I see it." This Court cannot devise a one-size-fits-all definition of "rare and extraordinary," but it does recognize it when it sees it. This is it.

the preparation and defense of a fee application. It also notes, as did the Bankruptcy Court, that there is no definitive opinion from our Circuit on this point. The vast majority of courts find that compensating bankruptcy lawyers for the preparation of and the successful defense of their fee applications is necessary to avoid unfair dilution of their fees. The Bankruptcy Court, below, and the many courts referenced in that well-reasoned opinion, accurately set forth the reasons for this policy and this Court will not repeat them here. Suffice it to say that most courts implement this rule as a necessary adjunct to the unambiguous policy underlying Section 330(a) that the pay of bankruptcy professionals should equate to comparable non-bankruptcy pay.

Of importance herein, however, is that both the courts that favor the award of preparation and defense fees and those that do not cite Section 330 as authority. A few courts have declined to award such fees finding that the pursuit of these fees does not benefit the estate. Some hold that the pursuit of fees benefits only the attorneys and is therefore not compensable. Others seem to rely solely on the historic "American" rule that each party bears their own attorneys' fees as a reason for the denial of such an award. Despite those well-intentioned opinions, this Court agrees with the majority view. The time spent defending a fee application "is necessary and beneficial to the bankruptcy system as a whole, and indirectly, to each estate participating in the system." *In re Engman II*, 404 B.R. 467, 483 (W.D. Mich. 2009). To the extent that sums awarded to Baker Botts represent sums expended on the preparation and defense of its fee application, the Bankruptcy Court is hereby **AFFIRMED**.

Baker Botts's actions in resolving outstanding fee issues clearly benefits the estate. The fact that it also benefits Baker Botts does not change the character of its actions. The fees were incurred as part of the bankruptcy, and the bankruptcy case cannot be put to bed until these matters are resolved.

> By definition, every fee petition is for the benefit of the petitioning professional. It is not that the professional benefits that is of consequence; what matters is whether the professional's obtaining of reasonable compensation is also a benefit to the estate. As several citations already provided demonstrate, it has been emphatically determined by the numerous courts that have addressed the issue that reasonable compensation for professionals is a benefit to the estate. . . .
>
> If, however, the "no benefit to the estate"argument by the Trustee is based on the premise that there is no longer an estate to benefit—a contention pressed by counsel during oral argument but nowhere evident in the Bankruptcy Court's reasoning—then the answer is that this dispute, like other post-confirmation disputes, must be dealt with as part of the administration of the case. Section 330(a)(4)(ii)(II) expressly allows compensation for services "necessary to the administration of the case." This is such a dispute. Indeed, section 330 anticipates post-confirmation fee applications when it speaks of"compensation awarded for the preparation of a fee application," 11 U.S.C. § 330(a)(6), a process regularly undertaken after confirmation.

In re Worldwide Direct, 334 B.R. 108, 111-12 (D.Del. 2005).

The same, however, cannot be said of the pursuit of a fee enhancement. Regardless of what standard a court adopts in judging fee requests (*Perdue*, a lodestar formula, a *Johnson* 12-step factor test or some combination of all three), seeking more than the agreed upon fee, however well-deserved, cannot be said to benefit the estate.

This Court finds that fees expended on the pursuit of an enhanced fee are not recoverable from the estate pursuant to Section 330. The entire rationale against diluting counsel's fees is inapplicable in a fee enhancement situation. This Court realizes that there might be an overlap between the expenses expended in the preparation and defense of the main fee application and those pertaining to an enhancement request. To the extent there is proof that there exists an indivisible overlap, the fees may be recoverable. Nevertheless, where the line between the fees expended for a fee defense and those expended for the pursuit of an enhancement is clearly distinct, services rendered in the pursuit of a bonus are not likely to benefit the estate and are not recoverable under Section 330.

There is a further reason for denying fees expended for an enhancement request. Section 330 authorizes compensation for services that were "necessary" to the administration of the estate. § 330(3)(A)(C). Stated another way, section 330(4)(A) instructs that the Court shall not award compensation for services that were not necessary to the administration of the estate. § 330(4)(A)(ii)(II). A law firm asking for an enhancement to its fees over and above what it is due under its agreement or pursuant to a lodestar analysis is not performing necessary services for the estate. None of the arguments that pertain to the inclusion of the final

fee applications apply to a request for a bonus. Therefore, this Court holds that any such request for fees and expenses expended in the pursuit of a bonus are not compensable.

There is one additional category of expenses that should not be charged to the estate. In this matter, there was allegedly some $400,000.00 spent by Baker Botts to correct time entries that were either insufficiently described or clumped or otherwise deficient.[14] Keeping accurate and sufficient time records is an inherent part of any professional's overall professional responsibilities. Any hourly billing rate used in a lodestar calculation necessarily and implicitly contains within that rate the time it takes the professional to accurately record her or his time and services. Even the Southern District of Texas Guidelines for Compensation and Expense Reimbursement of Professionals in Complex Chapter 11 Cases has specific requirements for time records. These guidelines forbid "grouping" or "clumping" in billing records, and instruct that all professionals must keep "accurate contemporaneous time records." While one could argue whether a lawyer can bill separately and additionally for writing down his or her time initially, no one can suggest with any credibility that it is reasonable for the estate to pay a professional to reconstruct time records that were initially done incorrectly.

Baker Botts in this appeal represented to this Court that it sought $8 million in fees, plus hundreds of

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[14] The Court notes that there is arguably evidence that some of these funds might have been expended solely to refute meritless objections. Sums spent to refute an objection to the primary fee request are a necessary adjunct to a fee request and are recoverable. The Court also notes that various individuals mentioned various sums attributable to this category of expenses.

thousands of dollars in expenses for the preparation and defense of its application for fees and for the work done in seeking the enhancement. Further, in the court below, certain testimony indicated that approximately $400,000.00 was spent in correcting time entries. The Bankruptcy Court gave only one award in this regard. It awarded $5 million in fees and $457,443.83 in expenses (*See* ¶ 232). It arguably included in this award fees for the pursuit of the enhancement (*See* ¶ 231). It also awarded fees or expenses which may or may not have included the costs to correct faulty time records. This Court cannot tell how much, if any, fees or expenses incurred to correct inaccurate time entries were included in this final award. Nor can it tell the amount, if any, of fees and expenses that were awarded for the pursuit of the enhancement.

Baker Botts suggested in oral argument that since the Bankruptcy Court ordered less fees and expenses than those sought for the preparation and defense of the fee application that this Court should just presume that no recovery was given for any categories it finds unrecoverable and that it should just affirm the award. While this is mathematically possible and theoretically may be true, this Court cannot engage in such monetary guess work. Therefore, it remands this case back to the Bankruptcy Court for it to elaborate and/or reconsider its award in this regard. It should delete or reform its judgment so as to remove any award of fees and expenses for the pursuit of a fee enhancement. It should also delete all sums awarded, if any, for the recreation of initially inaccurate or insufficient time records.

V. Post-Judgment Interest

Both Reorganized ASARCO and the Plan Administrator object to the award of post-judgment

interest. Given that the Court is remanding this case to the Bankruptcy Court for further elucidation and/or a recalculation and/or further hearings on the issue of fees and expenses, the issue of post-judgment interest is technically moot. Title 28 U.S.C. § 1961 allows for an award of post-judgment interest, but it is virtually a tautology that post-judgment interest by necessity requires a judgment. Given this order, there is no final judgment.

Mindful, however, that the Bankruptcy Court will, with all deliberate speed, resolve the issues necessitated by the remand, this Court feels compelled to address this issue so that it will not necessitate further briefings and so as to maximize judicial efficiency. Appellants argue that an award of post-judgment interest is inappropriate for two reasons: (1) an award of administrative fees authorized by § 330(a) is not a judgment and consequently § 1961 does not apply; and (2) the Reorganization Plan does not allow or provide for interest on these sums. This Court agrees with both positions.

There is no statutory authority which controls this issue and the case law and Rules of Civil Procedure give little more guidance. Section 1961 provides for the award of interest on all civil money judgments. Its exact wording is "on any money judgment in a civil case recovered in a district court." An award of legal fees pursuant to § 330(a) is a payment by the estate of expenses necessary to enable the system to "operate smoothly, efficiently, and expeditiously." H.R. Rep. No. 595, 95th Cong. 1st Sess. 330 reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6286. That being the case, the award of fees is not a money judgment recovered, but is an order of the Bankruptcy Court to pay certain

expenses. It necessarily follows that since the order awarding fees is not a civil judgment, § 1961 does not apply. *See St. Paul Fire & Marine Insurance Company v. Vaughn*, 779 F.2d 1003 (4th Cir. 1985). Stated more simply, "[s]ection 1961 is inapplicable to the grant of attorneys' fees in a bankruptcy case because attorneys' fees in bankruptcy are an expense of administering the estate and, therefore, do not constitute a money judgment." *In re Comandante Management Co., LLC*, 395 B.R. 807, 818 (D. Puerto Rico 2008).

The Fifth Circuit, in a case involving a claim for interest on a Chapter 7 bankruptcy trustee's compensation and expenses, was called upon to decide whether the interest should begin on the date the bankruptcy petition was filed (the minority view) or whether it should begin to accumulate upon the actual award of the bankruptcy court (the majority view). After reviewing the availing case law in all deciding circuits, the Fifth Circuit rejected both views and held that no interest was due. It reasoned that unlike a payment of interest to a creditor, which is authorized by 11 U.S.C. § 726(a)(5), an administrative expense did not fall into the same category as a pre-petition debt. *In re Reed*, 405 F.3d 338 (5th Cir. 2005). It relied on both a Second Circuit case, *In re Klein Sleep Products Inc.*, 78 F.3d 18 (2d Cir. 1996), and a case of its own, *In re Van Gerpen*, 267 F.3d 453 (5th Cir. 2001), for authority that administrative claims and those made against the estate by creditors are not treated the same. The *Reed* court ultimately held that the trustee and similarly situated professionals are not entitled to interest on claims for fees and expenses. The court concluded:

> To preclude recovery of all interest on a trustee's compensation and administrative expenses is no more

> untenable a result than that reached by the minority view, which reading "allows for interest to accrue on services before they are rendered or expenses before they are incurred." *Reed II,* 312 B.R. at 839.

Id. at 344.

While not entirely on point, the eventual conclusion is the same—administrative expenses, including fees, are not treated like a judgment mandating interest. This Court agrees with this theory and finds it applicable here. Absent some other compelling authority, interest is not statutorily available on administrative expenses.

Reorganized ASARCO and the Plan Administrator also argue that such interest is not available because the Reorganization Plan adopted by this Court does not provide for it—when it specifically provides for and orders interest in other situations to various classes of creditors. *Compare* Art. II, 2.1 *with* Art. IV. This is true and the Court also sustains the objection based upon this argument as well.

The Court notes that this does not relieve Reorganized ASARCO or the Plan Administrator from the duty of paying any claims allowed in a prompt manner. Article XIII, 13.8(e) of the plan, provides that a claim that has become allowed (such as those involving administrative expenses) shall be paid "no later than the 10th Business Day after the end of the calendar month in which such Disputed Claim becomes an Allowed Claim." The failure to make such a payment will cause the Plan Administrator to face the consequences that any party would face for failure to comply with a court order.

For these reasons the Court sustains the objections of Reorganized ASARCO and the Plan Administrator to the award of post-judgment interest on the legal fees and

expenses, and instructs the Bankruptcy Court that it should not include such an award in its revised judgment.

VI. Conclusion

This Court affirms the award of the fee enhancement for the services rendered by Baker Botts in the SCC litigation. It reverses and remands the award of the Bankruptcy Court for the fees and expenses awarded for the preparation and defense of the fee application to the extent that it has included in that award fees and expenses to Baker Botts for its pursuit of the enhancement or for any amounts it had to expend to correct its own inaccurate, vague or non-compliant time records. Since the award by the Bankruptcy Court was made in one single amount for fees and one single amount for expenses, this Court cannot determine what sums are recoverable and what sums, if any, are not. Nor can it determine if any of the award has been given for fees or expenses which are not reimbursable. Therefore, this Court remands this case to the Bankruptcy Court so that it can make further findings in this regard. Finally, for the reasons stated above, the award of post-judgment interest cannot stand, and any ultimate award shall be paid pursuant to the Plan of Reorganization. The Order Granting Final Fee Application (Case No. 05-21207, Doc. No. 16334) is reversed and remanded to the Bankruptcy Court for further elucidation consistent with this opinion.

Signed this 8th day of August, 2012.

[Signature]
Andrew S. Hanen
United States District Judge

APPENDIX C

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

Case No. 05-21207
Chapter 11
Jointly Administered

IN RE:

ASARCO LLC, ET AL.
Debtors.

(July 20, 2011)

MEMORANDUM OPINION ON FINAL
FEE APPLICATION OF BAKER BOTTS L.L.P.

I. INTRODUCTION

1. On this day came on for consideration the final fee application of Baker Botts L.L.P. filed on February 8, 2010, and supplemented on June 2 and July 7, 2010 (the "*Fee Application*").[1] Baker Botts L.L.P. ("*Baker Botts*"

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[1] *Final Fee Application and Request for Fee Enhancement of Baker Botts L.L.P.*, Dkt. No. 13915 ("*Final Fee Application*"); *Mot. for Leave to Supplement Final Fee Application and Request for Enhancement of Baker Botts L.L.P.*, Dkt. No. 14838; *Second Supple-*

or the "*Firm*") represented ASARCO LLC ("*ASARCO*" or the "*Company*") and its affiliated debtors (the "*Debtors*") in these chapter 11 cases during the period of August 9, 2005, through December 8, 2009 (the "*Application Period*"). The Court, having heard the evidence and arguments of counsel, makes the following findings of fact and conclusions of law.

2. Baker Botts asks the Court to finally approve and allow $135,870,714.58 in fees and $6,046,135.06 in expenses for services performed and expenses incurred by the Firm during the Application Period. The $135,870,714.58 in requested fees is comprised of (1) $113,074,527.74 in fees approved by this Court on an interim basis under section 331 of the Bankruptcy Code and paid to Baker Botts; (2) *plus* $263,994.74 in additional, unpaid fees incurred by Baker Botts for the period of November 1, 2009, through December 8, 2009; (3) *plus* $22,645,119.10 in additional, unpaid fees to compensate Baker Botts for the difference between the hourly rates it charged during the Application Period and the proper hourly rates (20% higher than the rates Baker Botts charged) based on application of section 330 of the Bankruptcy Code and the lodestar analysis; (4) *minus* $112,927.00 in fees charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates. The $6,046,135.06 in requested expenses is comprised of (1) $6,065,598.58 in expenses approved by this Court on an interim basis under section 331 of the Bankruptcy Code and paid to Baker Botts; (2) *minus* $19,463.52 in expenses charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates.

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ment to Final Fee Application and Brief in Support ("*Second Supplement*").

3. Baker Botts also asks the Court to finally approve and allow $8,004,920.50 in fees and $457,443.83 in expenses incurred by the Firm in preparing and defending the Fee Application through July 13, 2010. These amounts are comprised of (1) $5,042,001.50 in fees and $199,900.60 in expenses incurred by Baker Botts through July 6, 2010, defending the fees and expenses approved by this Court on an interim basis under section 331 of the Bankruptcy Code and the fees and expenses incurred by Baker Botts from November 1, 2009, through December 8, 2009; (2) $2,684,243.50 in fees and $252,883.23 in expenses incurred by Baker Botts through July 6 defending its request for a 20% increase; (3) $42,845.50 in fees incurred by Baker Botts through July 6 for non-working travel time; and (4) $235,830.00 in fees and $4,660.00 in expenses that Baker Botts estimated it would incur from July 7 through closing argument on the Fee Application on July 13. In addition, Baker Botts asks the Court to include in its final order resolving the Fee Application a provision authorizing the Firm to submit supplemental applications for additional defense fees and expenses incurred after July 13, 2010, upon resolution of any appeals or in connection with any subsequent proceedings in the event of a remand.

4. During the course of these cases, ASARCO, the Debtor in Possession, would from time to time raise questions or concerns regarding Baker Botts' invoices with the responsible attorneys. In each instance, Baker Botts addressed the concerns to the reasonable satisfaction of ASARCO. No party in these cases posed an objection to the interim allowance of Baker Botts' fees and expenses, and ASARCO paid the fees and expenses approved on an interim basis to Baker Botts. Nevertheless, Reorganized ASARCO LLC ("*Reorganized ASARCO*")

has now objected to the final approval and allowance of (1) the fees charged by Baker Botts to the estates during the Application Period, (2) any additional compensation over and above the fees charged by Baker Botts to the estates during the Application Period, and (3) the fees and expenses requested by Baker Botts for the preparation and defense of the Fee Application.[2] Reorganized ASARCO originally objected to the final approval and allowance of the expenses charged by Baker Botts to the estates during the Application Period, but withdrew that objection on June 1, 2010.[3]

5. During the course of these cases, the United States Trustee (the "*U.S. Trustee*") also would from time to time raise questions or concerns regarding Baker Botts' invoices with the responsible attorneys. In each instance, Baker Botts addressed the concerns to the reasonable satisfaction of the U.S. Trustee. The U.S. Trustee did not object to the final approval and allowance of either the fees and expenses charged by Baker Botts to the estates during the Application Period, or the fees and expenses requested by Baker Botts for the preparation and

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[2] *Reorganized ASARCO LLC's Response and Objection to Baker Botts L.L.P.'s Final Fee Application*, Dkt. No. 14118 ("*Original Objection to Final Fee Application*"); *Reorganized ASARCO LLC's Response and Objection to Preliminary and Final Requests for Fee Enhancement of Baker Botts L.L.P.*, Dkt. No. 14119 ("*Objection to Fee Enhancement*"); *Reorganized ASARCO LLC's First Amended Response and Objection to Baker Botts L.L.P.'s Final Fee Application*, Dkt. No. 14713 ("*Amended Objection to Final Fee Application*").

[3] *Original Objection to Final Fee Application*; *Amended Objection to Final Fee Application*; Hr'g Tr. 143:20–24, June 1, 2010 (H. Novosad).

defense of the Fee Application.[4] However, the U.S. Trustee has objected to the final approval and allowance of the 20% increase requested by Baker Botts.[5] The U.S. Trustee contends that if the Court deems any increase proper, the increase should be limited to 5% of the amount of fees charged by Baker Botts to the estates during the Application Period.[6] No other party has objected to the Fee Application.

6. Baker Botts provided adequate notice of the Fee Application and complied with the due process and service requirements of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the Parent's plan, and the order confirming the Parent's plan. The Court has considered all objections, briefs, arguments, testimony, and documentary evidence related to the Fee Application. The Court held a final hearing on the Fee Application on May 27 and 28, June 1 and 2, June 18, and July 13, 2010. Baker Botts, Reorganized ASARCO, the U.S. Trustee, and all other interested parties had a full and complete opportunity to be heard by the Court at the final hearing.

7. As detailed below, based upon the record before the Court, the Court finds and concludes that:

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[4] *Original Objection to Final Fee Application*; *Amended Objection to Final Fee Application*; Hr'g Tr. 143:20–24, June 1, 2010 (H. Novosad).

[5] *Corrected Limited Objection of the United States Trustee to the Final Fee Application and Request for Fee Enhancement of Baker Botts L.L.P., Counsel to Debtors*, Dkt. No. 14137.

[6] *Corrected Limited Objection of the United States Trustee to the Final Fee Application and Request for Fee Enhancement of Baker Botts L.L.P., Counsel to Debtors*, Dkt. No. 14137.

- $6,046,135.06 in expenses incurred by Baker Botts during the Application Period were actual, necessary expenses;
- The services summarized in the Fee Application and performed by Baker Botts during the Application Period were substantial and provided a tangible and material benefit to the estates;
- The fees sought by Baker Botts for the services it performed during the Application Period reflect the actual and reasonable billable time expended by Baker Botts during the Application Period in connection with these cases and do not reflect (1) any unnecessary duplication of services, or (2) services that were not (a) reasonably likely to benefit the estates or (b) necessary to the administration of the cases;
- $457,443.83 in expenses incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010, were actual, necessary expenses;
- The fees sought by Baker Botts for preparing and defending the Fee Application through July 13, 2010, reflect the actual time expended by Baker Botts for preparing and defending the Fee Application. However, the Court finds that the reasonable compensation for the actual, necessary services performed by Baker Botts in preparing and defending the Fee Application through July 13, 2010, is $5,000,000 based on the level and skill reasonably required to prepare and defend the Fee Application.
- In addition to the $113,225,595.48 in fees sought by Baker Botts in its original interim application,

it is entitled to an enhancement of $4,161,708.96 for the extraordinary efforts and results in litigating and obtaining a multi-billion dollar judgment against ASARCO's parent company in the SCC Litigation

8. The Court finally approves and allows $117,613,158.44 in fees and $6,046,135.06 in expenses for services performed and expenses incurred by Baker Botts during the Application Period. The $117,613,158.44 fee award is comprised of (1) $113,074,527.74 in fees approved by this Court on an interim basis under section 331 of the Bankruptcy Code and paid to Baker Botts; (2) *plus* $263,994.74 in additional, unpaid fees incurred by Baker Botts for the period of November 1, 2009, through December 8, 2009; (3) *plus* 4,161,708.96 as an enhancement because there are rare and extraordinary circumstances in these cases and Baker Botts' services were instrumental in producing the exceptional results that were unanticipated at case commencement; (4) *minus* $112,927.00 in fees charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates. The $6,046,135.06 expense award is comprised of (1) $6,065,598.58 in expenses approved by this Court on an interim basis under section 331 of the Bankruptcy Code and paid to Baker Botts; (2) *minus* $19,463.52 in expenses charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates.

9. The Court finally approves and allows $5,000,000.00 in fees and $457,443.83 in expenses incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010. In addition, the Court will include in its final order resolving the Fee Application a provision authorizing Baker Botts to submit supplemental applica-

tions for additional defense fees and expenses incurred after July 13, 2010, upon resolution of any appeals or in connection with any subsequent proceedings in the event of a remand.

II. Background

A. Summary

10. Throughout these bankruptcy cases, Baker Botts lawyers conducted themselves with the utmost professionalism and commitment, addressing an array of challenging legal issues with sophistication, creativity, and skill. Few firms in the country have the breadth and depth of experience in different disciplines necessary to handle these cases with the skill demonstrated by Baker Botts. Baker Botts performed at an exemplary level in a wide spectrum of legal specialties.

