No. 14-103

IN THE

Supreme Court of the United States

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

Petitioners,

v.

ASARCO LLC,

Respondent.

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

AMICUS BRIEF OF NEUTRAL FEE EXAMINERS SUPPORTING NEITHER PARTY

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INTEREST OF THE AMICI CURIAE

The amici curiae are practicing lawyers and law professors, without a financial stake in this appeal, who share the practical experience of U.S. Bankruptcy Court appointments to review the fees and costs of professional firms seeking compensation from the estate in large Chapter 11 proceedings. By definition neutral, they have provided detailed analysis of fee applications—and, on occasion, objected to them—to assist bankruptcy courts in fulfilling their responsibility under the U.S. Bankruptcy Code to review and approve professional compensation.

Specifically, the amici have analyzed professional fee applications—line by line—on an interim and on a final basis, making recommendations to the courts that appointed them. Fee examiners have a recognized role in the fee review process in some cases, whether fees have gone unchallenged by parties in interest or fees have been challenged, as they are here, through four courts and over 52 months. The amici support neither side in this appeal.[1]

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, the amici file this brief with the written consent of all parties. The petitioners' consent was given generally and noted on the docket on October 8, 2014. The respondent's consent came in a December 3, 2014 communication from its counsel. No counsel for a party wrote this brief in whole or in part. No person or entity other than the amici or his/her counsel made a monetary contribution for the submission of this brief; it has been prepared *pro bono*.

By all accounts, this has been and remains an "extraordinary" case—with the creditors paid in full, no taxpayer funds expended, the legal services provided "exceptional," and the Chapter 11 outcome a "once in a lifetime result."[2] Yet the amici and the country's 95 bankruptcy courts conduct themselves daily in the more ordinary business environment where creditors almost never are paid in full and the outcomes are rarely so satisfying despite the usually diligent efforts of the retained professionals. And the decision here will affect the ordinary Chapter 11 proceedings, including those involving fee objections and the defense of fees, no less than it will affect the parties here.

The Bankruptcy Code requires bankruptcy courts to review professional fees and expenses.[3] *See generally* 11 U.S.C. §§ 327-330. Congress also has mandated the involvement of U.S. Trustees in that process. 28 U.S.C. § 586(a)(3)(A). The Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and guidelines issued by the bankruptcy courts and the U.S. Trustees impose rigorous timekeeping and reporting standards on professionals. *E.g.*, Fed. R. Bankr. P. 2016. Those standards help ensure the integrity of the system and provide a basis for a

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[2] *Baker Botts L.L.P. v. ASARCO LLC*, 751 F.3d 291, 296-98 (5th Cir. 2014) (accepting the district court's "effusive evaluation of the results obtained").

[3] Although this case involves two law firms, referred to collectively in this brief as "Baker Botts," the Bankruptcy Code requires financial advisors, accounting firms and others to submit their fees and expenses for court review and approval. *See* 11 U.S.C. § 327(a).

court's determination that the professional fees are both reasonable and necessary under 11 U.S.C. § 330(a)(1).

Even with electronic data and filing now widely in use, those detailed reporting requirements impose a significant burden on the courts: daily narrative time records for hundreds and, in some proceedings, thousands of timekeepers fill thousands of pages and hundreds of thousands of lines. On occasion, usually by stipulation, the bankruptcy courts have utilized fee auditors, fee examiners, and fee committees to provide quantitative and qualitative analysis and recommendations. The amici here have provided those services in a series of Chapter 9 and 11 proceedings, *see* Petitioners' Brief at 48, and it is from that perspective that they submit this brief.

