Ethics & Professional Compensation/ Mediation

Ethical Issues in Professional Fee Disputes: Mediation vs. Litigation

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Hypothetical for 2015 Winter Leadership Mediation/Fee Panel

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Eden/Avalon manufactures fertilizers, plant growth enhancers, and other chemically-based products for plant care and growth. The company is closely-held by the Idyll family—husband Val, wife Elys, and sons Adam and Arthur. Val's father and uncle, immigrants from Iran, started the business years ago. At some point, they had a falling out, and the uncle began a rival company, Shangri-Landscape, with his children. When the father died, he left Eden/Avalon to Val and his family.

In the late eighties, the company sold off its home gardening division, and concentrated its efforts solely on the production and sale of U-Topiary, a commercial-grade fertilizer and growth-enhancer containing a proprietary ingredient called Factor E. Not only did U-Topiary increase the speed of plant growth, but treated plants were more lush and vibrant. U-Topiary became the market leader in sales to large landscaping and nursery companies.

By 2010, however, the tide had turned. End-users began to file suit against Eden/Avalon in courts around the country, alleging that, used consistently over time, U-Topiary poisoned soil, rendering it toxic. Plaintiffs alleged everything from loss of vegetation to loss of productive land to loss of businesses. As word of the allegations spread, sales decreased. Eden/Avalon tried to settle as many of the suits as it could, but could not service the judgments and continue to operate with the declining revenues. The EPA's office of inspector general had begun an investigation. By late 2013, the Idylls felt they had no choice but to consider Chapter 11.

Eden/Avalon hired the insolvency team at Lance, Percy and Gwen, a national firm with extensive Chapter 11 experience. LPG used its standard retention letter, which contains the following paragraph, "Should there arise, over the course of the representation or after completion of representation, circumstances in which the fees charged by Firm (or professionals retained at the recommendation, and with the approval, of Firm), and agreed upon by Client, are challenged, Client acknowledges and agrees that Firm will bill for the time and cost of defending its fees or the fees of any approved professionals."

The LPG team spent hours with the Idylls, their accounts and financial consultants, and hired an environmental and regulator advisor. They presented the Idylls with every option, including that of liquidating and paying out the suits. The meetings were agonizing—the Idylls had deep emotional connections to the business. It was their tie to Val's father. It was their link to Val's father's homeland of Iran, and its culture. Although they could not prove it, they believed that the allegations of U-Topiary's toxicity originated with Shangri-

Landscape, an effort by the rival family faction to avenge whatever wrong had occurred between Val's father and uncle years ago. They could not countenance the idea of a liquidation.

By the time the lender informed Eden/Avalon that it would not renew their credit instruments, however, even the Idylls had concluded that liquidation was the only option. They agreed with LPG that the Chapter 11 filing would buy them time to find the "right" buyer for either the company itself or component chemical divisions, and to pay out all of the lawsuits.

LPG filed an application seeking retention as counsel for Eden/Avalon as debtor in possession. The application sought retention "subject to the terms and conditions of the attached engagement agreement" and attached a copy of the pre-petition retention letter. The court entered an order approving the retention.

Things went smoothly early on. The committee agreed with the liquidation idea, and the DIP hired a valuation firm and a marketing expert. The professionals concluded that, given the bad press and the lawsuits, selling Eden/Avalon as a going concern was not possible. But the valuation firm estimated that the components—real estate and factories in various states, component chemicals, even the proprietary formula for Factor E (which had not yet been proven in court to be toxic)—were of sufficient value to satisfy creditors and pay significantly against the settlements. Sales proceedings for these various components began.

Things turned when the time came to auction off the proprietary recipe for Formula E. There were three qualified bidders for the recipe, and one of them was Shangri-Landscape. The Idylls never had considered the possibility that their rival would bid, and were outraged. Through LPG, they first tried to cancel the auction. When that effort failed, LPG filed numerous motions seeking to have Shangri-Landscape disqualified. LPG filed motions, objections, motions for reconsideration, to no avail. The court allowed the auction to take place, and allowed Shangri-Landscape to participate as a qualified bidder.

Shangri-Landscape was selected as the winning bidder by a large margin. LPG again filed a raft of pleadings, again to no avail. They appealed to the circuit court, to no avail. It appeared that LPG had exhausted every avenue.

On the day the sale was to be consummated, LPG filed an emergency motion to extend the time for Eden/Avalon to turn over the recipe. At the hearing, LPG argued that it had become aware, through Eden/Avalon's IP lawyers, that the DIP might not be the sole owner of the recipe, and that the DIP could not turn over the recipe without resolving that issue. Protracted litigation ensued, but in the end, LPG produced no proof that anyone other than Eden/Avalon owned the recipe. Another date was set for consummation of

the sale. On the day of that sale, LPG filed an emergency motion, asking that Eden/Avalon be relieved of the obligation to turn over the recipe because it "could not be located." At an extremely contentious hearing, LPG argued that there was no written "recipe," so to speak. Counsel for Shangri-Landscape alleged that Eden/Avalon was intentionally sabotaging the sale. The committee and the lenders agreed.

To resolve the issue, the court ordered Eden/Avalon to produce the scientists who had made Factor E to testify about its chemical make-up. This required all of the parties to retain chemistry experts. It took six months to get to hearing, and one of the scientists quit, and could not be found, by the hearing date. The hearing itself lasted four days. At the end of the hearing, the experts for all parties agreed that it appeared they had the recipe for Factor E.

LPG filed a final fee application. Every party—from the UST to committee counsel to counsel for Shangri-Landscape—objected. They argued that LPG had knowingly conducted spurious litigation on behalf of the Idylls, to assist them in their efforts to prevent the legitimate sale of the Factor E recipe to Shangri-Landscape. Some objectors went as far as to argue that LPG had knowingly assisted in the perpetration of a fraud on the court by arguing that there was no recipe, by "turning a blind eye" to the suspicious disappearance of one of the scientists, and by embroiling everyone in a protracted hearing to force reconstruction of the recipe. LPG responds that it zealously represented its client, that the objectors could not prove that there was a written recipe, or that there was anything nefarious in the scientist's disappearance. It also argued that because the objectors had no basis for challenging the fees, it ought to be compensated for the time it was forced to take defending the fees.

2014 WL 7166533 (U.S.) (Appellate Brief)
Supreme Court of the United States.

BAKER BOTTS L.L.P. et al., Petitioners,
v.
ASARCO LLC, Respondent.

No. 14-103.
December 10, 2014.

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

Brief for Former Bankruptcy Judges Leif M. Clark and Judith K. Fitzgerald as Amici Curiae in Support of Petitioners

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*1 INTEREST OF *AMICI CURIAE* [*]

Amici are former United States Bankruptcy Judges who have collectively devoted hundreds if not thousands of hours to reviewing fee applications. *See* Gordon Bermant et al., *A Day in the Life: The Federal Judicial Center's 1988 - 1989 Bankruptcy*

Court Time Study, 65 Am. Bankr. L.J. 491, 513-14 (1991) (noting that a bankruptcy judge spends an estimated 61.9 hours per year on fee applications). Those hours inspire little nostalgia, as "the fixing of compensation for professionals [is] a difficult and unpleasant task." *In re Int'l Coins & Currency, Inc.*, 22 B.R. 127, 128 (Bankr. D. Vt. 1982). But as one of the *amici* has explained, that work calls for great care on the part of the bankruptcy judge:

> [C]ourt-appointed counsel are … paid only upon application to the court. The money is transferred almost literally over the judge's signature on a court order approving the fees. The affixing of a judge's signature to an order is not an empty formality. It is a judicial confirmation that the fees in question are in fact reasonable and do in fact represent compensation for actual and necessary services, measured against the ***2** various factors set out in the case law. Because fees can be paid only upon court order, the court which signs that order must therefore be prepared to accept responsibility for its judicial actions by independently determining that court authorization for the fees is warranted.

In re Temple Ret. Cmty., Inc., 97 B.R. 333, 337 (Bankr. W.D. Tex. 1989) (citations omitted).

In this case, the Fifth Circuit constricted the discretionary authority of bankruptcy judges by holding that 11 U.S.C. § 330(a) "does not authorize compensation for the costs counsel or professionals bear to defend their fee applications." Pet. App. 14a. This surprising ban on "defense fees" threatens the smooth functioning of the bankruptcy courts by diluting the compensation that professionals can receive for services that arc necessary and beneficial to the administration of a bankruptcy case. *See* 11 U.S.C. § 330(a)(1), (3), (4). In particular, the Fifth Circuit's misreading of Section 330(a) hinders a bankruptcy judge's ability to maintain the parity of fees that Congress deems essential to avoiding a brain drain in the bankruptcy field. *Amici* submit this brief in support of petitioners and urge the Court to reverse the decision below so that *amici's* judicial successors will be allowed to do the job that Congress has assigned.

The signatories to this brief are as follows:

Hon. Leif M. Clark. The Honorable Leif M. Clark was a United States Bankruptcy Judge for the Western District of Texas from 1987 to 2012. His ***3** opinions on the subject of compensation under Section 330(a) include *In re Saunders*, 124 B.R. 234 (Bankr. W.D. Tex. 1991), *In re Farah*, 141 B.R. 920 (Bankr. W.D. Tex. 1992), *In re Intelogic Trace, Inc.*, 188 B.R. 557 (Bankr. W.D. Tex. 1995), *In re El Paso Refinery, L.P.*, 257 B.R. 809 (Bankr. W.D. Tex. 2000), *In re Balderas*, 328 B.R. 707 (Bankr. W.D. Tex. 2005), and *In re AGE Refining, Inc.*, 447 B.R. 786 (Bankr. W.D.Tex. 2011).

Hon. Judith K. Fitzgerald. The Honorable Judith K. Fitzgerald was a United States Bankruptcy Judge for the Western District of Pennsylvania from 1987 to 2013. She served as Chief Judge of that court for five years, and also presided over matters in the District of Delaware, the Eastern District of Pennsylvania, and the District of the Virgin Islands.

INTRODUCTION AND SUMMARY OF ARGUMENT

To ensure that a debtor's estate enjoys the benefit of assistance from talented professionals, Section 330(a) dictates that fees in bankruptcy cases may be awarded for "actual, necessary services" rendered by professionals that are beneficial to the administration of the bankruptcy case. *See* 11 U.S.C. § 330(a)(1), (3), (4). That statutory command grants bankruptcy judges broad discretion to ensure that professionals can recover reasonable compensation, which requires that their fees not be diluted relative to fees available in other cases. The application process for receiving compensation, which the Bankruptcy Code contemplates as an important part of administering a bankruptcy case, threatens fee dilution because it is demanding and onerous. ***4** Section 330(a) gives bankruptcy judges discretionary authority to solve that problem by awarding defense fees. By administering the sweet with the bitter, bankruptcy judges can satisfy their obligation to avoid fee dilution and thus ensure that bankruptcy professionals are able to recover a reasonable fee for the essential services they perform.

ARGUMENT

I. Section 330(a) Directs The Bankruptcy Court To Scrutinize A Professional's Fee Application And To Award Reasonable Fees.

A bankruptcy judge must strike a balance when fixing a professional's reasonable compensation under Section 330(a). On the one hand, the Bankruptcy Code requires that he subject the professional to a demanding process for judging whether the fees she seeks should be paid out of the estate. On the other hand, he must take care not to unnecessarily impose bankruptcy-specific costs that would drive talent to other practice areas, harming debtors and interfering with the efficient administration of their estates.

Professionals whose fees are to be paid out of the bankruptcy estate under Section 330(a) must submit to an onerous process that helps the bankruptcy judge avoid "vicarious generosity" of the sort Chief Justice Taft condemned in *In re Gilbert,* 276 U.S. 294, 296 (1928). A professional begins by preparing "an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested." ***5** Fed. R. Bankr. P. 2016(a). As the Fifth Circuit correctly noted, this application must be supported by "ample documentation" and "detailed, itemized billing records [that] assure … integrity and sharpen any potential disputes." Pet. App. 17a, 21a; *see also In re S.T.N. Enters., Inc.,* 70 B.R. 823, 835 (Bankr. D. Vt. 1987) (preparing application is "time-consuming and oppressive"). Lack of detail in the application jeopardizes the professional's entitlement to any payment at all. *See, e.g., Brake v. Tavormina (In re Beverly Mfg. Corp.),* 841 F.2d 365, 370 (11th Cir. 1988); *In re Baker,* 374 B.R. 489, 494 (Bankr. E.D.N.Y. 2007); *In re Chapman Farms,* 58 B.R. 822, 823-24 (Bankr. W.D. Wisc. 1986).