11. The results obtained in these cases are nothing short of extraordinary. This Court has said that the ASARCO bankruptcy case "is probably the most successful Chapter 11 of any magnitude in the history of the Code." Baker Botts contributed significantly to the success of these cases. Baker Botts performed in an extraordinary fashion in numerous areas, but perhaps most notably in trying and obtaining a multi-billion-dollar judgment against ASARCO's parent company, Americas Mining Corporation ("*AMC*," and together with ASARCO Incorporated, a Delaware corporation controlled by AMC, the "*Parent*"). Creditors ultimately received payment in full of all claims, plus post-petition interest and allowed attorneys' fees. Such an extraordinary result would have seemed far fetched at the outset of these cases.

12. When ASARCO filed its bankruptcy case on August 9, 2005, "the prospects of reorganization were slim."

"[T]he [C]ompany 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."[7] Creditors were expected to receive cents on the dollar, if anything, because ASARCO's assets were severely depleted and the claims against it were extraordinarily high. Environmental, asbestos, and toxic-tort claims alone were more than $10 billion. The history of this case is well documented in this Court's Recommendation to the District Court on plan confirmation.

13. Baker Botts faced significant hurdles from the outset of these cases. Following ASARCO's bankruptcy filing, all of the Company's prepetition directors and its chief executive officer were forced to resign. ASARCO had little cash, no debtor-in-possession financing, and no financial advisor. It also was in the midst of a labor strike. There was a significant possibility that these chapter 11 cases would be converted to chapter 7 cases and the Debtors would be forced to liquidate, placing professionals like Baker Botts at substantial risk of nonpayment.

14. Baker Botts acted quickly to assist ASARCO in resolving its corporate governance issues, obtaining debtor-in-possession financing, retaining a financial advisor, and settling the strike. Each of these steps was critical to save ASARCO from liquidation and put it on the path toward reorganization.

15. Over the next four years, the Debtors and Baker Botts "continuously moved this case toward the confir-

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[7] *Amended and Supplemental Report and Recommendation for Entry of Findings of Fact and Conclusions of Law on Plan Confirmation*, Dkt. No. 12844 ("*Amended Report and Recommendation*"), at 3.

mation of a plan that resulted in the best possible recovery for creditors—full payment."[8] Baker Botts' outstanding achievements are described below.

16. First, Baker Botts obtained a multi-billion-dollar judgment against AMC relating to the sale of ASARCO's controlling ownership interest in Southern Copper Corporation ("*SCC*"). The judgment obtained by Baker Botts against AMC is likely the largest fraudulent transfer judgment in chapter 11 history.

17. Second, Baker Botts conceived, recommended, and commenced an innovative auction of the multi-billion-dollar judgment against AMC that, under the Debtors' unique plan structure, exposed the Parent to the possibility that it could both lose the Company and have to pay the judgment in full.

18. Third, Baker Botts worked closely with ASARCO and Barclays Capital Inc. ("*Barclays*") to develop and implement a process to auction the Debtors' assets that resulted in the selection of a plan sponsor that vigorously competed with the Parent. When, as a result of the worldwide financial crisis in September and October of 2008, that plan sponsor repudiated the parties' deal, Baker Botts worked closely with ASARCO and Barclays to renegotiate the parties' contract to maintain this critical competition for the Debtors' assets.

19. Fourth, in addition to obtaining a multi-billion-dollar judgment against AMC, Baker Botts litigated and reclaimed the Mission South Mill (the "*South Mill*"), a valuable and important component of ASARCO's mining operations, and prosecuted a complicated tax adversary proceeding, the result of which led to creditors receiving the benefit of an approximately $60 million tax refund.

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[8] *Amended Report and Recommendation*, at 4.

These results increased ASARCO's profitability and made the Company far more attractive to potential buyers and ultimately more valuable to the Parent.

20. Fifth, Baker Botts significantly reduced the claims faced by the Debtors. The United States Department of Justice, Environment and Natural Resources Division (the "*DOJ*"), has described the ASARCO case in a press release as "the largest environmental bankruptcy in U.S. history." Baker Botts, through estimation and settlement resolved billions of dollars in environmental, asbestos, and toxic-tort claims, along with the claims related to the Mission Mine—all on terms favorable to the Debtors. These results liquidated the Debtors' liabilities in a substantially diminished amount and made ASARCO even more desirable to potential buyers.[9]

21. Finally, Baker Botts played a significant role in repairing the severed relationship ASARCO had with its workforce when it assisted the Company in settling the 2005 strike, negotiating a new collective bargaining agreement with the unions, and resolving a number of problems that had arisen in connection with employee benefit and pension plans.

22. During the course of these cases, ASARCO was transformed from a broke and broken company to a reorganized ASARCO, cleansed of its historical liabilities and well-positioned to compete effectively in the world of commerce. Under the guidance of Baker Botts, the

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[9] The Debtors entered bankruptcy with over $10 billion of asserted historical debts. They exited bankruptcy under a confirmed full-payment plan of reorganization with no historical debts other than a one-year $280 million note to a section 524(g) asbestos trust, $200 million of which Reorganized ASARCO prepaid in the first quarter of 2010. Baker Botts Exhibit 71, Grupo Mexico First Quarter 2010 Results, at 5.

Company reformed its corporate governance, dramatically improved its operations, and substantially reduced its liabilities.

23. Baker Botts' expert, retired bankruptcy lawyer Paul Wickes, explained that he is "not aware of a case in which the ultimate result was so much better than what would have been expected at commencement." The Court agrees. ASARCO's bankruptcy is truly a rags-to-riches story.

B. Synopsis of Services Performed by Baker Botts During the Application Period

24. Although the Court will not attempt to describe all the tasks Baker Botts performed during these cases, the Court nonetheless finds it appropriate to highlight some of the significant services that Baker Botts performed during these cases and the extraordinary results achieved in this case.

25. The Baker Botts Fee Application contains a detailed narrative summary of the tasks Baker Botts performed for the Debtors, organized by task code. These tasks were further described by Baker Botts' witnesses. The Court finds that the witnesses that Baker Botts presented at trial were credible, and the Court gives significant weight to their testimony.

26. In the first four months of these bankruptcy cases ASARCO fought its way through a free-fall and precipitous bankruptcy filing, a perilous financial situation, a labor strike, and the perception that the Company was being managed for the benefit of Grupo Mexico rather than in the best interests of the estates. With the advice and assistance of Baker Botts, ASARCO avoided liquidation, and instead laid the ground work for a successful reorganization.

27. Baker Botts successfully negotiated and documented the debtor-in-possession financing notwithstanding the labor strike and the fact that the Company had experienced severe financial distress for several years.

28. On October 15, 2005, after negotiations among the Debtors, lenders, and creditor constituents, the Debtors moved for and obtained court approval, on an interim basis, of a debtor-in-possession facility for up to $20 million provided by CIT.[10] The Court finds that Baker Botts' work in negotiating the debtor-in-possession financing provided a tangible benefit to the estate.

29. With the Court's guidance and the concurrence of Mr. Ruiz—who at that time was ASARCO's only director—Baker Botts negotiated an interim agreement with the USW, which put ASARCO's employees back to work.

30. On December 9, 2005, Baker Botts obtained a Court order mandating the appointment of two independent directors. Ultimately Edward R. Caine and H. Malcolm Lovett, Jr. were appointed to serve as independent directors.

31. In sum, Baker Botts played an important role in the Debtors' resolution of the major obstacles facing them during the first four months of these cases. Baker Botts assisted ASARCO in retaining a financial advisor, obtaining debtor-in-possession financing, settling the strike, and resolving the Company's corporate governance issues.

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[10] *Interim Order Authorizing Post-Petition Financing, Granting Senior Liens and Priority Administrative Expense Status, and Modifying the Automatic Stay*, Dkt. No. 648. This Court approved the financing on a final basis on December 15, 2005. *Final Order Authorizing Post-Petition Financing, Granting Senior Liens and Priority Administrative Expense Status, and Modifying the Automatic Stay,* Dkt. No. 1224.

1. Obtaining a $6 Billion Judgment Against AMC

32. The pivotal event in these cases was Baker Botts' successful prosecution of an action to recover ASARCO's crown jewel—its controlling ownership interest in SCC. When AMC directed ASARCO to transfer the SCC shares to AMC in March 2003, ASARCO was in financial distress and the transfer added insurmountable momentum to ASARCO's spiral into bankruptcy. By the time the SCC lawsuit (the "*SCC Litigation*") went to trial in May 2008, the stock and dividends Baker Botts fought to recover from AMC were worth more than $10 billion.

33. Through its creativity, tenacity, and legal talent, Baker Botts was able quickly and efficiently to prosecute the SCC Litigation, prevail at trial, and obtain and secure a judgment ordering AMC to return to ASARCO stock, dividends, and interest valued in excess of $6 billion at the time of the judgment. The Court finds that the results obtained by Baker Botts in the SCC Litigation are rare and extraordinary and unquestionably provided a tangible and material benefit to the estates. The Court further finds that the extraordinary results achieved by Baker Botts were due to Baker Botts' performance and not to inferior performance by opposing counsel, unanticipated defense concessions, unexpectedly favorable rulings, a sympathetic fact-finder, or simple luck. The Baker Botts trial team won the SCC Litigation by deciphering millions of pages of documents and using those documents to tell a compelling story primarily out of the mouths of adverse witnesses at depositions and in the courtroom. The SCC Litigation is described in detail in the District Court's opinions.[11]

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[11] *See generally ASARCO LLC v. Americas Mining Corp.*, 382 B.R. 49 (S.D. Tex. 2007); *ASARCO LLC v. Americas Mining Corp.*, 396

34. On April 1, 2009, the District Court issued its opinion on damages.[12] The opinion was later amended on April 14, 2009, to correct a clerical error. The District Court ordered AMC to return to ASARCO stock worth approximately $5.48 billion at that time. The District Court also ordered AMC to pay ASARCO money damages of approximately $1.38 billion. The monetary award was comprised of dividends AMC received on the SCC shares of $1.94 billion and prejudgment interest on those dividends of $329 million, less the $747 million that AMC paid for the SCC shares, together with interest on that payment of $164 million.

35. The District Court issued its Final Judgment on April 15, 2009, implementing its liability and damages opinions (the "*SCC Judgment*"). The SCC Judgment obtained by Baker Botts most likely is the largest fraudulent transfer verdict in United States history. Mr. Wickes testified that, based on his experience, "the results obtained in the SCC case are nothing short of remarkable." Reorganized ASARCO's Senior Associate General Counsel Ruth Kern, who testified at the final hearing on the Fee Application on behalf of Reorganized ASARCO, admitted that a $6 billion judgment is a rare result. Reorganized ASARCO's expert witness, Mr. Meckler, similarly testified that the SCC Litigation was "rare" and "extraordinary."[13] The Court agrees.

B.R. 278 (S.D. Tex. 2008); *ASARCO LLC v. Americas Mining Corp.*, 404 B.R. 150 (S.D. Tex. 2009); *ASARCO LLC v. Americas Mining Corp.*, No. 1:07-CV-00018, 2009 WL 2168778 (S.D. Tex. July 20, 2009).

[12] *Amended Report and Recommendation*, ¶ 50.

[13] Reorganized ASARCO's expert on fee enhancement, Judge Monroe, does not contest this. Judge Monroe testified that he was not offering an opinion as to whether the result of the SCC Litigation, or

The results achieved by Baker Botts in the SCC Litigation are, without question, rare and extraordinary measured by any possible standard.

36. The Court finds that, as a result of Baker Botts' efforts before, during, and after the trial in the SCC Litigation, ASARCO's creditors and the bankruptcy estates received perhaps the greatest benefit of these bankruptcy cases in at least two respects. First, the prospect of the return of billions of dollars of value to the estates promised a far more meaningful recovery for creditors than originally anticipated. In fact, this Court found that, given that ASARCO's enterprise value was between $950 million and $1.25 billion at the time of the confirmation hearing in August 2009, the Parent ultimately paid "in excess of $1 billion . . . for the release [of the SCC Judgment]."[14] The Court reaffirms and reiterates that finding.

37. The Court finds that the initiation of the SCC Litigation, the pursuit of the SCC Judgment, and the SCC Judgment itself brought tangible and material benefit to the estates.

2. Recovering the South Mill at ASARCO's Mission Mine

38. Baker Botts also was instrumental in obtaining the return of what became one of ASARCO's important operating assets: the South Mill.

Baker Botts' work on these cases as a whole, were rare and exceptional.

[14] *Amended Report and Recommendation*, ¶ 193; *see also* Hr'g Tr. 188:20–189:14, June 1, 2010 (J. Lazalde) (admitting that ASARCO was worth around $1 billion in July 2009 and that the Parent paid in excess of $2.4 billion for the Company).

39. The South Mill is one of two mills at ASARCO's Mission Mine in Sahuarita, Pima County, Arizona. The other mill is the Mission North Mill. The South Mill is a wholly functional, fully engineered mill in excellent condition for its intended use. ASARCO had spent $40 million in capital improvements to the mill in 1990 and 1991 to expand its milling capacity to 20,000 tons of ore per day. ASARCO operated the South Mill successfully from 1991 to 2001 in a copper price environment of $0.74 to $1.36 per pound (from 1992 to 2001), but took it out of production when copper prices dropped to $0.65 per pound as of December 31, 2001.

40. Strapped for cash, on July 19, 2005—just three weeks before the bankruptcy filing—ASARCO closed the sale of the South Mill and related equipment, parts, and supplies to Mineral Park. The total sales price was $6 million.

41. The decision to sell the South Mill to Mineral Park was directed by the Parent. Before agreeing to sell the South Mill to Mineral Park, ASARCO conducted no analysis of what the South Mill was worth to ASARCO's ongoing business or how the South Mill could increase ASARCO's cash flow if brought back into production.

42. In September 2006, Mineral Park started dismantling the South Mill. Baker Botts quickly investigated the matter and filed a lawsuit on September 21, 2006, to avoid the sale of the South Mill as a fraudulent transfer and to enjoin further dismantling of the mill.[15]

43. Baker Botts sought and obtained from this Court a temporary restraining order and, after a hearing, a preliminary injunction.

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[15] *See ASARCO's Complaint*, Adv. No. 06-02069, Dkt. No. 1.

44. The key issue in the case was whether Mineral Park had paid reasonably equivalent value for the South Mill at the time of sale. That question turned on whether the income approach could be used to value an asset that was not in operation—a matter of first impression.

45. Baker Botts' successfully defended the injunction in an appeal to the District Court.[16] Shortly thereafter, a settlement was reached and ASARCO retained the South Mill.

46. As a consequence of Baker Botts' efforts, ASARCO avoided spending $40 to $50 million to rebuild the South Mill, and ASARCO was able to retain an income-generating asset that increased revenues and profits for ASARCO. The restarting of the South Mill also lowered the cost per pound of production at the Mission Mine, the Hayden Smelter, and the Amarillo refinery, thereby increasing ASARCO's profitability.

3. Recovering Millions of Dollars of Tax Attributes

47. These cases involved some of the most complex and contentious tax issues of any bankruptcy case in this Court's experience. Despite this, Baker Botts effectively prosecuted a complicated tax adversary proceeding against the Parent, the result of which led to creditors receiving the benefit of an approximately $60 million tax refund.

4. Reducing the Liabilities of the Estates

48. The Court finds that Baker Botts' approach to these cases as a structured, court-supervised negotiation, rather than a platform for protracted litigation of the countless issues that can arise in any bankruptcy case,

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[16] *Order Affirming Bankruptcy Court Order Granting Preliminary Injunction Dated February 5, 2007*, Case No. 2:06-cv-524, Dkt. No. 21.

contributed substantially to the successful results obtained. As Debtors' counsel, Baker Botts was generally successful in developing a consensus among the key creditor constituents to support the Debtors' business or legal strategy. Baker Botts kept constituents informed of the Debtors' intended course of conduct, solicited creditor input, carefully considered their views, and then explained and provided, as appropriate, the analytical underpinning of the Debtors' decisions. There were many more hours spent at the negotiating table than in court.

49. Examples of consensus among the Debtors and their creditor constituents abound, including the agreements reached regarding the debtor-in-possession financing, the approval of the collective bargaining agreement, the plan sponsor selection process, and, finally, the confirmation hearing itself at which there was overwhelming creditor support for the Debtors' plan. However, the best examples of successful negotiations among the Debtors and the creditor constituents are the court-approved settlements of the Debtors' environmental, asbestos, toxic-tort, and Mission Mine liabilities. The Debtors' exposure to these claims was substantial and would have taken decades and hundreds of millions of dollars in professional fees to resolve in the tort system or in the context of an administrative proceeding (as was the case for the Mission Mine liabilities). Baker Botts developed and deployed innovative legal strategies that enabled the Debtors to settle over $10 billion of environmental, asbestos, toxic-tort, and Mission Mine claims in less than five years and on a cost-effective basis. The Court finds that Baker Botts' efforts with respect to ASARCO's most significant liabilities, and the results achieved by the Firm, provided tangible benefit to the estate. Baker Botts' work decreased ASARCO's liabili-

ties and made the Company more desirable to potential buyers and ultimately more valuable to the Parent.

5. Resolving the Environmental Liabilities

50. At the outset of these cases, ASARCO faced billions of dollars of environmental liabilities at approximately 100 sites in seventeen different states and six regions of the Environmental Protection Agency (the "*EPA*") involving many of the largest, oldest, and most complex Superfund sites in the country, including the two largest—Coeur d'Alene and Tri-States. Because resolution of the environmental claims outside of bankruptcy would have taken many years and perhaps decades, Baker Botts recommended that the Debtors seek to estimate them under section 502(c) of the Bankruptcy Code. However, only a handful of bankruptcy courts had actually estimated environmental claims prior to these cases, and none had undertaken estimation of environmental liabilities on such a large scale. The number and amounts of the claims, the large number of diverse sites, and the plethora of difficult issues posed a daunting challenge.

51. Baker Botts' accomplishments in the environmental aspect of the bankruptcy were outstanding. ASARCO faced staggering claims for billions of dollars of alleged environmental harm substantiated by credible experts, many of whom had spent decades or their entire careers studying the disputed sites. For each site, Baker Botts faced a shifting array of interests and demands from various governments, potentially responsible parties ("*PRPs*"), and constituencies. To resolve these claims in a timely manner—thereby allowing the Company to promptly reorganize—Baker Botts negotiated a creative case management order (the "*CMO*") that provided for the estimation of approximately $6 billion of claims at

twenty-one sites, involved dozens of parties, and required those estimation proceedings to be conducted and concluded in an expedited time frame. Baker Botts then executed the tasks contemplated by the CMO by assigning teams of highly proficient bankruptcy and environmental lawyers to each of the sites and requiring these teams, as well the other parties to the estimation proceedings, to meet the demanding schedule for discovery, third-party mediation, and actual estimation hearings, all as contemplated by the CMO. Baker Botts settled or tried all claims at the sites covered by the CMO within the timeframe allowed. Ultimately, Baker Botts managed to craft a "global environmental settlement" that resolved billions of dollars of environmental liabilities. And the Firm did it in a demanding, compressed time frame.

52. The Court finds that the global environmental settlement was of substantial material benefit to the estates, and that Baker Botts' superior performance in obtaining the settlement and gaining the Court's approval of the same provided a tangible benefit to the estates.

6. Implementing the Global Environmental Settlement

53. Another excellent feature of Baker Botts' work was addressing the difficulties inherent in the large numbers of property transactions that underpinned the settlement agreements and trusts that were necessary for the global environmental settlement.

54. Baker Botts established custodial trusts that resolved ASARCO's liabilities at the properties to be transferred to the trusts. Baker Botts again faced numerous legal and logistical challenges in the transfer of these properties. Included in these challenges was incorporating twenty-seven designated properties, located in four-

teen states, each with different legal obligations and liabilities to be addressed.

55. There were several months of negotiations with the federal and state agencies aimed at releasing ASARCO from these liabilities and establishing the terms and funding for custodial trusts. Ultimately, the Baker Botts team reached a deal with the governments to release ASARCO of the liabilities at these certain properties in exchange for funding a trust that would take ownership of the properties.

7. Resolving the Asbestos Liabilities

56. Another significant factor contributing to the Debtors' need to reorganize was their exposure to asbestos liability. Before their bankruptcy filings, approximately 195,600 asbestos claims had been filed against ASARCO or its subsidiaries. While about half of these claims had been settled, the Company was still facing 20,000 claimants with unfunded settlements and about 67,000 pending claims.

57. Resolution of the Debtors' asbestos liability was a critical path to their exit from bankruptcy. Without this resolution and a section 524(g) channeling injunction, the Debtors faced the prospect of litigating thousands of prepetition asbestos claims and an unknown number of future claims in jury trials across the nation, and proving feasibility of any plan of reorganization would have been a significant challenge for any plan proponent.

58. The task of resolving the asbestos claims and future demands was not an easy one, but, drawing on its previous experience with asbestos and bankruptcy matters, Baker Botts developed creative strategies for addressing these claims and demands and successfully assisted the Company in resolving its alleged asbestos lia-

bility in a timely and cost-effective manner. Among the creative strategies that Baker Botts developed was an innovative asbestos bar date process to obtain detailed claims information without expensive and prolonged discovery. The process facilitated direct communications among the experts and consultants for the major constituencies and provided the factual basis from which substantive negotiations could proceed.

59. In large part due to the efforts of Baker Botts, the Debtors were able to settle all asbestos claims and demands for a present value of $912.3 million under the Parent's plan—almost $1.2 billion less than the asbestos claimants' experts' estimate of the Subsidiary Debtors' asbestos liability alone. The Court finds that the services that Baker Botts performed with respect to the Debtors' alleged asbestos liabilities were excellent, allowed the Debtors to emerge from bankruptcy free from all asbestos liabilities in a timely and cost-effective manner, and provided a tangible and material benefit to the estates.

8. Resolving the Toxic-Tort Liabilities

60. In addition to its staggering environmental and asbestos liability exposure, ASARCO was burdened by 1,380 toxic-tort claims in the aggregate amount of $1.47 billion, excluding claims filed in an undetermined amount. Further complicating matters was the problem that individuals asserting such claims suffered from serious diseases and health impairments (*e.g.*, children exposed to lead and arsenic). Despite these obstacles, Baker Botts encouraged claimants to settle rather than to litigate. With the assistance of Baker Botts, ASARCO successfully settled substantially all of the toxic-tort claims for approximately $35 million—an outcome that, at the beginning of these cases, seemed impossible. By the commencement of the confirmation hearing, all but two of the

remaining claims were either settled or disallowed. The Court finds that Baker Botts demonstrated excellent wisdom and skill in negotiating these settlements, without which the Company undoubtedly would have incurred significant costs and expended valuable resources in litigation with no assurance of success.