Robert Keach is a partner in Bernstein Shur, Portland, Maine, responsible for that firm's bankruptcy practice. On the appointment of the U.S. Bankruptcy Court for the Southern District of New York, he was the fee examiner in AMR, *In re AMR Corp.*, U.S. Bankruptcy Court, Southern District of New York, Case Nos. 11-15462 through 11-15481 (2011-2013), the Chapter 11 proceeding initiated by and for American Airlines, in which the professional fees requested totaled more than $400 million. He is serving now as the fee examiner in two Chapter 11 cases pending in the U.S. Bankruptcy Court for Delaware, *Exide Technologies*, Case No. 13-11482 (2013), and *In re Mineral Park, Inc.*, Case Nos. 14-11996 through 14-11999 (2014). Mr. Keach co-chairs the Commission to Study the Reform of Chapter 11, established by the American Bankruptcy Institute.

Nancy Rapoport is the Gordon Silver Professor of Law at the William S. Boyd School of Law at the University of Nevada, Las Vegas, and serves as the Senior Advisor to UNLV's president. Her focus has been bankruptcy ethics, law firm conduct, and ethics in governance, writing extensively about these issues. She has served as a fee examiner and testifying expert in a series of Chapter 11 proceedings, including *In re Station Casinos, Inc.*, U.S. Bankruptcy Court, District of Nevada, Case Nos. BK-09-52477 through BK-11-51219 (2011); *In re Pilgrims Pride Corp.*, U.S. Bankruptcy Court, Northern District of Texas, Case No. 08-45664 (2009-2010) (testified at hearing); and *In re Mirant Corp.*, U.S. Bankruptcy Court, Northern District of Texas, Case No. 03-46590 (2003-2006; 2011-2012) (testified). She also was a testifying expert in the bankruptcy court in this matter, though that testimony was limited to the fee enhancement request, no longer at issue.

Brady C. Williamson is a partner at Godfrey & Kahn, based in Milwaukee, and he also has taught at the University of Wisconsin Law School. The firm has served as counsel to the court-appointed Fee Committee in the Lehman Brothers Chapter 11 proceeding, in which the professional fees totaled more than $1.75 billion, and in *Energy Future Holdings, Inc.*, Case No. 14-10979 (CSS), pending in the U.S. Bankruptcy Court for Delaware. He was the fee examiner in the General Motors Chapter 11. *In re Motors Liquidation Co.*, No. 09-50026, WL 285359 at *1 (Bankr. S.D.N.Y. 2010), ("*General Motors*"). He has submitted amicus briefs to this Court in three other bankruptcy cases: *Central Virginia Community College v. Katz*, 546 U.S. 356

(2006); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); and, *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004).

Robert M. Fishman is a member of the Chicago law firm of Shaw Fishman Glantz & Towbin LLC and co-head of that firm's bankruptcy practice. On the appointment of Hon. Steven W. Rhodes, U.S. Bankruptcy Court for the Eastern District of Michigan, he serves as the fee examiner in the City of Detroit Chapter 9 case, *In re: City of Detroit, Michigan*, Case No. 13-53846, in which the professional fees requested total approximately $170 million. He is a former president of the American Bankruptcy Institute and a Fellow of the American College of Bankruptcy.

SUMMARY OF ARGUMENT

The U.S. Court of Appeals concluded, as a matter of law, that the Bankruptcy Code, in section 330(a), "does not authorize compensation for the costs counsel or [other] professionals bear to defend their fee applications." *In re ASARCO LLC*, 751 F.3d 291, 302 (5th Cir.), *cert. granted*, 135 S. Ct. 44 (2014). This statutory construction has established, at least in the Fifth Circuit, a rule that a professional may virtually *never* be compensated by the estate for defending a challenge by anyone to any request for compensation.

The law firms that have represented the Debtors in this proceeding, disappointed in the Fifth Circuit's ultimate resolution of their fee applications, have a different perspective. A bankruptcy court, they argue, has a very "broad grant of discretion" to award professional fees incurred in the defense of a challenged fee application. Pet. Brief at 4. Neither

party's perspective is wholly persuasive. Instead, a more appropriate standard could permit the law firms to be compensated—at least in part—for their successful fee defense.