The professional's application is then opened to scrutiny and criticism before a wide audience that includes the bankruptcy judge, the United States Trustee, other trustees, the debtor, the creditors, and various committees. *See* 11 U.S.C. §§ 330(a)(1), 1109(b); Fed. R. Bankr. P. 2016(a). Any of these reviewers, including the bankruptcy judge on his own initiative, is entitled to object to the requested fee. *See* 11 U.S.C. § 330(a)(2); *cf.* 28 U.S.C. § 586(a)(3)(A) (authorizing United States Trustee to challenge fee applications). The objectors and the professional can then join issue over the application at a hearing. *See* 11 U.S.C. § 330(a)(1).

If the professional justifies her fee application, the bankruptcy judge "may award … reasonable compensation for actual, necessary services rendered," 11 U.S.C. § 330(a)(1), reducing the award to account for any well-taken objections, *see id.* § 330(a)(2). The fee decision is subject to further ***6** review by either the bankruptcy appellate panel or the district court, and still further review by the court of appeals and this Court. *See* 28 U.S.C. §§ 158, 1254(1). But because "[t]he bankruptcy judge is on the front line, in the best position to gauge the ongoing interplay of factors and to make the delicate judgment calls," *In re Martin,* 817 F.2d 175, 182 - 83 (1st Cir. 1987), he enjoys broad discretion in awarding compensation under Section 330(a). *See, e.g., In re Commercial Fin. Servs., Inc.,* 427 F.3d 804, 810 (10th Cir. 2005); *Anderson v. Anderson (In re Anderson),* 936 F.2d 199, 205 (5th Cir. 1991) (per curiam).

This process of seeking compensation under Section 330(a) is often arduous for the professional who works on a bankruptcy case, especially if a member of the gallery "mount[s] objections to extract a fee reduction." Pet. App. 139a. As Bankruptcy Judge Schmidt noted in this case:

> 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.

Pet. App. 138a.

Bankruptcy-specific costs like these threaten to dilute the compensation that professionals receive relative to the fees recovered by professionals in other practice areas. *See* ***7** *In re Nucorp Energy, Inc.,* 764 F.2d 655, 658 - 59 (9th Cir. 1985); *Rose Pass*

Mines, Inc. v. Howard, 615 F.2d 1088, 1093 (5th Cir. 1980) (per curiam). A diluted fee is not a reasonable fee. As a result, fee dilution threatens to drive away the " 'bankruptcy specialists[] who enable the system to operate smoothly, efficiently, and expeditiously.' " *Boyd v. Engman,* 404 B.R. 467, 483 (W.D. Mich. 2009) (quoting H.R. REP. No. 95-595, at 330 (1977)); *see also Smith v. Edwards & Hale, Ltd. (In re Smith),* 317 F.3d 918, 928-29 (9th Cir. 2002); *Hennigan Bennett & Dorman LLP v. Goldin Assocs. L.L.C. (In re Worldwide Direct Inc.),* 334 B.R. 108, 111-12 (D. Del. 2005); Pet. App. 135a-43a.

In recognition of this serious problem, Congress has instructed each bankruptcy judge to guard against fee dilution. Section 330(a)(3)(F) promotes parity of fees by commanding the bankruptcy judge to consider "the customary compensation charged by comparably skilled practitioners in" non-bankruptcy cases when "determining the amount of reasonable compensation." And Section 330(a)(6) calibrates the dilution-avoiding payment "for the preparation of a fee application," limiting the bankruptcy judge to an award "based on the level and skill reasonably required to prepare the application" so that bankruptcy professionals do not collect fees that they could not obtain from clients in other fields.

II. Section 330(a) Grants The Bankruptcy Court Broad Discretion To Avoid Fee Dilution.

Because the Bankruptcy Code establishes an onerous process for awarding fees, it falls to the bankruptcy judge to steer a safe course between ***8** vicarious generosity and fee dilution in determining reasonable compensation under Section 330(a). *See Smith,* 317 F.3d at 928-29; *In re Fibermark, Inc.,* 349 B.R. 385, 395-96 (Bankr. D. Vt. 2006); *cf. Jacobowitz v. Double Seven Corp.,* 378 F.2d 405, 408 (9th Cir. 1967). In the words of then-Judge Brewer:

> We desire to sec the officers and agents of the court well paid, in order that men of character and ability may be willing to accept the burdens and responsibilities of these trusts; but at the same time we may not forget that the property to be charged with these allowances is not ours ….

Cent. Trust Co. v. Wabash, St. L. & P. Ry. Co., 32 F. 187, 188 (C.C.E.D. Mo. 1887), To satisfy the duty that Section 330(a) assigns, the bankruptcy judge must press each professional for enough information to assess her fee application and any objections, while taking care that the necessary costs of oversight do not discourage bankruptcy practice by diminishing the award of reasonable fees.

The bankruptcy judge is empowered to perform this delicate task by Section 330(a), which grants the judge "discretion to award compensation for the defense of a fee application." Pet. i; *cf.* 11 U.S.C. § 330(a)(1)(A) ("[T]he court *may* award … reasonable compensation …." (emphasis added)). When the bankruptcy judge awards defense fees to temper bankruptcy-specific oversight costs and thus avoid fee dilution, he is properly compensating the professional for services that were both "necessary to the administration of [the] case," *id.* § 330(a)(3)(C), (4)(A)(ii)(II), and "reasonably likely to benefit the ***9** debtors estate," *id.* § 330(a)(4)(A)(ii)(I). Were it otherwise, there would be no need to limit compensation for preparing a fee application. *See id.* § 330(a)(6). The contested fee-award procedure is a necessary process under the Code that helps the bankruptcy judge determine how much compensation should be paid out of the debtor's estate. The debtor's estate benefits when talented professionals are attracted to the bankruptcy field by the prospect of reasonable (and hence undiluted) fees.

This is not to say that defense fees should be dispensed automatically - Section 330(a)(1)(A) uses a "may," not a "shall." *See Jama v. Immigration & Customs Enforcement,* 543 U.S. 335, 346 (2005); *see also Smith,* 317 F.3d at 928 (rejecting "the *per se* award of administrative fees arising from litigation of a fee application"). Instead, bankruptcy judges must make case-by-case decisions about the need for defense fees, drawing on their unmatched familiarity with the relevant litigation. *See id.* at 929 (noting that entitlement to defense fees "depends on the circumstances and is largely a matter within the informed discretion of the bankruptcy court"); *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983) (noting lower court's "superior understanding of the litigation"); *Trustees v. Greenough,* 105 U.S. 527, 537 (1882) (noting lower court's "far better means of knowing what is just and reasonable"). The Fifth Circuit's observation that, "[i]n bankruptcy, the equities are quite different," confirms the wisdom of leaving these decisions to *bankruptcy* judges - those who understand the equities better than anyone. Pet. App. 17a.

***10** The case-by-case exercise of defense-fee discretion has not caused problems in the many places where the practice occurs. To avoid inviting litigation for litigation's sake, courts reduce or deny compensation for the unsuccessful prosecution of fee applications. *See, e.g., Boldt v. Crake (In re Riverside-Linden Inv. Co.),* 945 F.2d 320, 322-23 (9th Cir. 1991); *Prappas & Kidman v. Smith (In re Mira-Pak, Inc.),* 922 F.2d 214, 215 - 16 (5th Cir. 1991) (per curiam); *In re Quigley Co.,* 500 B.R. 347, 370 - 71 (Bankr. S.D.N.Y. 2013); *cf. Comm'r v. Jean,* 496 U.S. 154, 163 n.10 (1990) ("[F]ees for fee litigation should be excluded to the extent that the applicant ultimately fails to prevail in such litigation."). Some bankruptcy judges limit the defense-fee amount to a single-digit percentage of the underlying fee. *See, e.g.,* Pet. App. 141a n.124 (collecting cases); *In re Millennium Multiple Emp'r Welfare Benefit Plan,* 470 B.R. 203, 217 - 18 (Bankr. W.D. Okla. 2012). Others probe defense-fee reasonableness without taking such shortcuts. *See, e.g., In re Kahuku Hosp.,* No. 07176, 2011 WL 5884144, at *5 - *6 (Bankr. D. Haw. Nov. 23, 2011); *In re Geneva Steel Co.,* 258 B.R. 799, 803-04 (Bankr. D. Utah 2001). "There is no precise rule or formula for making these determinations," *Hensley,* 461 U.S. at 436, but bankruptcy judges can be trusted to use their "great leeway" in determining defense fees to avoid the twin evils of vicarious generosity and fee dilution, *Gagne v. Maher,* 594 F.2d 336, 344 (2d Cir. 1979).

***11 III. The Decision Below Prevents The Bankruptcy Court From Carrying Out Section 330(a)'s Commands.**

The Fifth Circuit's reading of Section 330(a) is unsound because it deprives bankruptcy judges of discretionary authority to avert fee dilution on a case-by-case basis, preventing them from awarding reasonable compensation for necessary services. Implicitly conceding this flaw, the opinion below suggests two alternative solutions: inflated billing rates and fee-shifting sanctions. These stopgaps offer inadequate protection against a brain drain caused by bankruptcy's "unique process" for scrutinizing fee applications. Pet. App. 138a.

After telling professionals that "defend[ing] their fee applications [is] a cost of doing business" in bankruptcy, the Fifth Circuit invites them to take self-help measures. Pet. App. 17a - 18a. Specifically, the opinion below advises that "[w]hen firms become aware that they may not be reimbursed for defending core fee applications, they can anticipate this possibility in their hourly rates." Pet. App. 18a n.7.

This rate-padding scheme will make the fee award process less transparent - undermining the open and rigorous fee-review process the Bankruptcy Code establishes - but it will not undo the dilution caused by the Fifth Circuit's holding. A professional who artificially inflates her hourly rate to account for the bankruptcy-specific risk of fee litigation should draw scrutiny from the bankruptcy judge, who must consider "the rates charged for such services" and "the customary compensation charged by comparably skilled practitioners in" non-bankruptcy cases. ***12** 11 U.S.C. § 330(a)(3)(B), (F); *see In re Fleming Cos.,* 304 B.R. 85, 92-93 (Bankr. D. Del. 2003); 28 C.F.R. pt. 58, app. A, § (b)(1)(iii). And under the Fifth Circuit's atextual "test of reasonableness and necessity *to the debtor's estate*," the professional could hardly justify receipt of such a premium. Pet. App. 16a. As the Fifth Circuit might put it, "[t]he primary beneficiary of [an anti-dilution rate premium], of course, is the professional." Pet. App. 15a.

In any event, there is no sense in wresting discretion from the bankruptcy judge and giving it to the professionals who seek to be paid out of the estate. If fee dilution "is in the eye of the beholder," Pet. App. 19a, that would seem to counsel against deferring to those accused of complicity in a "conspiracy of silence," Pet. App. 20a (quoting *Pierson & Gaylen v. Creel & Atwood (In re Consol. Bancshares, Inc.),* 785 F.2d 1249, 1255 (5th Cir. 1986)). The notion that a "claim for comparability is easily made but difficult to analyze" calls for more reliance on expert bankruptcy judges, not less. Pet. App. 18a. A bankruptcy judge who has discretion to award reasonable defense fees is not bound to do so at the request of a professional with "perverse incentives." *Id.* The bankruptcy judge can always say no. *See Jean,* 496 U.S. at 163 ("Exorbitant, unfounded, or procedurally defective fee applications … are matters that the [judge] can recognize and discount."); *In re S. Cal. Sunbelt Developers, Inc.,* 608 F.3d 456, 463 n.2 (9th Cir. 2010) ("[W]e reject [the] contention that permitting recovery of fees on fees fosters a 'lottery mentality' and invites debtors to engage in excessive fee litigation.").