61. The Court finds that Baker Botts' work on the Debtors' toxic-tort claims was a successful and efficient resolution of complex personal injury claims that otherwise would have taken years, if not decades, to resolve in the tort system at a significantly greater cost to the Debtors and their estates. Baker Botts' services with respect to toxic-tort claims provided tangible and material benefit to the estates.

9. Resolving the Mission Mine Liabilities

62. Central to ASARCO's ability to emerge from chapter 11 as a viable mining company was the Company's ability to continue mining copper at its Mission Mine. After hard-fought negotiations complicated by distrust for the Company and Grupo Mexico, Baker Botts successfully resolved the claims relating to the Mission Mine for only $30 million in contrast to the estimates of the claimants of between $69 million and $1 billion, and ASARCO was permitted to continue mining copper at its Mission Mine.

63. The Court finds that the Mission Mine Settlement provided tangible and material benefit to the estates.

10. Resolving Labor and Employee Benefit Issues

64. From the beginning of these cases until their conclusion, ASARCO has had a troubled relationship with its workforce and labor unions. Baker Botts played a significant role in repairing this severed relationship when it assisted the Company in negotiating a new collective

bargaining agreement with the unions and resolving problems that had arisen in connection with employee benefit plans and pensions. In 2006, Baker Botts worked closely with ASARCO's new President and Chief Executive Officer, Joseph Lapinsky, as he negotiated with the labor representatives on the terms of a definitive collective bargaining agreement. ASARCO, again with the assistance of Baker Botts, also addressed settlement of the retiree medical class action suit filed in the United States District Court for the District of Arizona. The collective bargaining agreement that Baker Botts helped to bring about "was critical to a successful reorganization and assisted in the Debtor[s] being in position to generate $1.4 billion in cash that ma[de] both the Debtor's Plan and the Parent's Plan possible."[17]

65. In addition to the labor strike, ASARCO, under the control of the Parent, had also allowed many of the employee benefit plans to languish to the point that many of them no longer complied with applicable law and ran the substantial risk of being terminated. Baker Botts' efforts were crucial to getting these issues resolved and the plans back into compliance because ASARCO otherwise lacked the resources, personnel, or expertise to do so independently.

66. ASARCO also had to address issues regarding the adequate funding of its pension plans during the course of these cases, which Baker Botts expended significant time and energy in addressing on ASARCO's behalf.

67. The Court finds that Baker Botts' efforts with respect to labor, employee benefits, and pension matters contributed to the stable workforce that enabled ASARCO to generate approximately $1.4 billion in cash,

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[17] *Amended Report and Recommendation*, ¶ 15.

which ultimately was distributed to creditors under the Parent's plan. The Court finds that Baker Botts' superior performance with respect to labor and employee benefits and pension issues provided tangible and material benefit to the estates.

11. Creating Competition for the Assets of the Estates

68. Throughout these cases, Baker Botts encouraged ASARCO to adopt a strategy of creating a competitive environment for the control of the Company's assets to maximize the value of the estates and the return to creditors. Competition was necessary to encourage the Parent to put forth a full-payment plan. The benefits of competition accrued to the estates by providing more and better creditor options, maximizing the value of the Debtors' estates, and presenting for confirmation two confirmable full-payment plans.

69. The Court finds that Baker Botts' efforts to create competition for the assets of the estates were outstanding and provided tangible and material benefit to the estates.

12. Securing Sterlite as the Plan Sponsor

70. Baker Botts worked closely and effectively with ASARCO and Lehman Brothers to develop and implement an auction process that resulted in the selection of a plan sponsor that vigorously competed with the Parent. By securing Sterlite as a plan sponsor and later encouraging ASARCO to both evaluate alternatives to a Sterlite-sponsored plan and to keep Sterlite engaged in the auction process, Baker Botts provided a tangible and material benefit to the estates.

71. On March 6, 2009, the Debtors entered into a new purchase and sale agreement with Sterlite. Pursuant to the terms of the New Sterlite PSA, Sterlite would obtain

a release from ASARCO's breach of contract claim against it only if Sterlite successfully purchased the Company. Because the Parent's plan was ultimately confirmed, ASARCO delivered to the Parent at closing a $50 million deposit and the breach of contract claim against Sterlite—a claim Reorganized ASARCO is now pursuing.

72. The renegotiated contract with Sterlite and the threat of the litigation against it if it did not win the Company kept Sterlite competing with the Parent, contributed to the competitive bidding process at confirmation and ultimately to two full-payment plans.

13. Maintaining Competition During Plan Confirmation

73. This Court previously noted the effect of competition on the Parent when it explained that, "[t]hroughout 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."[18]

74. Baker Botts analyzed the numerous changes to the Parent's plan and evolving deal terms, conducted necessary discovery at an accelerated pace before and during confirmation. Baker Botts identified and forced the Parent to close loopholes and walk-away rights and to solidify its funding and escrow agreement as part of a competitive bidding process.

75. Throughout the confirmation hearing, Baker Botts continued to negotiate with Sterlite to improve the

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[18] *Amended Report and Recommendation*, at 5.

Debtors' plan, and four amendments to the plan were filed during the course of the confirmation hearing. The Debtors' improvement to their plan pressured the Parent to improve its plan, resulting in six plan amendments from the Parent after the commencement of the confirmation hearing.

76. The Debtors' plan on which the creditors voted provided for a distribution to creditors of $1.1 billion cash, a $770 million nine-year, non-interest-bearing note, and litigation trust interests in the SCC Judgment. The Parent's plan on which creditors voted proposed a $1.4625 billion cash distribution plus an additional $280 million note to the asbestos trust. Baker Botts encouraged Sterlite to increase the cash consideration and to monetize the non-cash consideration under the Debtors' plan such as the SCC Litigation trust interests. By the end of confirmation, Sterlite had contractually agreed to buy the interests in the SCC Litigation Trust that would otherwise have been distributed to creditors under the Debtors' plan for a total of $1.1515 billion. In response to this competitive pressure, the Parent increased its cash consideration and improved the terms of its plan by way of six amendments. However, creditors voted overwhelmingly in favor of the Debtors' plan.[19]

77. By the conclusion of the confirmation hearing, the Debtors' plan provided for $2.272 billion cash in aggregate consideration (subject to additional contributions if necessary for claims to be paid in full), and the Parent's plan proposed $2.4801 billion cash in aggregate consideration (subject to the return of cash in excess of the amount necessary for claims to be paid in full).

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[19] *Amended Report and Recommendation*, at 7.

78. This Court entered its report and recommendation in favor of the Parent's plan on August 31, 2009. Sterlite offered to improve its offer under the New Sterlite PSA, thereby improving the Debtors' plan. Because Sterlite's presence in these cases had always incentivized the Parent, Barclays recommended that the Debtors keep Sterlite as an available alternative. Sterlite agreed to waive its right to terminate the New Sterlite PSA (Sterlite had a termination right if this Court failed to recommend the Debtors' plan for confirmation), and to allow the Debtors to prepare for a closing with the Parent, but only if the Debtors objected to the report and recommendation.

79. The Court finds that it was reasonable for the Debtors and its advisors to believe that copper price volatility could impede financing under the Parent's plan. It also was reasonable for them to believe that the Parent might have devised a strategy before closing if it became necessary or desirable for the Parent to avoid or delay a closing. After careful consideration and deliberation, the Board decided to object to the report and recommendation on certain limited discrete issues, provided Sterlite would stipulate that the Company and its advisors could and would prepare for a prompt closing of the Parent's plan if and when confirmed.

80. The District Court entered its confirmation order in favor of the Parent's plan on November 13, 2009. The Debtors, aided by Baker Botts, worked diligently and professionally to prepare for a prompt closing of the Parent's plan. Copper prices held, the Parent obtained its financing, the plan closed on December 9, 2009, and the creditors were paid in full.

81. The Court finds that Baker Botts' efforts before and during confirmation not only benefitted the Debtors

and their creditors but the Parent and Grupo Mexico as well. Not only did Grupo Mexico retain its indirect ownership of ASARCO, but it received a company cleansed of its liabilities and well positioned to compete in the world of commerce. At closing, ASARCO received the benefit of the $50 million Sterlite deposit, a breach of contract claim against Sterlite that it is pursuing, and a refund from the Plan Administrator of approximately $70 million. Grupo Mexico has advertised the benefits it has received from the ASARCO bankruptcy and reorganization. Baker Botts Exhibits 70 and 71 are Grupo Mexico's Fourth Quarter Results 2009 and First Quarter Results 2010 that are published on its website (http://www.gmexico.com/financial/en-fi00.asp). Extracts from those reports follow:

- The restructuring of Asarco was successfully concluded in December, consolidating once again as a subsidiary of [Grupo Mexico] completely free of any environmental and asbestos related contingencies and liabilities. With the integration of Asarco, [Grupo Mexico] positions itself as the number one company in copper reserves worldwide . . . and reaffirms its position as one of the main producers of mined and refined copper.
- Asarco contributed US$1.357 billion from its own cash and made payment to its creditors for an aggregate cash consideration of US$3.562 billion.
- Tax Benefits of US$1.024 billion. [Grupo Mexico's] investment in the reorganization of Asarco generated a fiscal benefit of US$1.024 billion to be realized in the following quarters. Taking this benefit into account, the net transaction cost was US$1,181 million. At the average copper price of US$3.25 per pound estimated by analysts for 2010,

Asarco will generate an EBITDA of approximately US$550 million in 2010, implying for the transaction a very attractive valuation of 2.1 times EBITDA.

- Consolidated sales for 1Q10 were US$1.933 billion compared to US$851 million for 1Q09, an increase of 127% mainly due to greater production by the Mining Division through the recovery of Asarco and higher metal prices.

82. Grupo Mexico's overall net cash position has significantly improved following the ASARCO acquisition, allowing Grupo Mexico to prepay its debt and reward its stockholders with at least two cash dividends. During the first quarter of 2010, "prepayments were made on the AMC loan and the ASARCO note for a total of US$500 million." Additionally, "[o]n January 29, 2010, the Board of Directors approved a dividend payment of $0.14 pesos per outstanding share," which equates to a total dividend of $83,594,131.[20] "On April 23, 2010, the Board of Directors approved a dividend payment in cash of $0.17 pesos per outstanding share," which equates to a total dividend of $108,599,660.[21] The Court finds that Grupo Mexico benefitted from the superior performance of Baker Botts in representing ASARCO in these cases.

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[20] This amount was calculated as of January 29, 2010, at which time there were 7,785,000,000 shares outstanding and the conversion factor was 0.0766989.

[21] This amount was calculated as of April 23, 2010, at which time there were 7,785,000,000 shares outstanding and the conversion factor was 0.082058.

III. DISCUSSION

A. Section 330 of the Bankruptcy Code

83. Section 330 of the Bankruptcy Code governs the award of fees and expenses for professionals retained under section 327 of the Bankruptcy Code. Section 330 of the Bankruptcy Code "authorizes compensation for services and reimbursement of expenses of officers of the estate," and "prescribes the standards on which the amount of compensation is to be determined."[22] Section 330 provides that a bankruptcy court, in its discretion, determines "the amount of reasonable compensation" for professionals retained under section 327 of the Bankruptcy Code.[23]

84. Section 330 provides considerable guidance to bankruptcy courts in determining reasonable compensation. It provides:

> (3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;

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[22] H.R. Rep. No. 95-595, at 329 (1977); *see also Chamberlain v. Kula (In re Kula)*, 213 B.R. 729, 736 (B.A.P. 8th Cir. 1997) ("Section 330 applies to all bankruptcy cases, including Chapter 11 cases.").

[23] 11 U.S.C. § 330(a)(3); *see In re Farah*, 141 B.R. 920, 923 (Bankr. W.D. Tex. 1992) ("Determining what constitutes reasonable compensation is soundly within the discretion of the bankruptcy court, primarily because the bankruptcy judge is in the best position to determine the reasonableness of a proposed fee.").

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.[24]

This list is non-exclusive.[25]

1. Application of the Statutory Factors Listed in Section 330 of the Bankruptcy Code

a. Time Spent on Services

85. Courts may determine the reasonable amount of time a professional should spend on a given project.[26] In

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[24] 11 U.S.C. § 330(a)(3). Section 330(a)(3) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005. The amendment to section 330(a)(3) is effective for all title 11 cases filed after October 17, 2005. The ASARCO bankruptcy case was filed prior to that date. The amendment to section 330(a)(3) added an additional statutory factor for courts to consider in determining reasonable compensation: with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field. 11 U.S.C. § 330(a)(3). Even if the amendment to section 330(a)(3) governed these cases, the Court concludes that Baker Botts has demonstrated skill and experience in the bankruptcy field. Baker Botts' proffers and the Court's first-hand experience presiding over these cases support this conclusion.

[25] *See Staiano v. Cain (In re Lan Assocs. XI, L.P.),* 192 F.3d 109, 123 (3d Cir. 1999) ("[T]he factors set forth in § 330(a) are not exhaustive and . . . bankruptcy courts may consider relevant factors beyond those listed in the statute.").

making such determination, the Court may take into account the complexity of the legal issues for which the services were performed.[27] A fee applicant should also demonstrate good faith "billing judgment."[28]

86. The Court finds that Baker Botts spent a total of 319,860.85 hours of professional time during the Application Period.

87. Baker Botts firm policy requires timekeepers to record their hours contemporaneously with the work they perform, or as soon thereafter as reasonably possible, recognizing the vagaries and demands of the practice. Baker Botts lawyers are to accurately describe the work performed, and record all of their time but "not a minute more." The Court has no reason to doubt that any attorney who worked on these cases performed as efficiently and as diligently as he or she reasonably could under the circumstances.

88. In terms of complexity and novel issues, few if any chapter 11 cases in United States history rival these cases.

89. The amount of time that Baker Botts spent securing the SCC Judgment; developing the innovative auction of the SCC Judgment; addressing the Debtors' environmental, asbestos, and toxic-tort liability; addressing the Debtors' cash-flow deficiencies in the early stages of these cases; participating in the resolution of disputes between ASARCO and the labor unions and work on the Debtors' employee benefits issues; addressing ASARCO's corporate governance issues; identifying and

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[26] *In re Wildman*, 72 B.R. 700, 713 (Bankr. N.D. Ill. 1987).

[27] *See Frazin v. Haynes & Boone LLP (In re Frazin)*, 413 B.R. 378, 424 (Bankr. N.D. Tex. 2009).

[28] *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

securing Sterlite as the plan sponsor; seeking confirmation of the Debtors' plans of reorganization and responding to other plan sponsors' plans of reorganizations; maintaining competition among the plan sponsors in these cases; and performing other services that counsel for debtors-in-possession routinely perform in chapter 11 cases was reasonable and fully compensable.

90. The Court concludes that Baker Botts exercised good faith billing judgment during these cases, Baker Botts staffed these cases properly under the circumstances, the work was performed efficiently and consistent with high standards, and the time Baker Botts spent on the services it performed for the Debtors during the Application Period was reasonable and fully compensable.

b. **Rates Charged for Services**

91. Courts take a number of different factors into account when reviewing the rates charged by a fee applicant, including (1) the customary compensation charged by comparably skilled professionals;[29] (2) the novelty and complexity of the issues, the special skill and experience of counsel, the quality of the representation, the results obtained, and the superior performance of counsel;[30] (3) the lack of objection to the rate charged;[31] (4) the type

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[29] *See, e.g.*, *Pal Family Credit Co. v. County of Albany (In re Pal Family Credit Co., Inc.)*, 425 B.R. 1, 9 (N.D.N.Y. 2010); *see also In re Berg*, 05-39380, 2008 WL 2857959, at *5 (Bankr. E.D. Pa. July 21, 2008) (taking into account the experience and skill of the professionals in the case, the market cost for a professional with such experience and skill, and the applicant's normal billing rate).

[30] *In re Tan, Lie Hung & Mountain States Inv., LLC*, 413 B.R. 851, 862 n.23 (Bankr. D. Or. 2009).

[31] *In re Moss*, 320 B.R. 143, 157 (Bankr. E.D. Mich. 2005).

of services performed;[32] (5) the bankruptcy court's own experience with the rates charged by other fee applicants;[33] and (6) whether the applicant charges more for bankruptcy services than for non-bankruptcy services.[34] In addition, courts will analyze what the prevailing market rate is for similar work in connection with a lodestar analysis.[35]

92. The Court concludes that consideration of the novelty and complexity of these cases, the results obtained, and the rates charged by comparably skilled attorneys in other large chapter 11 cases is more appropriate when determining the prevailing market rate under the lodestar analysis.

93. The Court finds that no other firm could have achieved the results in these cases at the rates charged by Baker Botts. Baker Botts presented unrebutted evidence to support this finding. Baker Botts' expert, Paul Wickes, testified that Baker Botts was one of a select few law firms that could have achieved the results obtained in these cases. Mr. Wickes further testified that none of the other firms capable of achieving the results obtained in these cases would have been "prepared to take [these cases] for a blended hourly rate of anything close to the $354 per hour that Baker Botts has charged and would have instead insisted on a blended hourly rate more in the range of that charged by [the Parent's counsel] Milbank." Mr. Wickes even admitted that his former firm, Linklaters, would not have been able to handle these cas-

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[32] *In re Busy Beaver Bldg. Centers, Inc.*, 19 F.3d 833, 849 (3rd Cir. 1994).

[33] *In re Allegheny Int'l, Inc.*, 139 B.R. 336, 339 (Bankr. W.D. Penn. 1992).

[34] *In re Fleming Cos., Inc.*, 304 B.R. 85, 92–93 (Bankr. D. Del. 2003).

[35] *See, e.g.*, *In re Atwell*, 148 B.R. 483, 489 (Bankr. W.D. Ky. 1993).

es. Mr. Kinzie testified that while there might be a handful of firms that could have represented ASARCO successfully, it is unlikely any of those firms could have done so for less than $200 million. The Court agrees.

c. **Baker Botts' Hourly Rates**

94. For the period 2005 through 2009, Baker Botts billed ASARCO at the standard rates that Baker Botts had in place for each of those years. The rates that Baker Botts charged to ASARCO are the same or lower than they would have been in a non-bankruptcy matter of similar size and complexity.

95. The standard rates that Baker Botts charged during these cases are generally lower than those charged by Baker Botts' competitors. Baker Botts sets its standard rates at the lower end of the range of rates relative to most of the firms that Baker Botts considers its primary competitors. Baker Botts' average standard rates are generally 9% to 14% lower than competitor firms headquartered outside New York or California, and 7% to 11% lower than other large Texas firms.

96. In part because Baker Botts' rates are relatively modest compared to the firms with which it primarily competes, but also because of the Firm's billing practices, the quality of its lawyers, and the sophistication of its practice, Baker Botts sets standard rates but then bills or collects at or above the Firm's standard rates. Between 2005 and 2009, 58% of the time that Baker Botts billed to its clients was at or above its standard rates. Of the 58%, 42% was billed at standard rates and more than 16% was billed at premium rates (*i.e.*, rates above standard). For this period of time, Baker Botts' premium fees as a percentage of standard fees ranged from approximately 13% to 19%. The work for ASARCO represented 3.9% of Baker Botts' overall standard work value during

the years 2005 through 2009. If the time worked on behalf of ASARCO is removed from this analysis, the result is that over 56% of the remaining work was billed at or above Baker Botts' standard rates. The average percentage of the work billed at premium rates rises to 17%.

97. Billing and collecting premium rates is part of Baker Botts' billing practice and a material component of the Firm's revenues. While Baker Botts' average rates are at the lower end of the spectrum relative to its primary competitors, between 15% and 20% of the Firm's production is billed at a premium to standard rates (an average of approximately 16% in years 2005 to 2009). Premiums are billed and collected by Baker Botts for several reasons, but in general Baker Botts' clients agree to pay a premium because of the exceptional effort, significant result, or specialized skill of the Baker Botts lawyers involved in the representation.

98. For all Baker Botts timekeepers that worked on these cases during the years 2005 through 2009, work on these cases represented 10% of the total time billed to all clients. For these same timekeepers and time period, of the 90% of their hours billed to other clients, 79% of their hours were billed at or above Baker Botts' standard rates.

99. During 2005 through 2009, it was Baker Botts' typical practice to invoice most of its time to clients at or above Baker Botts' standard rates with very little write down at the time of invoicing. Baker Botts' clients typically pay Baker Botts' invoices on a timely basis, which averages from fifty to fifty-two days. ASARCO's payment cycle average was approximately forty-nine days during the period 2005 through 2009.

100. The Court finds that the possibility of receiving premium rates based on extraordinary circumstances is

an important consideration of Baker Botts in setting its standard rates. The Court further finds that, when Baker Botts set its standard rates in these cases, bankruptcy professionals had a reasonable expectation that they could receive an increase to their standard rates based on results obtained if the Court determined the circumstances warranted.

d. **Comparison of Baker Botts' Hourly Rates to Others**

101. The Court finds that the hourly rates that Baker Botts charged in these cases were low when compared to (1) the rates other law firms charged representing debtors in other chapter 11 cases as well as the rates that law firms participating in these cases charged in other chapter 11 cases representing debtors and official creditor committees; (2) the rates that law firms representing debtors charged in chapter 11 cases filed in Corpus Christi, Dallas, Houston, and San Antonio; and (3) the rates that other professionals charged in these cases.

i. Comparison of Baker Botts' Rates to Rates Charged in Other Chapter 11 Cases

102. The Court finds that the average hourly rate that Baker Botts charged in these cases was substantially lower than rates charged by other firms in other large, complex chapter 11 cases pending during the same time as these cases. To reach this finding, the Court considered the rates charged in other cases that were derived from the following sources: (1) the top five bankruptcy cases reported on www.bankruptcydata.com for every year from 2005 through 2009; (2) all cases listed on Exhibit B to Barclays' motion for allowance of fee enhancement; (3) cases where Milbank, Tweed, Hadley & McCloy, Haynes and Boone, LLP, Vinson & Elkins LLP, Shearman & Sterling LLP, Kramer Levin Naftalis &

Frankel LLP, Gibson, Dunn & Crutcher LLP, and Latham & Watkins, LLP (each of whom participated in these cases) were counsel to a debtor or official creditors committee; and (4) various chapter 11 cases filed in Texas from 2005 through 2009. The chart attached hereto as exhibit 1 shows comparison of Baker Botts rates with other chapter 11 cases.

