**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF DELAWARE**

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| In re:<br><br>NORTHSHORE MAINLAND SERVICES, INC., *et al.*,<br><br>Debtors. | Chapter 11<br><br>Case No. 15-11402 (KJC)<br>Jointly Administered<br><br>Re: D.I. 284<br><br>**Hearing Date: August 17, 2015 at 11:00 a.m. (prevailing Eastern Time)**<br><br>**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. <u>The Parties Cannot "Consent" to Unauthorized Compensation.</u>**

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

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Acting United States Trustee

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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)).