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February 5, 2008

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BY HAND DELIVERY

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Chief Clerk
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CHIEF CLERKS OFFICE
2:00 FEB - 5 PM 3:54
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Re: TCEQ Docket No. 2004-0049-AIR; SOAH Docket No. 582-05-0593; *Application of ASARCO, Incorporated for Renewal of Air Quality Permit No. 20345*

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced and numbered proceeding please find an original and twelve (12) copies of Asarco's Response to the City Of El Paso's Supplement to Its Motion to Continue the Texas Commission On Environmental Quality's Consideration of the Application of Asarco Incorporated for Renewal of Air Quality Permit No. 20345.

Please file the original and 11 copies of this document and return one file-stamped copy to the messenger. A copy of the above referenced document is being served on the persons in the attached Certificate of Service.

Thank you for your attention to this matter. If you have any questions concerning this filing, please do not hesitate to contact me at the number above.

Sincerely,


Pamela M. Giblin

Enclosures

cc: Attached Service List

SOAH DOCKET NO. 582-05-0593
TCEQ DOCKET NO. 2004-0049-AIR

2008 FEB -5 PM 3: 54

APPLICATION OF ASARCO
INCORPORATED FOR RENEWAL
OF AIR QUALITY
PERMIT NO. 20345

§
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BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

**ASARCO'S RESPONSE TO THE CITY OF EL PASO'S
SUPPLEMENT TO ITS MOTION TO CONTINUE
THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S
CONSIDERATION OF THE APPLICATION OF ASARCO INCORPORATED
FOR RENEWAL OF AIR QUALITY PERMIT NO. 20345**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

ASARCO LLC ("Asarco")¹ hereby files this Response to the City of El Paso's (the "City") Supplement to its Motion to Continue the Texas Commission on Environmental Quality's (the "TCEQ" or "Commission") Consideration of the Application of ASARCO Incorporated for Renewal of Air Quality Permit No. 20345 ("Supplement"), and would respectfully show the following:

INTRODUCTION

The City of El Paso has asked the Commission to delay this proceeding indefinitely because of a press release. The press release was not issued by the permit holder in this renewal proceeding, ASARCO LLC. It was not issued by any entity that has control of ASARCO LLC or the El Paso Plant (the "Plant"). It does not contain any information that is relevant to the renewal proceeding at hand. And it certainly does not form the basis for an indefinite delay of the Commission's work that has progressed to final consideration of permit renewal.

The City's original motion for continuance was based on (1) an EPA rulemaking that is not yet underway and may lead to the revocation of the lead NAAQS; (2) a petition that

¹ In this Response, references to "Asarco" are to the permit holder ASARCO LLC and not to ASARCO Incorporated.

the City has not obtained bankruptcy court permission to file and which appears to be an effort to repackage the same arguments that the City has already raised in this renewal proceeding; and (3) Asarco's ongoing bankruptcy proceeding, which has been in progress since 2005. This latest "new information" provides no better reason for delay than those other irrelevant arguments.

ARGUMENT

A. The Issuer of the Press Release Does Not Speak for the El Paso Plant.

The only facts that one needs to consider in order to understand the implications of the ASARCO Incorporated press release cited by the City are that ASARCO Incorporated does not control the El Paso Plant and is not the permit applicant. ASARCO LLC, the operator of the Plant and the permit applicant in this proceeding, is operating its business independently during its Chapter 11 bankruptcy reorganization proceeding pursuant to sections 1107 and 1108 of the United States Bankruptcy Code.² ASARCO LLC has been governed by a court-appointed Board of Directors since December 15, 2005. ASARCO Incorporated owns the equity in ASARCO LLC but does not control the Board of Directors that governs ASARCO LLC.

The three-member Board of Directors that now governs ASARCO LLC was created pursuant to a Stipulation and Order Regarding Corporate Governance in Asarco's Chapter 11 bankruptcy proceeding ("Stipulation and Order," Exhibit A). The court-approved Stipulation and Order was entered in response to motions by two creditor committees in bankruptcy court seeking to remove ASARCO Incorporated from control of ASARCO LLC.³ Those two motions are attached as Exhibit B and Exhibit C. Two of the new Board's three members, Mr. Malcolm Lovett and Mr. Edward Caine, are independent directors, and ASARCO Incorporated is represented through its parent, Grupo Mexico, S.A. de C.V., by the third member of the new Board of Directors, Mr. Carlos Ruiz.⁴ It is important to note that on *four separate occasions* since the new Board of Directors was established, efforts in the bankruptcy proceeding

² 11 U.S.C. §§ 1107, 1108.

³ See Stipulation and Order at 1. The Stipulation and Order notes that the committees expressed their concerns regarding conflicts of interest and potential conflicts of interest between Asarco's parent Grupo Mexico, S.A. de C.V. and Southern Peru Copper Corporation on the one hand, and ASARCO LLC on the other. Stipulation and Order at 2-3. The committees indicated their desire to insure that during Asarco's Chapter 11 case, the Board of Asarco is free of conflicting loyalties and influences that would impair its ability to carry out its fiduciary duty to the Asarco Estate. *Id.* More detailed information can be found in the two motions, which are attached as Exhibits B and C.

⁴ See Stipulation and Order at 3.

by ASARCO Incorporated to regain managerial control over ASARCO LLC have been opposed by creditors and denied by the bankruptcy court.

B. Under New Management, Asarco Is Moving Toward Successful Exit From Bankruptcy.

After Asarco's new Board was established by court order, it selected Joseph F. Lapinsky as President and Chief Executive Officer of Asarco. Under the leadership of the new Board and Mr. Lapinsky, Asarco's production capacity has been expanded and revenue and capital increased. Of primary importance, Asarco and the United Steelworkers Union negotiated a new collective bargaining agreement, which was approved by the bankruptcy court on March 15, 2007 over the objection of ASARCO Incorporated. Aided by favorable copper pricing, Asarco is operating profitably and has accumulated substantial amounts of cash to aid its emergence from bankruptcy.

Asarco took an important step in its progress toward final reorganization on February 4, 2008, when it filed in bankruptcy court a Motion for Entry of an Order Approving Bid Procedures in Connection with the Selection of a Chapter 11 Plan Sponsor and Exit Transaction Under a Chapter 11 Plan ("Bid Procedures Motion"). The Bid Procedures Motion follows an agreement in principle on the structure of a plan for reorganization between Asarco and its creditor constituents who hold the overwhelming majority of its claims, including committees representing the creditors of Asarco and Asarco's affiliated debtors, a future claims representative, the United States Department of Justice, and the United Steelworkers Union. With its Bid Procedures Motion, Asarco has sought bankruptcy court approval of a process for selecting a Chapter 11 plan sponsor to fund the company's exit from bankruptcy.