103. The hourly rate of Baker Botts' highest billing-rate partner was lower than the hourly rate of the highest billing-rate partners in several other bankruptcy cases that were pending from 2005 through 2009. The chart attached hereto as exhibit 2 shows a comparison of Baker Botts partners with partners in other chapter 11 cases.

104. The hourly rate of Baker Botts' associates was lower than the hourly rate of the associates in several other bankruptcy cases that were pending from 2005 through 2009. The chart attached hereto as exhibit 3 compares the highest rates of second-, fourth-, and eighth-year associates at Baker Botts to the highest rates of associates at the same level in other national bankruptcy cases. The highest associate rates of Milbank and Haynes and Boone in these cases are also included in this chart.

ii. **Comparison of Baker Botts' Rates to Rates Charged in Other Bankruptcy Cases Pending in Texas**

105. The average hourly rate that Baker Botts charged in these cases was lower than the rates charged by comparable firms in other bankruptcy cases pending in Corpus Christi, Dallas, Houston, and San Antonio from 2006 through 2009. The chart attached hereto as exhibit 4 shows the average rates charged in Texas bankruptcy cases.

iii. **Comparison of Baker Botts' Rates to Rates Other Professionals Charged in these Cases**

106. The average hourly rate for all professionals that Baker Botts charged over the course of these cases was $353.98, which is substantially lower than rates charged by other firms in these cases. This is true even taking into account that Milbank reduced its rates for partners beginning November 2008 and took an additional $4 million voluntary reduction, and taking into account Haynes and Boone's 10% discount for all timekeepers beginning January 1, 2009.

AVERAGE RATES OF FIRMS INVOLVED IN THESE BANKRUPTCY CASES	
Milbank	$482.84 (36.4% higher than Baker Botts)
Jordan Hyden	$434.00 (22.6% higher than Baker Botts)
Reed Smith	$417.00 (17.8% higher than Baker Botts)
Haynes and Boone (not discounted)	$415.86 (17.5% higher than Baker Botts)
Haynes and Boone	$397.97 (12.4% higher than Baker Botts)
Baker Botts	**$353.98**

107. The hourly rates of ten Milbank partners were at least 20% higher than Baker Botts' highest hourly rates during these cases. Milbank discounted its hourly rates for its partners beginning in November 2008, but its partners' hourly rates were still substantially higher than Baker Botts' partners even in 2009. The chart attached

hereto as exhibit 5 shows a comparison of Milbank's highest rates with Baker Botts' highest rates.

108. The range of rates Baker Botts charged during the Application Period was $365-$800 per hour for partners, $195-$525 per hour for associates, and $50-$250 per hour for paraprofessionals. Baker Botts did not charge a higher rate for its bankruptcy professionals than its non-bankruptcy professionals. The majority of Baker Botts' timekeepers billing to these cases were non-bankruptcy lawyers. Exhibit C to the Fee Application reflects that Baker Botts does not charge more for a particular service, including bankruptcy work.

109. Baker Botts has cultivated an impressive legal record since its founding in 1840. The Firm has demonstrated excellence in a variety of fields and is widely regarded as one of the country's most prestigious law firms. Moreover, the Firm, and Mr. Kinzie in particular, has specialized knowledge of section 524(g) bankruptcies in which a debtor has massive asbestos liability. Baker Botts also has garnered impressive litigation results, including the largest unreversed judgment in United States history in the *Pennzoil v. Texaco* case. Mr. Terrell, who was the lead trial lawyer in the SCC Litigation, was one of the lead lawyers in the *Pennzoil* case.

110. The rates that Baker Botts charged are comparable to or lower than the rates charged in these chapter 11 cases by other professionals paid by the estates. Also, based on this Court's experience with fee applications in this Court, the rates that Baker Botts charged to the Debtors as interim fees under section 331 are not unreasonable. Moreover, Reorganized ASARCO did not object to the hourly rate that any Baker Botts attorney charged

in these cases.[36] Accordingly, the Court holds that the hourly rates that Baker Botts charged for all professionals and paraprofessionals during the Application Period are not unreasonably high and are fully compensable. However, the Court also holds that Baker Botts' hourly rate is approximately 20% lower than an appropriate market rate.

e. **Necessary or Beneficial to the Estates**

111. In *Andrews & Kurth, LLP v. Family Snacks, Inc. (In re Pro-Snax Distribs., Inc.)*, 157 F.3d 414, 426 (5th Cir. 1998) ("*Pro-Snax*"), the Fifth Circuit held that work performed by legal counsel on behalf of a debtor must be of material benefit to the estate. The *Pro-Snax* standard does not, however, require unbridled success. An estate may benefit from first tries, mixed results, and even failures that lay the groundwork for future progress. *Pro-Snax* does not require denial of compensation that is rightfully earned by second-guessing reasonable decisions that ultimately advanced the case. While the Parent argues that *Pro-Snax* requires a court find from hindsight that each action taken by Debtor's counsel resulted in tangible benefit to the estate, this Court disagrees with that interpretation of Fifth Circuit law. (See below for specific discussion of the Parent's Objections.) This fact was recently emphasized in *In re Cyrus II Partnerships*, No. 05-39857, 2009 WL 2855725, at *5 n.5; 2009 Bankr. LEXIS 2587, *16. n.5 (Bankr. S.D. Tex. Sept. 1, 2009): "[A] service may 'benefit the estate' under *Pro-Snax* even though the service did not directly result in a quantifiable or monetary benefit."

112. In *Cyrus II*, a fee applicant sought compensation for pursuing a motion to compromise that was ultimately

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[36] *See Amended Objection to Final Fee Application*, n.15.

unsuccessful.[37] The court allowed compensation for work performed regarding the unsuccessful motion.[38] The court noted that "the failure of a motion to compromise teaches lessons that lead to an ultimate resolution."[39] The Court refused to "read *Pro-Snax* to hold that . . . counsel can only be compensated for litigation in which the estate succeeds."[40]

113. If *Pro-Snax* required payment only upon success, then every professional compensated by an estate would be working on a contingency fee. In *Cyrus II*, the court stated that conditioning payment of a professional's fees on the success of their work would effectively force all professionals compensated by an estate to accept a contingency fee arrangement. Judge Isgur stated:

> If the Court were to read *Pro-Snax* to limit Trustee's counsel's fee awards to matters in which the Trustee was the prevailing party, then the Court would be impermissibly converting hourly lodestar fees to contingent fees. Just as courts may not convert a contingency fee approved pursuant to § 328 into an hourly fee, the Court here may not convert the pre-approved hourly fee into a contingency fee.[41]

114. Since *Pro-Snax*, courts have struggled with the question of whether to analyze material benefit from a hindsight or "at the time the services were rendered" perspective. Reorganized ASARCO argues that the material benefit test is an objective after-the-fact test whereby the Court must determine "'whether [] services

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[37] *In re Cyrus II P'ships*, 2009 WL 2855725, at *8.
[38] *In re Cyrus II P'ships*, 2009 WL 2855725, at *9.
[39] *In re Cyrus II P'ships*, 2009 WL 2855725, at *9.
[40] *In re Cyrus II P'ships*, 2009 WL 2855725, at *9 (citing *Pro-Snax*, 157 F.3d at 426).
[41] *In re Cyrus II P'ships*, 2009 WL 2855725, at *10.

resulted in an identifiable, tangible, and material benefit to the bankruptcy estate,' regardless of the reasonableness of such services at the time that they were rendered."[42]

115. Courts have applied the material benefit test in three fashions: first, some courts apply a strict hindsight test;[43] second, some courts state that they apply a pure hindsight approach but then include a prospective viewpoint in their analysis;[44] and third, some courts apply a hybrid approach that explicitly includes prospective and hindsight viewpoints.[45] The third approach is the better-reasoned approach because it harmonizes the express language of section 330(a)(3)(C) of the Bankruptcy Code, which states that the necessity and benefit of services should be evaluated "at the time at which the service was rendered," with the Fifth Circuit's decision in *Pro-Snax*.

116. Under any standard, the services that Baker Botts provided to the Debtors during the Application Period were necessary and beneficial to the bankruptcy estates. The benefits Baker Botts' representation produced for the estates are significant and numerous. As this Court has noted before, the ASARCO bankruptcy "is probably the most successful Chapter 11 of any magni-

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[42] *See Amended Objection to Final Fee Application*, ¶ 18 (quoting *Quisenberry v. Am. State Bank (In re Quisenberry)*, 295 B.R. 855, 865 (Bankr. N.D. Tex. 2003)).

[43] *See In re Weaver*, 336 B.R. 115, 119 (Bankr. W.D. Tex. 2005), *In re Quisenberry*, 295 B.R. at 865.

[44] *See PricewaterHouseCoopers, LLP v. Litzler (In re Harbor Fin. Group, Inc.)*, 99-37255, 2001 WL 1041785, at *3–4 (N.D. Tex. Sept. 5, 2001); *In re JNS Aviation, LLC*, 04-21055, 2009 WL 80202, at *8 (Bankr. N.D. Tex. Jan. 9, 2009).

[45] *See In re Spillman Dev. Group, Ltd.*, 376 B.R. 543, 550–54 (Bankr. W.D. Tex. 2007); *In re Energy Partners, Ltd.*, 409 B.R. 211, 228–30 (Bankr. S.D. Tex 2009).

tude in the history of the Code."[46] The outcome of these cases for creditors and for ASARCO itself far surpassed expectations. Creditors have been paid in full and ASARCO has been remade into a functioning business. Below is a non-exhaustive list of examples where Baker Botts provided a material and tangible benefit to the bankruptcy estates:

- obtaining the SCC Judgment, which motivated the Parent to file the full-payment plan;
- developing the innovative auction of the SCC Judgment;
- identifying Sterlite as a plan sponsor;
- maintaining competition in these cases by negotiating the New Sterlite PSA;
- vigilantly representing the Debtors during the confirmation hearing whereby both plan sponsors' plans were amended multiple times to improve recovery to creditors;
- assisting the Parent with closing the multi-billion-dollar transaction contemplated under the Parent's plan;
- devising and implementing an unprecedented procedure for estimation of over $6 billion of environmental claims asserted by federal and state agencies, Native American tribes, and individual parties;
- eliminating almost $5 billion of the Debtors' environmental liabilities;
- pursuing estimation of ASARCO's asbestos liability, creatively collecting claims data, and vigorous-

[46] Hr'g Tr. 41:5–6, November 23, 2009.

ly negotiating with the parties representing asbestos claims and future demands;

- reducing the Debtors' toxic-tort liability by approximately 94% from $1.383 billion to $34.97 million;
- resolving ASARCO's reclamation obligation under the Mission Mine Leases;
- participating in resolution of the labor strike;
- obtaining an injunction prohibiting the dismantling of the profitable South Mill, avoiding the sale of the mill, and obtaining the return of the mill, which ultimately earned the estates millions of dollars; and
- realizing tax benefits for the estates.

f. **Performance of Services Within a Reasonable Amount of Time**

117. The Court may determine what is the reasonable amount of time a professional should have to spend on a given project.[47] The Court may draw inferences of the reasonable amount of time necessary to perform legal services based on the record of the proceeding.[48]

118. As Mr. Kinzie testified, there are bankruptcy cases in which the only significant issue is the company's asbestos liability that lasted longer than these cases. When one combines the opposition of the Parent with the asbestos, environmental, toxic tort, labor, corporate governance, tax, litigation, and other issues that had to be addressed, these cases were resolved in a remarkably short period of time. Further, Baker Botts positioned

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[47] *In re Palladino*, 267 B.R. 825, 831 (Bankr. N.D. Ill. 2001).

[48] *All Trac Transp., Inc. v. Transp. Alliance Bank (In re All Trac Transp., Inc.)*, 310 B.R. 570, 573 (Bankr. N.D. Tex. 2004).

these Debtors for a robust, competitive confirmation hearing as early as November 2008, but citing the global financial crisis and the collapse of credit and commodity markets in September 2008, Sterlite refused to proceed with its purchase obligations under its original purchase and sale agreement and the Parent withdrew its 2008 plan shortly thereafter. The Court also notes that Reorganized ASARCO did not argue, or present any evidence to suggest, that any particular task that Baker Botts performed was not performed in a timely or reasonable manner.

119. The Court holds that based on the services that the Debtors required of Baker Botts, the complexity of these chapter 11 cases, and the time required to achieve full recovery to creditors, the services that Baker Botts performed for the Debtors were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problems, issues, and tasks addressed in these cases.

g. **Customary Compensation Charged by Comparably Skilled Practitioners**

120. Section 330 and its legislative history express a congressional intent "that compensation in bankruptcy matters be commensurate with the fees awarded for comparable services in non-bankruptcy cases."[49] As Judge Perris stated in *Columbia Aircraft Manufacturing Corporation*, No. 07-33850, 2008 WL 1337855, at *2 (Bankr. D. Or. Apr. 10, 2008), "[t]he idea behind the factors set out in § 330(a)(3) is that professionals should not be paid an arbitrarily low rate in bankruptcy cases (in

[49] *In re UNR Indus., Inc.*, 986 F.2d 207, 209 (7th Cir. 1993) (citing H.R. Rep. No. 595, 329–30, reprinted in 1978 U.S.C.C.A.N. 5963, 6286).

order to preserve the estate), but instead should be paid comparably to rates they would receive outside bankruptcy, so professionals will be willing to serve in bankruptcy cases." In discussing section 330(a)(3)(E), another court stated that it "strives to balance the fiduciary obligation of a debtor to spend its limited assets in a judicious fashion so as to maximize the ultimate distribution to its creditors against the importance of compensating the professionals who advise the chapter 11 debtor fairly, so as to encourage competent and experienced professionals to continue to participate in chapter 11 cases."[50]

121. During the Application Period, Baker Botts charged the Debtors at its standard rates. As the Court previously noted, the majority of Baker Botts' timekeepers billing to these cases were non-bankruptcy lawyers. Exhibit C to the Fee Application reflects that Baker Botts does not charge more for a particular service, including bankruptcy work.[51] Moreover, there is no evidence in the record that comparably skilled practitioners would have charged less in non-bankruptcy cases than the Baker Botts professionals and paraprofessionals charged in these cases. To the contrary, the evidence shows that Baker Botts' standard rates are below market. The Court holds that the total compensation that Baker Botts requests, inclusive of the upward adjustment to the fees discussed below, is consistent with the customary billing practice of Baker Botts to charge a premium for outstanding results, and is consistent with the customary compensation charged by comparably skilled practitioners in non-bankruptcy cases.

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[50] *See In re Fibermark, Inc.*, 349 B.R. 385, 395–96 (Bankr. D. Vt. 2006).

[51] *See Final Fee Application*, Baker Botts Exhibit 17, Exhibit C.

B. Reorganized ASARCO's Objections to the Fees Charged by Baker Botts to the Estates During the Application Period

122. As described above, Reorganized ASARCO objects to Baker Botts' requested compensation and argues that the requested fees charged by Baker Botts to the estates during the Application Period should be reduced for various reasons. The Court has considered Reorganized ASARCO's objections and finds them to be without merit.

1. The Court's Discretion in Evaluating Fees and Objections Thereto

123. The Court has broad discretion in evaluating the Fee Application and the objections thereto.[52] Appellate courts defer to the sound discretion of the bankruptcy court because that court "is more familiar with the actual services performed and 'has a far better means of knowing what is just and reasonable than an appellate court can have.'"[53]

124. The Court can and should utilize its own knowledge of these cases in assessing the Fee Application.[54]

The Court is itself an expert on the fees in question and, as such, is not bound by the testimony of expert wit-

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[52] *Lawler v. Teofan (In re Lawler)*, 807 F.2d 1207, 1211 (5th Cir. 1987) ("[T]he bankruptcy court has broad discretion in determining compensation for services performed in a bankruptcy proceeding.").

[53] *In re Lawler*, 807 F.2d 1207, 1211.

[54] *See Nat'l Benevolent Ass'n of Christian Church v. Weil, Gotshal, & Manges, L.L.P.*, No. 04-50948-RBK, 2006 WL 2516522, at *3 (W.D. Tex. Aug. 2, 2006) ("[T]he Bankruptcy Court is intimately aware of the fee application in question, and it is prudent for the bankruptcy judge to use his background knowledge of the case to reach a decision on this issue.").

nesses, even if unrebutted.[55] The Court has used its first-hand knowledge of these cases in evaluating the Fee Application and Reorganized ASARCO's objections to the Fee Application.

125. Many of Reorganized ASARCO's objections to Baker Botts' fees are grounded in the argument that compensation should be denied when counsel fails to strictly adhere to the Guidelines.[56] While the Guidelines are useful tools for counsel, they are not binding on the Court. The Guidelines are in place to aid fee applicants in providing the Court with sufficient information to determine whether requested fees are reasonable. So long as the Court has such information, the purpose of the Guidelines has been fulfilled.

2. Information Needed to Determine if Fees are Reasonable

126. Baker Botts has provided the Court with ample and detailed information regarding the services performed by the Firm through the Fee Application, proffers, hearing testimony, and other evidence. The Court concludes that this information is sufficiently detailed to allow the Court to assess the reasonableness of Baker Botts' fees.

127. Billing records need only provide the Court with sufficient information to allow the Court to evaluate the reasonableness of the requested fees.[57] Fee applications

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[55] *See In re McClanahan*, 137 B.R. 73, 74 (Bankr. M.D. Fla. 1992) (expert testimony regarding attorneys fees not binding on the court even if such testimony is unrebutted).

[56] ASARCO Exhibit 1007A, Meckler Report, ¶ 47; *Amended Objection to Final Fee Application*, ¶ 19.

[57] *In re Pan Am. Gen. Hosp. LLC*, 385 B.R. 855, 876 (Bankr. W.D. Tex. 2008) ("We must remember the purpose of the fee detail—to allow the court to evaluate the reasonableness of the requested fee.

that do not reach "an ideal level of completeness" may still support an award for compensation so long as the Court has sufficient information to assess the reasonableness of the fees.[58]

128. Applicants are not required to "'detail the exact number of minutes spent nor the precise activity to which these hours are devoted.'"[59] It is sufficient if the billing entries "show the amount of time devoted to the case by each of the involved persons" and make clear that "the work was not duplicative or otherwise prohibited by the Bankruptcy [Code]."[60]

a. **Reorganized ASARCO's Objections Regarding the Specificity of Billing Entries**

129. Reorganized ASARCO asserts that $9,373,251 in fees for work performed by Baker Botts should be disallowed in full because the work performed allegedly was inadequately described in Baker Botts' billing statements. The Court has considered this objection along with the testimony of Reorganized ASARCO's expert, Mr. Meckler, on this subject. The Court finds this objection without merit and will not reduce Baker Botts' requested fees on these grounds.

130. Baker Botts' billing descriptions, when considered in conjunction with the record and the Court's knowledge of these cases, are sufficiently detailed to pro-

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So long as the detail provided is sufficient for the court to make that determination, that is enough.").

[58] *In re Lawler*, 807 F.2d 1207, 1211–12 (5th Cir. 1987) ("While the time sheets submitted by [the applicants] did not reach an ideal level of completeness, it cannot be said that they lack the necessary information.").

[59] *In re Lawler*, 807 F.2d 1207, 1211–12 (quoting *Riddell v. Nat. Democratic Party*, 545 F. Supp. 252, 257 (S.D. Miss. 1982)).

[60] *In re Lawler*, 807 F.2d at 1211–12.

vide the Court with an opportunity to assess the reasonableness of the requested fees.

131. Furthermore, Reorganized ASARCO's own experts disagree as to what constitutes a vague or inadequate billing description. Billing entries identified by Mr. Meckler as vague were identified as not vague by Judge Monroe, who has considerably more experience in evaluating fee requests in bankruptcy.

132. Billing descriptions are sufficient so long as the Court possesses enough information to determine if the requested fees are reasonable.[61] Courts have recognized that a billing entry that could be considered vague if read in isolation, may not be vague when viewed in the context of the surrounding work performed.[62] Likewise, billing entries that appear vague to an outside fee expert or fee auditor, may not be vague to the Court, which is very familiar with the case.[63] This is especially true where the outside fee expert is not a bankruptcy practitioner.[64]

133. In light of these standards, the Court finds the level of detail submitted by Baker Botts to be sufficient.

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[61] *In re Pan Am. Gen. Hosp.*, 385 B.R. 855, 876 (Bankr. W.D. Tex. 2008).

[62] *In re Worldwide Direct, Inc.*, 316 B.R. 637, 644 (Bankr. D. Del. 2004) ("Though other entries were not very explicit, when viewed in context with the other work done by the attorneys at the same time . . . the Court is able to determine what issues were researched.").

[63] *In re Worldwide Direct, Inc.*, 316 B.R. at 644.

[64] *In re Worldwide Direct, Inc.*, 316 B.R. at 644 ("since the Fee Auditor was not a bankruptcy practitioner and did not inquire of anyone involved in the case about the nature of the research, he could not opine as to its significance. The court is familiar with the case (and the contested issues) and, therefore, is able from the descriptions and the context to determine the appropriateness of the research done.")

The Court would reach the same conclusion with or without Baker Botts' revised time entries.

134. Even if Baker Botts' billing entries could be considered vague, denying the requested compensation would not be appropriate in light of Baker Botts' performance in these cases. Reduction of fees is not mandatory for insufficiently detailed time records.[65]

b. **Reorganized ASARCO's Objections Regarding Block-Billing**

135. Reorganized ASARCO requests that the Court reduce Baker Botts' fee because time entries for approximately $12,900,000 worth of work performed were allegedly block-billed. The Court has considered this objection and finds it without merit. The billing entries to which Reorganized ASARCO objects do not prevent the Court from assessing the reasonableness of Baker Botts' requested fees.

136. Applicants are not required to "'detail the exact number of minutes spent nor the precise activity to which these hours are devoted.'"[66] Applications that do not reach "an ideal level of completeness" may still support an award for compensation.[67]

137. While counsel should make an effort to separate their time by project, such a requirement should not be enforced as to "impose slavish and over burdensome rec-

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[65] *See In re Wire Cloth Prods. Inc.*, 130 B.R. 798, 807 (Bankr. N.D. Ill. 1991) ("The Court also agrees that certain time entries are insufficiently detailed. However, such deficiencies do not warrant a reduction in compensation due to other factors which weigh heavily in the Court's evaluation.").

[66] *In re Lawler*, 807 F.2d 1207, 1211–12 (5th Cir. 1987) (quoting *Riddell v. Nat. Democratic Party*, 545 F. Supp. 252, 257 (S.D. Miss. 1982)).