This Court should vacate the U.S. Court of Appeals' decision and remand the dispute. The bankruptcy court should be able to approve compensation for a professional firm defending a fee application where the time and services involved in that defense were not only "reasonable" and "necessary" but where the professional substantially prevailed in the defense of its application for compensation.

ARGUMENT

ASARCO objected to Baker Botts' fee applications—applications submitted largely using the lodestar method under 11 U.S.C. § 330. ASARCO also objected to the firms' request for enhanced fees based on the extraordinary outcome of the proceeding. And, finally, ASARCO objected to the fees incurred by Baker Botts in defending the applications against the objections. This appeal solely involves the fee defense issue, asking if the Bankruptcy Code "grants bankruptcy judges discretion" to award compensation for defending a fee application. Question Presented, p. (i), Pet. Brief. Yet that is only part of the question.

At the outset, it is noteworthy that the resolution of the other fee issues, either by the bankruptcy court or consensually or both, is not atypical for a Chapter 11 proceeding. The bankruptcy court must approve all compensation requests, regardless of whether a party in interest objects. *See In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 841 (3d Cir.

1994). Litigated fee challenges that result in a judicial resolution rising through the U.S. Court of Appeals are nevertheless uncommon—even in very significant cases.

On remand from the district court here, the bankruptcy court concluded that the $5 million defense fee award was for the defense of the lodestar fee request and not for the defense of the fee enhancement. There has been no finding that any ASARCO objections were frivolous or made in bad faith. Indeed, the objections themselves are not at issue. It is the very fact of the bankruptcy court's defense fee award, not its precise contours or amount, that the *certiorari* petition placed at issue.

A. The Law Is Unsettled on Compensation for Defending Fee and Cost Objections.

The Bankruptcy Code permits a retained professional to seek compensation for *preparing* a fee application but only based on "the level and skill reasonably required to prepare th[at] application." 11 U.S.C. § 330(a)(6). Standing alone, however, that provision leaves open the question of whether time spent responding to requests for documentation or other information about a filed fee application, or responding to an objection, is compensable. Whether or not there is now a circuit split, this Court has decided to resolve the issue. *See* 3 Collier on Bankruptcy ¶ 330.03[16][a][ii] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014).[4]

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[4] The petitioners maintained that there is a "stark[]" circuit split, Pet. at 18-19, citing (among others) *In re Smith*, 317 F.3d 918, 928 (9th Cir. 2002), and the Fifth Circuit's decision here.

Like the Fifth Circuit panel here, courts that have denied professionals any compensation for defending fees have reasoned that defending a fee application is a different activity within the meaning of the Bankruptcy Code than preparing the application. *E.g.*, *In re Riverside-Linden Inv. Co.*, 945 F.2d 320 (9th Cir. 1991) (fees denied; most objections sustained); *In re Wireless Telecomms., Inc.*, 449 B.R. 228, 237-38 (Bankr. M.D. Pa. 2011); *In re St. Rita's Assocs. Private Placement, L.P.*, 260 B.R. 650, 652 (Bankr. W.D.N.Y. 2001). The courts embracing this position, however, have generally acknowledged that, under the right facts, court-approved compensation may be appropriate nonetheless. *E.g.*, *Riverside-Linden*, 945 F.2d at 323 (fee litigation might be "necessary" and, therefore, compensable under other circumstances); *St. Rita's*, 260 B.R. at 652 (leaving open whether compensation could be awarded where the objection was itself not meritorious); *In re Teraforce Tech. Corp.*, 347 B.R. 838, 867 (Bankr. N.D. Tex. 2006) ("normally" counsel should not be compensated by the estate for fee defense, disallowing fees for defending largely meritorious objections filed in good faith).