***13** The opinion below also expresses "confiden[ce] that bankruptcy courts, practicing vigilance and sound case management, can thwart punitive or excessively costly attacks on professional fee applications." Pet. App. 21a. Flattering words aside, the Fifth Circuit's interpretation of Section 330(a) deprives bankruptcy judges of the authority they need to manage their cases. Vigilance alone will not get the job done, and neither will the fee-shifting sanctions proposed by the opinion below. *See id.* (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991)); *see also* Fed. R. Bankr. P. 9011.

The standard for imposing sanctions is too high for bankruptcy judges to prevent dilution with that rarely used cudgel. *See Chambers*, 501 U.S. at 44 (dictating "restraint and discretion"); *Santa Fe Minerals, Inc. v. BEPCO, L.P. (In re 15375 Mem'l Corp.)*, 430 B.R. 142, 150 (Bankr. D. Del. 2010) (demanding "exceptional circumstances where a claim is patently unmeritorious or frivolous" (internal quotation marks omitted)). In many bankruptcy cases, fee dilution is likely to occur even if the professional cannot show that "the very temple of justice has been defiled" by an objection to her application. *Chambers*, 501 U.S. at 46 (internal quotation marks omitted). The "no-win situation" described by Bankruptcy Judge Schmidt, in which "the resources the applicant would expend fighting objections could quickly overtake the value of the reduction the objector sought," Pet. App. 140a, will discourage bankruptcy practice without regard to the presence or absence of "bad-faith conduct," *Chambers*, 501 U.S. at 47.

***14** The inadequacy of sanctions can be illustrated with a hypothetical: Suppose the bankruptcy judge, acting sua sponte under Section 330(a)(2), flags a perceived problem with the professional's fee application. The professional prepares a response, at some nontrivial cost, and the bankruptcy judge is ultimately persuaded to award fees as originally requested by the application. Nobody has done anything wrong here. To the contrary, the process is precisely what the Bankruptcy Code requires. The bankruptcy judge has performed his "*duty* to review fee applications," *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 841 (3d Cir. 1994) (emphasis added), while the professional has provided a service "necessary to the administration of the case" within the meaning of Section 330(a)(4)(A)(ii)(II) by preparing a useful response to the concerns from the bench. The bankruptcy judge certainly will not sanction himself, so the Fifth Circuit's sanctions-only approach will force the professional to bear the bankruptcy-specific cost of defending her successful application. That cannot be right - Section 330(a) must be understood to give bankruptcy judges the power to effect the statute's anti-dilution command.

*15 CONCLUSION

The judgment of the court of appeals should be reversed.

Footnotes

* Petitioners' letter giving blanket consent to *amicus* briefs, and respondent's written consent to this brief, are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

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FREQUENTLY ASKED QUESTIONS (FAQS) – PROFESSIONAL COMPENSATION

The United States Trustee Program is prohibited from providing legal advice to private individuals. These questions and answers relate to general circumstances involving bankruptcy.

Questions

1. After *ASARCO*, will the USTP object to defense fees incurred after an objection has been filed in court?
2. Will the USTP rely on *ASARCO* to object to fees incurred in preparing a fee application?
3. After *ASARCO*, will the USTP object to defense fees incurred negotiating or explaining fee applications *before an objection is filed in court?*
4. Will the USTP object to professionals seeking a pre-approved term of employment that permits the payment of fees-on-fees otherwise disallowed by *ASARCO*?
5. Will the USTP object if a professional seeks a higher rate or enhanced compensation, *i.e.*, a bankruptcy premium, than that charged for comparable non-bankruptcy engagements based on the purported risk of non-payment for future fee litigation and resulting dilution of its bankruptcy compensation?
6. How will the USTP handle pending cases with requests for fees incurred in defending fee applications?
7. Will the USTP continue to object to billing for the preparation of invoices submitted in support of a fee application?
8. Will the USTP object to non-legal professionals seeking the reimbursement of legal fees for defending objections to fee applications?

Answers

1. **After *ASARCO*, will the USTP object to defense fees incurred after an objection has been filed in court?**

   A: Yes. The Supreme Court ruled that attorneys' fees for defending objections to applications for compensation ("defense fees" or "fees-on-fees") are *per se* prohibited because section 330 does not expressly alter the American Rule against fee shifting. *See generally Baker Botts LLP v. ASARCO LLC*, 135 S. Ct. 2158, 2167 (2015). Although the U.S. Trustee Fee Guidelines for Attorneys in Larger Chapter 11 cases ("LCFG") state that billing the estate for defending fee applications is "generally inappropriate" unless the defense fees fall "within a judicial exception applicable within the [judicial] district," LCFG, B.2.g., there are no applicable judicial exceptions after *ASARCO*.

2. **Will the USTP rely on *ASARCO* to object to fees incurred in preparing a fee application?**

   A: No. The Court in *ASARCO* did not disallow reasonable compensation for preparing a fee application and noted that "preparation of a fee application is best understood as a 'servic[e] rendered' to the estate administrator under § 330(a)(1)." 135 S. Ct. at 2167. Thus, reasonable charges for preparing interim and final fee applications are compensable because section 330(a)(1) allows them, and section 330(a)(6) requires that the compensation for the fee application be reasonable in relation to the level and skill required to prepare it. *See* also LCFG, B.2.f. (preparation of a fee application is not required for lawyers practicing in areas other than bankruptcy as a condition to getting paid).

3. **After *ASARCO*, will the USTP object to defense fees incurred negotiating or explaining fee applications *before an objection is filed in court?***

   A: Generally no, but it depends on the facts and circumstances of each case. Work that is an extension of fee application preparation will not generally be objectionable. Thus, good faith communications and negotiations regarding a well-prepared fee application may be considered an extension of fee application preparation. But patently poor and deficient fee applications that elicit extensive inquiries or negotiations and require extensive amendment may not be considered part of the fee application preparation. For example, fees related to repeated billing errors, such as vague descriptions or block-billing, will draw an objection. In the absence of further court guidance post-*ASARCO*, the USTP will consider many factors in determining whether such defense fees appear to be for the professional's benefit or for the client's and, therefore, objectionable or not. The USTP's goal is to apply *ASARCO* faithfully, while encouraging sound billing practices and professional cooperation and compliance short of litigation, where possible.

4. **Will the USTP object to professionals seeking a pre-approved term of employment that permits the payment of fees-on-fees otherwise disallowed by *ASARCO*?**

   A: Yes. Professionals' employment and compensation rights in bankruptcy arise by statute. *ASARCO's* analysis is relevant to all Bankruptcy Code sections dealing with employment and compensation. First, section 328 permits a professional to seek court approval for any reasonable terms and conditions of employment. But section 328, like section 330, does not contain explicit statutory authority for deviating from the American Rule against fee-shifting. Second, section 328 terms must both relate to the scope of the professional's employment and be reasonable. Paying fees-on-fees is neither a term of employment nor is it reasonable for the estate to pay for work that is not a client service. Third, section 330(a)(1) governs the award of compensation, subject to sections 326, 328, and 329, and *ASARCO* expressly precludes an award of fees-on-fees under section 330 (a)(1). (A section 330 award is what gives the professional an administrative claim against estate assets under section 503(b)(2)).

   In addition, estate-paid professionals cannot by consent or contract create an exception to pay what the Code does not allow. *See In re Lehman Bros. Holdings, Inc.,* 508 B.R. 283, 294 (S.D.N.Y. 2014). The Code, through sections 326-331 and 503, regulates both professional compensation and administrative expenses paid from the estate in a comprehensive way that parties are not free to rewrite. *See id.* Thus, fees cannot be shifted by a contract that violates a statute, and the USTP will generally object to efforts to pay fees-on-fees in circumvention of *ASARCO*.

5. **Will the USTP object if a professional seeks a higher rate or enhanced compensation, *i.e.*, a bankruptcy premium, than that charged for comparable non-bankruptcy engagements based on the purported risk of non-payment for future fee litigation and resulting dilution of its bankruptcy compensation?**

   A: Yes. The Court in *ASARCO* considered—and rejected—the idea of bankruptcy premiums or enhancements based on the risk of "dilution." "In our legal system, no attorneys, regardless of whether they practice in bankruptcy, are entitled to receive fees for fee-defense litigation absent express statutory authorization. Requiring bankruptcy attorneys to pay for the defense of their fees thus will not result in any disparity between bankruptcy and nonbankruptcy lawyers." *ASARCO*, 135 S. Ct. at 2168. This analysis is consistent with section 330(a)(3)'s standard that a bankruptcy practitioner's reasonable compensation is what is customary and comparable to a non-bankruptcy practitioner's, i.e., market rates and billing practices. See 11 U.S.C. § 330 (a)(3)(F). To the extent the

Fifth Circuit suggested otherwise in its earlier *ASARCO* decision, 751 F.2d 291 (5th Cir. 2014), the Supreme Court disagreed.

Moreover, dilution risk is minimal. *ASARCO* is an exceedingly rare case for many reasons. First, *ASARCO* involved the very unusual circumstance where management of the reorganized debtor was again controlled by the parent upon confirmation. Post-confirmation management was uniquely motivated to be hostile to debtor's bankruptcy counsel because bankruptcy counsel had represented the debtor in obtaining an extraordinarily large judgment against the parent during the bankruptcy—and any reduction in fees would have been a dollar-for-dollar economic benefit to the parent. Second, the fee defense costs were $5 million, reflecting again the very unusual nature of the case. Third, in many cases, the USTP is the only party that objects to a fee application. *See In re Busy Beaver Building Centers, Inc.,* 19 F.3d 833 (3rd Cir. 1994). Finally, because an objecting party must pay its own attorneys' fees to pursue fee objections, this should discourage frivolous objections. And to the extent there are bad faith or frivolous fee objections, the Court noted that a bankruptcy professional can avail itself of Rule 9011 sanctions. 135 S. Ct. at 2168, n.4.

6. **How will the USTP handle pending cases with requests for fees incurred in defending fee applications?**

   A: Any newly filed interim application and any final application containing a request for defense fees *for the first time* should be reviewed under the standards discussed above. That is, if the fees-on-fees resulted from fee litigation, an objection is generally appropriate. If no fee objection was ever filed, then whether the fees-on-fees are objectionable depends on the facts and circumstances of the case.

   If fees-on-fees have been previously awarded on an interim application that would have been disallowed under *ASARCO's* ruling, the USTP should determine whether an objection at the final application stage is advisable based on controlling law within the jurisdiction.

7. **Will the USTP continue to object to billing for the preparation of invoices submitted in support of a fee application?**

   A: Yes. There is no statutory authorization to shift fees for preparing invoices (as opposed to fee applications) to the estate, and the Court in *ASARCO* did not rule otherwise.

   As explained in the LCFG, "routine billing activities . . . typically are not compensable outside of bankruptcy. Most are not compensable because professionals do not charge a client for preparing invoices, even if detailed. Reasonable charges for preparing interim and final fee applications, however, are compensable, because the preparation of a fee application is not required for lawyers practicing in areas other than bankruptcy as a condition to getting paid." LCFG, B.2.f. This rationale applies to all cases, including those not subject to the LCFG.

8. **Will the USTP object to non-legal professionals seeking the reimbursement of legal fees for defending objections to fee applications?**

   A: Yes, using standards analogous to those discussed above that apply to attorneys seeking compensation for fee defense work. Regardless of whether the fee defense request is made by a legal or financial professional, the result must be the same based on *ASARCO*: A professional's legal fees for litigating fee objections cannot be paid. Non-lawyer professionals, such as financial advisors, are entitled to no better and no worse treatment than lawyers with respect to legal fees for defending objections to fee applications in a bankruptcy case.

Because legal fees for defending fee application objections cannot be paid as compensation under section 330(a)(1)(A), those same legal fees cannot be reimbursed as expenses under section 330(a)(1)(B). Section 330(a)(1)(B) allows the award of "necessary" expenses. But those expenses must relate and be incident to the work for which the professional can be compensated under section 330(a)(1)(A). Otherwise, in *ASARCO*, Baker Botts need only have retained outside counsel to defend its fee applications and expensed the legal fees for reimbursement rather than seek compensation for them.

Updated September 25, 2015

Model Rules of Professional Conduct 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. ["In a criminal case" language omitted.]