[67] *In re Lawler*, 807 F.2d 1207, 1211–12.

ord-keeping requirements which, in the final analysis, result in fee applications of such enormous length and detail that they are of little ultimate value to the Court in awarding fees."[68] Courts refuse to reduce requested compensation for clumped time when such clumping has not been a detriment to the estate.[69] Compensation may be awarded for clumped time where the Court, using its own knowledge of the case, can determine the time spent was reasonable.[70]

138. Reorganized ASARCO's own experts did not agree on a definition of clumping or which Baker Botts billing entries should be considered impermissibly clumped. When presented with billing entries identified as impermissibly clumped by Mr. Meckler, Judge Monroe did not believe that such entries were inappropriate.

139. The evidence submitted by Baker Botts and the record as a whole contain ample information allowing the Court to assess the reasonableness of requested fees. In light of this evidence and the Court's own knowledge of the case, the Court holds that compensation should not be reduced on the grounds that certain billing entries were allegedly clumped. The Court would reach the

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[68] *In re Reconversion Techs., Inc.*, 216 B.R. 46, 58 (Bankr. N.D. Okla. 1997).

[69] *In re Reconversion Techs., Inc.*, 216 B.R. 46, 58; *see also In re Lanier Spa*, 99 B.R. 490, 492 (Bankr. N.D. Ga. 1989) ("When such lumping makes it impossible for the court to allocate time to each activity or to each attorney, the court may disallow all the hours which were lumped together . . . . In the instant case, however, the lumping is not so egregious as to prevent the court from determining if the number of hours spent on specific activities were reasonable.").

[70] *See In re McGuier*, 346 B.R. 151, 168 (Bankr. W.D. Pa. 2006) ("The entries again include the practice of 'lumping'. Nevertheless, the Court was able to discern the necessity and reasonableness of the services.").

same conclusion with or without Baker Botts' revised time entries.

c. Supplemental Information Submitted by Baker Botts

140. After Reorganized ASARCO filed its Amended Objection to the Fee Application, Baker Botts submitted supplemental billing descriptions that provided the Court with additional information regarding the tasks performed and the specific amounts of time spent on certain tasks. While the Court finds that the Fee Application contained sufficient information without these supplemental billing descriptions, the Court notes that this additional information supports the conclusion that the requested fees are reasonable.

141. Supplementation of fee applications is permissible.[71] Courts permit supplementation of fee applications to address concerns such as alleged clumping or vagueness.[72]

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[71] *See Zolfo, Cooper & Co., v. Sunbeam-Oster Co., Inc.*, 50 F.3d 253, 262 (3rd Cir. 1995) ("When a bankruptcy court denies compensation to an applicant who has attempted to comply in good faith with specificity requirements of the bankruptcy rules, the court should allow time to supplement the application."); *In re Busy Beaver Building Ctrs., Inc.*, 19 F.3d 833, 847–48 (3rd Cir. 1994) (if a court determines that there are deficiencies in an application, the court should "allow the professional a reasonable time to supplement the application with either a more detailed description of the questionable services, or with a memorandum of points and authorities in support of the application.").

[72] *See In re Indep. Am. Real Estate, Inc.*, 146 B.R. 546, 556 (Bankr. N.D. Tex. 1992) (temporarily disallowing a portion of an applicant's fees due to clumping, but permitting the applicant to file supplemental information curing these defects); *In re Temple Retirement Cmtys., Inc.*, 97 B.R. 333, 339 (Bankr. W.D. Tex. 1989) ("Counsel should supplement their time records with written narrative that places the services rendered in context so that the court can evaluate

142. The supplemental information submitted by Baker Botts was considered by the Court and supports the Court's conclusion that the requested fees are appropriate and should not be reduced on the grounds that billing descriptions were inadequate.

3. Clerical and Administrative Efforts

143. Reorganized ASARCO asserts that approximately $3,469,155.00 in fees should be completely disallowed because the underlying work was allegedly administrative in nature.[73]

The Court has considered this argument and finds it without merit. The Court will not reduce Baker Botts' compensation on the grounds that work performed was administrative or clerical in nature.

144. "[T]he classification of services as clerical or non-clerical does not decide the question of compensability under § 330: clerical services may be compensated in the proper context."[74] "[T]he bankruptcy court should review fee applications not for whether each particular service undertaken by a paralegal is clerical or paraprofessional by nature, but for whether non-bankruptcy attorneys typically charge and collect from their clients fees for that particular service when performed by a member

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the necessity of their rendition."); *In re Garrison Liquors, Inc.*, 108 B.R. 561, 566 (Bankr. D. Md. 1989) ("The time records submitted in support of the application are deficient because they fail to disclose the nature of services performed, and in fact are indecipherable . . . . Counsel will be afforded the opportunity to correct the various problems outlined in this opinion by submitting a revised fee application within 60 days.").

[73] *Amended Objection to Final Fee Application*, ¶¶ 37–38

[74] *In re Busy Beaver*, 19 F.3d at 851.

of that profession and the rates charged and collected therefor."[75]

145. The Court concludes that Baker Botts' compensation should not be reduced on the grounds that certain tasks performed were clerical or administrative in nature because Baker Botts has shown that the Firm typically charges its clients fees for such services.[76] Other firms also typically charge their clients for such services. Furthermore, the Court concludes that many of the categories of services alleged to be administrative by Reorganized ASARCO in fact required legal training or knowledge. The Court concludes that the services objected to by Reorganized ASARCO on these grounds were actual, reasonable, necessary, and beneficial to the estates.

4. Summer Associates

146. Reorganized ASARCO asserts that approximately $493,000.00 in fees requested by Baker Botts should be completely denied because the underlying work was performed by summer associates. The Court has considered this argument and finds it without merit. The Court will not reduce Baker Botts' requested fees on the grounds that certain fees reflect work performed by summer associates.

147. "[S]ummer associates can be valuable and worthy of billing at reasonable rates."[77] Numerous bankruptcy

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[75] *In re Busy Beaver*, 19 F.3d at 849.

[76] *See* Baker Botts Exhibit 3, Proffer of J. Prince, ¶¶ 168–186.

[77] *In re Recycling Indus., Inc.*, 243 B.R. 396, 404 (Bankr. D. Colo. 2000) (allowing a firm to bill for summer associates, but reducing the rates at which they were billed).

courts have allowed compensation for work performed by summer associates.[78]

148. Summer associate time is compensable outside of bankruptcy as well. As the Supreme Court has stated, "the increasingly widespread custom of separately billing for services of paralegals and law students who serve as clerks . . . must be taken into account."[79] "[E]ncouraging the use of low cost [paralegals and law clerks] rather than attorneys wherever possible . . . encourages cost-effective delivery of legal services."[80]

149. The Court rejects Mr. Meckler's "extraordinary showing" standard for paying fees for summer associate work. As long as summer associate work is necessary and beneficial to the estates and the time expended is reasonable—in order words, as long as the work satisfies the criteria established by section 330 of the Bankruptcy Code—debtor's counsel can collect fees for work performed by summer associates.

150. The Court has awarded compensation for work performed by summer associates in the past. Furthermore, the Court notes that several firms involved in these

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[78] *See, e.g.*, *In re Child World, Inc.*, 185 B.R. 14, 19 (Bankr. S.D.N.Y. 1995) (finding that fees requested by debtor's counsel for paralegals and summer associates were reasonable within the meaning of § 330 based on testimony from the debtor despite objections from the Trustee); *In re Davidson Metals, Inc.*, 152 B.R. 917, 921–22 (Bankr. N.D. Ohio 1993) (finding that $75 per hour was a reasonable rate for summer associates but reducing an applicant's fees by 30% based on other factors); *In re Auto Parts Club, Inc.*, 224 B.R. 445, 449 (Bankr. S.D. Cal. 1998) (allowing a firm to charge "summer interns" at $80 an hour instead of the $140 an hour requested by the firm).

[79] *Missouri v. Jenkins*, 491 U.S. 274, 286 (1989) (citing *Ramos v. Lamm*, 713 F.2d 546, 558 (10th Cir. 1983)).

[80] *Missouri v. Jenkins*, 491 U.S. at 288 (citing *Cameo Convalescent Ctr., Inc. v. Senn*, 738 F.2d 836, 846 (7th Cir. 1984)).

cases billed and collected for summer associate time, including counsel for Reorganized ASARCO.

151. The Court finds fees billed by Baker Botts summer associates to be reasonable and their work beneficial to the estates. Accordingly, Baker Botts' requested compensation will not be reduced on the grounds that the Firm billed for work performed by summer associates.

5. Document Review Efforts

152. Reorganized ASARCO asserts that "all attorneys who performed document review tasks should have been billed at the lowest billing rate of any document review attorney." Reorganized ASARCO requests that Baker Botts' fees be reduced by $1,689,298 for fees associated with document review. The Court has considered this argument and finds it without merit. The Court will not reduce Baker Botts' requested compensation on these grounds.

153. The "document review" work performed by Baker Botts' attorneys consisted of screening documents for privilege, responding to discovery requests, identifying exhibits for use at deposition or at trial, preparing summaries of particular factual matters, and other trial preparation work.

154. The Court finds the fees associated with document review work are reasonable and that the work performed was necessary and beneficial to the estates. Reorganized ASARCO cites to no authority holding that debtor's counsel should charge uniform and reduced rates for document review. Furthermore, the Court notes that the billing rates charged by the Parent's counsel for document review attorneys exceeds the rates Reorganized ASARCO would have the Court impose on Baker Botts.

6. Services that Allegedly Failed to Provide a Material Benefit to the Estates

155. Reorganized ASARCO requests that the Court reduce Baker Botts' requested compensation for $9,022,885 in fees for work that, according to Reorganized ASARCO, did not provide a material benefit to the estates. The Court has considered this objection and finds it to be without merit. The Court finds that the work performed by Baker Botts was necessary and provided a material benefit to the estates.

156. Reorganized ASARCO cites to the *Pro-Snax* decision in support of its position that Baker Botts' requested compensation should be reduced. Reorganized ASARCO misconstrues the language of *Pro-Snax* to require something that it does not. Contrary to Reorganized ASARCO's interpretation, *Pro-Snax* does not require that every action taken by a debtor's counsel be successful in order for counsel to receive compensation.

157. The facts of the *Pro-Snax* case differ significantly from these cases. *Pro-Snax* was filed as an involuntary chapter 7 and converted to a chapter 11 by the debtor.[81] Creditors requested that the case be reconverted to chapter 7.[82] The court denied the motion to reconvert but appointed a chapter 11 trustee.[83] The court was presented with two separate issues: (1) whether debtor's counsel could be compensated for services after the trustee had been appointed, and (2) whether debtor's counsel could be compensated for services performed before the appointment.[84] The majority of the court's opinion addressed the first question: compensation for work done

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[81] *Pro-Snax*, 157 F.3d at 416–418.
[82] *Pro-Snax*, 157 F.3d at 416–418.
[83] *Pro-Snax*, 157 F.3d at 416–418.
[84] *Pro-Snax*, 157 F.3d at 419–20, 26.

after the appointment of the trustee, which the court concluded should not be awarded. At the end of the court's opinion, the court briefly addressed the second question of compensation before the trustee was appointed.[85] The court concluded that for work by a debtor's counsel to be compensable, the work must have provided material benefit to the estate.[86] The court denied compensation to debtor's counsel for pursuing a failed chapter 11 plan because the majority of creditors "repeatedly informed the Debtor and the bankruptcy court that they believed the case should be administered under chapter 7."[87] The court denied compensation to the applicant on the basis that the services were not reasonable at the time performed and because such services were not beneficial when judged in hindsight.[88]

158. Unlike in *Pro-Snax*—where the creditors urged liquidation, and the fee applicant, as noted by the Fifth Circuit, should have known from the outset that prosecution of the debtor's chapter 11 plan would fail—in these cases creditors voted overwhelmingly in favor of confirmation of the Debtors' plan, which in turn provided the competitive pressure that resulted in the Parent's full-payment plan..[89]

7. Benefit Conferred by Specific Categories of Services

159. Reorganized ASARCO seeks to disallow fees for six categories of services: (a) seeking a cash bond for the

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[85] *Pro-Snax*, 157 F.3d at 425–26.
[86] *Pro-Snax*, 157 F.3d at 425–26.
[87] *Pro-Snax*, 157 F.3d at 425–26.
[88] *Pro-Snax*, 157 F.3d at 425–26 ("[W]e find that [the applicant] should have known from the outset that the Debtor's prosecution of a Chapter 11 plan would fail.").
[89] *Amended Report and Recommendation* at 7, 111.

SCC Judgment, (b) researching and drafting a directors and officers bonus motion, (c) researching and drafting a contingency fee memorandum, (d) researching and drafting a conflict of interest memorandum, (e) plan confirmation efforts from May 2008 until the 9019 Hearing for the New Sterlite PSA, and (f) supporting a revised plan after this Court's confirmation recommendation.[90] These services provided benefits to the estates as follows.

a. **Cash Bond for the SCC Judgment**

160. By putting pressure on the Parent to provide some manner of security on appeal and ultimately obtaining additional security on appeal, Baker Botts provided a tangible benefit to the estates.

161. In its Amended Objection, Reorganized ASARCO asks the Court to disallow $186,935 in fees requested in the Fee Application for efforts to obtain a cash bond for the SCC Judgment because these efforts purportedly provided no material benefit to the estates. The Court disagrees with Reorganized ASARCO and finds that Baker Botts' efforts to secure the SCC Judgment provided tangible and material benefit to the estates.

162. The District Court entered a final judgment in the SCC Litigation on April 15, 2009, requiring AMC to return to ASARCO stock and dividends and prejudgment interest (net of consideration paid) worth over $6 billion. That same day, the District Court entered an agreed order restricting the transfer and voting of shares of SCC by AMC and execution on or enforcement of the SCC Judgment by ASARCO. Under the agreed order, ASARCO could not take any action to execute on or enforce the SCC Judgment from the date of the agreed order through June 5, 2009.

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[90] *Amended Objection to Final Fee Application*, ¶ 5.

163. On April 24, 2009, AMC filed a notice of appeal from the SCC Judgment and all adverse orders, rulings, decrees, opinions, and judgments leading up to and included within that judgment. Five days later, on April 29, 2009, AMC filed a motion to alter or amend the SCC Judgment or for a new trial and a motion for stay of execution of the SCC Judgment pending appeal of that judgment.

164. ASARCO's independent directors instructed Baker Botts to do everything necessary to protect the SCC Judgment, which they considered to be ASARCO's most valuable asset.

165. In response to the motion to stay, ASARCO argued that the District Court should allow it to execute on the SCC Judgment or the District Court should stay execution only upon the posting of a supersedeas bond, as required by Federal Rule of Civil Procedure 62(d).

166. In seeking a cash bond for the SCC Judgment at the direction of the Independent Committee, Baker Botts helped ASARCO fulfill its fiduciary duties to increase and protect the assets of the estates.

167. On June 2, 2009, the District Court entered a memorandum opinion and order partially granting and partially denying AMC's motion for stay of execution of the SCC Judgment. The District Court did not require AMC to post a supersedeas bond to secure the monetary portion of the SCC Judgment. The District Court nevertheless adopted almost all of the minimum requirements sought by Baker Botts to secure both the non-monetary and monetary portion of that judgment.

168. The Court finds that Baker Botts' efforts to maximize the security provided by AMC pending appeal of

the SCC Judgment provided tangible and material benefit to the estates.

b. **Directors and Officers Bonus Motion**

169. Researching and drafting the directors and officers bonus motion provided tangible benefit to the estates by securing appropriate compensation for ASARCO's management.

170. In its Amended Objection, Reorganized ASARCO asks the Court to disallow $10,207 in fees requested in the Fee Application for efforts researching and drafting the directors and officers bonus motion because these efforts purportedly provided no material benefit to the estates. This objection concerns the *Motion for Approval of Bonuses to Edward R. Caine and H. Malcolm Lovett, Jr. as Members of the Board of Directors of ASARCO LLC and Joseph F. Lapinsky* filed on December 4, 2009. The Court disagrees with Reorganized ASARCO and finds that Baker Botts' efforts with respect to the directors and officers bonus motion provided a tangible and material benefit to the estates.

171. On December 3, 2009, the Board, in a two-to-one vote, passed a resolution approving a bonus of no more than $4 million to be divided among board members electing to participate. The Board also voted by a two-to-one margin to pay ASARCO's President, Joseph Lapinsky, a bonus of $2.5 million. The Board directed Baker Botts to file a motion approving payment of the bonuses. No creditor objected to the motion.

172. On December 9, 2009, the Parent assumed control of Reorganized ASARCO and a new board of directors was appointed. On December 22, 2009, the new board voted by unanimous written consent to rescind the prior board's action in approving the bonuses and author-

ized withdrawal of the motion. On March 24, 2010, this Court denied the motion.

173. Mr. Caine, Mr. Lovett, and Mr. Lapinsky each deserved consideration for a special bonus. In its order denying the motion, this Court noted that the service of Messrs. Lovett, Caine, and Lapinsky "was not only highly beneficial to the debtor, but also professional in every aspect."

174. The Court finds that Baker Botts' efforts in researching and drafting the directors and officers bonus motion provided tangible and material benefit to the estates by helping the Debtors and the Court ensure that appropriate compensation was paid to members of the management team who successfully guided the Company through the chapter 11 process. The Board directed Baker Botts to file the motion, and no creditor constituency opposed it. Baker Botts' efforts were reasonable, necessary, and compensable. Actions taken by Reorganized ASARCO to rescind the Board's prior approval of the motion after the Parent assumed control of the Company can be attributed to the Parent and should not be permitted to deny Baker Botts reasonable compensation for its services.

c. **Contingency Fee Memorandum**

175. Researching and drafting the contingency fee memorandum provided tangible benefit to the estates by allowing the parties to assess all compensation arrangements and their prospective benefits for ASARCO.

176. In its Amended Objection, Reorganized ASARCO asks the Court to disallow $5,780 in fees requested in the Fee Application for efforts researching and drafting a memorandum on the question of whether Baker Botts should bill its time for the SCC Litigation on

a contingency-fee basis because these efforts purportedly provided no material benefit to the estates. The Court disagrees with Reorganized ASARCO and finds that Baker Botts' efforts with respect to the contingency-fee memorandum provided a tangible and material benefit to the estates.

177. In November 2006, Mr. Terrell raised the issue with Mr. Kinzie of whether Baker Botts could represent ASARCO in what would later become the SCC Litigation on a contingency-fee basis. Baker Botts considered whether a contingent fee was appropriate in order to perhaps reduce the estates' legal costs. Baker Botts researched whether and under what circumstances bankruptcy law would allow a contingency-fee arrangement. Baker Botts ultimately decided, and ASARCO and the ASARCO Committee's counsel concurred, that the litigation should be pursued on an hourly basis.

178. Baker Botts' efforts in connection with the contingency-fee memorandum provided tangible and material benefit to the estates by allowing Company management and creditor constituencies to assess various compensation arrangements and their respective benefits to ASARCO. These efforts were reasonable, necessary, and compensable. In hindsight this may have saved the Debtors' parent several billion dollars.

d. **Conflict of Interest Memorandum**

179. In its Amended Objection, Reorganized ASARCO asks the Court to disallow $79,863 in fees requested in the Fee Application for efforts researching and drafting a so-called "conflict of interest" memorandum because these efforts purportedly provided no material benefit to the estates. The Court disagrees with Reorganized ASARCO and finds that Baker Botts' ef-

forts in this regard provided a tangible and material benefit to the estates.

180. In late 2007 and early 2008, events in the SCC Litigation justifiably led Mr. Terrell to believe that Grupo Mexico and AMC intended to try to disqualify Baker Botts—or even bring suit against Baker Botts on the basis of a purported "conflict situation"—as a litigation tactic in an attempt to derail the scheduled May 2008 trial. Among other things, at a hearing held on January 28, 2008, AMC's counsel suggested that Baker Botts was in a "conflict situation."

181. Mr. Terrell directed certain Baker Botts lawyers to perform legal research into disqualification issues, to investigate Baker Botts' prepetition representation of ASARCO, to determine whether any investigation into the substance of the SCC transaction had been conducted before May 2006 (when David Genender of Baker Botts began his investigation of that transaction at the direction of the Independent Committee), and to draft pleadings necessary to respond immediately in the event that Grupo Mexico or AMC were to move to disqualify or sue Baker Botts in an attempt to delay the trial.

182. Although no disqualification motion or suit was ever filed, and the trial proceeded on ASARCO's preferred expedited schedule, the Court finds that Baker Botts' efforts researching and drafting the so-called "conflict of interest" memorandum were reasonable and necessary. As the Court has noted repeatedly, the SCC Litigation aimed to obtain the return of an enormously valuable asset. The sooner AMC faced a judgment requiring the return of the fraudulently transferred stock, the sooner ASARCO would be in a position to confirm a full-payment plan of reorganization and exit bankruptcy. Baker Botts' efforts to keep the SCC Litigation trial

date, including its analysis of and preparation to defend a motion to disqualify the Firm, provided tangible benefit to the estates and are fully compensable.

e. **Initial Sterlite Plan Confirmation Efforts**

183. In its Amended Objection, Reorganized ASARCO asks the Court to disallow $8,400,000 in fees requested in the Fee Application for "Plan Confirmation Efforts from May 2008 Agreement with Sterlite until 9019 Hearing for New Sterlite Agreement" because these efforts purportedly provided no material benefit to the estates. The Court disagrees with Reorganized ASARCO and finds that Baker Botts' efforts in this regard provided a tangible and material benefit to the estates.

184. On February 4, 2008, the Debtors filed a motion seeking entry of an order approving bid procedures in connection with selecting a chapter 11 plan sponsor and exit transaction under a chapter 11 plan. On March 25, 2008, this Court approved the bid procedures on a preliminary basis, reserving the right to rule on the appropriateness of the proposed breakup fee and to give final approval to the process and other bid protections at a final hearing. The Parent and three other bidders (including Sterlite) submitted qualified bids pursuant to the court-approved bid procedures. After a two-day plan sponsor selection meeting held on May 22 and 23, 2008, at Baker Botts' offices in Dallas, the Board, by a vote of two in favor and one against, named Sterlite the "stalking horse" or "lead bidder" and authorized the Company and its advisors to negotiate (but not execute) final transaction documents with Sterlite. With board approval, ASARCO and Sterlite entered the Original Sterlite PSA on May 30, 2008. On July 1, 2008, this Court entered a final order approving (1) bid procedures for selecting a

chapter 11 plan sponsor and exit transaction and (2) bid protections for Sterlite in connection therewith. The bid protections included a break-up fee to be paid to Sterlite in the event that a higher and better bid was made for ASARCO's assets at or before confirmation.