The bankruptcy court in *In re Brous* analyzed the relatively few cases on the issue and denied the compensation requested by a Chapter 7 trustee for responding to a "good faith" fee objection. It noted both the force of the black-letter American Rule against fee awards to the prevailing party and the fact that the objecting party had "substantially prevailed." 370 B.R. 563, 572 (Bankr. S.D.N.Y. 2007); *accord*, *530 West 28th St.*, L.P., No. 08-13266, 2009 WL 4893287, at *11 (Bankr. S.D.N.Y. Dec. 11, 2009). In *Teraforce Tech. Corp.*, cited in *Brous* and

approvingly by the U.S. Court of Appeals here, the bankruptcy court noted the division of authority, cited *St. Rita's*, and emphasized the American Rule. The court concluded that the objections "were filed in good faith and ultimately resulted in a partial disallowance of the requested fees." 347 B.R. at 866. The Bankruptcy Code's undoubted silence on the fee defense issue led the court to conclude that "counsel should not normally be able to recover fees for defending a fee application…." *Id.* at 867.

Other courts have reached a facially different conclusion, construing the Bankruptcy Code's silence differently. "[R]equiring counsel who has *successfully* defended a fee claim to bear the costs of that defense is no different than cutting counsel's rate or denying compensability on an earlier fee application." *In re Worldwide Direct, Inc.*, 334 B.R. 108, 112 (D. Del. 2005) (emphasis added); *see also In re Ahead Commc'ns Sys., Inc.*, No. 02-30574, 2006 WL 2711752, at *4-5 (Bankr. D. Conn. Sept. 21, 2006). Again, however, those courts permitting compensation for fee defense have often noted that a *per se* rule is nonetheless inappropriate because it could encourage meritless fee requests. *E.g.*, *Worldwide Direct*, 334 B.R. at 112; *see also In re Parklex Assocs. Inc.*, 435 B.R. 195 (Bankr. S.D.N.Y. 2010) (no benefit to the estate but no *per se* rule against fee defense compensation); *In re Smith*, 317 F.3d at 928-29, *supra* n.4 (distinguishing *Riverside-Linden* on the basis of the merits of the objection, found "frivolous" in *Smith*, and granting fees based in part on concern about fee dilution).

The Bankruptcy Code's silence on the availability of estate compensation for defending a fee

application led Judge Cudahy (a senior 7th Circuit judge sitting in the 9th Circuit) in *In re Smith* to reach a conclusion different from that reached by the Fifth Circuit and several bankruptcy courts. Relying on section 330(a)(3)(F), the court said that denying compensation for defending contested fee awards would "reduce the effective compensation of bankruptcy attorneys to levels below the compensation available to attorneys generally." 317 F.3d at 928. The Court of Appeals there emphasized as well that the objections had been found "frivolous" and that counsel had successfully defended its fee award. *Id.* at 929, citing *In re Nucorp Energy, Inc.*, 764 F.2d 655 (9th Cir. 1985).

An alternative approach is less categorical, suggested by the focus of some cases on the merits of an objection and shifting that focus from the scope of the statutory "preparation" clause to the statutory "reasonableness" standard. That standard, heightened by analogy to fee-shifting statutes, could be applied to disallow compensation for defending a fee request that in some significant part failed to acknowledge or comply with established points of law and practice. *See infra* at Parts C., D.

Virtually all of the relevant decisions—regardless of the result, regardless of the jurisdiction—share a common trait: they shy away from a *per se* rule. Those decisions finding statutory authority to award fees for defending a challenge to compensation recognize that fee defense is not always compensable. Analogously, those decisions denying any authority to award fees for defending a challenge to compensation nonetheless recognize that fee defense may sometimes be compensable—if

only under the American Rule's exceptions and even though the Bankruptcy Code itself is not explicit on the issue. *See ASARCO*, 751 F.3d at 301. This amicus brief advances a middle ground that avoids a *per se* rule.

B. 11 U.S.C. § 330 Provides a Statutory Basis for Awarding, After a Heightened Review, Limited Compensation for the Defense of a Challenged Fee Application.