There has been little, if any, indication during the bankruptcy proceedings that ASARCO Incorporated is prepared to make the commitment necessary to become a plan sponsor. ASARCO Incorporated has never offered a serious plan to fund reorganization of ASARCO LLC on terms that would be acceptable to creditors. Coming on the eve of the Commission's renewal proceeding and at the same time that serious potential plan sponsors are being identified, ASARCO Incorporated's statement has every appearance of a coordinated effort to unnecessarily delay the TCEQ renewal proceeding, thereby introducing unwarranted confusion into the future of the Plant and driving down its value. This strategy has nothing to do with the merits of the renewal itself, which have been thoroughly evaluated by the Commission.

C. Reopening the El Paso Plant Will Be Good For the Bankruptcy Estate and Good for the Region.

The new Board of Directors that controls the El Paso Plant owes its fiduciary duty to ASARCO LLC's bankruptcy estate. To this end, the same management team that brought Asarco to profitability and negotiated a new collective bargaining agreement with the United Steelworkers Union remains committed to seeing Air Quality Permit No. 20345 renewed. Asarco has started work in El Paso on the inspection and maintenance recommendations listed in the *Executive Director's Report to the Commission*.⁵ With near-record copper prices in the United States, the El Paso Plant represents an important potential source of income to the bankruptcy estate today. In the future, an operating El Paso Copper Plant will represent a powerful source of income to its owner, and it will be a valuable engine for job creation in the state's manufacturing economy. That is why Asarco continues to invest in restarting the El Paso Plant, and that is why the City's arguments for delay are reckless and without merit.

CONCLUSION AND PRAYER

The Commission should not be distracted by the City's last minute efforts to delay consideration of Asarco's permit renewal. The proceeding to renew Air Quality Permit No. 20345 has progressed through staff review, a special contested case hearing in the public interest, a rigorous investigation by the Executive Director, and periods for public comment and response. The renewal proceeding is now ready for Commission consideration, which has been scheduled for more than 5 weeks. The City's latest Supplement is no different than its previous filing, in that it unjustifiably seeks to halt the Commission's business because of the City's own efforts to create confusion and uncertainty.

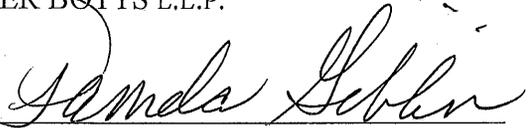
For the reasons cited above, and in Asarco's previous Response to the City's Motion to Continue, Asarco respectfully requests that the Commissioners deny the City of El Paso's Motion to Continue the Texas Commission on Environmental Quality's Consideration of the Application of ASARCO Incorporated for Renewal of Air Quality Permit No. 20345.

⁵ Tex. Comm'n on Env'tl Quality, *Executive Director's Report to the Commission on Renewal of ASARCO Incorporated's Air Quality Permit No. 20345* (May 1, 2007).

Respectfully submitted,

BAKER BOTTS L.L.P.

By:

A handwritten signature in cursive script, appearing to read "Pamela Giblin", written over a horizontal line.

Pamela M. Giblin

State Bar No. 07858000

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ATTORNEYS FOR ASARCO L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing by facsimile or U.S. mail on the following parties on this 5th day of February, 2008.

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Pamela M. Giblin

CHIEF CLERKS OFFICE

2008 FEB -5 PM 3: 54

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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

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

STIPULATION AND ORDER REGARDING CORPORATE GOVERNANCE

This Stipulation dated this 15th day of December, 2005 resolves the Emergency Motion for Appointment of a Chief Restructuring Officer filed by the Official Committee of Unsecured Creditors of ASARCO LLC (the "ASARCO Committee") on November 21, 2005 at Docket Entry No. 974, and related pleadings (the "ASARCO Committee Motion"), and the Emergency Motion to Appoint Doug McAllister as Responsible Person for Debtor-in-Possession filed by the Official Committee of Unsecured Creditors of the Subsidiary Debtors (the "Subsidiary Committee") on November 22, 2005 at Docket Entry No. 978, and related pleadings (the "Subsidiary Committee Motion").

PRELIMINARY MATTERS

WHEREAS, On August 9, 2005 (the "Petition Date"), ASARCO, LLC ("ASARCO") filed a voluntary petition for relief under chapter 11, title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of Texas (the "Court") at Case No. 05-21207 (the "Chapter 11 Case");

WHEREAS, ASARCO remains in possession and control of its assets and is a debtor-in-possession in its Chapter 11 Case;

WHEREAS, on September 2, 2005, the ASARCO Committee was formed by the United States Trustee to represent unsecured creditors in ASARCO's Chapter 11 Case;

WHEREAS, shortly after the Petition Date the then existing members of ASARCO's Board of Directors resigned;

WHEREAS, on September 23, 2005, Grupo Mexico, S.A. de C.V. ("Grupo"), ASARCO's ultimate parent corporation, caused Carlos Ruiz Sacristán ("Ruiz") along with Javier Perez Rocha to be elected to ASARCO's Board of Directors;

WHEREAS, in late September or early October 2005 Javier Perez Rocha resigned from ASARCO's Board of Directors, leaving Ruiz as ASARCO's sole Director;

WHEREAS, Ruiz also is a director of Southern Peru Copper Corporation, a former subsidiary of ASARCO, which is now owned by an affiliate of Grupo and which is a direct competitor of ASARCO;

WHEREAS; Grupo owns and controls various entities in addition to Southern Peru Copper Corporation that compete directly with ASARCO;

WHEREAS, on April 11, 2005, Lac d'Amiante du Quebec Ltee, Capco Pipe Company, Inc., Cement Asbestos Products Company, Lake Asbestos of Quebec, Ltd., and LAQ Canada, Ltd., (the "Subsidiary Debtors") each filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas. These cases were originally jointly administered under Case No. 05-20521;

WHEREAS, on April 19, 2005, Robert C. Pate was appointed as the future claims representative in the Subsidiary Debtors' bankruptcy cases (therein "FCR");

WHEREAS, on April 27, 2005, the Subsidiary Committee was appointed in the Subsidiary Debtors' bankruptcy cases by the Office of the United States Trustee;

WHEREAS, the ASARCO Committee, the Subsidiary Committee and the FCR (together hereinafter collectively referred to as the "Committees") each has expressed its concern

regarding conflicts of interest and potential conflicts of interest between Grupo and Southern Peru Copper Corporation, on the one hand, and ASARCO on the other; and has indicated its desire to insure that during ASARCO's Chapter 11 Case, the Board of ASARCO is free of conflicting loyalties and influences that would impair its ability to carry out its fiduciary duty to the ASARCO Estate;

WHEREAS, on or about November 14, 2005, Daniel Tellechea resigned as Chief Executive Officer of ASARCO and the Committees have expressed a concern about the failure of the Board to elect a qualified independent Chief Executive Officer to be in charge of ASARCO's business; and

WHEREAS, the parties have agreed to resolve the issues relating to the independence of the Board of ASARCO and the election of a Chief Executive Officer on the terms set forth below.