185. On July 31, 2008, the Debtors filed a plan of reorganization proposing to sell substantially all of ASARCO's operating assets to Sterlite pursuant to the Original Sterlite PSA. The Parent sought and obtained a modification of exclusivity and filed its own competing plan on August 26, 2008. This Court approved the disclosure statements for the plans proposed at that time by the Debtors and the Parent and approved procedures for solicitation and voting on both plans. The DOJ supported the Debtors' efforts to enter the Original Sterlite PSA. By contrast, the Parent's plan received no significant creditor support.

186. Sterlite announced its intention not to perform the Original Sterlite PSA on October 14, 2008. Shortly thereafter, the Parent withdrew its plan.

187. After Sterlite's breach, ASARCO and its legal and financial advisors made a careful study and analysis of alternatives reasonably available to ASARCO and counseled and recommended that ASARCO resume discussions with Sterlite. The Debtors chose this course to maintain a competitive process and thereby maximize the value of the estates. Ultimately, the Debtors entered into the New Sterlite PSA with Sterlite and asked this Court to approve the New Sterlite PSA and revised bid protection and release provisions. This Court did so, overruling the objections of the Parent and other parties in interest after a contentious hearing on April 13-14, 2009. The Debtors submitted a new plan of reorganization based on the New Sterlite PSA with Sterlite on May 11, 2009. The

Parent submitted an amended plan on May 15, 2009. With that, the competition for ASARCO resumed.

188. In its report and recommendation, this Court found that "[t]he continuation of the Plan Selection Process resulting in the New Plan 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." Further, this Court found 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.'" This work was reasonable, necessary, and beneficial to the estates.

189. Engaging Sterlite throughout the bankruptcy created competition which contributed to the ultimate success of the bankruptcy. The Court finds that this work provided tangible and material benefit to the estates.

f. **Post-Recommendation Amended Sterlite Plan**

190. Supporting a revised plan after this Court's confirmation recommendation provided tangible benefit to the estates by ensuring Sterlite's continued presence in these cases, which, in turn, incentivized the Parent to close on its plan and pay creditors.

191. In its Amended Objection, Reorganized ASARCO asks the Court to disallow $340,000 in fees requested in the Fee Application for efforts supporting a Sterlite-backed plan of reorganization after the Court issued its Confirmation Report and Recommendation because these efforts purportedly provided no material benefit to the estates. The Court disagrees with Reorganized ASARCO and finds that Baker Botts' efforts in

this regard provided a tangible and material benefit to the estates.

192. This Court entered its report and recommendation in favor of the Parent's plan on August 31, 2009. The Debtors then "weighed their options, but the correct course was not obvious." Sterlite offered to improve its offer under the New Sterlite PSA, thereby improving the Debtors' plan. Because Sterlite's presence in these cases had always incentivized the Parent, Barclays recommended that the Debtors keep Sterlite as an available alternative. Sterlite agreed to waive its right to terminate the New Sterlite PSA (Sterlite had a termination right if this Court did not recommend the Debtors' plan for confirmation), and even to allow the Debtors to prepare for a closing with the Parent, but only if the Debtors objected to the report and recommendation.

193. Baker Botts, at the direction of the Board, worked to keep the Sterlite option on the table to preserve a viable back-up option in case the Parent's plan could not be consummated or if the Parent decided to withdraw its plan. While the plan documents, escrow agreements, financing arrangements, and deposit terms appeared sound, a deal closing is never certain until the deal actually closes, and one never knows what hidden loopholes or clever litigation tactics an opponent might have at the ready. Furthermore, the Parent was financing its plan and a downturn in the price of copper could have imperiled that financing and impaired the Parent's ability to close. Baker Botts prepared a memorandum to the Board summarizing certain legal considerations in connection with keeping the Sterlite option available to ASARCO as either a primary or back-up plan while, at the same time, protecting ASARCO from unintended consequences.

194. The Debtors filed the Sixth Amended Plan of Reorganization on September 10, 2009. The next day, this Court issued an order asking the Debtors to show cause why this Court should consider the newly amended plan. A hearing was held on September 15, 2010. At the hearing, the United States, ASARCO's largest creditor, encouraged this Court to consider the Sixth Amended Plan. This Court recommended that the District Court not consider the Sixth Amended Plan but also recommended confirmation of the Parent's plan as superior to the Sixth Amended Plan.

195. The District Court heard arguments in support of the Debtors' plan and the Parent's plan on October 19, 2009, and entered its confirmation order in favor of the Parent's plan on November 13, 2009. The District Court's confirmation order addressed the objections raised by the Debtors.

196. Mr. Lovett testified that he believes that filing the Sixth Amended Plan provided a benefit to the estates by ensuring the continued presence of an alternative full-payment option and by putting pressure on the Parent to close. The Court agrees. The Court finds that Baker Botts' work in support of the post-recommendation Sterlite plan was reasonable, necessary, and benefitted the estates by providing yet another incentive to close and an option in case the Parent could not or would not close.

C. Expenses

197. Throughout these cases, it was necessary for Baker Botts to incur and pay in advance substantial out-of-pocket expenses in connection with its representation of the Debtors. Baker Botts submitted regular invoices for expenses and provided this Court with an "Expense Summary" as an exhibit to the Fee Application that summarized all expenses Baker Botts charged to the

Debtors during the Application Period. Neither the Parent nor any other creditor constituent objected to expenses in any of Baker Botts' thirteen interim fee applications. In its Fee Application and responses to Reorganized ASARCO's Interrogatories, Baker Botts identified several categories of expenses that the Firm has agreed voluntarily to deduct from the requested expenses.

198. Reorganized ASARCO originally objected to $1,024,724.65 in expenses requested by Baker Botts. Reorganized ASARCO later withdrew its objections to expenses.

199. The expense reimbursements requested by Baker Botts are for actual and necessary expenses. Baker Botts charges all of its clients for the types of expenses charged to the Debtors.

200. Section 330 of the Bankruptcy Code "authorizes compensation for services and reimbursement of expenses of officers of the estate."[91] Section 330 provides for compensation of "actual, necessary expenses."[92]

201. The Court has reviewed Baker Botts' requested reimbursements for expenses and concludes that the requested expenses were actual and necessary.[93]

D. Reorganized ASARCO's Other Objections

202. Reorganized ASARCO makes several other miscellaneous objections. The Court has considered each and finds them to be without merit.

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[91] House Report No. 95-595, 95th Cong., 1st Sess. 329 (1977); *see also In re Kula*, 213 B.R. 729, 736 (B.A.P. 8th Cir. 1997) ("Section 330 applies to all bankruptcy cases, including Chapter 11 cases.").

[92] 11 U.S.C. § 330 (a)(1)(B).

[93] *See supra* Section II(F)(6).

203. Reorganized ASARCO asserts that the Court should apply a percentage reduction because Baker Botts did not create enough matter codes and because Baker Botts timekeepers did not consistently apply their time to matter codes that were created.[94] The Court has considered this objection and finds it without merit. Baker Botts segregation of time spent on various projects was sufficient to allow the Court to assess the reasonableness of the requested fees.

204. Reorganized ASARCO asserts that Baker Botts unnecessarily duplicated work performed by Baker Botts attorneys and co-counsel.[95] Reorganized ASARCO has not directed the Court to any evidence of such duplication and the Court finds that the work performed by Baker Botts was necessary and non-duplicative. Reorganized ASARCO's expert, Mr. Meckler, stated that he did not form an opinion as to whether duplication of work took place.[96] The Court will not reduce Baker Botts' fees pursuant to Reorganized ASARCO's unsubstantiated argument that duplicative work took place.

205. Reorganized ASARCO asserts that Baker Botts overstaffed these cases.[97] Reorganized ASARCO has not presented to the Court any evidence of overstaffing and the Court finds that Baker Botts' staffing of these cases was not unreasonable or unanticipated given the intensity and duration of these cases. Mr. Meckler testified that he did not reach a decision as to whether staffing was reasonable or unreasonable.[98] The Court will not reduce Baker Botts' fees pursuant to Reor-

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[94] *Amended Objection to Final Fee Application*, ¶ 7.
[95] *Amended Objection to Final Fee Application*, ¶ 23.
[96] Hr'g Tr. 64:10–21, 65:7–12, June 2, 2010 (B. Meckler).
[97] *Amended Objection to Final Fee Application*, ¶¶ 25–29.
[98] Hr'g Tr. 59:3–7, June 2, 2010 (B. Meckler).

ganized ASARCO's argument that Baker Botts overstaffed these cases.

206. Reorganized ASARCO further argues that the turnover rate of Baker Botts' attorneys working on these cases was too high.[99] The Court has not been directed to any evidence showing that Baker Botts' turnover rate was inappropriate or somehow harmful to the estates The Court finds that Baker Botts' turnover rate was appropriate. Mr. Meckler testified that he was not critical of attorney turnover.[100] The Court will not reduce Baker Botts' requested fees on these grounds.

207. Finally, Reorganized ASARCO argues that Baker Botts should have staffed the cases with lower-rate attorneys.[101] Reorganized ASARCO has submitted no evidence substantiating this claim and the Court concludes that Baker Botts' staffing of the cases was appropriate in this regard. In fact, Mr. Meckler testified that he did not find the partner-to-associate work ratio to be inappropriate.[102] The Court will not reduce Baker Botts' requested fees on these grounds.

E. Enhancement

208. In the previous Section, the Court concluded that the number of hours for which Baker Botts has sought compensation in the Fee Application are reasonable. The Court also concluded that the rates charged by Baker Botts as interim compensation under section 331 are not unreasonably high and are compensable.

209. Normally, the appropriate fee is calculated by use of the lodestar, multiplying the number of hours by

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[99] *Amended Objection to Final Fee Application*, ¶ 30.
[100] Hr'g Tr. 63:5–17, June 2, 2010 (B. Meckler).
[101] *Amended Objection to Final Fee Application*, ¶ 31.
[102] Hr'g Tr. 63:18–20, June 2, 2010 (B. Meckler).

the hourly rate. Here, however, Baker Botts seeks an enhancement of their fees either by way of an increase in the hourly rate or by award of an additional amount.

210. Reorganized ASARCO counters that the recent Supreme Court case of *Perdue v. Kenny A.*, 130 S.Ct. 1662 (2010) is controlling and bars Baker Botts' ability to receive a fee enhancement.

211. Prior to *Perdue*, the Fifth Circuit ruled that a Bankruptcy judge has discretion to award an enhancement of attorneys fees where counsel succeeded in accomplishing a substantial recovery for their clients—money which might well have been totally lost but for their efforts. *Wolf v. Frank*, 555 F.2d 1213, 1218 (5th Cir. 1977)(allowing enhancement of 33%); *Rose Pass Mines, Inc., v. Howard,* 615 F.2d 1088, 1092 (5th Cir. 1980)(allowing enhancement of 16%).

212. In *CRG Partners v. United States Trustee*, 2011 U.S. Dist. LEXIS 14243 *14 (N.D. Tex. 2011) the District Court expressly rejected the argument made by Reorganized ASARCO and held that "the Supreme Court did not intend for *Perdue* to apply outside the context of federal fee-shifting statutes." The District Court explained that "*Perdue* established a framework different from the standard that has been used in Texas bankruptcy cases in determining whether to award a fee enhancement." *Id.* at *11. The District Court noted that the *Perdue* opinion itself "expressly limits the scope of the issue to 'federal fee-shifting statutes.'" *Id.* at *13. Additionally, the District Court found that the policies underlying the federal fee- shifting statutes and the Bankruptcy Code differ substantially and materially, quoting with approval from a New Mexico bankruptcy court that "[o]ther than the commonality of the lodestar as the subject of *Perdue* and of this case, which commonality arises from the fact

that the lodestar methodology for calculating fees became commonplace after the practice of hourly billing had become widespread, the holding in *Perdue* is irrelevant for [the court's] inquiry." *Id.* at *13 (quoting *In re Heise*, 436 B.R. 143, 149 (Bankr. D.N.M. 2010)).

213. In refusing to ignore decades of established bankruptcy jurisprudence based on a decision in a civil-rights case that does not even contain the word "bankruptcy," the District Court correctly observed that "[i]t is one thing for a court to seek guidance from a case decided in a different context; it is another thing entirely for a court to allow such a case to displace its previously established precedent." *Id.* at *15. "Furthermore, the mere fact that the Fifth Circuit relies on Johnson in evaluating fees in bankruptcy cases does not compel the conclusion that *Perdue* applies as well." *Id.* at *17. Indeed, courts are not rigidly bound to apply Supreme Court fee-shifting precedent in non-fee-shifting contexts. *Klein v. O'Neal, Inc.* 705 F.Supp. 2d 632 (N.D.Tex. 2010)(*Perdue's* application is strictly limited to federal fee-shifting cases and is inapplicable outside that context.); *Sheperd v. Dallas County*, No. 3:05-CV-1442-D, 2010 WL 2573346, at *3 n.2 (N.D. Tex. June 24, 2010); *In re Vioxx Products Liability, Inc.,* No. 1567, 2010 WL 5576193, at *17 n.25(E.D. La. Oct 19, 2010)(*Perdue* has little bearing on the use of the lodestar as a cross-check of a common benefit fee awarded as a percentage of a common fund). This was true before *Perdue* and it continues to be true after *Perdue*. The body of case law has developed organically over the course of more than thirty years, during which time the Bankruptcy Code has been amended and jurisprudence unique to bankruptcy cases has evolved independent of the jurisprudence governing civil rights cases.

214. While *Perdue* is not binding, it does establish principles which must be followed in any request for an enhancement. First, whether it is a request to increase the hourly rate upward or a request for a lump sum bonus, enhancement is only appropriate in the rare and exceptional case. *Perdue, supra.* at 1673. Ordinarily, the amount billed by an attorney is the maximum reasonable fee. Second, the burden of proof for an enhancement is on the requesting attorney. The applicant must prove that the enhancement is warranted. *Perdue, supra.* at 1673. Third, the success in the case must be the result of the applicant's efforts. The outcome cannot be the result of inferior performance by opposing counsel, unanticipated concessions, or luck. *Perdue, supra* at 1674. Finally, the awarding court must be able to make findings which adequately explain all aspects of the award. *Perdue, supra* at 1666.

215. A fee enhancement is appropriate in this case. The overall representation of the Debtor by Baker Botts was outstanding. The bankruptcy case itself was rare and exceptional, beginning with minimal prospect of recover and ending with 100% pay out to creditors. The environmental claims were the largest ever in a bankruptcy case. The SCC litigation resulted in the largest fraudulent conveyance judgment ever in a bankruptcy case. The return to creditors was far more than expected. The rates charged by Baker Botts were below market rate because the Firm customarily collects premium rates or enhancements in non-bankruptcy representations.

216. Baker Botts requested that the Court calculate the enhancement by increasing its hourly rate by 20%. Such an approach has been approved by courts in the past. However, much of the work in this case, although

outstanding, is the type of professional legal work expected of a national law firm such as Baker Botts. Enhancement should reward rare and exceptional work and should be tied to both the effort and the outcome. In addition, much of the success in this case is due to a coalescence of factors beyond the work of Baker Botts.

217. As this Court previously found, the Parent's full-payment plan was attributable to a number of factors, including:

- A well-timed and substantial rise in copper prices in 2009;
- The SCC Judgment;
- The Parent's desire to retain ownership and control of ASARCO LLC and move to a full-payment plan;
- The Parent's strong desire to bring an end to the costly, time-consuming and distracting litigation involving the environmental claims and asbestos claims;
- This Court and how this Court conducted the case; and
- Other participants, constituents, professionals, and attorneys.

218. However, Baker Botts was directly responsible for the successful recovery in the SCC litigation which resulted in recovery of a substantial asset for the estate. The case was tried to conclusion with outstanding representation by both sides. An enhancement based upon a 20% upward adjustment of the hourly rate for the SCC

litigation services is appropriate and results in a fee enhancement of $4,161,708.96.[103]

F. Preparation and Defense of the Final Fee Application

219. Section 330(a)(6) of the Bankruptcy Code states that the Court may award to a professional employed under section 327 compensation for the preparation of a fee application based on the level and skill reasonably required to prepare the application.[104] Though there is no binding Fifth Circuit authority on the issue and there is a split in authority in other jurisdictions, the better-reasoned cases have concluded that section 330(a)(6) authorizes a bankruptcy court to award a professional fees and expenses for defending a fee application if the professional is successful. Reorganized ASARCO's counsel agreed with this proposition at a hearing held on April 23, 2010:

> [W]e clearly acknowledge that the professional firms employed at the expense of the estate are entitled to reasonable compensation to pursue approval of their final fee applications and that the reorganized Debtor has assumed responsibility under the plan and the various implementing orders, your Honor, that you have entered to satisfy the fees that are allowed.[105]

220. The rule that a bankruptcy lawyer may recover costs for successfully litigating a fee application originated in the Ninth Circuit. In *Boldt v. Crake* (*In re Riverside-Linden Investment Co.)*, 945 F.2d 320 (9th Cir. 1991), the Ninth Circuit held that the bankruptcy court

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[103] 58,781.2 (hours expended on the SCC Litigation) x $70.80 (20% hourly fee enhancement) = $4,161,708.96

[104] 11 U.S.C. 330(a)(6).

[105] Hr'g Tr. 31:24–32:5, April 23, 2010 (R. Moore).

did not abuse its discretion in disallowing fees incurred in an unsuccessful defense of a fee application.[106] A decade later, the Ninth Circuit revisited the issue-but this time with a fee applicant that was successful in its defense of its fee application.[107] The Ninth Circuit awarded the fee applicant its fees in connection with the defense of its fee application, reasoning:

> Failure to grant fees for successfully defending challenges to an authorized fee application would dilute fee awards, in violation of section 330(a), and this would reduce the effective compensation of bankruptcy attorneys to levels below the compensation available to attorneys generally.[108]

221. Numerous other courts have followed this rule.[109] The Court has not identified any published cases within

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[106] *Boldt v. Crake (In re Riverside-Linden Inv. Co.)*, 945 F.2d 320, 323 (9th Cir. 1991).

[107] *See Smith v. Edwards & Hale, Ltd. (In re Smith)*, 317 F.3d 918, 928 (9th Cir. 2002), *abrogated on other grounds by Lamie v. United States Tr.*, 540 U.S. 526, 531–39 (2004).

[108] *In re Smith*, 317 F.3d at 928.

[109] *See, e.g.*, *Boyd v. Engman (In re Engman II)*, 404 B.R. 467, 82–83 (W.D. Mich. 2009) (defending attorney fee applications is "part and parcel with the attorney's role in the administration of the bankruptcy process" and compensable under the Bankruptcy Code); *Hennigan Bennett & Dorman LLP v. Goldin Assocs. L.L.C. (In re Worldwide Direct Inc.)*, 334 B.R. 108, 111–12 (D. Del. 2005) (allowing fees incurred in successful defense of fee application); *Big Rivers Elec. Corp. v. Schilling (In re Big Rivers Elec. Corp.)*, 252 B.R. 670, 675 (W.D. Ky. 2000) (same); *In re Buckridge*, 367 B.R. 191, 207 n.26 (Bankr. C.D. Cal. 2007) (same); *In re 14605, Inc.*, No. 05-11910, 2007 WL 2745709, at * 8–9 (Bankr. D. Del. Sept. 19, 2007) (same); *In re Atwell*, 148 B.R. 483, 491–92 (Bankr. W.D. Ky. 1993) (same); *In re Hutter Constr. Co.*, 126 B.R. 1005, 1013 (Bankr. E.D. Wis. 1991) (same); *In re DN Assocs.*, 165 B.R. 344, 355 (Bankr. D. Me. 1994) (denying compensation for unsuccessfully defending against an objection to fees); *In re Courson*, 138 B.R. 928, 936 (Bankr. N.D. Iowa

the Fifth Circuit directly addressing the issue, but bankruptcy courts within the Fifth Circuit—including this Court—have granted applicants' requests for fees and expenses incurred in connection with defending their fee applications.[110]

222. Courts also have awarded compensation of fees and expenses incurred in the successful defense of applications to increase the applicant's base fee request.[111] In the *Big Rivers* case, the district court denied fees incurred in defending a fee enhancement request that was reversed on appeal.[112] However, the district court engaged in a lengthy discussion about when a fee applicant may be awarded its defense costs.[113] Making no distinction between the base application and the fee enhancement request, the district court in *Big Rivers* allowed defense costs for the base application because the base fees were affirmed but denied defense costs for the fee enhancement request because the fee enhancement award was reversed.[114]

223. Compensating bankruptcy lawyers for successfully defending their fee applications is necessary to

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1992) (same); *In re Great Sweats, Inc.*, 113 B.R. 240, 245–46 (Bankr. E.D. Va. 1990) (same); *In re Watervliet Paper Co.*, 109 B.R. 733, 735 (Bankr. W.D. Mich. 1989) (same).

[110] *See, e.g., Scotia Dev., LLC, et al.,* Case No. 07-20027, Dkt. No. 3897 (Nov. 24, 2008) (order granting supplemental fee application for defense costs).

[111] *See In re Vista Foods USA, Inc.*, 234 B.R. 121, 135 (Bankr. W.D. Okla. 1999) (awarding compensation for time and effort in relation to application for upward fee adjustment); *In re Buckridge*, 367 B.R. 191, 207 n.26 (Bankr. C.D. Cal. 2007) (awarding fees incurred defending a final fee application that included a fee enhancement request).

[112] *See In re Big Rivers Elec. Corp.*, 252 B.R. at 675.

[113] *See In re Big Rivers Elec. Corp.*, 252 B.R. at 675.

[114] *See In re Big Rivers Elec. Corp.*, 252 B.R. at 675.

avoid unfair dilution of professionals' fees.[115] Bankruptcy involves a unique process whereby a lawyer who is compensated by the bankruptcy estate must publicly file his fee statements, and multiple parties are given the opportunity to object to those fees. A non-bankruptcy lawyer would not be subject either to the same level of scrutiny or to the same number of potential objectors. Bankruptcy lawyers would be unfairly prejudiced—and the goal of compensating bankruptcy lawyers the same as non-bankruptcy lawyers would be undermined—by a rule that does not allow bankruptcy lawyers to recover costs for defending their fee applications in a process required by statute. One district court provided a succinct justification for allowing bankruptcy lawyers to recover costs for successfully litigating their fee applications:

> [T]he unambiguous policy inspiring Section 330(a) . . . is that professionals and para-professionals in bankruptcy cases should earn the same income as their non-bankruptcy counterparts. That policy cannot be vindicated through the rule expressed by the Bankruptcy Court in this case. If compensation is not permitted for fees incurred in defending a fee application, creditors could negotiate reductions in these fee awards knowing full well that the attorney is in a no-win situation. Even if the attorney prevails, he or she will in effect have financed the litigation without any hope of surviving it whole.[116]

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[115] *See In re Downs & Assocs.*, Ltd, No. 02-32905, 2002 WL 32139302, at *3 (Bankr. W.D.N.C. Dec. 11, 2002); *Sloan v. Hoffman (In re Chavez)*, 157 B.R. 30, 33 (D. Colo. 1993).