The Bankruptcy Code prohibits compensation for professional "services that were not reasonably likely to benefit the debtor's estate or; … necessary to the administration of the case." 11 U.S.C. § 330(a)(3)(C), (a)(4)(A)[5]. ASARCO argues that the fees at issue here cannot conceivably benefit the estate because they will benefit only the law firms receiving them. The argument suggests a very narrow view of the term "benefit," limiting it to a quantifiable benefit attributable directly to the challenged services. However, estates and their administrators benefit from the professionals for the estates and for those who represent or advise committees. Their services, provided with zeal and competence, should not be subject to undue concern that the fees for them will be effectively reduced by unsuccessful challenges.

ASARCO's argument begs the question of the acknowledged and extraordinary benefit to the estate provided by the firms here through their representation in the Chapter 11 proceeding for

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[5] The Bankruptcy Code has other fee provisions not applicable here. *E.g.*, 11 U.S.C. § 362(k)(1) (costs and fees available for response to willful violation of the automatic stay).

more than four years. Reasonable professional services are a necessary predicate to a Chapter 11 proceeding, extraordinarily successful or not.

Putting ASARCO's benefit argument aside, however, the fee defense is, as a matter of fact and law, "necessary to the administration of the case." Indeed, it is inseparable from the case's administration because the statutes require U.S. Trustee review of professional fee applications and court approval on notice and a hearing. In this regard, the Fifth Circuit's analysis is at odds with itself.

"[T]he specification of an award for 'preparation of a fee application' is clearly different from authorizing fees for the defense of the application in a court hearing." 751 F.3d at 300. The two are "clearly different," to be sure, but one inexorably follows the other. The fact that the Bankruptcy Code does not provide "explicit statutory authority" for awarding fees for the defense of a challenged application does not preclude such an award. For, just as certainly, the statute does not explicitly prohibit the award of those fees. Rather, it prohibits duplicative fees, unnecessary fees, or fees not "reasonably likely to benefit" the estate. 11 U.S.C. § 330(a)(4)(A).

In the absence of "explicit" language, either affirmatively or negatively resolving the question, the issue devolves to the circumstances under which defense fees can be awarded. ASARCO concedes that, under the American Rule, a bankruptcy court can award defense fees in the face of a frivolous or vexatious challenge. The prohibition, then, is not absolute but necessarily case-by-case. If the

statutory silence actually had the preemptive effect advanced by ASARCO, even the American Rule exceptions should be unavailable. But the silence does not occur in a vacuum. The Bankruptcy Code itself provides context, in section 330, that helps eliminate the silence.

C. Any Award of Compensation for Defending a Challenged Fee Application Requires a Heightened Standard of Review.

ASARCO agrees that, under "a settled exception to the American Rule," professional fees are compensable for a response to "frivolous or bad faith objections." Br. for the Resp't in Opp'n, at 2. Baker Botts' position lies at the other end of the spectrum—a bankruptcy court has virtually unfettered discretion to award defense fees. This Court should accept neither position. The first requires too much; the second too little.

The "American Rule" generally places the financial burdens of costs and counsel on each party, regardless of outcome. Its simplicity, history, and rare (though recognized) exceptions commend it. Yet that rule should not be applied by rote in Chapter 11 proceedings because of the Bankruptcy Code's specific requirements for professionals and the specific mandate for judicial review for all professional fees. Moreover, a Chapter 11 reorganization proceeding is not inherently or pervasively adversarial, making a civil litigation analogue imperfect.

In fact, the American Rule is inapposite to the issue of estate-paid fees in bankruptcy cases because that rule reflects the presumptive division of legal costs in an adversarial situation—each side bears its

own costs, subject to exceptions. In bankruptcy cases, though, the courts exercise two very different functions. One is adjudicative—determining specific rights through motions, objections, and adversary proceedings.[6] The other is administrative—ensuring that the progression of the case, from its filing to its ultimate disposition, follows the Bankruptcy Code. In particular, authorizing and compensating estate-paid professionals is codified in Chapter 3 of the Bankruptcy Code, "Case Administration," rather than in the sections of the Code dealing with specific parties' rights. Unlike a traditional fee-shifting or class action case, where the award of fees is part of the litigation itself, all estate-paid fees in bankruptcy cases require court review—whether or not those fees are associated with particular litigation and whether or not any party in interest has objected to those fees. Associating estate-paid fees with a "winning side," therefore, does not capture the nature of case administration in bankruptcy.