NOW THEREFORE, intending to be legally bound, the parties hereto, subject to court approval, agree as follows:

1. Appointment of Independent Directors. Ruiz shall immediately appoint Malcolm Lovett and Edward R. Caine as additional Directors of ASARCO. Such additional Directors shall serve through consummation of a plan of reorganization of ASARCO's Chapter 11 case, the conversion of ASARCO's Chapter 11 case to a case under Chapter 7 or until their death, resignation or incapacity.

2. Replacement Directors. Should a Director appointed pursuant to paragraph 1 hereof resign or otherwise be unable to serve, a replacement Director shall be selected by the remaining members of the Board subject to approval by the Bankruptcy Court. The Committees shall have an opportunity to interview such replacement Director prior to any hearing.

3. Modification of Operating Agreement. The Limited Liability Company Agreement of ASARCO, LLC, dated February 4, 2005 ("Operating Agreement"), shall be amended and, may not be changed without an order of the Court, so as to assure the independence of its Board of Directors from interests of Americas Mining Corporation and its parent, Grupo. Such amendments shall include, but shall not be limited to, amendments to provide that:

- (a) During ASARCO's Chapter 11 case, the size of the Board shall be three (3) Directors.
- (b) Ruiz shall be Chairman of the Board and shall remain Chairman of the Board so long as he is a Director.
- (c) Two (2) Directors shall constitute a quorum of Directors.
- (d) The Board may take any action provided for or permitted under the Operating Agreement or Delaware law, upon the approval of two (2) Directors.
- (e) All meetings of the Board of Directors of ASARCO shall be held in the United States unless otherwise agreed by all members of the Board.
- (f) Board meetings may be held by telephone.
- (g) Board meetings shall be called on not less than three (3) days' written notice unless (i) all Directors consent, or (ii) counsel to ASARCO advises that the matters to be addressed are of such urgency to require less than three (3) days notice.

(h) The Board shall select a Chief Executive Officer who will be responsible for day to day operations of ASARCO.

4. Compensation of Directors. The Directors shall be paid \$100,000 annually for their service as a Director, commencing as of their election or appointment (which in Mr. Ruiz's case shall be September 19, 2005), with \$25,000 paid promptly after the Court approval of this Stipulation, and the balance paid at the end of each quarter served thereafter.

5. Indemnity of Directors. The Directors shall be entitled to indemnification, as of the date of the entry of the Order by the Bankruptcy Court approving this Stipulation, to the full extent provided under Delaware law. Nothing herein shall modify the right to indemnification that current and former directors have or had prior to Court approval of this Stipulation nor waive or release any rights that any other party had or may have against any current or former officer or director.

6. Directors and Officers Insurance. ASARCO shall as promptly as practical, and in any case no later than January 25, 2006, seek to secure directors and officers insurance covering such risks as appropriate for a company of ASARCO's size and circumstances as a debtor-in-possession under Chapter 11. To that end, and to the extent necessary, ASARCO shall set aside in a segregated account, with the consent of the Committees, which shall not be unreasonably withheld, such amount as is necessary to pay any self-insured retention under the directors and officers insurance.

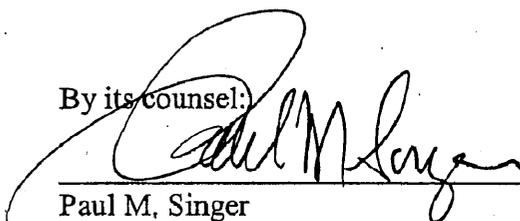
7. Interim Chief Executive Officer. Upon the entry of a Bankruptcy Court Order approving this Stipulation, Douglas McAllister, Esquire ("McAllister"), shall, in addition to his other titles and duties, be appointed as interim Chief Executive Officer of ASARCO. As interim Chief Executive Officer McAllister shall have responsibility for all day to day operations of ASARCO and shall report to the reconstituted Board. McAllister's salary shall be increased to the level of his predecessor so long as he serves as interim Chief Executive Officer. The

Board, including the new Directors appointed pursuant hereto, shall meet as promptly as possible to determine whether McAllister shall be elected as Chief Executive Officer, and if, so, under such terms and conditions as agreed by McAllister and the Board of Directors and approved by the Court. If the Board determines to replace McAllister with another Chief Executive Officer, McAllister shall receive a \$50,000 lump sum payment upon the election of his successor. McAllister shall have indemnification to the full extent provided under Delaware law in his service as interim Chief Executive Officer.

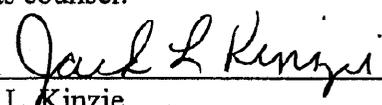
8. Binding Effect. This Stipulation and Order will be binding on ASARCO and the other parties hereto and none of the provisions hereof may be modified or changed without prior Order of this Court.

OFFICIAL COMMITTEE OF UNSECURED ASARCO, LLC
CREDITORS OF ASARCO, LLC
("ASARCO COMMITTEE")

By its counsel:

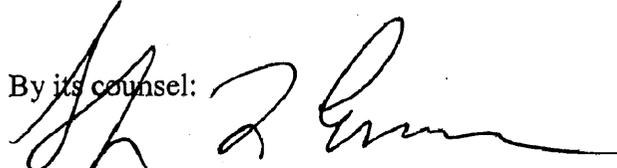

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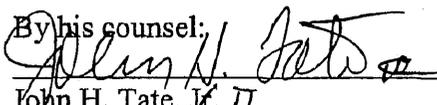
OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF THE SUBSIDIARY
DEBTORS' CHAPTER 11
REORGANIZATION ("SUBSIDIARY
COMMITTEE")

By its counsel:


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FUTURE CLAIMS REPRESENTATIVE OF
THE SUBSIDIARY DEBTORS, JUDGE
ROBERT C. PATE

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ASARCO, INC.

CARLOS RUIZ SACRISTÁN

By: *D. E. McAdams*

C Ruiz

Title: *Vice President, General
Counsel & Secretary*

SO ORDERED, this *15th* day of *December*, 2005.

[Signature]
Honorable Richard S. Schmidt
United States Bankruptcy Judge

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

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

IF YOU WANT A HEARING, YOU MUST REQUEST ONE IN WRITING AND YOU MUST RESPOND SPECIFICALLY TO EACH PARAGRAPH OF THIS PLEADING. YOU MUST FILE YOUR RESPONSE WITH THE CLERK OF THE BANKRUPTCY COURT WITHIN TWENTY DAYS FROM THE DATE YOU WERE SERVED AND GIVE A COPY TO THE PERSON WHO SENT YOU THE NOTICE; OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF.