[116] *In re Worldwide Direct Inc.*, 334 B.R. 108, 111 (D. Del. 2005) (citations and quotations omitted); *see also In re Computer Learning Ctrs., Inc.*, 285 B.R. 191, 224 (Bankr. E.D. Va. 2002) ("Congressional objective of compensating professionals the same whether they are engaged in a bankruptcy case or in a non-bankruptcy matter [is] fur-

Denying fees incurred in defending fee applications would provide an incentive for parties in interest to mount objections to extract a fee reduction.[117]

224. Some courts have denied recovery of fees incurred in defending a fee application in bankruptcy, reasoning that those fees are not specifically allowed by section 330 of the Bankruptcy Code.[118] These courts have held that in the absence of a statutory or common law exception, the American Rule that parties bear their own litigation costs applies to litigation over a fee application in a bankruptcy case.[119] Two bankruptcy judges in the Northern District of Texas have adopted this rule on the theory that the American Rule prevents recovery of defense costs in bankruptcy.[120]

225. In the *Engman II* case, a district court judge held that these cases are contrary to the "underlying purpose of Section 330(a) and other federal statutes allowing for attorney fees" because those statutes "show

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thered by allowing additional fees to successfully present, prosecute or defend a fee application in appropriate circumstances."); *In re 14605, Inc.*, 2007 WL 2745709 at *9.

[117] *In re Worldwide Direct Inc.*, 334 B.R. at 111; *see also In re Riverside-Linden Inv. Co.*, 945 F.2d at 323 (opining that denying the applicant fees for defending against frivolous objections would only encourage parties to file meritless objections).

[118] *See, e.g.*, *In re St. Rita's Assoc. Private Placement, L.P.*, 260 B.R. 650, 652 (Bankr. W.D.N.Y. 2001).

[119] *See In re St. Rita's Assoc. Private Placement, L.P.*, 260 B.R. at 652; *see also In re Brous*, 310 B.R. 563, 572 (Bankr. S.D.N.Y. 2007) (trustee failed to justify a departure from the American Rule where objections to the fee award were made in good faith and were largely meritorious).

[120] *See Frazin v. Haynes & Boone LLP* (*In re Frazin*), 413 B.R. 378 (Bankr. N.D. Tex. 2009); *In re JNS Aviation LLC*, No. 04-21055, 2009 WL 80202 (Bankr. N.D. Tex. Jan. 9, 2009); *In re Teraforce Tech. Corp.*, 347 B.R. 838 (Bankr. N.D. Tex. 2006).

that [time spent defending a fee application] is necessary and beneficial to the bankruptcy system as a whole, and indirectly, to each estate participating in the system."[121] Preventing recovery of prosecution costs would allow an objecting party-in-interest to extract unwarranted fee reductions from a fee applicant by placing the applicant in a no-win situation: the resources the applicant would expend fighting objections could quickly overtake the value of the reduction the objector sought.[122]

226. Reorganized ASARCO's objections placed Baker Botts in the very "no-win situation" that the *Engman II* court envisioned when it reversed the bankruptcy court. Denying recovery of fees incurred in defending a fee application "would undoubtedly compromise" and "might also deter" competent lawyers and firms like Baker Botts from taking on long-term, complex bankruptcy cases such as this one.[123]

227. This Court is not bound by the Northern District of Texas bankruptcy cases and refuses to apply the holdings in those cases here for the same statutory, policy, and fairness reasons articulated by the district court in *Engman II*. Allowing Baker Botts to recover its fees and costs incurred in this litigation is consistent with the policy driving section 330 of the Bankruptcy Code and provides an actual benefit to the bankruptcy estates and the bankruptcy system as a whole.

228. The Court further concludes that the line of cases holding that a fee applicant is entitled to compensation for the successful defense of a fee application also applies

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[121] *In re Engman II*, 404 B.R. at 483 (reversing a bankruptcy court following the rule denying recovery of fees incurred in prosecuting a fee application).

[122] *In re Engman II*, 404 B.R. at 483.

[123] *See Engman II*, 404 B.R. at 483.

to the prosecution of an enhancement. Moreover, as discussed above, section 330 of the Bankruptcy Code requires the Court to determine Baker Botts' reasonable compensation, and the lodestar analysis, in addition to the factors set forth in section 330, is the vehicle by which the Court must make that determination.

229. No published opinion in the Fifth Circuit has addressed the issue of whether the amount a fee applicant may recover in prosecution costs is capped. Some courts outside the Fifth Circuit have imposed such a cap ranging from 3% to 7.5% for ordinary cases, but no uniform rule has emerged on the amount of the limitation.[124] "Courts either do not provide a rationale for the specific percentage limitation or adopt rationales [based on reasonableness]."[125]

230. Even those bankruptcy courts that impose a cap on the amount of fees that may be recovered for defending a fee application generally do so "in the absence of unusual circumstances."[126] These cases present the "unu-

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[124] *Coulter v. Tennessee*, 805 F.2d 146, 151 (6th Cir. 1986) (holding in a federal-fee shifting case that fees should be limited to "3% of the hours in the main case when the issue is submitted . . . without a trial and should not exceed 5% of the hours . . . when a trial is necessary"); *In re Bass*, 227 B.R. 103, 109 (Bankr. E.D. Mich. 1998) (following the 5% rule in the absence of extraordinary circumstances); *In re Atwell*, 148 B.R. 483, 491–92 (Bankr. W.D. Ky. 1993) (following the 5% rule); *In re Churchfield Mgmt. & Inv. Corp.*, 98 B.R. 838, 866 (Bankr. N.D. Ill. 1989) (holding that "in the absence of unusual circumstances, the hours allowed for preparing and litigating an attorney's fee application should not exceed three percent of the total hours applied for"); *In re Chicago Lutheran Hosp. Ass'n*, 89 B.R. 719, 743 (Bankr. N.D. III. 1988) (awarding an applicant 7.5% of its total fees for pursuing its fee application).

[125] *In re CF & I Fabricators of Utah, Inc.*, 131 B.R. 474, 83 n.8 (Bankr. D. Utah 1991).

[126] *In re Churchfield Mgmt. & Inv. Corp.*, 98 B.R. at 866.

sual circumstances" that cause percentage cap courts to deviate from their self-imposed limits. Baker Botts has been forced to respond to Reorganized ASARCO's challenges to over $20 million of the fees and expenses that Baker Botts charged to the estates during the Application Period.[127]

231. However, the Court concludes that the fees and expenses that Baker Botts has requested for preparing and defending the Fee Application through July 13, 2010, are higher than were reasonable or necessary based on the level and skill reasonably required to prepare and defend the Fee Application. The amounts sought by Baker Botts for preparing and defending the Fee Application through July 13—including the enhancement—reflect the actual billable time expended by Baker Botts and the actual and necessary expenses incurred by Baker Botts in performing that work. However, the Court finds that the reasonable compensation for the actual, necessary services performed by Baker Botts in preparing and defending the Fee Application through July 13, 2010, is $5,000,000 based on the level and skill reasonably required to prepare and defend the Fee Application.

232. The Court finally approves and allows $5,000,000.00 in fees and $457,443.83 in expenses requested by Baker Botts for preparing and defending the Fee Application through July 13, 2010.

233. Few cases have addressed whether a bankruptcy court may award a professional the costs he incurs in defending an appeal of a fee award. Of the handful of cases that have addressed this issue, the majority award defense costs to fee applicants for successfully defending a

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[127] *Amended Objection to Final Fee Application.*

fee award on appeal.[128] Like the cases that allow defense costs through the trial of a fee application, courts allow appellate defense costs to avoid an unfair dilution of the professional's base fee award.[129] The minority of cases deny such costs, reasoning that they benefit the law firm but not the estate.[130]

234. The Court agrees with the majority line of decisions and concludes that it may award appellate defense fees and expenses to Baker Botts if the Firm successfully defends the Court's fee award on appeal.

235. The Court will include in its final order resolving the Fee Application a provision authorizing Baker Botts to submit supplemental applications for additional defense fees and expenses incurred after July 13, 2010, upon resolution of any appeals or in connection with any subsequent proceedings in the event of a remand.

IV. CONCLUSION

236. The Court finds and concludes that:

- $6,046,135.06 in expenses incurred by Baker Botts during the Application Period were actual, necessary expenses;

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[128] *See, e.g.*,*In re Manoa Fin. Co., Inc.*, 853 F.2d 687, 692 (9th Cir. 1988) (appellant entitled to fees incurred in successfully appealing denial of fee award); *Nunley v. Jessee*, 92 B.R. 152, 154 (W.D. Va. 1988) (executrix for chapter 11 estate entitled to fees incurred in defending fee award on appeal); *see also In re Hers Cosmetics Corp.*, 114 B.R. 240, 244 (Bankr. C.D. Cal. 1990) (awarding fees incurred in defending claims on appeal and stating "reimbursement for reasonable attorneys fees incurred in defending a fee award on appeal should be available").

[129] *In re Hers Cosmetics Corp.*, 114 B.R. at 243–44.

[130] *See, e.g.*, *In re DN Assocs.,* 165 B.R. 344, 354–55 (Bankr. D. Me. 1994).

- The services summarized in the Fee Application and performed by Baker Botts during the Application Period were substantial and provided a tangible and material benefit to the estates;
- The fees sought by Baker Botts for the services it performed during the Application Period reflect the actual and reasonable billable time expended by Baker Botts during the Application Period in connection with these cases and do not reflect (1) any unnecessary duplication of services, or (2) services that were not (a) reasonably likely to benefit the estates or (b) necessary to the administration of the cases;
- The reasonable compensation for the actual, necessary services performed by Baker Botts during the Application Period is $117,613,158.44;
- $457,443.83 in expenses incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010, were actual, necessary expenses;
- The fees sought by Baker Botts for preparing and defending the Fee Application through July 13, 2010, reflect the actual time expended by Baker Botts for preparing and defending the Fee Application. However, the Court finds that the reasonable compensation for the actual, necessary services performed by Baker Botts in preparing and defending the Fee Application through July 13, 2010, is $5,000,000 based on the level and skill reasonably required to prepare and defend the Fee Application.

237. The Court finally approves and allows $117,613,158.44 in fees and $6,046,135.06 in expenses for

services performed and expenses incurred by Baker Botts during the Application Period. The $117,131,158.44 fee award is comprised of (1) $113,074,527.74 in fees approved by this Court on an interim basis under section 331 of the Bankruptcy Code and paid to Baker Botts; (2) *plus* $263,994.74 in additional, unpaid fees incurred by Baker Botts for the period of November 1, 2009, through December 8, 2009; (3) *plus* $4,161,708.96 as an enhancement because there are rare and extraordinary circumstances in these cases and Baker Botts' services in the SCC litigation were instrumental in producing the exceptional results that were unanticipated at case commencement.; (4) *minus* $112,927.00 in fees charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates The $6,046,135.06 expense award is comprised of (1) $6,065,598.58 in expenses approved by this Court on an interim basis under section 331 of the Bankruptcy Code and paid to Baker Botts; (2) *minus* $19,463.52 in expenses charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates.

238. The Court finally approves and allows $5,000,000.00 in fees and $457,443.83 in expenses incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010.

239. In the event of an appeal, Baker Botts may file a supplemental fee application.

240. The Court orders Baker Botts to prepare and submit an order consistent with these findings within ten (10) days from the date of entry of this Memorandum Opinion.

DATED: JUL 20 2011

[Signature]

RICHARD S. SCHMIDT
United States Bankruptcy Judge

APPENDIX D

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

Case No. 05-21207
Chapter 11
Jointly Administered

IN RE:

ASARCO, LLC, ET AL.
Debtors.

(September 27, 2012)

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING BAKER BOTTS L.L.P.'S FINAL FEE APPLICATION

On August 8, 2012, the United States District Court for the Southern District of Texas affirmed in part and reversed in part this Court's *Order Granting Final Fee Application and Request for Fee Enhancement of Baker Botts L.L.P, Counsel to the Debtors*, entered on August 18, 2011 (Dkt. 16334) ("Original Judgment"). *See Memorandum Opinion and Order on the Final Fee Application of Baker Botts, L.L.P.*, Case No. 2:11-CV-290 (S.D. Tex. Aug. 8, 2012) (Dkt. 32) ("District Court Order").

The District Court remanded the case to allow this Court to make further findings regarding three discrete issues:

> (1) What portion, "if any," of this Court's award of "$5,000,000 in fees . . . incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010," *see* Original Judgment at 3, constitutes an "award of fees . . . for the pursuit of a fee enhancement." District Court Order at 24, 27.
>
> (2) What portion, "if any," of this Court's award of "$457,443.83 in expenses incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010," *see* Original Judgment at 3, constitutes an "award of . . . expenses for the pursuit of a fee enhancement." District Court Order at 24, 27.
>
> (3) What portion, "if any," of this Court's award of "$5,000,000 in fees . . . incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010," *see* Original Judgment at 3, constitutes an award "for the recreation of initially inaccurate or insufficient time records." District Court Order at 24, 27.

Originally, this Court found that Baker Botts requested and proved a total of $8,004,920.50 in fees related to defense of both its fee application and its request for a fee enhancement ($5,159,916.50 in defense of its fee application and $2,802,158.50 in defense of its enhancement request). Uncharacteristically, this Court did not engage in a mathematical exercise to determine the appropriate amount of those fees to award. Instead, the Court, using its discretion, found that it could not award an amount in excess of $5,000,000 for the defense of fees because it felt that the amount requested was too high in light of other decisions and the total amount of fees approved in the case. In doing so the Court did not make a percentage

reduction of any particular fee. In light of the District Court Order, the Court must now decide what reduction, if any, should be made to the fee defense request of $5,159,916.50. The Court still believes that, based upon the total fees approved in this case, an award of $5,000,000 is appropriate. Based on the record before the Court and the foregoing explanation, the Court finds, concludes, and clarifies that:

(1) None of the Court's award of $5,000,000 in fees incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010, is an award of fees for the pursuit of a fee enhancement. That entire award is for "defending the fees that had been approved [by the Court] on an interim basis and those sought through December 8, 2009." District Court Order at 5. The reasonable compensation for the actual, necessary services performed by Baker Botts in defending the fees that had been approved by the Court on an interim basis and those sought through December 8, 2009, is $5,000,000 based on the level and skill reasonably required to defend those fees.

(2) $255,213.23 of the Court's initial award of $457,443.83 in expenses incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010, was an award of expenses for the pursuit of a fee enhancement and should be eliminated from the amount of expenses awarded as instructed in the District Court Order. The remaining $202,230.60 was and continues to be an award of actual, necessary expenses incurred by Baker Botts for defending the fees that had been approved by the Court on an interim basis and those sought through December 8, 2009.

(3) None of the Court's award of $5,000,000 in fees incurred by Baker Botts in preparing and defending

the Fee Application through July 13, 2010, is an award of fees "for the recreation of initially inaccurate or insufficient time records." *Id.* at 24. Baker Botts' time records were not initially "inaccurate," "incorrect[]," "insufficient," "vague," "clumped," "non-compliant," or "otherwise deficient." *Id.* at 22-24. As the Court explained in its *Memorandum Opinion on Final Fee Application of Baker Botts L.L.P.*, entered on July 20, 2011 (Dkt. 16249), Reorganized ASARCO's objections regarding the specificity of Baker Botts' billing entries were "without merit." Memorandum Opinion at 43. "[T]he level of detail submitted by Baker Botts [was] sufficient," even without considering Baker Botts' supplemental time entries. *Id.* at 44. Reorganized ASARCO's objections regarding block-billing were also "without merit." *Id.* at 45. "The evidence submitted by Baker Botts and the record as a whole contain[ed] ample information allowing the Court to assess the reasonableness of requested fees," even without considering Baker Botts' supplemental time entries. *Id.* at 46. "Billing entries identified by [Reorganized ASARCO's expert] Mr. Meckler as vague were identified as not vague by [Reorganized ASARCO's other expert] Judge Monroe, who has considerably more experience in evaluating fee requests in bankruptcy." *Id.* at 43. "When presented with billing entries identified as impermissibly clumped by Mr. Meckler, Judge Monroe did not believe that such entries were inappropriate." *Id.* at 45. While Baker Botts' supplemental billing descriptions "support[ed] the conclusion that the requested fees [were] reasonable," the Fee Application "contained sufficient information without [those] descriptions." *Id.* Baker Botts clarified its time records to refute Reorganized ASARCO's meritless objection.

The Court will reform its final order consistent with this opinion and the District Court's Order.

DATED: SEP 27 2012

[Signature]
RICHARD S. SCHMIDT
United States Bankruptcy Judge

APPENDIX E

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

Case No. 05-21207
Chapter 11
Jointly Administered

IN RE:

ASARCO, LLC, ET AL.
Debtors.

(September 27, 2012)

ORDER ON REMAND GRANTING FINAL FEE APPLICATION AND REQUEST FOR FEE ENHANCEMENT OF BAKER BOTTS L.L.P., COUNSEL TO THE DEBTORS

Upon consideration of the *Final Fee Application of Baker Botts, L.L.P., Counsel for the Debtors, for Allowance and Payment of Compensation for Services Rendered and Reimbursement of Expenses Incurred for the Period August 9, 2005 Through December 8, 2009*, filed on February 8, 2010, as amended or supplemented (the "Fee Application"), the Court **FINDS** that:

A. The Court has jurisdiction over this Fee Application under 28 U.S.C. §§ 157 and 1334.

B. This is a core proceeding pursuant to 28 U.S.C. §157(b).

C. Venue is proper in this district under 28 U.S.C. §§ 1408 and 1409.

D. Baker Botts was properly retained as counsel to the Debtors for the pendency of the above-captioned case under 11 U.S.C. § 327(a).

E. Due notice and opportunity to be heard were given respecting the Fee Application.

F. Entry of this Order is based upon, without limitation, the following: (a) the Court's review of, familiarity with, and judicial notice of the entire record in the above-captioned bankruptcy case and all related cases, contested matters, and adversary proceedings; (b) the Fee Application (including exhibits), responses, briefs, and other written arguments and evidence submitted to the Court relating to the Fee Application; (c) arguments and evidence presented at the hearings on the Fee Application; and (d) the Court's considered judgment and experience gained in presiding over the case from its inception to present and presiding over numerous other complex chapter 11 reorganization cases and proceedings.

G. The findings and conclusions contained in the Court's *Memorandum Opinion on Final Fee Application of Baker Botts L.L.P.* entered on July 20, 2011 (Dkt. 16249) (the "Fee Opinion") are incorporated herein by reference.

H. The findings and conclusions contained in the Court's *Supplemental Findings of Fact and Conclusions of Law Regarding Baker Botts L.L.P.'s Final Fee Application* entered contemporaneously herewith (the "Sup-

plemental Findings") are incorporated herein by reference.

I. The findings and conclusions set forth herein and in the Fee Opinion as modified by the Supplemental Findings constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding by Bankruptcy Rule 9014.

J. Any finding of fact set forth herein or in the Fee Opinion or Supplemental findings shall constitute a finding of fact even if it is stated as a conclusion of law; any conclusion of law set forth herein or in the Fee Opinion or Supplemental Findings shall constitute a conclusion of law even if it is stated as a finding of fact.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Court finally approves and allows as administrative expenses entitled to priority under the applicable provisions of the United States Bankruptcy Code $117,387,304.44 in fees[1] and $6,046,135.06 in expenses for services performed and expenses incurred by Baker Botts during the Application Period (as defined in the Fee Application). The $117,387,304.44 fee award is comprised of (1) $113,074,527.74 in fees approved by this Court on an interim basis under section 331 of the Bankruptcy Code and paid to Baker Botts; (2) *plus* $263,994.74

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[1] The Fee Opinion contains typographical errors indicating a total fee amount (not including fees for defense of the Fee Application) of $117,613,158.44 in one place and $117,131,158.44 in another. *See* Fee Opinion at 74, ¶ 237. Neither of these is correct. The correct number is $117,387,304.44. In its *Order Granting Final Fee Application and Request for Fee Enhancement of Baker Botts L.L.P, Counsel to the Debtors*, entered on August 18, 2011 (Dkt. 16334), the Court amended the Fee Opinion to substitute the correct number of $117,387,304.44 where incorrectly stated previously.

in additional unpaid fees incurred by Baker Botts for the period of November 1, 2009 through December 8, 2009; (3) *plus* $4,161,708.96 as an enhancement because there are rare and extraordinary circumstances in these cases and Baker Botts' services in the SCC Litigation were instrumental in producing the exceptional results that were unanticipated at case commencement; (4) *minus* $112,927.00 in fees charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates. The $6,046,135.06 expense award is comprised of (1) $6,065,598.58 in expenses approved by this Court on an interim basis under section 331 of the Bankruptcy Code and paid to Baker Botts; (2) *minus* $19,463.52 in expenses charged by Baker Botts to the estates, for which Baker Botts has agreed voluntarily to credit the estates.

2. In addition, the Court finally approves and allows as administrative expenses entitled to priority under the applicable provisions of the United States Bankruptcy Code $5,000,000 in fees and $202,230.60 in expenses incurred by Baker Botts in defending the fees that had been approved on an interim basis and those sought through December 8, 2009.

3. The Court authorizes Baker Botts to file supplemental fee applications for additional fees and expenses incurred after July 13, 2010 in connection with any appeals or any subsequent proceedings in the event of a remand which relate to defense of its fee application but not to its request for enhancement.

4. Subject to the *Amended Order Approving Plan Administrator's Amended Funds Flow Memorandum Pursuant to Section 10.4 of the Parent's Plan and Paragraph 105 of Confirmation Order* (Dkt 13441) (the "Amended Funds Flow Order"), the Plan Administrator

is authorized and directed to pay Baker Botts $9,495,543.78, representing the amount of fees and expenses (including fee enhancement) approved in this Order but which remains unpaid. This Order constitutes an Allowance Order as defined in the Amended Funds Flow Order.