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Model Rules of Professional Conduct 1:13: Organization as a Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonable might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyers efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonable believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

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(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyers is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Model Rules of Professional Conduct 3.1: Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law or fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: NORTHSHORE MAINLAND SERVICES, INC., *et al.*, Debtors.	Chapter 11 Case No. 15-11402 (KJC) Jointly Administered Re: D.I. 284 **Hearing Date: August 17, 2015 at 11:00 a.m. (prevailing Eastern Time)** **Objection Deadline: August 13, 2015 at 12:00 p.m. (prevailing Eastern Time)**

UNITED STATES TRUSTEE'S OBJECTION TO APPLICATION OF UNSECURED CREDITORS OF NORTHSHORE MAINLAND SERVICES, INC. ET AL., FOR ENTRY OF AN ORDER AUTHORIZING THE EMPLOYMENT AND RETENTION OF WHITEFORD, TAYLOR & PRESTON LLC AS DELAWARE COUNSEL *NUNC PRO TUNC* TO JULY 14, 2015

Andrew R. Vara, the Acting United States Trustee for Region 3 (the "U.S. Trustee"), pursuant to 11 U.S.C. §§ 327-331 and Federal Rule of Bankruptcy Procedure 2014,[1] hereby objects to the *Application Of Official Committee Of Unsecured Creditors Of Northshore Mainland Services, Inc., et al., For Entry Of An Order Authorizing The Employment And Retention Of Whiteford, Taylor & Preston LLC As Delaware Counsel Nunc Pro Tunc To July 14, 2015* (the "Retention Application") filed by the Official Committee of Unsecured Creditors appointed in the chapter 11 cases of the above-captioned debtors and debtors in possession.

[1] Unless otherwise indicated, all chapter, section, federal bankruptcy rule, and local bankruptcy rule references are to the Bankruptcy Code (the "Code"), 11 U.S.C. §§ 101-1532, the Federal Rules of Bankruptcy Procedure (the "Rules"), Rules 1001-9037, and to the Local Bankruptcy Rules of the United States Bankruptcy Court for the District of Delaware.

I. SUMMARY OF ARGUMENT

Whiteford, Taylor & Preston LLC (the "Firm") seeks to be paid "from the Debtors' estates, subject to approval by the Court pursuant to 11 U.S.C. §§ 330 and 331, for any fees, costs or expenses, arising out of the successful defense of any fee application by [the Firm] in these bankruptcy cases in response to any objection to its fees or expenses in these Chapter 11 cases" (the "Fee Defense Provisions"). Retention Application [D.E. 284], ¶ 12.

The Fee Defense Provisions violate the Code and the American Rule, ignore the express directives of the United States Supreme Court, and are otherwise unreasonable. The Supreme Court recently held that section 330(a) does not authorize a court to approve a law firm's fee for litigating its fee application. *Baker Botts LLP v. ASARCO LLC*, ___ U.S. ___, 135 S. Ct. 2158 (2015). For five separate and independent reasons, the Firm cannot circumvent *ASARCO* by having the same fees approved as a term or condition of its employment under section 328(a).[2] Unless the Fee Defense Provisions are removed or stricken, the Court should deny the Retention Application.

II. ARGUMENT

A. Section 328(a) Creates No Exception to the "American Rule's" General Prohibition Against Shifting Fees.

1. Section 328(a) is Not a Fee-Shifting Statute

In *ASARCO*, the Court stated that the "basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Id.* at 2164

[2] Although the Fee Defense Provisions expressly reference sections 330 and 331 only, Paragraph 14 of the Retention Application suggests that the Firm seeks pre-approval of the Fee Defense Provisions pursuant to section 328(a). *See* Retention Application, ¶ 14. The proposed form of order accompanying the Application also relies on section 328(a): "WTP shall be indemnified and be entitled to payment . . . pursuant to section 328(a) of the Bankruptcy Code."

(quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–253 (2010)). Although statutory provisions overruling the American Rule "take various forms," any statutory departures from the American Rule must be contained in "specific and explicit provisions." *Id.* The Court further ruled that a fee-shifting statute typically must both (1) "authorize the award of 'a reasonable attorney's fee,' 'fees,' or 'litigation costs,' and [(2)] usually refer to a 'prevailing party' in the context of an adversarial 'action.'" *Id.*

Applying this two-part test, the Court ruled that Congress did not depart from the American Rule in section 330(a). *Id.* Rather, the statute allows a court to award only "reasonable compensation for actual, necessary services rendered." *Id.* at 2165. The Court reasoned that section 330(a) authorizes a court to award fees for work done to assist the estate in the bankruptcy case, but it does not specifically or explicitly award fees to a "'prevailing party' in the context of an adversarial 'action.'" *Id.* at 2164. Relying on the bedrock principle of the American Rule, the Court held that 11 U.S.C. "§ 330(a)(1) [does not] permit[] a bankruptcy court to award attorneys' fees for work performed in defending a fee application." *Id.* at 2164.

For the same reasons articulated by the Court in *ASARCO*, the Fee Defense Provisions cannot be approved here. Section 328(a), like section 330(a), does not overcome the American Rule's presumption that each party will pay its own fees for fee defense litigation. Section 328(a) provides that, with the court's approval, a professional may be employed "on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis." This text does not "specifically" or "explicitly" allow a "prevailing party" to recover its fees from the other party in an "adversarial action," s*ee id.* at 2164-65, and, therefore, it too fails to satisfy the second prong of the *ASARCO*

test. Because section 328(a) does not expressly vary the American Rule against fee shifting, the Fee Defense Provisions cannot be approved.

In *ASARCO*, the Court also found it significant that certain Code provisions, unlike sections 328(a) and 330(a), *do* explicitly shift a prevailing party's fees to the other side. *ASARCO*, 135 S. Ct. at 2164 (citing as an example 28 U.S.C. § 2412(d)(1)(A)). Those include:

- **11 U.S.C. § 110(i)(1)(C)** (providing that "the court shall order the bankruptcy petition preparer to pay to the debtor . . . reasonable attorneys' fees and costs");
- **11 U.S.C. § 303(i)(1)(B)** (providing that unsuccessful involuntary petitioners may be ordered to pay "a reasonable attorney's fee" to the alleged debtor);
- **11 U.S.C. § 362(k)(1)** (providing that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees . . ." from the violating creditor);
- **11 U.S.C. § 526(c)(2)** (providing that a debt relief agency shall be liable to an assisted person "for reasonable attorneys' fees and costs" if it is found liable under the statute);
- **11 U.S.C. § 707(b)(4)(A)** (providing that a trustee who successfully prosecutes a motion to dismiss may recover from the debtor's attorney who filed the petition "all reasonable costs in prosecuting [the] motion . . . including reasonable attorneys' fees" when specific criteria are met); and
- **11 U.S.C. § 707(b)(5)(A)** (providing that a court "may award" to certain debtors, who defeat a motion to dismiss, "all reasonable costs (including reasonable attorneys' fees").

These Code fee-shifting provisions confirm that Congress did not draft either section 328(a) or section 330(a) in a way that shifts a prevailing party's fees to the loser.[3] Section 328(a), just like section 330(a), stands in stark contrast to the Code provisions that expressly require a losing party to pay the prevailing party's litigation costs, including their attorneys' fees. Congress knows how to shift litigation fees in bankruptcy when it wants them shifted, and it did not shift them under section 328(a).

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[3] None of these provisions shift the fee burden from the prevailing party *to the estate*.

2. The Fee Defense Provisions Are Not a "Contract."

In addition, the Fee Defense Provisions cannot evade *ASARCO* under a contract theory. The Firm's request to be compensated for their legal defense costs does not constitute a "contract"—and even if it did, that contract could not be enforced in a manner that violates the Code.

Professionals' employment and compensation rights in bankruptcy are not bestowed by "contract." Instead, the retention and payment of professionals is governed by statute. Under the Code, an employment application under section 327 or 1103 is filed with the court, which may also approve reasonable terms and conditions of a professional's employment under section 328(a). See 11 U.S.C. § 328(a) (providing that "a committee . . . with the court's approval, may employ or authorize the employment of a professional person"). Regardless of how it is titled, the application is not a contract because it is not an agreement. It is a request that a judge, acting within the constraints of section 328(a), authorize the term or condition of employment. And what a judge can approve is a matter of federal statutory law, not the law of contracts. *In re Federal Mogul-Global, Inc.*, 348 F.3d 390, 397-98 (3d Cir. 2003) (holding that bankruptcy court could approve professional's employment on terms and conditions that were not proposed by the committee but the court found necessary to satisfy the requirement of reasonableness under section 328(a)).

The proposed order approving the application is also not a contract. First, any rights or obligations created by the order are the result of the court's approval, not the agreement of the party to be obligated. RESTATEMENT (SECOND) OF CONTRACTS 9 (1981) (providing that "[t]here must be at least two parties to a contract, a promisor and a promise."). Second, as stated above, the scope of permissible terms is governed by federal statute, not the agreement of the

parties. *In re Federal Mogul-Global, Inc.*, 348 F.3d at 397-98. So while an order approving employment terms may create a statutory right, it does not create a contractual one.

Finally, the proposal here looks nothing like a contract. The professionals do not propose an agreement between parties who mutually agree that in the event of litigation, the losing party will pay the prevailing party's legal fees. The professionals have not agreed to a reciprocal obligation to pay the estate's (or anyone else's) legal fees should the professionals unsuccessfully litigate objections to their fee applications. Rather, the professionals seek to impose a one-way shift of fees to the estate—not a losing party—and to do so regardless of whether it is the estate or some other party who objects to the fees.

A party other than the estate could object since bankruptcy is not a bilateral contract or proceeding. Rather, it is a comprehensive, court-supervised process implicating diverse constituencies with a multiplicity of interests. It is a "collective proceeding through which" creditors' claims are "vindicated for creditors' mutual benefit." *In re A.G. Financial Service Center, Inc.*, 395 F.3d 410, 415 (7th Cir. 2005). As a result, the Code provides "numerous and detailed provisions concerning the employment of professional persons, their compensation and payment." *In re Financial News Network, Inc.*, 134 B.R. 732, 735 (Bankr. S.D.N.Y. 1991). But professionals cannot by contract require third parties to pay their legal fees. Although one can become a third party beneficiary of a contract without giving consent, the law does not recognize unilateral imposition of contractual obligations on third-party benefactors. *See Motorsport Eng'g, Inc. v. Maserati SPA*, 316 F.3d 26, 29 (1st Cir. 2002) (holding that a third party cannot be bound to a contract it did not sign or otherwise assent to); *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 103 (2d Cir.1985) (same).

But even if the proposed employment agreement could somehow be construed to be a contract, it would have to be rejected. The American Rule's prohibition against fee shifting can be altered by statute, and it can be altered by contract. But the American Rule cannot be altered by a contract that violates a statute. Courts have an independent obligation to ensure that what they approve is lawful under the Code. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 277 (2010) (holding that bankruptcy courts have the authority to ensure that proposed actions conform to the requirements of the Code). And courts have no power to take actions that violate the Code. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988) (stating that whatever "equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code"); *Law v Siegel*, __ U.S. __, 134 S. Ct. 1188, 1194 (2014) (holding that "in exercising [its] statutory and inherent powers, a bankruptcy court may not contravene specific statutory provisions."). As will be explained, the proposed employment provisions violate sections 328 and 330 of the Code. Thus, the application asking the Court to approve these provisions must be rejected.[4]

[4] The Third Circuit's decision in *United Artists Theatre Co. v. Walton*, 315 F.3d 217 (3d Cir. 2003) does not compel a different result. In that case, the Third Circuit held that the bankruptcy court was authorized (but not required) to approve a reasonable, "market-driven" indemnification provision in a financial advisor's retention application, which purported to give the non-attorney professionals the same rights of indemnification enjoyed by the debtor's fiduciary employees in the event they were sued for negligence. Nothing in that decision creates authority to approve a novel retention provision that would skirt section 330 by allowing attorneys to shift fees in connection with their own litigation against the estate, or to be compensated for work that did not serve or benefit the estate. Even if *United Artists* were to be given such a broad interpretation, however, its holding would necessarily be limited by the subsequent Supreme Court decisions in *Espinosa*, *Law*, and *ASARCO*.