IF A PARTY REQUESTS EMERGENCY CONSIDERATION, THE COURT MAY ACT EXPEDITIOUSLY ON THE MATTER. IF THE COURT ALLOWS A SHORTER RESPONSE TIME THAN TWENTY DAYS, YOU MUST RESPOND WITHIN THAT TIME. IF THE COURT SETS AN EMERGENCY HEARING BEFORE THE RESPONSE TIME WILL EXPIRE, ONLY ATTENDANCE AT THE HEARING IS NECESSARY TO PRESERVE YOUR RIGHTS. IF AN EMERGENCY HEARING IS NOT SET, YOU MUST RESPOND BEFORE THE RESPONSE TIME EXPIRES.

AN EMERGENCY HEARING HAS BEEN SET FOR TUESDAY, NOVEMBER 22, 2005 AT 3:00 P.M. IN CORPUS CHRISTI, TEXAS.

**EMERGENCY MOTION FOR
APPOINTMENT OF A CHIEF RESTRUCTURING OFFICER**

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

The Official Committee of Unsecured Creditors (the "Committee") of ASARCO LLC ("ASARCO" or the "Debtor") submits this Emergency Motion (the "Motion") for Appointment of a Chief Restructuring Officer (a "Chief Restructuring Officer"), and in support thereof, respectfully represents:

PRELIMINARY STATEMENT

From July 4, 2005, through the date of filing of this Motion, the Debtor's operations have been substantially limited due to a work stoppage by the Debtor's hourly workforce. The work stoppage was settled last week, and the Debtor's hourly employees have begun returning to work. However, during the nearly five month duration of the work stoppage, the Debtor was unable to take full advantage of record-high copper prices, *resulting in the Debtor foregoing incremental operating margin of at least \$50 million, approximately \$17 million of which was incurred from the time of the Committee's proposal to resolve the work stoppage until its resolution on November 14, 2005.*

The Debtor cited the work stoppage as a key reason for its bankruptcy filing. While the work stoppage endured, ASARCO's competitors – including at least one entity owned and controlled by ASARCO's 100% controlling shareholder, Grupo Mexico, S.A. de C.V. ("Grupo Mexico") – were able to capitalize on ASARCO's loss of market share, calling upon ASARCO's customers and profiting greatly from its inability to keep up production of finished copper products. The lasting effects of this customer diversion have yet to be determined.

The work stoppage may have been avoidable. The Committee had its organizational meeting on September 2, 2005, and since that time has been actively involved in attempting to resolve the strike. The Committee is therefore able to speak with some authority on the timing of resolution of the work stoppage, and the actions of ASARCO's sole director, Carlos Ruiz Sacristan (the "Sole Director") – who was appointed to his directorship by Grupo Mexico – in connection therewith.

The work stoppage could have, and should have, ended substantially sooner than it did. On October 3, 2005, the Committee submitted a draft term sheet, proposing terms on which the work stoppage would be resolved, to the union bargaining committee led by the United Steelworkers of America (in its capacity as representative of all of the Debtor's unions, the "USW") and ASARCO.

With certain limited modifications, the USW advised counsel to the Committee on October 7, 2005, that it was willing to accept the proposed term sheet to resolve the work stoppage. The Sole Director, however, rejected the term sheet, and declined to make a counteroffer or propose different terms on which the work stoppage might be resolved, despite being requested to do so by counsel to the Committee.

ASARCO continued in this intransigent position, at the direction of the Sole Director, until the Court indicated on October 28, 2005, at a status conference early that day and at a hearing later that day on an unrelated matter, that in light of the work stoppage, the Court was concerned about ASARCO's viability. Notwithstanding the Court's admonition, ASARCO continued to drag its feet, at the direction of the Sole Director, in seeking to resolve the work stoppage. It was only after Committee counsel repeatedly requested a face-to-face meeting between the parties – which occurred on Monday, November 7, 2005 – that the work stoppage was resolved, on terms substantially identical to those proposed by the Committee in its October 3, 2005, draft, which contained provisions for a Court supervised successorship clause.

Throughout this process, the Committee expressed its concern to ASARCO's management, the Sole Director, and the Court, regarding (i) the Sole Director's protracted refusal to take steps toward resolving the work stoppage; (ii) the Sole Director's simultaneous service on the board of directors of Southern Peru Copper Company – an entity 100% owned by Grupo Mexico that competes directly with ASARCO in the international copper market; (iii) Grupo Mexico's ownership of other copper producing entities that compete with ASARCO, including Grupo Minera Mexico, which may have made replacement sales to certain of ASARCO's customers during the work stoppage at ASARCO; and (iv) the failure of the Sole Director to elect a Chief Executive Officer who enjoys the

confidence of ASARCO's management and its salaried and hourly workforces so as to maximize the value of the Debtor's estate.

The Sole Director has refused to address the Committee's concerns, and has instead indicated his intention to appoint two additional members to ASARCO's board of directors. In addition, and despite the undeniable need to do so now that the work stoppage has been resolved, the Sole Director has failed to appoint a new independent Chief Executive Officer to replace Daniel Tellechea, who resigned more than three weeks ago.

The Committee respectfully submits that ASARCO's operating management and hourly employees appear capable of returning ASARCO to full operating capacity, and maximizing returns for ASARCO's estate and its creditors. However, they are unlikely to succeed in these endeavors if they continue to be hampered by board-level decisionmaking that is designed to benefit parties other than ASARCO, and by the lack of an experienced and independent Chief Executive Officer.

Therefore, for the foregoing reasons, and based upon the facts and legal authorities described below, the Committee respectfully requests that this Court enter an Order appointing Douglas McAllister as Chief Restructuring Officer, to assume all rights and responsibilities of the board of directors and CEO of ASARCO.¹

PARTIES, JURISDICTION, AND VENUE

1. On April 11, 2005, several wholly owned subsidiaries (the "Asbestos Subsidiary Debtors"²) of ASARCO filed voluntary petitions for relief under chapter 11 of title 11 of the United

¹ As discussed below, the Court is empowered to enter such an Order, prohibiting ASARCO's board of directors from exercising any of the powers or rights of a debtor in possession, and instead vesting those powers and rights in Mr. McAllister, pursuant to 11 U.S.C. §§ 1107(a) & 1108. As also discussed below, entry of such an Order is further justified pursuant to 11 U.S.C. §§ 1104(c)(1) & 1106(b).

² The Asbestos Subsidiary Debtors consist of the following five entities: Lac d'Amiante du Québec Ltée (f/k/a Lake Asbestos of Quebec, Ltd.); Lake Asbestos of Quebec, Ltd.; LAQ Canada, Ltd.; CAPCO Pipe Company, Inc. (f/k/a/ Cement Asbestos Products Company); and Cement Asbestos Products Company.