5. For the reasons set forth in the Fee Opinion as modified by the Supplemental Findings, and except as otherwise provided in this Order, all objections to the Fee Application are overruled.

6. This Order is a final order subject to appeal under 28 U.S.C. § 158.

7. To the fullest extent permitted by law, the Court retains jurisdiction with respect to all matters arising from or related to the implementation and enforcement of this Order, including jurisdiction to award Baker Botts additional fees and expenses incurred in defense of any appeal of this Order or in connection with any appeals or any subsequent proceedings in the event of a remand.

Dated: SEP 27 2012

[Signature]
RICHARD S. SCHMIDT
United States Bankruptcy Judge

APPENDIX F

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

Case No. 2:11-CV-318
(previously docketed as 2:11-cv-290)
Bankruptcy Case No. 05-21207

IN RE:
ASARCO LLC,
Debtor.

ASARCO LLC,
Appellant.
v.
BAKER BOTTS, L.L.P.
Appellee.

(March 26, 2013)

MEMORANDUM OPINION AND JUDGMENT

The Court now reconsiders this appeal by ASARCO, L.L.C. (hereinafter "ASARCO") after an initial remand by this Court of certain issues regarding the award to Baker Botts, L.L.P. (hereinafter "Baker Botts" or "the law firm") of certain attorneys' fees and expenses. The Court considers the relatively narrow question of whether the Bankruptcy Court adequately complied with this Court's direction on remand that it clarify and delete all

amounts, if any, of its original award of fees and expenses that were to compensate Baker Botts for the pursuit of a fee enhancement or the correction of allegedly deficient time records, work to which this Court ruled the law firm would not be entitled to fees. On remand, the Bankruptcy Court reduced its original award of $5,457,443.83 to $5,202,230.60, finding that $255,213.23 of the original amount had been awarded for the pursuit of a fee enhancement. The new amount of $5,202,230.60 was awarded only for compensable sources of work identified by this Court, and therefore this Court finds the new judgment of the Bankruptcy Court should be **AFFIRMED**.

I. Introduction and Case Background

Previously, this Court affirmed the Bankruptcy Court's decision to award Baker Botts additional compensation in addition to its agreed upon professional rates for its representation of ASARCO in *Southern Peru Holdings, LLC v. Americas Mining Corporation*, civil case of this Court B-07-18 (hereinafter "the SCC case"). That decision rested on Baker Botts's superlative performance in the case and the benefit conferred on the bankruptcy estate, circumstances this Court also found were rare and extraordinary. As earlier expressed by this Court, if ever there were a case which called for an enhancement, surely this was it. In its earlier decision this Court further held that one could receive attorneys' fees for the preparation and defense of its fee application, but not for the fees and expenses expended in seeking a fee enhancement, the latter being of no benefit to the bankruptcy estate. Rather than repeat its findings, that Opinion is incorporated herein. (Memorandum Opinion and Order, civil case 2:11-cv-290, Doc. 32). The matter was remanded to the Bankruptcy Court because it did

not delineate what part of the $5,000,000 in fees and $457,443.83 in expenses it had awarded were attributable to the preparation and defense of its fee application, and which, if any, were attributable to the pursuit of a fee enhancement or the correction of allegedly deficient time records.[1]

In its Supplemental Findings of Fact and Conclusions of Law Regarding Baker Botts's Final Fee Application, the Bankruptcy Court held that none of the award of $5,000,000 in fees incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010, was an award for the pursuit of a fee enhancement or for the correction of deficient time records. The Bankruptcy Court did find, however, that $255,213.23 of its initial award of $457,443.83 in expenses was an award for the pursuit of a fee enhancement, and should therefore be eliminated as per the prior Opinion of this Court. The Bankruptcy Court's revised judgment makes that correction.

II. Discussion of Issues on Appeal

The question presented in this subsequent appeal is, did the Bankruptcy Court err in awarding Baker Botts $5,000,000 in fees and $202,230.60 in expenses for defending its fee application for fees earned and expenses expended in the representation of ASARCO in the bankruptcy case? Appellant makes essentially three arguments in its Brief to support that proposition.

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[1] This Court found that keeping appropriate time records was an integral part of a lawyer's duty in these circumstances. As such, no debtor should have to pay a law firm additional legal fees and/or expenses to correct its own shoddy record keeping. Such fees would not benefit the estate and additionally would constitute an unnecessary duplication of services.

1. The Bankruptcy Court Attributed its Current Award Amount in Part to Improper Sources.

First, ASARCO argues that "[d]espite clear statements in the bankruptcy court's prior ruling that its award of $5,000,000 in fees to Baker Botts included fees for pursuing a fee enhancement, the bankruptcy court did not reduce its award of fees to Baker Botts on remand" (Brief of Appellant, 4). On remand, the Bankruptcy Court clearly explained in its Supplemental Findings how it had initially arrived at the fees and expenses awarded to Baker Botts:

> Uncharacteristically, this Court did not engage in a mathematical exercise to determine the appropriate amount of those fees to award. Instead, the Court, using its discretion, found that it could not award an amount in excess of $5,000,000 for the defense of fees because it felt that the amount requested was too high in light of other decisions and the total amount of fees approved in the case.

Doc. 16711, p. 2. The Bankruptcy Court went on to expressly state, "[n]one of the Court's award of $5,000,000 in fees incurred by Baker Botts in preparing and defending the Fee Application through July 13, 2010, is an award of fees for the pursuit of a fee enhancement." *Id.* The Bankruptcy Court found that the evidence presented supported a fee in excess of the $5,000,000 it awarded, but it capped the award at $5,000,000 as an exercise of its own discretion. The Bankruptcy Court thus answers this Court's request to delineate what portion of the $5,000,000 award of fees, if any, was attributable to work other than the preparation and defense of its fee application. Appellant's argument that the Bankruptcy Court attributed its current award amount in part to improper sources is unsubstantiated, and contrary to the direct

findings of the Bankruptcy Court. This Court also notes that such findings were supported by the evidence presented.

2. Fees for Litigating a Fee Application Should Be Overturned as a Matter of Law.

Second, Appellant argues that Baker Botts should not be entitled to fees incurred in preparing and defending a fee application, something ASARCO admits this Court has already decided to the contrary. Appellant raises this objection again simply to preserve the issue for appeal. This Court has discussed this issue at length in its previous Memorandum Opinion and Order, and sees no reason to depart from that earlier ruling.

3: Fees Spent Litigating a Fee Award on Remand or Appeal Should Not Be Included in an Award.

Third, Appellant argues that fees incurred litigating a fee application on appeal or on remand should not be allowed, characterizing them as "fees on fees on fees" and "a third tier of fees" (Brief of Appellant, 9). This is a new argument. In its August 18, 2011, Order, the Bankruptcy Court "authorize[d] Baker Botts to file supplemental fee applications for additional defense fees and expenses incurred after July 13, 2010 in connection with any appeals or any subsequent proceedings in the event of a remand" (Doc. No. 16334, p. 3). Appellant argues this would lead to further iterations of fees, which would "encourage an endless cycle of fee litigation." (Brief of Appellant, 9).

First, this Court finds this "ruling" by the Bankruptcy Court to be at most its permission to file an application for fees. It is not the award of any fees or expenses nor is it an indication that the Court would grant such an award if requested. As a rule, the basic policy of federal courts is that an appeal will only lie from a "final decision."

Cobbledick v. United States, 309 U.S. 323, 324 (1940). "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). In *City of Detroit v. Grinnell Corp.*, the Second Circuit considered an issue similar to that presented by Appellant and found that "a final judgment will arise only when the District Court makes a final apportionment of the fee." 495 F. 2d 448, 475 (2d Cir. 1974) (abrogated on other grounds). As such, there is no appealable issue to be considered. The entire matter is not ripe for consideration.

Second, and assuming hypothetically that this ruling were appealable, whether work spent on appeal defending the fees awarded for successfully defending a fee application is entitled to attorney fees is, unsurprisingly, not explicitly addressed by § 330. Courts essentially fall into two camps when deciding whether to award fees spent successfully defending a fee application, whether at the first stage, or any number of successive appellate stages. The majority position, adopted by this Court in its previous Opinion, reasons that fee applicants must be entitled to recover fees spent defending those fees, as long as their application is successful. To withhold fees at any stage or appeal or proceeding from an applicant with a successful fee application would unfairly dilute the original fee award. In turn, competent counsel would be dissuaded from choosing bankruptcy cases, a result opposite the intent of Congress when it drafted § 330. This is true whether the application is defended at the trial court level or on appeal. *See, e.g.*, *Nunley v. Jessee*, 92 B.R. 152 (W.D. Va. 1988) (reversing bankruptcy court's refusal to consider award of fees for successful defense of fee award on appeal), *In re U.S. Golf Corp.*, 639 F.2d

1197, 1208 (5th Cir. 1981) (awarding fees on appeal to successful trustee's counsel without discussion), *In re Manoa Finance Co., Inc.*, 853 F. 2d 687 (9th Cir. 1988) (ruling attorney fees should be granted for an appeal if the fee applicant prevails).

The minority position, advocated by the Appellant, argues that the American Rule should control in the absence of clear and explicit statutory authorization. A representative case cited by Appellant, *In re DN Associates*, 165 B.R. 344, 349 (Bankr. D. Me. 1994), is an example of a court which considered the argument above, but ultimately found it unpersuasive and chose not to award fees. "Bankruptcy professionals," it reasoned, "regularly face the risk of nonpayment or reduced payment for a variety of reasons." *Id.* at 354. Appellant asks this Court to adopt the minority position in this circumstance.

As Appellee points out, however, this Court has already held that this latter approach is the less well reasoned interpretation of the statute, especially considering the legislative intent that bankruptcy attorneys be compensated commensurate with attorneys in other fields. Appellant's argument that attorney fees should not be awarded for fee appeals, even if successful, lacks persuasive authority. This Court follows the majority of courts in holding that fees for the successful defense of a § 330 fee appeal are recoverable, at any stage of the case. To give anything less would fall short of making a law firm whole for its original fee award.

The additional infirmity in Appellant's argument that Baker Botts should not be entitled to fees on appeal or remand is that such awards would apply only insofar as ASARCO chooses to continue litigating and continues to lose. Further tiers of fees, as ASARCO terms them, could only be awarded when, and if, ASARCO continues

to object, and appeal (and lose). The existence of a new "tier" is solely up to the discretion of ASARCO and whether it takes a legal position forcing the Appellee to respond. To deny the law firm fees each time it is forced to respond to some issue in a different court would dilute Baker Botts's core fees, an outcome this Court has already held Appellee should not be forced to bear. This Court affirms its previous ruling that "the time spent defending a fee application 'is necessary and beneficial to the bankruptcy system as a whole, and indirectly, to each estate participating in the system'" (Memorandum Opinion and Order, p. 20) (citing *In re Engman II*, 404 B.R. 467, 483 (W.D. Mich. 2009)). Therefore, assuming that there actually is an appealable issue, which this Court does not find, this Court holds that a court may award attorney fees for the successful trial and/or appellate defense of fees awarded as part of a fee application.

III. Conclusion

The Bankruptcy Court originally awarded Baker Botts an enhancement for its representation of ASARCO in the SCC case, in which it reached a result that all parties have agreed were both rare and extraordinary. The debtor emerged from bankruptcy as a financially sound, functioning entity. All of the creditors were completely paid (including interest and attorneys' fees). Overall, the result was positive and unexpected, and perhaps the single most successful in American bankruptcy history. Even so, the Bankruptcy Court did not award an enhancement based upon the overall body of work performed in the bankruptcy case; instead, the Bankruptcy Court limited the enhancement to the work performed in the SCC fraudulent transfer litigation. According to the Bankruptcy Court, this superlative result was attributable in no small part to the performance of the attorneys

of Baker Botts and the result obtained in the SCC case, and not to any factors that might otherwise make a substantial victory easier (as was the case in *Perdue v. Kenny*, __ U.S. __, 130 S.Ct. 1662 (2010)). This Court reiterates its previous ruling that there is an abundance of evidence which supports the Bankruptcy Court's decision to award Baker Botts an enhancement for its representation in the SCC case. This Court also earlier denied the recovery of post judgment interest by the law firm, a holding this Court now reaffirms.[2]

Subsequently, the Bankruptcy Court has clarified that none of its initial $5,000,000 fee award for the preparation and defense of the fee application was expended for the pursuit of a fee enhancement, but rather was entirely for the preparation and defense of Baker Botts's fee application. The Bankruptcy Court did find, however, that $255,213.23 of its initial award of $457,443.83 in expenses was an award for the pursuit of a fee enhancement, and accordingly reduced that award as instructed by this Court. While the Bankruptcy Court used its discretion in capping the fee request, instead of a precise mathematical calculation to arrive at its award of fees, the evidence does support that Baker Botts's expenditures were at least in excess of that amount. See Declaration of James R. Prince, Doc. No. 15188-11, p. 5-9. While this might be a somewhat unusual approach, Baker Botts would be the

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[2] These rulings, including the ruling reargued here regarding fees for defending a fee application, have actually already been appealed. See Case No. 12-40997, *ASARCO, LLC v. Jordan, Hyden et. al.*, and Case No. 12-40998, *ASARCO, LLC v. Baker Botts, LLP*, pending in the Fifth Circuit Court of Appeals. This Court reiterates here that this Judgment makes both orders final, in case the Fifth Circuit finds these first two appeals to be premature.

only entity harmed by such a technique and it has not objected as to that methodology.

The total amount awarded by the Bankruptcy Court, $9,495,543.78, equals the original amount awarded by that Court's Order dated August 18, 2011 (Doc. No. 16334), $9,750,757.01, minus the $255,213.23 the Bankruptcy Court found should be eliminated. No party has questioned or objected to the actual calculations performed by the Bankruptcy Court, so this Court will assume they are accurate and hereby affirms the award of $9,495,543.78. This figure represents the unpaid amount of fees and expenses expended in the preparation and defense of its fee application and the fee enhancement approved by the Bankruptcy Court and upheld by this Court.

Finally, this Court finds ASARCO's complaint regarding any future fee application is not ripe. No application has been made, and no fees have been awarded. It is therefore the judgment of this Court that the Bankruptcy Court's Order on Remand (Doc. No. 16712) should be **AFFIRMED**. Given that this Order incorporates the Memorandum Opinion and Order of this Court dated August 8, 2012, these two Orders together form a final and appealable judgment on all issues in the controversy.

Signed and ordered this the 26th day of March, 2013.

[Signature]
Andrew S. Hanen
United States District Judge

APPENDIX G

A. Cases authorizing compensation for defending fee applications

1. *In re Bible Deliverance Evangelistic Church*, 39 B.R. 768 (Bankr. E.D. Pa. 1984)
2. *In re S.T.N. Enters. Inc.*, 70 B.R. 823 (Bankr. D. Vt. 1987)[1]
3. *Nunley* v. *Jessee*, 92 B.R. 152 (W.D. Va. 1988)
4. *In re Chicago Lutheran Hosp. Ass'n*, 89 B.R. 719 (Bankr. N.D. Ill. 1988)
5. *In re Churchfield Mgmt. & Inv. Corp.*, 98 B.R. 838 (Bankr. N.D. Ill. 1989)
6. *In re CF & I Fabricators of Utah, Inc.*, 131 B.R. 474 (Bankr. D. Utah 1991)
7. *In re Hutter Constr. Co.*, 126 B.R. 1005 (Bankr. E.D. Wis. 1991)
8. *In re Atwell*, 148 B.R. 483 (Bankr. W.D. Ky. 1993)
9. *In re Concrete Prods., Inc.*, No. 88-20540, 1993 WL 13726054 (Bankr. S.D. Ga. July 27, 1993)
10. *In re Ricci Inv. Co., Inc.*, 217 B.R. 901 (D. Utah 1998)
11. *Big Rivers Elec. Corp.* v. *Schilling (In re Big Rivers Elec. Corp.)*, 252 B.R. 670 (W.D. Ky. 2000)

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[1] The court deferred any award of fees pending supplementation of the final fee application. *In re S.T.N. Enters. Inc.*, 70 B.R. at 845.

12. *In re Geneva Steel Co.*, 258 B.R. 799 (Bankr. D. Utah 2001)

13. *In re Downs & Assocs., Ltd.*, No. 02–32905, 2002 WL 32139302 (Bankr. W.D.N.C. Dec. 11, 2002)

14. *In re Moss*, 320 B.R. 143 (Bankr. E.D. Mich. 2005)

15. *Hennigan Bennett & Dorman LLP* v. *Goldin Assocs. L.L.C. (In re Worldwide Direct Inc.)*, 334 B.R. 108 (D. Del. 2005)

16. *In re DIMAS, LLC*, 357 B.R. 563 (Bankr. N.D. Cal. 2006), aff'd in part, rev'd in part, *In re DIMAS, LLC*, Nos. NC-08-1073-DJUMK, 02-51420, 2009 WL 7809032 (B.A.P. 9th Cir. Feb. 25, 2009)

17. *In re Walters*, No. BKR. 04-06902-JM7, 2006 WL 6589027 (Bankr. S.D. Cal. May 30, 2006)

18. *In re Ahead Commc'ns Sys., Inc.*, No. 02-30574, 2006 WL 2711752 (Bankr. D. Conn. Sept. 21, 2006)

19. *In re Buckridge*, 367 B.R. 191 (Bankr. C.D. Cal. 2007)

20. *In re 14605, Inc.*, No. 05–11910, 2007 WL 2745709 (Bankr. D. Del. Sept. 19, 2007)

21. *In re Smith*, No. 97-62183-AER7, 2008 WL 2852263 (Bankr. D. Or. July 23, 2008)

22. *In re Schneider*, No. 06-50441-MM, 2008 WL 4447092 (Bankr. N.D. Cal. Sept. 26, 2008)

23. *Boyd* v. *Engman (In re Engman II)*, 404 B.R. 467 (W.D. Mich. 2009)

24. *In re CCT Comc'ns, Inc.*, No. 07-10210 SMB, 2010 WL 3386947 (Bankr. S.D.N.Y. Aug. 24, 2010)

25. *In re Kahuku Hosp.*, No. 07-00176, 2011 WL 5884144 (Bankr. D. Haw. Nov. 23, 2011)

26. *In re Millennium Multiple Emp'r Welfare Benefit Plan*, 470 B.R. 203 (Bankr. W.D. Okla. 2012)

27. *In re Shalan Enters., LLC*, No. 2:09-BK-43263-PC, 2012 WL 1345328 (Bankr. C.D. Cal. Apr. 17, 2012)

28. *In re Lupo*, No. 09-21945-JNF, 2012 WL 1682571 (Bankr. D. Mass. May 14, 2012)

29. *In re Quigley Co., Inc.*, 500 B.R. 347 (Bankr. S.D.N.Y. 2013)

30. *In re Wiczorek*, No. 12-13503, 2013 WL 1120019 (E.D. Mich. Mar. 17, 2013)

31. *Goodbar* v. *Beskin*, No. 5:12CV063, 2013 WL 1249124 (W.D. Va. Mar. 26, 2013)

32. *In re Merced Falls Ranch, LLC*, No. 11-19212-13-11, 2013 WL 3155448 (Bankr. E.D. Cal. June 20, 2013)

33. *In re GFI Commercial Mortg. LLP*, No. C 12-03956 SI, 2013 WL 4647300 (N.D. Cal. Aug. 29, 2013)

34. *In re Schupbach Invs.*, No. 11-11425, 2013 WL 5495577 (Bankr. D. Kan. Oct. 3, 2013)

35. *In re S. Lakes Dairy Farm*, No. 12-17458-B-11, 2014 WL 271635 (Bankr. E.D. Cal. Jan. 22, 2014)

36. *In re First State Bancorporation*, No. 7-11-11916 JA, 2014 WL 1203141 (Bankr. D.N.M. Mar. 24, 2014)

B. Cases denying fee-defense compensation for reasons other than lack of discretion

1. *In re Erewhon, Inc.*, 21 B.R. 79 (Bankr. D. Mass. 1982)
2. *In re Four Star Terminals, Inc.*, 42 B.R. 419 (Bankr. D. Alaska 1984)
3. *In re Shaffer-Gordon Assocs., Inc.*, 68 B.R. 344 (Bankr. E.D. Pa. 1986)
4. *In re Great Sweats, Inc.*, 113 B.R. 240 (Bankr. E.D. Va. 1990)
5. *In re Courson*, 138 B.R. 928 (Bankr. N.D. Iowa 1992)
6. *In re DN Assocs.*, 165 B.R. 344 (Bankr. D. Me. 1994)
7. *In re Computer Learning Ctrs., Inc.*, 285 B.R. 191 (Bankr. E.D. Va. 2002)
8. *In re Wireless Telecomms. Inc.*, 449 B.R. 228 (Bankr. M.D. Pa. 2011)

C. Cases denying fee-defense compensation because court believed it lacked discretion

1. *In re Wilson Foods Corp.*, 36 B.R. 317 (Bankr. W.D. Okla. 1984)*
2. *In re The Vogue*, 92 B.R. 717 (Bankr. E.D. Mich. 1988)*
3. *In re McClanahan*, 137 B.R. 73 (Bankr. M.D. Fla. 1992)
4. *In re St. Rita's Assoc. Private Placement, L.P.*, 260 B.R. 650 (Bankr. W.D.N.Y. 2001)

5. *In re New Boston Coke Corp.*, 299 B.R. 432 (Bankr. E.D. Mich. 2003)*
6. *In re Teraforce Tech. Corp.*, 347 B.R. 838 (Bankr. N.D. Tex. 2006)
7. *In re Brous*, 370 B.R. 563 (Bankr. S.D.N.Y. 2007)*
8. *Frazin* v. *Haynes & Boone LLP (In re Frazin)*, 413 B.R. 378 (Bankr. N.D. Tex. 2009)
9. *In re JNS Aviation LLC*, No. 04–21055, 2009 WL 80202 (Bankr. N.D. Tex. Jan. 9, 2009)

D. Cases denying compensation both for preparing and defending fee applications

1. *In re Gibbons-Grable Co.*, 151 B.R. 814 (Bankr. N.D. Ohio 1992)
2. *In re Jefsaba, Inc.*, 172 B.R. 786 (Bankr. E.D. Pa. 1994)
3. *In re Rothman*, 206 B.R. 99 (Bankr. E.D. Pa. 1997)
4. *In re Euromotorsport Racing, Inc.*, 94-04503-RLB-11, 2000 WL 33963797 (Bankr. S.D. Ind. June 13, 2000)

* Cases where the same court allowed compensation for defending a fee application in a subsequent case.