B. The Fee Defense Provisions Cannot be Approved Under Section 328(a) Because They Seek To Pay Professionals for Work Not Within the Scope of their Employment.

Even if the American Rule against fee shifting did not preclude approval of the Fee Defense Provisions, those provisions cannot be authorized because they fall outside the scope of section 328(a), the statutory provision on which the Application ostensibly relies. Section 328(a) only authorizes courts to approve "reasonable terms and conditions of *employment . . . under section 327 or 1103 of this title.*" 11 U.S.C. § 328(a) (emphasis added). Nothing in the text of section 328(a) provides courts with authority to pay a professional from the estate for work outside the scope of the professional's employment under either section 327 or 1103.[5] For this reason, any "terms and conditions" approved under section 328(a) must relate only to activities that a professional could be retained to perform under sections 327 or 1103. *Id.* After *ASARCO*, those activities cannot include the professional's defense of its own fee application.

For committee professionals, the relevant retention provision of the Code is section 1103(a), which authorizes "*employment* by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee."[6] 11 U.S.C. § 1103(a) (emphasis added). "Employ" means "to engage the *services* of." The American Heritage Dictionary 450 (def. 3.a.) (2d ed. 1982) (emphasis added). Black's Law Dictionary defines "employ" as "[t]o engage in one's *service*." Black's Law Dictionary 471 (5th ed. 1979)

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[5] "Congress has not granted us 'roving authority . . . to allow counsel fees . . . whenever [we] might deem them warranted.' [internal citation omitted]. Our job is to follow the text . . . ." *ASARCO*, 135 S. Ct. at 2169 (quoting *Aleyeska Pipeline Serv. Co. v. Wildnerness Soc'y*, 421 U.S. 240, 260 (1975)).

[6] Similarly, section 327 is entitled "employment of professional persons" and likewise authorizes the trustee to "employ" professionals "to represent or assist the trustee" or debtor-in-possession "in carrying out the trustee's duties." 11 U.S.C. § 327(a).

(emphasis added). Black's Law Dictionary similarly defines "employer" as "[o]ne who employs the *services* of others." *Id.* (emphasis added).

In *ASARCO*, the Supreme Court held that the litigation efforts of a professional employed by the estate in defense of its own fees are not services under section 330 and, therefore, not compensable. *See ASARCO*, 135 S. Ct. at 2165 (internal citations omitted). That same analysis precludes paying for fee defense litigation under a section 328(a) term or condition. Employment by a client necessarily entails the professional providing services to the client. *See* RESTATEMENT (SECOND) OF AGENCY 228(1) (1957) (for an action to be within the scope of "employment" it must be "actuated, at least in part, by a purpose *to serve* the master") (emphasis added). A professional defending an objection to its fee application is not serving the client's interest but instead acts for its own benefit and own interests. *ASARCO* compels the conclusion that a professional does not provide a client "service" when defending an objection to its fee application, and by extension, that doing so is not a term of the professional's "employment" under section 1103. Because fees for fee defense are therefore outside the scope of the professional's employment by its client, the Fee Defense Provisions are also outside the scope of what may be authorized under section 328(a).[7]

This conclusion is consistent with the structure of section 328(a). In general, section 328(a) addresses the question of *how* the professional is to be paid, but not the type of services *for which* the professional may be paid. Section 328(a)'s examples all involve forms of payment, and a term authorizing fees for fee defense is not a form of payment. Section 328(a) includes four examples of "reasonable terms and conditions of employment . . . [:1] a retainer, [2] on an hourly basis, [3] on a fixed or percentage fee basis, or [4] on a contingent fee basis."

[7] Should there be any doubt, section 1103 also provides that a committee professional performs "services" for the committee. That same term also appears in section 330(a), the subject of the *ASARCO* decision.

11 U.S.C. § 328(a). Each addresses how a professional will be compensated for the work that it does. None addresses the *type* of work for which a professional may be compensated. Rather, the type or scope of work is governed by either section 1103 (represent or perform services for committees) or section 327 (represent or assist trustees or debtors-in-possession).

Statutory terms, arguably ambiguous when considered alone, should be given related meaning when grouped together. Under the doctrine of *noscitur a sociis*, the meaning of an ambiguous statutory term may be derived from the meaning of accompanying terms. *In re Cont'l Airlines, Inc*., 932 F.2d 282, 288 (3d Cir. 1991). It follows that the "terms and conditions" that can be approved under section 328(a) should be limited to those addressing the forms of compensation and similar matters, like hourly vs. contingent fees, not the scope of substantive work for which the professional may be compensated, like fee defense litigation. As a result, section 328(a) does not authorize the Court to approve the Fee Defense Provisions.

C. The Fee Defense Provisions Cannot be Approved under Section 328(a) Because They Are Not Reasonable.

Not only must section 328(a) terms relate to the scope of employment, they must also be reasonable. Section 328(a) permits courts to approve "any reasonable terms and conditions of employment." 11 U.S.C. § 328(a). A term allowing fees for fee defense is not "reasonable" for two reasons.

First, courts should and do consider section 330(a) factors when determining whether a proposed term and condition of employment is reasonable under section 328(a). *Federal Mogul*, 348 F.3d at 407-08. In *Federal Mogul*, Judge, now Justice, Alito writing for the Third Circuit ruled that section 330(a)(1) factors could be considered when determining the reasonableness of

a fee structure sought to be approved under section 328(a):

> Section 328(a), as noted above, authorizes the retention of a professional "on any *reasonable* terms and conditions of employment." 11 U.S.C. § 328(a) (emphasis added). Section 330(a)(1) authorizes a Bankruptcy Court to award a professional "reasonable compensation for actual, necessary services rendered," and then lists several criteria to be used in determining the reasonableness of the fees sought. 11 U.S.C. § 330(a)(1). It is well established that "[i]dentical words used in different parts of the same act are intended to have the same meaning." *Barnhart v. Walton*, 535 U.S. 212, 221, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002) (*quoting Dept. of Revenue of Ore. v. ACF Indus., Inc*., 510 U.S. 332, 342, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994)). **Though we need not decide whether Congress intended to limit Bankruptcy Courts to considering only the Section 330(a)(1) factors when determining the reasonableness of a requested fee structure under Section 328(a), we believe that the Section 330(a)(1) factors may be taken into account in asking whether a fee request is reasonable.** The District Court therefore did not err in considering the Section 330(a)(1) factors when evaluating the reasonableness . . . of the terms and conditions of employment proposed by the Equity Committee.

Id. at 390, 407-08 (emphasis added). As explained by then Judge Alito, the plain statutory text of section 328(a) allows courts to consider the section 330(a)(1) factors when presented with section 328(a) terms. Although the Third Circuit did not rule that courts must consider the section 330(a)(1) factors when presented with section 328(a) terms, it conclusively stated that it was proper to do so. Based on the plain statutory text and *Federal Mogul*, a term or condition in a retention application providing for compensation that *ASARCO* held cannot legally be awarded under section 330(a)(1) should not be approved under section 328(a) as reasonable.

Second, section 1103(a)—the employment authorization provision at issue here—specifies that committee professionals are employed "to represent or perform services for such committee." 11 U.S.C. 1103(a).[8] The Supreme Court has definitively ruled that fee defense litigation is not a client service. *ASARCO*, 135 S. Ct. at 2166 ("The term 'services' in this provision cannot be read to encompass adversarial fee-defense litigation"). Because the Fee

[8] *Cf*. 11 U.S.C. § 327(a) (professionals are employed under that section "to represent or assist [the client] . . . in carrying out the . . . duties under this title").

Defense Provisions are not related to the work for which the professionals may be compensated—to represent or perform services for such committee—they are not reasonable and, therefore, cannot be approved under section 328(a). *See Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (holding that a fee is not "reasonable" if it is "unrelated to [the] work" for which the attorney is being compensated.).

D. ASARCO Directly Bars The Fee Defense Provisions Because All Compensation Must Be Approved For Final Payment Under Section 330.

Professionals are employed under sections 327 or 1103, their terms of employment may be approved under section 328(a), and they are paid under section 330, subject to sections 326, 328, and 329. Sections 330 and 331 are the exclusive Code provisions authorizing payments to professionals. *In re Ferguson*, 445 B.R. 744, 751 (Bankr. N.D. Tex. 2011). "While section 330(a)(1) makes an award of compensation 'subject to sections 326, 328, and 329,' **sections 330 and 331 are the only provisions of the Code which authorize the payment of professionals**" employed under sections 327 or 1103. *Id.* (emphasis added). Indeed, the Committee itself correctly acknowledges that any compensation awarded for defense fees will be "subject to approval by the Court pursuant to 11 U.S.C. §§ 330 and 331." Retention Application, ¶ 16.

Any other interpretation of the interplay between sections 328(a) and 330(a) risks forfeiting a professional's claim for an administrative expense. Only a section 330 award gives professionals an administrative claim against estate assets under 11 U.S.C. § 503(b)(2).[9] *Ferguson,* 445 B.R. at 751 ("[S]ection 503(b)(2) is the only statutory basis for according that status to compensation awarded to persons employed under section 327 (and section 1103).").

[9] Section 503(b)(2) provides that: "After notice and a hearing, there shall be allowed administrative expenses . . . including compensation and reimbursement awarded under section 330(a) of this title." Section 507(a)(2) gives that professional's administrative claim second priority, trumping almost all other types of unsecured claims. 11 U.S.C. § 507(a)(2).

Cf. F/S Airlease II, Inc. v. Simon, 844 F.2d 99, 108–09 (3d Cir. 1988), *cert. denied*, 488 U.S. 852 (1988) (professional who was not entitled to a section 330 award of compensation and, therefore, ineligible for an administrative expense under section 503(b)(2) may not receive an administrative expense under section 503(b)(1)(A)'s catchall);[10] *In re Garden Ridge Corp.*, 326 B.R. 278, 281 (Bankr. D. Del. 2005) ("[T]he Third Circuit [in *F/S Airlease*] unequivocally held that section 503(b)(1)(A) cannot be used to reimburse professionals for services rendered to the estate.").[11]

Because section 330(a)(1) is the exclusive provision authorizing the "award" of compensation to a retained professional, even those with pre-approved terms under section 328(a), *ASARCO* conclusively resolves the matter. Under *ASARCO*, bankruptcy courts may not award section 330(a)(1) fees for fee defense litigation. 135 S. Ct. at 2164. Section 328(a) does not independently authorize the award of these fees and, thus, the Fee Defense Provisions cannot be approved as "reasonable."

E. The Parties Cannot "Consent" to Unauthorized Compensation.

The Fee Defense Provisions, even if the Committee and other parties agree to them, cannot override the statutory requirements discussed above. The Code, through sections 326-331 and 503, regulates both professional compensation and administrative expenses paid from the estate in a comprehensive way that parties are not free to rewrite. *See* 11 U.S.C. §§ 326-331, 503; *see also In re Lehman Bros. Holdings, Inc.*, 508 B.R. 283, 294 (S.D.N.Y. 2014) ("The

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[10] *See also In re Milwaukee Engraving Co.*, 219 F.3d 635, 637 (7th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001); *In re Keren Ltd. P'ship*, 189 F.3d 86, 88 (2d Cir. 1999).

[11] Similarly, section 504's broad fee-sharing prohibition for retained professionals is made operative by reference to those "receiving compensation or reimbursement under section 503(b)(2)." 11 U.S.C. § 504. Section 503(b)(2) applies only to compensation awarded under section 330. If section 330 is not the exclusive authority for awarding compensation to retained professionals, then section 504's fee-sharing prohibition would be rendered meaningless.

Bankruptcy Code is meant to be a "comprehensive federal scheme . . . to govern" the bankruptcy process. Although flexibility is necessary[,] the federal scheme cannot remain comprehensive if interested parties and bankruptcy courts in each case are free to tweak the law to fit their preferences . . .") (citations omitted).