States Code (the "Bankruptcy Code") in this Court. On August 9, 2005, ASARCO filed its voluntary petition for relief in this Court. On August 26, 2005, two more of ASARCO's subsidiaries³ filed voluntary petitions for relief in this Court. On September 1, 2005, ASARCO Consulting, Inc. filed a voluntary petition for relief in this Court. On October 13, 2005, ten additional subsidiaries⁴ filed voluntary petitions for relief in this court. This Motion will refer to all of the above-referenced cases collectively as the "Reorganization Cases."

2. The Debtor remains in possession of its property and is operating its business as Debtor-in-possession, pursuant to sections 1107 and 1108 of the Bankruptcy Code. Official committees of unsecured creditors have been appointed in both Reorganization Cases. No trustee or examiner has been appointed in any of the Reorganization Cases.

3. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334. This Court may hear and determine this Motion under the standing order of reference issued by the United States District Court for the Southern District of Texas under 28 U.S.C. § 157. Consideration of this Motion is a core proceeding under 28 U.S.C. § 157(b). Venue of this proceeding is proper in this district under 28 U.S.C. §§ 1408 and 1409.

ASARCO AND THE SUBSIDIARY DEBTORS

4. Originally organized in 1899 as American Smelting and Refining Company, ASARCO has operated for over 105 years—first as a holding company for diverse smelting, refining, and mining operations throughout the United States and now as a Tucson-based integrated copper-mining, smelting, and refining company. At full operating levels, ASARCO is one of the leading

³ The two entities that filed on August 26, 2005, are Encycle/Texas, Inc. and Encycle, Inc.

⁴ The ten entities that filed on October 13, 2005 are: ALC, Inc.; American Smelting and Refining Company; AR Mexican Explorations Inc.; AR Sacaton, LLC, an Arizona limited liability company; Asarco Master, Inc.; Asarco Oil and Gas Company, Inc.; Bridgeview Management Company, Inc.; Covington Land Company; Government Gulch Mining Company, Limited; and Salero Ranch, Unit III, Community Association, Inc.

producers of copper and one of the largest nonferrous metal producers in the United States with over 2,000 employees in Arizona and Texas alone.

5. ASARCO's active operations consist of three open-pit copper mines in Arizona (the Mission Mine, the Ray Mine and the Silver Bell Mine), a copper refinery and precious-metals plant in Amarillo, Texas, a copper smelter in Hayden, Arizona, and a specialty-chemicals plant in Globe, Colorado.

6. The Subsidiary Debtors are direct or indirect wholly owned subsidiaries of ASARCO. Prior to 1986, Lac d'Amiante du Québec Ltée ("LAQ") was in the business of mining asbestos fiber from the Black Lake region of central Quebec, Canada, and CAPCO Pipe Company, Inc. (f/k/a/ Cement Asbestos Products Company) ("CAPCO") formerly manufactured various asbestos-containing cement pipe products. LAQ, CAPCO, and the remaining Subsidiary Debtors are non-operating companies.

FACTS RELEVANT TO THIS MOTION

The Work Stoppage

7. On or around July 4, 2005, after working for approximately one year without a collective bargaining agreement, the unions representing the hourly employees of the Debtor (led by the USW) commenced a work stoppage, resulting in the majority of the Debtor's non-salaried workforce walking off the job.

8. The work stoppage resulted in a significant reduction in the Debtor's hourly workforce and, consequently, its ability to produce at full capacity and bring high quality finished product to market. The Debtor has advised the Committee that the work stoppage was one of the most significant precipitating causes of the Debtor seeking relief under the Bankruptcy Code.

9. During the work stoppage, the Debtor's finished product production dropped by approximately 48%, or 15,817,000 pounds per month. During this period, copper prices were at a record high, marked as of October 31 at \$1.92 per pound, up from a March 2005 level of \$1.49 per pound. Both of these price points are higher than ASARCO's historic cost of production.

10. Based upon analysis undertaken by the Committee's financial advisors, FTI Consulting, Inc., as a result of the Debtor's inability to produce at full capacity during the work stoppage it lost incremental operating margin of at least \$50 million, approximately \$17 million of which was incurred from the time of the Committee's proposal to resolve the work stoppage until its resolution on November 14, 2005.

Constitution of the Board of Directors

11. In August or September 2005, all the Debtor's pre-petition directors resigned from the Debtor's board of directors

12. On or around September 23, 2005, Carlos Ruiz Sacristan (previously defined as the Sole Director) and Javier Perez Rocha were appointed by Grupo Mexico as the members of the Debtor's board.

13. In early October 2005, Mr. Rocha resigned from the board, leaving Mr. Sacristan as the Sole Director.

The Sole Director's Unjustified Delay in Resolving the Work Stoppage

14. Shortly after its formation, understanding that full operational capacity of the Debtor would benefit all the Debtor's stakeholders, the Committee (based upon an analysis and vote undertaken without consultation with or participation by USW) took steps to attempt to bring about an end to the work stoppage and enable the Debtor to return to full operational capacity.

15. On October 3, 2005, the Committee submitted a draft term sheet, proposing terms on which the work stoppage would be resolved to the USW and ASARCO.

16. With certain limited modifications, the USW agreed in principle to accept the term sheet on October 7, 2005.

17. Despite several requests from Committee counsel, ASARCO, at the direction of its Sole Director, refused to act on the term sheet, and declined to make a counteroffer or propose different terms on which the work stoppage might be resolved.

18. By an October 19, 2005 letter, the Sole Director requested additional time to obtain a written cost-benefit analysis from the Debtor's financial advisors, Lehman Bros., of the relative impact of signing the term sheet or allowing the work stoppage to continue.

19. The Committee understands that the Sole Director received Lehman's report on this subject on or about October 21, 2005. This report has not been produced to the Committee.

20. ASARCO continued in its intransigent position, at the direction of its Sole Director, until October 28, 2005, when the Court advised ASARCO and its major creditor constituencies of the Court's concern over ASARCO's viability as a consequence of the work stoppage.

21. Based upon the Court's admonition, on October 31, 2005, ASARCO's attorneys and advisors were permitted to consider discussions to settle the work stoppage, but it was only after urging of Committee counsel that ASARCO agreed to attend a face to face meeting on November 7, 2005, at which the work stoppage was resolved.

The Sole Director's Lack of Independence

22. Both during and after the work stoppage, the Committee advised ASARCO and the Sole Director of its concerns over the ability of ASARCO as a debtor-in-possession to carry out its fiduciary duties because of the lack of independence of the Sole Director and the lack of a Chief

Executive Officer who enjoys the confidence of ASARCO's employees. Among the factors that gave rise to these concerns include (i) the Sole Director's protracted refusal to take steps toward resolving the work stoppage; (ii) the Sole Director's simultaneous service on the board of directors of Southern Peru Copper Company – an entity 100% owned by Grupo Mexico that competes directly with ASARCO in the international copper market; (iii) Grupo Mexico's ownership of other copper producing entities that compete with ASARCO, including Grupo Minera Mexico, which may have made replacement sales to certain of ASARCO's customers during the work stoppage at ASARCO; and (iv) the failure of the Sole Director to elect a Chief Executive Officer who enjoys the confidence of ASARCO's management and its salaried and hourly workforces so as to maximize the value of the Debtor's estate.

