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

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[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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