The Code's numerous limitations on professional compensation—including the limitation on defense fees recognized by *ASARCO*—would be undermined if they could be bypassed through consent. A professional could evade its burden to make the detailed showings required under sections 330 and 503 if payment depended on nothing more than client consent. *See Lehman*, 508 B.R. at 293 (noting the comprehensive nature of section 503(b) was inconsistent with allowing "backdoor" payments through plan provision). And if defense fees prohibited by *ASARCO* could be circumvented by consent, other Code provisions relating to compensation could similarly be evaded—including prohibitions on compensation for unnecessary or duplicative services, *see* 11 U.S.C. § 330(a)(4); on fee-splitting, *see* 11 U.S.C. § 504; and on compensation for unretained or non-disinterested professionals, *see* 11 U.S.C. §§ 328(c), 330(a)(1). Even if all creditors were to affirmatively consent to the Fee Defense Provisions, there would be no basis for this Court to create a consent exception to ASARCO that contravenes the Code.[12]

[12] The absence of objection to one term in a retention application should not be mistaken for affirmative consent. Rather, parties-in-interest may see no economic benefit to objecting when all creditors will share the burden pro rata. *See Lehman*, 508 B.R. at 293, n.8. "Appellees overstate the amount of consent involved in the approval of section 6.7 [of the plan]. True, majorities of each class of claimant voted for the Plan, but claimants had only an up-or-down vote on the Plan as a whole and could not vote provision-by-provision. (See Reply at 2, 10.) Even if a majority of claimants opposed section 6.7, the Plan would still have won a majority if claimants were willing to swallow the relatively small price of $26 million spread across all claimants in exchange for moving the process forward."

III. CONCLUSION

For the reasons stated above, the Court should deny the Retention Application unless the Fee Defense Provisions are removed or stricken.[13]

DATED: August 13, 2015

ANDREW R. VARA
Acting United States Trustee

By: _/s/ Natalie M. Cox_____
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[13] The Court "may approve some of the terms and conditions proposed in an employment application while rejecting others." *Federal Mogul*, 348 F.3d at 398-99 (citing *Zolfo, Cooper & Co. v. Sunbeam-Oster Co*., 50 F.3d 253 (3d Cir. 1995)).

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
BOOMERANG TUBE, LLC, a Delaware limited liability company, *et al*.,	:	Case No. 15-11247 (MFW)
Debtors.[1]	:	(Jointly Administered)
	:	**Re: D.I. 271, 273, 314, 315**

OMNIBUS REPLY IN SUPPORT OF (I) THE APPLICATION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS PURSUANT TO 11 U.S.C. §§ 328(A), 504, AND 1103(A); FED. R. BANKR. P. 2014, 2016, AND 5002; AND DEL. BANKR. L.R. 2014-1 FOR AN ORDER AUTHORIZING RETENTION AND EMPLOYMENT OF MORRIS, NICHOLS, ARSHT & TUNNELL LLP AS CO-COUNSEL FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS *NUNC PRO TUNC* TO JUNE 19, 2015; AND (II) THE APPLICATION FOR ORDER AUTHORIZING THE RETENTION OF BROWN RUDNICK LLP AS CO-COUNSEL FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF BOOMERANG TUBE, LLC, *NUNC PRO TUNC* TO JUNE 19, 2015

The Official Committee of Unsecured Creditors (the "Committee") of the above-captioned debtors and debtors-in-possession (the "Debtors") hereby files its reply (the "Reply") in support of the applications (the "Applications") for entry of orders authorizing the retention and employment of Brown Rudnick LLP (D.I. 271) ("Brown Rudnick") and Morris, Nichols, Arsht & Tunnell LLP (D.I. 273) ("Morris Nichols," and with Brown Rudnick, the "Firms") as counsel to the Committee *nunc pro tunc* to June 19, 2015, pursuant to sections 328(a), 504, and 1103(a) of title 11 of the United States Code (as amended, the "Bankruptcy Code"); Rules 2014, 2016, and 5002 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"); and

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Boomerang Tube, LLC (9415); BTCSP, LLC (7632); and BT Financing, Inc. (6671). The location of the Debtors' corporate headquarters is 14567 North Outer Forty, Suite 500, Chesterfield, Missouri 63017.

Rule 2014-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), and in response to the objections to the Applications (D.I. 314, 315) (collectively, the "Objection") filed by the Office of the United States Trustee (the "U.S. Trustee").[2] In further support of the Applications, the Committee respectfully states as follows:

SUMMARY OF ARGUMENT

1. Contrary to the U.S. Trustee's objection, the relief sought in the Applications is neither extraordinary nor violative of the United States Supreme Court's decision in *Baker Botts LLP v. ASARCO LLC (In re ASARCO LLC)*, ___ U.S. ___, 135 S. Ct. 2158 (2015).

2. To begin, it is important to set forth the actual holding of the Supreme Court in *ASARCO*: with respect to a professional retained solely under section 327(a) of the Bankruptcy Code, *section 330(a)(1)* of the Bankruptcy Code does not allow for departure from the "American Rule" because *section 330(a)(1)* does not contain an express statutory exception to the common law rule that each litigant pays his or her own attorney's fees. The "basic point of reference" for the American Rule, however, is that it only requires that "[e]ach litigant pay[] his own attorney's fees . . . unless a *statute or contract* provides otherwise." *ASARCO*, 135 S. Ct. at 2164 (emphasis added). The only holding from the majority opinion in *ASARCO* is that, as to fees of a professional retained solely under section 327(a) of the Bankruptcy Code, section 330(a)(1) does not "provide otherwise."

3. In the Firms' Applications, the Committee determined to provide reimbursement of the Firms' defense costs if the Firms were successful in defending their fees

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Applications or the Objection.

before this Court.[3] As has already been recognized by the U.S. Trustee when permitting another professional's retention on similar terms *in these bankruptcy cases*, this common provision in a retention application and engagement letter with an estate professional is not subject to the proscriptions set forth in *ASARCO*. The Supreme Court never considered the distinct issue present here—whether another statute, section 328(a), in combination with the Firms' Applications (and Morris Nichols's engagement letter), "provide otherwise." Indeed, the *ASARCO* opinion is entirely silent concerning section 328(a) of the Bankruptcy Code. Nothing the Court said in *ASARCO* directly informs the meaning of the clause "reasonable terms and conditions of employment" as used in section 328(a). *See* 11 U.S.C. § 328(a).

4. Additionally, as the decades of approvals of indemnification for estate professionals under section 328(a) have established, the Fee Defense Provisions are "reasonable terms and conditions" that this Court should approve. Estate professionals, with the U.S. Trustee's consent, regularly obtain indemnification that is much broader than the Fee Defense Provisions as part of their retention under section 328(a) of the Bankruptcy Code. As noted above, the U.S. Trustee permitted the Debtors' investment banker to obtain indemnification for its defense costs under section 328(a) of the Bankruptcy Code in these cases. This court-approved indemnity was neither inappropriate nor extraordinary, yet the U.S. Trustee seeks to bar the Firms from obtaining significantly *narrower* relief simply because they are attorneys rather than investment banking, financial advisory or crisis management professionals. There is no sound basis in the text of the Bankruptcy Code, this Court's precedent, or the *ASARCO* decision for this disparate treatment.

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[3] The reimbursement provision is incorporated into a standalone engagement letter with the Committee for Morris Nichols. The Committee would enter into a similar engagement letter with Brown Rudnick to the extent Brown Rudnick's Application does not adequately reflect a contract to depart from the American Rule.

5. For these and the other reasons set forth below, the Applications, with the Fee Defense Provisions, should be approved.

ARGUMENT

I. The American Rule Is Inapplicable to the Applications

6. As set forth in *ASARCO*, the American Rule provides that "[e]ach litigant pays his own attorney's fees, win or lose, *unless a* statute or *contract provides otherwise*." *ASARCO*, 135 S. Ct. at 2164 (emphasis added). The Committee's Applications (and engagement letter with Morris Nichols, which is similar to the engagement letter between Lazard Frères & Co. LLC ("Lazard") and the Debtors) are agreements that place the Fee Defense Provisions within the exception to the American Rule. Accordingly, *ASARCO* is inapplicable to, and does not prohibit the approval of, the Fee Defense Provisions contained in the Applications.[4]

7. Cognizant that the American Rule does not apply, the U.S. Trustee argues that approval of the Fee Defense Provisions in the Applications would somehow undermine the Bankruptcy Code limitations on professional compensation. *Objection* ¶¶ 25-26. This argument fails for at least two reasons.

8. First, as explained in more detail below, bankruptcy courts and the U.S. Trustee already authorize reimbursement of defense costs under section 328(a) of the Bankruptcy Code. *See Order (I) Authorizing the Retention and Employment of Lazard Frères & Co. LLC as Investment Banker to the Debtors,* Nunc Pro Tunc *to the Petition Date, and (II) Waiving Certain Information Requirements of Local Rule 2016-2* (D.I. 214) (the "Lazard Order") ¶ 11(d). At no point has the U.S. Trustee argued, or a bankruptcy court found, that reimbursement of defense

[4] It is important to note that it is far from certain that an objection to a fee application of a Firm would implicate the American Rule. For example, if a creditor objected to a fee application, any reimbursement of defense costs would not be imposed against the objecting creditor.

costs pursuant to an indemnity provision in an engagement letter "circumvents by consent" the terms of section 330 of the Bankruptcy Code. *See Objection* ¶ 26.

9. The U.S. Trustee's argument also relies on the unsound premise that reimbursement under the Fee Defense Provisions would be the equivalent of authorizing "back-door" payments to professionals. *See id*. To the contrary, under the Fee Defense Provisions, the Firms would file requests for reimbursement with the Court, serve them on all parties in interest, and would only be reimbursed if the law firm was successful in defending its fee application. In other words, if the Law Firms incurred and sought reimbursement of their defense costs, the requests for reimbursement would be filed with the Court and subject to notice and a hearing, similar to the indemnification rights of non-lawyer professionals in these cases.[5] This process for reimbursement does not permit a professional to evade the public disclosure and notice requirements imposed by this Court.

10. In sum, the specific provisions in the Applications (and the explicit contractual right of Morris Nichols set forth in its engagement letter) remove the Fee Defense Provisions from the American Rule and render the *ASARCO* decision inapplicable.

II. The Fee Defense Provisions Are Appropriate Under Section 328(a)

11. The Court should also approve the Fee Defense Provisions under section 328(a) because they do not violate *ASARCO* and the right to reimbursement is a "reasonable term and condition of employment" regularly approved by this Court.

12. The Supreme Court's holding in *ASARCO* is limited to section 330(a) of the Bankruptcy Code. In no place was section 328(a) mentioned—the Supreme Court (and the

[5] Unlike the U.S. Trustee's examples of prohibited fee-splitting under 11 U.S.C. § 504 and duplicative services, as explained in detail below, there is no prohibition on the reimbursement of defense costs under section 328(a) of the Bankruptcy Code.

Fifth Circuit before it) simply did not consider that section of the Bankruptcy Code.[6] Therefore, any argument that the decision is binding precedent prohibiting the use of section 328(a) to approve the Fee Defense Provisions is incorrect.

13. The Supreme Court's opinion in *ASARCO* stands for the limited proposition that a retention pursuant to sections 327 and 330 of the Bankruptcy Code in and of itself does not authorize fee-shifting for successful defense of a fee application—not that an indemnification provision by contract allowing for reimbursement of defense costs could not be approved as a "reasonable term[] and condition[]" under section 328(a). *See* 11 U.S.C. § 328(a).

14. Section 328(a) allows employment "on *any* reasonable terms and conditions," and indemnification provisions that allow for the recovery of defense costs have been approved as reasonable by this Court and other courts around the country. Indeed, "[c]ourts generally hold that exculpation and indemnification clauses are permissible in retention agreements if the clauses are reasonable in accordance with 11 U.S.C. § 328(a)." *In re Firstline Corp*., 2007 WL 269086, at *2 (Bankr. M.D. Ga. Jan. 25, 2007) (citing *United Artists Theatre Co. v. Walton*, 315 F.3d 217, 230 (3d Cir. 2003)); *see also Bodenstein v, KPMG Corporate Fin. LLC (In re DEC Int'l, Inc.)*, 282 B.R. 423, 424 (W.D. Wis. 2002) (affirming lower court authorizing indemnification provision); *In re Joan & David Halpern, Inc.*, 248 B.R. 43, 47 (Bankr. S.D.N.Y. 2000) (authorizing indemnification provision).[7] In fact, significantly broader reimbursement and indemnification provisions for estate attorneys for costs incurred in

[6] This is unsurprising as the professional in *ASARCO* sought payment of its fees and expenses for successfully defending its final fee application only under section 330(a) of the Bankruptcy Code and not any other statute.