23. Based on the lack of independence of the Sole Director, and ASARCO's lack of a respected Chief Executive Officer, by this motion the Committee is requesting that the Court appoint Douglas McAllister as ASARCO's Chief Restructuring Officer, to assume the rights and responsibilities of the board of directors and Chief Executive Officer, thus granting him the authority necessary to carry out his duties without interference from Grupo Mexico or its hand-picked board of directors.

24. Mr. McAllister currently serves as the Vice President, General Counsel and Secretary of ASARCO. He has been in that position for approximately four years. Before that, Mr. McAllister had been employed in various mining and environmental positions, including serving as Vice President of Environmental Affairs and Deputy Chief Counsel for the American Mining Congress, during 10 years of employment with that well regarded organization. The Committee believes that, by virtue of Mr. McAllister's background and experience, he can more than adequately fill the role as ASARCO's Chief Restructuring Officer to ensure that ASARCO carries out its fiduciary duties to its estate and creditors.

LEGAL ARGUMENT

25. “The Bankruptcy Code Authorizes the Bankruptcy Court to ‘issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.’ 11 U.S.C. § 105(a). Further, it states that the rights and powers of a debtor in possession are subject ‘to such limitations or conditions as the court prescribes.’ 11 U.S.C. § 1107(a). The case law demonstrates that the court has considerable authority to interfere with the management of a debtor corporation in order to protect the creditors’ interests.” *In the Matter of Gaslight Club Inc., et al.*, 782 F.2d 767, 770 (7th Cir. 1986) (citing *In re Lifeguard Industries, Inc.*, 37 B.R. 3 (Bankr. S.D. Ohio 1983), with approval).

26. The powers referenced by the Seventh Circuit in *Gaslight* include, where appropriate, removing the debtor’s board of directors from authority. In *In re Lifeguard Indus., Inc.*, the court did just that, declining to permit the board and the controlling shareholder to install new management where evidence demonstrated that installation of such management was not in the best interest of creditors, and entering an order declaring that the board of directors could not “direct, undertake or in any way interfere with day-to-day operations of the corporation. . . .” 37 B.R. at 18.

27. Pursuant to Bankruptcy Code §§ 1107(a) & 1108, the Court is empowered to tailor a remedy appropriate to protect the interests of ASARCO’s creditors, including vesting in Mr. McAllister the power to perform the duties and exercise the rights of a debtor in possession. See *Gaslight Club*, 782 F.2d at 770 (affirming appointment of a responsible person to perform debtor’s duties and exercise debtor’s rights); *In re National Century Fin. Enterprises, Inc.* (Bankr. S.D. Ohio 2003) (holding that party appointed to perform debtor’s duties and exercise debtor’s rights need not be given a particular title, so long as mandate is clear); *In re FSC Corp.*, 38 B.R. 346 (Bankr. W.D. Pa. 1983) (appointing a responsible person to exercise powers of the debtor in possession where board

members have resigned); and *In re Lifeguard Indus.*, 37 B.R. at 18 (removing board from corporate chain of command, to be replaced by operating management).

28. The facts of this case clearly call for removal of the Sole Director from control over the Debtor. As discussed in detail above, the Sole Director's irreconcilable conflicts of interest and allegiance to Grupo Mexico, combined with his failure to elect a CEO who will have the confidence of ASARCO's operating management and workforce, make vesting of all rights and powers of the board of directors and Chief Executive Officer in Mr. McAllister necessary and appropriate.

CONCLUSION

The Committee respectfully submits that, for the foregoing reasons, replacing the Sole Director with Mr. McAllister, as Chief Restructuring Officer, is in the best interests of the Debtor's estate and its creditors. The requested relief is within the power of this Court, and should be granted.⁵

WHEREFORE, the Committee respectfully requests that the Court enter an Order:

- (i) Appointing Douglas McAllister as Chief Restructuring Officer, to assume all rights and responsibilities of the board of directors and CEO of ASARCO;
- (ii) Ordering the Debtor's controlling shareholder, Grupo Mexico, and the Debtor's board of directors, to cease all governance activities with respect to the Debtor and its assets;

⁵ The Court's authority is clear pursuant to Bankruptcy Code §§ 105(a), 1107(a) & 1108, but the Committee notes that appointment of Mr. McAllister as Chief Restructuring Officer is further supported by Bankruptcy Code §§ 1104(c)(1) & 1106(b).

Bankruptcy Code § 1104(c)(1) calls for appointment of an examiner where such appointment is in the best interest of creditors, and § 1106(b) permits the Court to direct such examiner to perform, "the duties specified in paragraphs (3) and (4) of subsection (a) of this section [1106], and . . . any other duties of the trustee that the court orders the debtor in possession not perform." Where the Bankruptcy Code references an "examiner," courts of the Fifth Circuit have generally appointed examiners with expanded powers rather than Chief Restructuring Officers. However, courts in other Circuits have granted parties selected to fill the role of the existing board of directors and senior management the title "Responsible Officer," and analogous titles, placing greater emphasis on the actual powers granted to the individual than on the title given. See, e.g. *In re Communication Options, Inc.*, 299 B.R. 481 (Bankr. S.D. Ohio, 2003) (appointing Responsible Officer); *In re FSC Corp.*, 38 B.R. 346 (appointing "responsible party").

- (iii) Ordering the Debtor to disregard any directions received from Grupo Mexico or the board of directors; and
- (iv) granting the Committee such other and further relief as is just.

Dated: November 21, 2005

Respectfully submitted,

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COUNSEL FOR THE OFFICIAL COMMITTEE
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DEBTORS' CHAPTER 11 REORGANIZATIONS

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

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

**EMERGENCY MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF THE SUBSIDIARY DEBTORS TO APPOINT DOUG
MCALLISTER AS RESPONSIBLE PERSON FOR DEBTOR-IN-POSSESSION**

**To: The Honorable Richard S. Schmidt,
United States Bankruptcy Judge**

The Official Committee of Unsecured Creditors of the Subsidiary Debtors (the "Subsidiary Committee") hereby files its Motion to Appoint Doug McAllister As Responsible Person of Debtor-In-Possession Asarco, LLC (the "Motion"). This Motion is filed pursuant to 11 U.S.C. §§ 105, 1107, and 1108. The Official Committee of Unsecured Creditors of Asarco (the "Asarco Committee") has also filed its Emergency Motion for Appointment of a Chief Restructuring Officer, seeking appointment of Doug McAllister as Chief Restructuring Officer of Asarco (the "Motion for CRO"). While the Subsidiary Committee agrees with substantially all of the allegations contained in the

Asarco Committee's Motion for CRO, the Subsidiary Committee's Motion differs in one respect – the Subsidiary Committee requests that Doug McAllister be appointed as a responsible person with full decision making authority, including the authority to hire, with Bankruptcy Court approval, an independent chief restructuring officer and a chief operating officer. Having noted that difference, the Subsidiary Committee does not oppose the appointment of McAllister as CRO, if in the best interests of the estate. In support of the Motion, the Subsidiary Committee respectfully states as follows:

FACTUAL BACKGROUND

1. On April 11, 2005, the Subsidiary Debtors¹ each filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas. These cases were originally jointly administered under case no. 05-20521.