[7] The Fee Defense Provisions are also reasonable under section 328(a) of the Bankruptcy Code because they only provide for reimbursement for the successful defense of fee applications of the Firms. If a party in interest successfully objects to the Firms' fee applications on the basis that their fees were not appropriate, the Firms would be prohibited from recovering their defense costs.

successfully defending actions brought against them have been previously approved under section 328(a). *See, e.g., In re Potter*, 377 B.R. 305, 308 (Bankr. D.N.M. 2007).[8]

15. In fact, the U.S. Trustee made it clear that it believed that indemnifications such as the Fee Defense Provisions are reasonable and appropriate in bankruptcy just months ago. *See Brief for the United States* at 13-34, *In re ASARCO LLC*, 135 S. Ct. 2158 (2015) ("U.S. Brief") ("Treating additional fees for time spent defending the fee application as a component of "reasonable compensation" for those underlying services furthers the anti-dilution purpose that petitioners correctly emphasize, without adopting an unnaturally broad reading of the term "services" in Section 330(a)(1)(A) as encompassing work that professionals perform on their own behalf.").[9]

16. Additionally, the U.S. Trustee, *in these cases*, consented to Lazard being retained with an indemnification provision approved pursuant to section 328(a) that permits, among other things, reimbursement and *advancement of defense costs*. *See Lazard Order* ¶ 11(d). Lazard has been retained, pursuant to section 328(a), and is permitted to receive defense

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[8] In *Potter*, the bankruptcy court approved the trustee's counsel's employment under section 328(a) with the following indemnification provision, over the objection of a creditor:

> *Reimbursement and Indemnity of Defense Attorney Fees and Costs*. The estate shall reimburse, indemnify, and hold the Firm harmless from and against all attorney fees and costs (whether for work performed by the Firm, to be compensated as set forth in paragraph 3, or incurred by the Firm to a third party law firm) incurred in defending against any actions brought against the Firm by any third party in connection with the Firm's performance of its work set forth above, including appeals, if the Firm is the substantially prevailing party in such action(s).

Potter, 377 B.R. at 306-8 (emphasis in original).

[9] As the Supreme Court did not rule on the reasonableness of defense-fee reimbursement in *ASARCO*, there appears to be no reason why these statements are still not true.

costs—pursuant to the exception to the American Rule that arises when a contract specifies otherwise.[10] There is no principled basis to apply a different rule to the Firms.[11]

17. For these reasons, the Fee Defense Provisions are reasonable and should be approved pursuant to section 328(a) of the Bankruptcy Code.

II. The Fee Defense Provisions Are Not Prohibited by Section 330(a)

18. Contrary to the U.S. Trustee's position, section 330(a) does not limit the approval of reasonable terms and conditions of employment available under section 328(a) or the payment thereof. *Objection* ¶¶ 19-24. To make these arguments, the U.S. Trustee seeks to have

[10] Lazard's right to recover defense costs is not limited to costs incurred in successfully defending its fee applications, but instead covers anything and everything "related to, arising out of or in connection with our engagement." *See Debtors' Application for an Order (I) Authorizing the Retention and Employment of Lazard Frères & Co. LLC as Investment Banker to the Debtors,* Nunc Pro Tunc *to the Petition Date, and (II) Waiving Certain Information Requirements of Local Rule 2016-2* (D.I. 101), Ex. B. It is surprising that the U.S. Trustee consents to the approval of significantly broader indemnification rights to financial advisors, notwithstanding that an investment banker's defense of "a claim arising out of or in connection with [Lazard's] engagement" is not providing a "service" to the estate, *see Objection* ¶ 16, yet objects to narrower rights of reimbursement for law firms on the same rationale. There is no statutory or logical basis for this disparate treatment under section 328 of the Bankruptcy Code.

[11] A further example of the problems inherent in the U.S. Trustee's position is that without the Fee Defense Provisions, bankruptcy attorneys will not be able to receive market-driven compensation due to the U.S. Trustee's recently-promulgated guidelines, which, when combined with the rule advanced by the Objection, negates the "anti-dilution purpose" the government argued in favor of before the Supreme Court. *See supra* ¶ 15. The reason for this is that when the *ASARCO* case was heard by the Fifth Circuit, that court suggested that professionals could counteract the fee-depressing effects of its ruling by adjusting their hourly rates upwards. *See ASARCO, LLC v. Jordan Hyden Womble Culbreth & Holzer, PC (In re ASARCO LLC)*, 751 F.3d 291, 301, n.7 (5th Cir. 2014). Given that the guidelines promulgated by the U.S. Trustee come with a stated policy to "object to fees that are above the market rate for comparable services," the Fifth Circuit's suggested work-around is not sanctioned by the U.S. Trustee. *See Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under United States Code by Attorneys in Larger Chapter 11 Cases*, 78 Fed. Reg. 116, at 36250 (June 17, 2013). The U.S. Trustee has created a "Catch-22" for any professional such that any fee objection practically guarantees that it will "dilute its compensation for 'actual and necessary services' rendered in the underlying bankruptcy case." *See U.S. Brief* at 18.

the Court superimpose language from section 330(a) into section 328(a) so that it can argue that *ASARCO* somehow bars the reimbursement of reasonable defense costs and expenses under section 328(a). The U.S. Trustee fails to mention, however, that these arguments are contrary to the express language of the Bankruptcy Code, Third Circuit precedent, the practice before this Court, and the arguments the U.S. Trustee made before the Supreme Court only months ago.

19. To begin, as the court is aware, the plain text of section 330 provides that it is section 330 that "*is subject to section[] . . . 328*," not the other way around. 11 U.S.C. § 330(a) (emphasis added). Nothing in the Bankruptcy Code renders the Court's ability to approve reasonable terms and conditions of employment or payments thereunder pursuant to section 328(a) as being subject to section 330(a).[12]

20. The factors commonly analyzed by courts in connection with approving retention arrangements as reasonable under section 328(a) are by reference to a "market-driven" approach, not a requirement that the agreement be subject to section 330(a). *See In re Energy Partners, Ltd.*, 409 B.R. 211, 226 (Bankr. S.D. Tex. 2009); *In re High Voltage Eng'g Corp.*, 311 B.R. 320, 333 (Bankr. D. Mass. 2004); *In re Insilco Techs., Inc.*, 291 B.R. 628, 633 (Bankr. D.

[12] The U.S. Trustee claims that courts "should" consider 330(a) factors when determining whether a term is reasonable under section 328(a) pursuant to *In re Federal Mogul-Global Inc*., 348 F.3d 390, (3d Cir. 2003). *Objection* ¶ 20. However, in that decision, now-Justice Alito only noted that courts ***may*** look to section 330 in determining whether a fee request approved pursuant to section 328(a) is reasonable. *Fed. Mogul-Global*, 348 F.3d at 408. When courts are determining the reasonableness of indemnity provisions, however, they take a "market driven" approach. *United Artists*, 315 F.3d at 230, 235 (3d Cir. 2003) ("The opinion of the court, as I understand it, holds only that the 'reasonableness' standard of 11 U.S.C. § 328(a) does not categorically prohibit indemnification of financial advisers, as the United States Trustee argues. If such a blanket prohibition is desirable, it should be enacted by Congress.") (J. Alito concurrence).

Del. 2003).[13] Indeed, under the governing precedent from the Third Circuit concerning whether indemnification provisions are reasonable under section 328(a), courts evaluate the indemnification provisions under the "market-driven" approach. *See United Artists*, 315 F.3d at 229-231 (3d Cir. 2003) ("Our approach is 'market driven,' not 'market-determined,' especially in the realm of bankruptcy, where courts play a special supervisory role. With the understanding and limitations set out below, we believe Houlihan Lokey's indemnification agreement to be reasonable and therefore permissible under § 328."). The U.S. Trustee's construction of section 328(a) is wholly inconsistent with this approach.

21. Additionally, with respect to the payment of fees or expenses under section 328(a), this Court has held that "[t]he Court must approve a professional's fee application under section 328 or section 330, but not both." *In re Argose, Inc.*, 372 B.R. 705, 709 (Bankr. D. Del.) *on reconsideration*, 377 B.R. 148 (Bankr. D. Del. 2007) (MFW); *see also F.V. Steel & Wire Co. v. Houlihan Lokey Howard & Zukin Capital, L.P.*, 350 B.R. 835, 839 (E.D. Wis. 2006) (same).[14] Indeed, the U.S. Trustee agreed with this very proposition in its brief to the Supreme

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[13] These factors include, but are not limited to: (1) whether the terms of the engagement agreement reflect normal business terms in the marketplace; (2) the relationship between the debtor and the professionals, i.e., whether the parties involved are sophisticated business entities with equal bargaining power who engaged in an arms-length negotiation; (3) whether the proposed retention is in the best interests of the estate; (4) whether there is creditor opposition to the retention and retainer provisions; and (5) whether, given the size, circumstances and posture of the case, the amount of the retainer is itself reasonable, including whether the retainer provides the appropriate level of risk minimization, especially in light of the existence of any other risk-minimizing devices, such as an administrative order or a carve-out. *Energy Partners*, 409 B.R. at 226; *High Voltage*, 311 B.R. at 333; *Insilco Techs*., 291 B.R. at 634. *Cf. United Artists*, 315 F.3d 217, 238 n.4 (J. Rendell concurred with the result reached by the majority and discussed various factors which courts have considered in determining "reasonableness" under § 328).

[14] The cases in paragraph 23 of the Objection are entirely inapposite to whether or not fee applications can be approved pursuant to section 328(a). First, the court in *In re Ferguson*, 445 B.R. 744 (Bankr. N.D. Tex. 2011), did not deal with a retention approved

Court in *ASARCO*, stating that "***[u]nless*** the bankruptcy court approves the terms and conditions of employment in advance [under section 328(a)], the compensation of a professional employed under Section 327 is governed by 11 U.S.C. 330(a)." *U.S. Brief* at 3 (emphasis added). This was a concession by the U.S. Trustee that section 330 does not govern a reimbursement request under section 328(a).

22. The U.S. Trustee's attempt to superimpose language from section 330 into section 328(a) in an attempt to make *ASARCO* applicable is also not supported by the plain language of each section of the Bankruptcy Code. The U.S. Trustee argues that the word "employment" in the phrase "reasonable terms and conditions of employment" should be read to have the same meaning as "reasonable compensation for actual, necessary services" in section 330(a). *Objection* ¶¶ 14-16. The U.S. Trustee claims that this is "consistent with the structure of section 328(a)," which "addresses the question of *how* the professional is to be paid, but not the type of services *for which* the professional may be paid." *Objection* ¶ 17. That the U.S. Trustee cites no case law for this proposition is not surprising, as the proposition runs directly contrary to the applicable case law and the practice in this Circuit.[15]

23. In the labor law context, by comparison, the phrase "terms and conditions of employment" appears in the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, and is

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under section 328(a) and merely ruled that payments made under section 328(a) would be subject to the same fee splitting prohibition under section 504 of the Bankruptcy Code as payments made under section 330(a). *Id*. at 751. As noted above, there are no explicit prohibitions to indemnification provisions in the Bankruptcy Code. Second, *F/S Airlease II, Inc. v. Simon (In re F/S Airlease II, Inc.)*, 844 F.2d 99 (3d Cir. 1988) and *In re Garden Ridge Corp.*, 326 B.R. 278 (Bankr. D. Del. 2005), both only dealt with *unretained* professionals. Neither of these two cases addressed the interplay between section 330(a) and 328(a).

15 Additionally, a reimbursement of costs and expenses related to the Fee Defense Provisions would properly be categorized as a "reimbursement for actual, necessary expenses" under section 330(a)(1)(B), which, unlike "reasonable compensation" under section 330(a)(1)(A), does not include the word "services." *See* 11 U.S.C. § 330(a).

understood to include rights for reimbursement of attorney's fees if included in the collective bargaining agreement. *See* 29 U.S.C. § 158(d) (1974) (referring to collective bargaining agreements that may incorporate the "wages, hours, and other terms and conditions of employment"); *Leonardis v. Burns Int'l Sec. Servs., Inc.*, 808 F. Supp. 1165, 1179 (D.N.J. 1992) ("[B]ecause the Collective Bargaining Agreement provides for the reimbursement of legal fees, reimbursement constitutes a 'condition of employment' for all security guards who are employed by [defendant] and belong to [the union]").[16]

24. Furthermore, the U.S. Trustee's argument that the Fee Defense Provisions represent "unauthorized compensation" is without merit. *Objection* ¶¶ 25-26. It appears that the U.S. Trustee's argument relies on the belief that *ASARCO* represents a policy determination by the Supreme Court that the American Rule always applies in bankruptcy—but this is simply not true. The *ASARCO* decision provides a narrow holding: section 330(a) of the Bankruptcy Code does not provide a statutory exception to the American Rule. The *ASARCO* decision does not address whether indemnification provisions in a contract may be approved under section 328(a), and nowhere in *ASARCO* did the Supreme Court indicate that it intended to impose such a broad change to the scope of retentions of all estate professionals that were not even before the Supreme Court. Additionally, as noted above, reimbursement of costs pursuant to the Fee Defense Provisions will be subject to all of the various procedural protections, including the public disclosure and notice requirements, imposed by this Court and the Bankruptcy Rules. *See supra* ¶ 9.

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[16] As the U.S. Supreme Court has stated, "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 589-90 (2010).

25. Finally, if the U.S. Trustee were correct, all indemnification provisions (including the one previously permitted in these cases by the U.S. Trustee) would be similarly impermissible. Compensating a financial advisor for losses due to litigation for which the estate indemnified such advisor is not a "form of payment" for "services rendered." Instead, it is more appropriately viewed as a contractual right to be reimbursed for costs and expenses related to challenges that are made to the services actually rendered to the estates by the professional.[17] The U.S. Trustee's interpretation of section 328(a) is clearly inconsistent with courts' routine approval of indemnification provisions. *See, e.g., United Artists, 315 F.3d at 235; DEC Int'l, 282 B.R. at 429; Potter, 377 B.R. at 308; Firstline Corp., 2007 WL 269086, at *3; Joan & David Halpern, 248 B.R. at 47; see also Lazard Order* ¶ 11(d).

CONCLUSION

26. The proposed Fee Defense Provisions are reasonable and market-based. They are far more limited than the indemnification provisions routinely approved by this Court and others around the country. The Supreme Court's majority opinion in *ASARCO* only dealt with the proper interpretation of section 330 of the Bankruptcy Code and did not reach any broad policy pronouncement about the American Rule and the Bankruptcy Code or otherwise alter the

[17] For example, the terms of Lazard's indemnification would allow it to recover attorney's fees for defending itself for allegedly negligent service rendered to the bankruptcy estates. Similarly, the Fee Defense Provisions would allow the Firms to recover attorney's fees for defending themselves for allegedly improper service rendered to the bankruptcy estates because the Supreme Court in *ASARCO* specifically recognized that a "*professional's preparation of a fee application is best understood as a 'servic[e] rendered' to the estate administrator*." *ASARCO LLC*, 135 S. Ct. at 2167 (emphasis added).

application of section 328(a). For all of the reasons set forth herein, the Objection should be overruled and the Applications, with the Fee Defense Provisions, should be approved.

Dated: August 6, 2015
Wilmington, Delaware

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July 16, 2015

BY E-MAIL

Official Committee of Unsecured
Creditors of Boomerang Tube, LLC, et al.
c/o Nucor Steel, as Committee Chair
Attn: Mark DiGirolamo
P.O. Box 30
Armorel, AR 72310

Re: Boomerang Tube, LLC, et al.; Case No. 15-11247 (MFW)
Legal Representation

Dear Committee Members:

Thank you for selecting Morris, Nichols, Arsht & Tunnell LLP ("Morris Nichols") to serve as co-counsel for Official Committee of Unsecured Creditors (the "Committee") of Boomerang Tube, LLC, et al. (the "Debtors") to provide legal advice relating to the scope of matters set forth herein and as otherwise directed by the Committee (the "Engagement"). The purpose of this letter is to confirm the terms and conditions upon which Morris Nichols will provide, subject to court approval and any applicable guidelines and orders, legal services in connection with the Engagement. In this engagement letter, we sometimes refer to the Committee as "you," and to Morris Nichols as "we" or "us."

This letter will describe the basis on which our firm will provide legal services to you. We have agreed that our engagement is limited to performance of services related to this matter. We may agree with you to limit or expand the scope of our representation from time to time, provided that any such change is confirmed by us in writing.

Client

Our engagement is solely on behalf of the Committee. We will not be representing any individual member of the Committee or any other person in connection with the Debtors' Chapter 11 cases.

Scope of Engagement

You have engaged Morris Nichols as of June 19, 2015 to represent the Committee in connection with legal advice relating to the Engagement, as more particularly described in the application to be filed by the Committee seeking approval of Morris Nichols' retention (the "Application"). Morris Nichols' receipt or use of confidential or other information from you or others in the course of this representation does not mean that Morris Nichols will render any advice or services not contemplated by the Engagement. Similarly, you acknowledge that Morris Nichols is not able to provide any investment, accounting, financial, or other non-legal advice, including without limitation any advice regarding the character or credit of any person with whom you may be dealing.

We understand that the Committee has engaged other professionals, including Brown Rudnick LLP. Bearing in mind the need to avoid duplication, we will work with Brown Rudnick LLP and the Committee's other professionals to minimize duplication of the work of any of your other professionals.

Billing

I will have primary responsibility for your representation and will utilize other firm lawyers and legal assistants as I believe appropriate in the circumstances. We will provide legal counsel to you in accordance with this letter, and in reliance upon information and guidance provided by you. The principal basis for computing our fees will be the amount of time spent on the matter by various lawyers and legal assistants multiplied by their individual hourly billing rates. My time will be billed at $675.00 per hour, and the hourly rates of associates range from $305.00 to $525.00 per hour.

As you are aware, Morris Nichols has a diverse practice that includes representation of many other companies and individuals. Because of the size and diversity of our practice, it is possible that some of our present or future clients will have disputes with individual members of the Committee. You agree as a condition of our representing you that Morris Nichols may continue to represent, or may undertake in the future to represent, existing or new clients in any matter, including litigation, that is not substantially related to the subject matter of this representation, even if the interests of such clients in those other matters are directly adverse to individual members of the Committee. We will always honor our duty of confidentiality to you and protect the Committee's information. We agree, accordingly, that we will not act adversely to individual members of the Committee in any instance where, as a result of our representation of the Committee, we have obtained nonpublic, confidential information that, if

known to any other client of ours, could be used to your material disadvantage, unless we screen our lawyers and paralegals who have such information from any involvement in the adverse representation. You also understand and agree that we may obtain confidential information from other clients that might be of interest to you, but which we cannot share with you.

Subject to any guidelines imposed by the Court (including any guidelines promulgated by the Office of the United States Trustee), our standard billing practice is to bill each month for our services, disbursements and other charges. In accordance with the Bankruptcy Code, the Debtors' estates, and not the Committee or any member thereof, will be responsible for any invoices for services rendered and expenses incurred while we represent you. Our mutual understanding is that the amounts due in our statements will be paid when due in accordance with orders of the Bankruptcy Court generally applicable to other retained professionals. If our bills are not paid in such manner, that will be grounds, in our sole discretion, to withdraw from the Engagement.[1] If we do withdraw or if you terminate our representation for any reason, our outstanding fees and costs, to the extent allowed by the Bankruptcy Court, will become due and payable immediately.

Ancillary Costs

In addition to our hourly rates, subject to any guidelines imposed by the Court (including any guidelines promulgated by the Office of the United States Trustee), we charge market rates for certain ancillary services we provide, and we pass along out-of-pocket costs and charges that we incur on our clients' behalf. These typically include messenger charges, facsimile charges, secretarial overtime, word processing charges, deposition videography and transcript charges, administrative charges, printing and photocopying charges, computerized legal research fees, travel costs, meal charges and parking charges (when we are working exclusively on your matter), filing fees, telephone toll charges, fees for experts and other consultants retained on your behalf (with your prior approval), and similar charges. In some cases, particularly if the amount is large, we may forward an invoice from an outside vendor or service directly to the Debtors' estates for payment, which will also be due and payable in accordance with those terms. The Debtors' failure to pay such an invoice despite Court approval will be grounds for us to withdraw from our representation.

Document Retention

The Committee will be responsible for retaining documents relevant to the Engagement. Even if there is in effect a document retention policy that might result in the scheduled destruction or discarding of documents that could be relevant to a matter we are

[1] We also reserve the ability with you to discuss alternative or contingency fee arrangements in the event that restrictions on our ability to be paid for any aspect of our services are imposed by third parties and beyond the Committee's control, and the Committee nevertheless wishes to engage us on other reasonable terms subject to Court approval.

handling, you will not destroy or discard any possibly relevant documents without consulting us first because such destruction could result in sanctions for counsel or the client.

It is our policy and practice to destroy our files seven years after the file is first closed unless the client requests a shorter or longer retention period in writing. Files are generally closed at the conclusion of a representation.

No Guarantee of Results

Although we may offer opinions from time to time about the possible or probable course or results of the Engagement, these do not constitute "legal opinions" intended for reliance as such and we cannot and do not guarantee or represent that we can obtain any particular result given the nature of our work.

Bankruptcy Provisions

We understand that the Committee is a statutory committee in Chapter 11 cases pending before the Court and, as such, all of the terms and conditions of the Engagement, and the compensation and reimbursement contemplated hereby, are subject to approval by the Court. Notwithstanding anything to the contrary herein, we agree that our fees and expenses will be subject to approval by the Court pursuant to 11 U.S.C. §§ 330 and 331, and that payment for our services on an hourly basis at our normal hourly rates constitutes reasonable terms and conditions pursuant to 11 U.S.C. § 328(a). We further understand and agree that any and all disputes arising hereunder will be determined by the Court.

As part of the compensation payable to the Morris Nichols hereunder, the Committee agrees that Morris Nichols shall be indemnified and be entitled to payment from the Debtors' estates, subject to approval by the Court pursuant to 11 U.S.C. §§ 330 and 331, for any fees, costs or expenses, arising out of the successful defense of any fee application by Morris Nichols in these bankruptcy cases in response to any objection to its fees or expenses in these cases.

Other Terms of Our Engagement

If any provision of our retention agreement is held unenforceable in whole or in part for any reason, the remainder of that provision and of the entire agreement will be severable and remain in effect. This letter is a fully integrated agreement and contains all of our agreements and understandings. In entering into it, neither you nor we have made or relied on any promise, representation or warranty not expressly contained in this letter and the accompanying statement. No parol or other evidence will be admissible to contradict, alter or amend this agreement, which both of us agree is clear and comprehensive on what we have agreed to.

Our agreement may be modified only in writing and only if signed by both you and us.

The Attorney-Client Relationship

Above all, our relationship with you must be based on trust, confidence, and clear understanding. If you have any questions at any time about this letter or the work that the firm, or any attorney, is performing, please call me to discuss it. Clients may, of course, terminate our representation at any time for any reason. Subject to ethical and professional obligations, we reserve the right to withdraw from our engagement if our statements are not paid when due or if for any other reason we determine in our sole judgment that the lawyer-client relationship is not proceeding in a satisfactory manner.

Additional information regarding fees and other important matters appears in the enclosed Standard Terms of Representation, which are incorporated as part of this letter and which you should review carefully before agreeing to our engagement. Please indicate your acceptance of the terms of this letter and the Standard Terms of Representation by signing and returning a copy of this letter. Please call me if you have any questions.

Very truly yours,

Derek C. Abbott
Partner

Enclosures

AGREED TO AND ACCEPTED:

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF BOOMERANG TUBE, LLC, ET AL.

Mark DiGirolamo
Authorized Representative of Nucor Steel
Chair, Official Committee of Unsecured Creditors in the Chapter 11 Cases of Boomerang Tube, LLC, et al.

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