2. On April 19, 2005, Robert C. Pate was appointed as the future claims representative ("FCR") in the Subsidiary Debtors' bankruptcy cases. On April 27, 2005, the Subsidiary Committee was appointed in the Subsidiary Debtors' reorganization cases by the Office of the United States Trustee pursuant to 11 U.S.C. § 1102.

3. On August 9, 2005, Asarco, LLC ("Asarco") itself filed a chapter 11 petition for relief. Pursuant to §§ 1107 and 1108 of the Bankruptcy Code, each of the Debtors² are operating as debtors-in-possession. The Asarco bankruptcy case, along with the Subsidiary Debtors' cases, are being jointly administered under case number 05-

¹ As used herein, the term "Subsidiary Debtors" shall mean the following entities: Lac d'Amiante du Québec Ltée, Capco Pipe Company, Inc., Cement Asbestos Products Company, Lake Asbestos of Quebec, Ltd., and LAQ Canada, Ltd.

² Hereafter, any reference to "Debtors" shall include both Asarco and the Subsidiary Debtors.

21207.

4. On August 25, 2005, the Office of the United States Trustee appointed the Official Committee of Unsecured Creditors of Asarco (the "Asarco Committee").

5. The Subsidiary Debtors are each liable for a substantial number of asbestos claims, stemming primarily from the prior operations of both LAQ, which was in the business of mining asbestos fiber from the Black Lake region of central Quebec, Canada, and Capco, which formerly manufactured various asbestos-containing cement underground pipe products. Both LAQ and Capco are non-operating dormant companies with essentially no assets, and are substantially dependent upon their parent company, Asarco, to satisfy their asbestos liabilities.

6. Prior to its petition date, on June 15, 2005, Asarco commenced adversary proceeding 05-2048 (the "Adversary Proceeding") for the purpose of obtaining a declaratory judgment that Asarco is not liable for the Subsidiary Debtors' asbestos liabilities under one or more "Alter Ego Theories."³ In its complaint, Asarco alleges that at least 85,000, and probably many more, asbestos claims have been asserted against it, and thousands more such claims are likely to arise in the future.

7. Asarco named the FCR as a party-defendant in the Adversary Proceeding. Also named as defendants therein are each of the Subsidiary Debtors. The Subsidiary

³ As defined in Asarco's Complaint, the term "Alter Ego Theories" includes any theory asserted by an asbestos claimant in an attempt to hold Asarco liable for the debts of Capco and LAQ. According to Asarco's complaint, such theories include, without limitation, "denuding-the-corporation, single business-enterprise, corporate trust funds, breach of fiduciary duty or conspiracy, allegations that [any of the Subsidiary Debtors were] the mere instrumentality, agent, or alter ego of Asarco, or that the corporate veil should be pierced, or that as a result of domination and control over any of the Debtors, directly or indirectly, Asarco should be liable for asbestos-related claims or any other claims that have origins in acts or omissions of any of the Debtors, or any other theories alleging direct or indirect liability for the conduct of, claims against, or demands on the Defendants to the extent that such alleged liability arises by reason of any of the other circumstances enumerated in section 524(g)(4)(A)(ii) of the Bankruptcy Code."

Committee, however, was not named as a party.

8. On September 2, 2005, the Subsidiary Committee filed its Motion to Intervene as Realigned Party Plaintiff and for Authority to Prosecute Claims and Causes of Action on Behalf of the Subsidiary Debtors' Estates (the "Subsidiary Committee Motion"). On that same date, the FCR filed his Motion to Realign Parties, to Grant Authority to Prosecute Avoidance and Other Actions on Behalf of the Subsidiary Debtors' Estates, and to Deem as Filed the Amended Complaint Adding Parties and Claims, or Alternatively to File a Separate Action, and Subject Thereto, Answer and Counterclaims to Complaint of Asarco LLC for Declaratory Judgment (the "FCR Motion", and collectively with the Subsidiary Committee Motion, the "Motions for Authority to Prosecute"). In essence, the Motions for Authority to Prosecute, which were filed in the Adversary Proceeding, assert that Asarco is liable for the asbestos obligations of the Subsidiary Debtors and seek an order from this Honorable Court authorizing the Committee, together with the FCR, to prosecute various claims and causes of actions on behalf the Subsidiary Debtors' estates (the "Additional Counts") against additional defendants, most notably Asarco's ultimate parent corporation, Grupo México S.A. de C.V. ("Grupo México").

9. In the Additional Counts, the Subsidiary Committee and the FCR contend that Grupo México has used and continues to use its position as the ultimate parent company of Asarco to strip Asarco of all viable assets in an effort to leave Asarco hopelessly insolvent and unable to effectively reorganize. For example, the Amended Complaint alleges that up until March 2003, Southern Peru Copper Corp., n/k/a Southern Copper Corp ("SCC") was owned by Asarco and was Asarco's most valuable asset. As

outlined in the Amended Complaint, Grupo México divested Asarco of its ownership interest in SCC in March 2003 for grossly inadequate consideration. Thus, SCC and Asarco are now sister companies under the Grupo México corporate umbrella, and direct competitors in the world copper trade.

10. Moreover, Grupo México has engaged in its improper and fraudulent course of action with Asarco over a period of years and, upon information and belief, Grupo México intends to thwart Asarco's reorganization to ensure the collapse of Asarco's reorganization, thereby terminating Asarco's ongoing operations.

11. Grupo México owns additional subsidiaries holding interests in copper mines, including SCC and Grupo Minera Mexico. By reducing copper production through a deliberately-failed Asarco reorganization, Grupo México will benefit from increased copper prices as well as from increased copper profits from its other mining operations.

12. Additionally, a failed Asarco reorganization would likely result in a complete liquidation of Asarco's copper mining assets and copper producing properties, and Grupo México stands in the best position to try and purchase these assets for the benefit of itself and its other copper-related subsidiaries.

13. Grupo México has also exercised dominion and control over the Asarco board of directors. Currently, Carlos Ruiz Sacristan is the sole director of Asarco, and he was appointed to his position based on his loyalty to Grupo México. He is also a member of the board of SCC. Mr. Ruiz has a direct and unavoidable conflict of interest between his duties to SCC and his duties to Asarco. Mindful of Grupo México's strategy, Mr. Ruiz has exercised his conflicting duties to the detriment of Asarco.

14. For example, as the sole director of Asarco, Mr. Ruiz was the only party capable of agreeing to resolve Asarco's labor stoppage. The strike began on July 4, 2005, and it was not until November 8, 2005, that Asarco filed a motion to approve the strike resolution. Grupo México used its influence of Mr. Ruiz to preclude Asarco from promptly resolving the strike, and such tactics have been estimated to have cost Asarco over \$50 million in incremental operating margin.⁴ In fact, Mr. Ruiz's refusal to settle the strike caused the Asarco Committee, the Subsidiary Committee, and the FCR to send letters to Asarco demanding that the strike be resolved, and required this Bankruptcy Court to intervene by holding an in-chambers meeting with the Asarco representative. Only after these discussions did Mr. Ruiz settle the labor stoppage.

15. On information and belief, Mr. Ruiz has failed and refused to establish an independent board of directors.

16. Asarco also lacks a chief executive officer. In fact, Grupo México recently forced Asarco's prior President and Chief Executive Officer, Daniel Tellechea, to resign from his position with Asarco, apparently because Mr. Tellechea refused to act in Grupo México's best interests to the detriment of Asarco.

17. Doug McAllister is general counsel of Asarco. Like the Asarco Committee's Motion for CRO, the Subsidiary Committee supports his appointment as a responsible person at Asarco, although, at this time, the Subsidiary Committee requests that Mr. McAllister be appointed a responsible person with the authority to hire a chief restructuring officer and chief operating officer, rather than for Mr. McAllister being named the chief restructuring officer. The Subsidiary Committee will, however, consider

⁴ See Asarco Committee's Motion for CRO.

the reasons advanced by the Asarco Committee to name McAllister the CRO.

18. In an effort to curb the ever-diminishing chances for a successful reorganization caused by Grupo México's conflict of interest and inherent self-dealing, the Subsidiary Committee hereby moves for the appointment of Doug McAllister as the Responsible Person for Asarco with full decision making authority, including the authority to hire, with Bankruptcy Court approval, an independent chief restructuring officer and/or a chief operating officer. The Subsidiary Committee further requests that the Court direct the Debtor to maintain the retention of all professionals employed by the Debtors pursuant to 11 U.S.C. § 327.

19. Because of his conflict of interest, Mr. Ruiz should not interfere with or exercise corporate control over Asarco. To that end, the Subsidiary Committee requests that the Court direct the Debtor to maintain the professional persons employed under 11 U.S.C. § 327 pending entry of an order appointing McAllister as responsible person or, as the Asarco Committee suggests, CRO.

JURISDICTION

20. The Bankruptcy Court has subject matter jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 157(a) and 1334(b). This is a core proceeding within the meaning of 28 U.S.C. § 157(b). Venue is proper in this district pursuant to 28 U.S.C. § 1409(a).

RELIEF REQUESTED

21. Section 1108 of the Bankruptcy Code provides that "[u]nless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee

may operate the debtor's business." The Code provides in Section 1107 that with the exception of "such limitations or conditions as the court prescribes," a debtor in possession shall have all rights and powers and shall perform all the functions and duties⁵ of a trustee.

22. The Bankruptcy Code sets forth the duties of the trustee in some detail. 11 U.S.C. § 1106. The duties apply to a debtor in possession. 11 U.S.C. § 1107. So long as a debtor in possession "conducts the affairs of the estate by exercising his business judgment in good faith, upon a reasonable basis, and within the scope of his authority under the Code, he may proceed without interference." *In re Consolidated Auto Recyclers, Inc.*, 123 B.R. 130, 140 (Bankr. D. Me. 1991) (citing *In re Curlew Valley Assoc.*, 14 B.R. 506, 513-14 (Bankr. D. Utah 1981)). A debtor in possession is, however, subject to certain limitations. For example, a debtor in possession "who manages [its] affairs ... under Section 1108 of the Bankruptcy Code is bound by a duty of loyalty. This duty requires that the [debtor] refrain from self-dealing, avoid conflicts of interest and the appearance of impropriety, treat all parties to the case fairly, and maximize the value of the estate." *In re Spielfogel*, 211 B.R. 133, 144 (Bankr. E.D.N.Y. 1997) (citing *7 Collier on Bankruptcy*, Sec. 1108.09 (15th ed. rev. 1997)).

23. Moreover, courts have held that pursuant to Sections 1107 and 105(a) of the Bankruptcy Code, the bankruptcy court "has considerable authority to interfere with the management of a debtor corporation in order to protect the creditors' interests." *Matter of Gaslight Club, Inc.*, 782 F.2d 767, 770-771 (7th Cir. 1986); *In re Ralph C. Tyler, P.E., P.S., Inc.*, 156 B.R. 995, 997 (Bankr. N.D. Ohio 1993). This comports with

⁵ Other than certain rights and duties not applicable hereto.

Judge Dennis Michael Lynn's recent holding that the bankruptcy court "has authority by reason of Debtors' chapter 11 filings *to limit or direct aspects of the conduct of Debtors' business.*" See *In re Mirant Corp.*, Case No. 03-46590, Memorandum Order entered by Judge Dennis Michael Lynn, United States Bankruptcy Judge for the Northern District of Texas on December 21, 2004 (*citing* Code §§ 363(c)(2), 1107(a) and 1108 for the proposition that the Bankruptcy Court has authority to vary for cause a debtor's conduct of business and use of its assets) (emphasis added).

24. Here, due to an inherent conflict of interest, the sole director of the debtor in possession, Asarco, is unable to fulfill his duty of loyalty and his duty of care to Asarco. For many years, Asarco has been controlled by its direct and indirect parent companies, Grupo México and Americas Mining Corp ("AMC"). These controlling entities have usurped Asarco's assets,⁶ caused Asarco to cannibalize itself in order to pay down financing obligations benefiting other corporate entities,⁷ unnecessarily and unreasonably delayed the resolution of Asarco's labor strike in the face of record copper prices, and have now manipulated the officers and directors of Asarco to such an extent that the sole remaining director and decision-maker, Carlos Ruiz Sacristan, has an inherent conflict of interest which he inevitably exercises in favor of the controlling entities. In fact, Mr. Ruiz is also a director of SCC, the very company that the Amended Complaint alleges was stripped away from Asarco at the behest of Grupo México, and which is directly controlled by Grupo México and whose interests are aligned with Grupo México to the exclusion of Asarco.

⁶ See *supra* note 3 and accompanying text.

⁷ See Amended Complaint.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November 2005, a true and correct copy of the foregoing was transmitted via ECF and/or facsimile to all parties entitled to service, including the parties identified below:

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