Moreover, in non-bankruptcy matters, the extent to which fees are scrutinized (if at all) is often very different. A lawyer defending or prosecuting a breach of contract case need not submit her fees for court approval nor need that lawyer record the time she has spent each day and the tasks she has performed—indeed, to the tenth of an hour. Not so in bankruptcy cases. "The equities" in specific fee

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[6] *See*, *e.g.*, 11 U.S.C. §§ 547 (preferences), 548 (fraudulent transfers), 544 (trustee as successor to certain creditors and purchasers); Bankruptcy Rules Part VII (adversary proceedings); Fed. R. Bankr. P. 9014 (contested matters).

shifting statutes, the Court of Appeals concluded, "are quite different" from those "in bankruptcy." 751 F.3d at 300. Perhaps. But so are the demands placed by Congress on professionals applying for compensation and, in turn, on the U.S. Trustee system and the bankruptcy courts.

When Congress enacted the Bankruptcy Code in 1978,[7] it rejected the old "economy of administration" standard, which had systematically undercompensated bankruptcy professionals. Instead, Congress specifically provided, pursuant to 11 U.S.C. § 330(a)(3)(F), that the compensation of bankruptcy professionals should be commensurate with the reasonable compensation available to counsel in non-bankruptcy cases, including consideration of the actual value of their services. This presumption of fair and comparable compensation has continued through amendments to section 330, but the presumption itself has left these parties divided.[8]

This is Baker Botts' argument: If bankruptcy professionals are to be compensated fairly, based on the reasonableness of their work and charges, then they should be entitled to all of their reasonable fees defending that compensation. Ill-founded attacks on

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[7] Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, 92 Stat. 2549 (1978).

[8] *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 433, 98 Stat. 333, 370 (1984) (codified at 11 U.S.C. § 330); Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994) (same); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) (same).

reasonable fees chip away at those fees by causing the professionals to incur unnecessary defense costs. Should those unnecessary costs go uncompensated, then the effective recoverable fees are diminished—that is, diluted—sometimes significantly so.

This is ASARCO's argument: Agreeing that the 1978 Code sought to make professional fees in bankruptcy commensurate with compensation outside bankruptcy, the American Rule should apply in bankruptcy. In *any* case, after all, every effort to obtain professional compensation from the "other" side entails the expenditure of time and money and, necessarily, dilutes the ultimate award.

If this Court were to take ASARCO's perspective to its logical limit, however, there would be no check, other than Bankruptcy Rule 9011, on any parties in interest who wished to file unfair or tactical objections to fee applications. Every objection requires the professional whose fees are being questioned to respond in some manner—to suggest a proposed compromise or to file a formal response to the objection—and every such response costs time and, therefore, money. Aggressive parties in interest could create disincentives for bankruptcy professionals—in a sense, suggesting that bankruptcy professionals either fulfill their fiduciary duties without charge or pull their punches to avoid triggering tactical fee objections.

A rule permitting "fees on fees" when the professional substantially prevails in a fee application dispute would forestall gamesmanship. For legitimate and well-grounded objections, each party would bear its own costs of litigating the objection. For objections in which the bankruptcy

professional wins some of the arguments but loses a number of the others, each party would bear its own fees. Only in the situation in which most of the objections were not well-taken would the bankruptcy professional be entitled to fees on fees.

The law firms here argue, with a basis in lower court decisions, *see supra* at Part A., that a "successful" fee defense should always be compensable and, by implication, that even an unsuccessful but grounded defense might be compensable at the court's discretion. Part of the difficulty with that argument lies in the definition of "success."

Fee challenges involve a variety of issues and categories, either in individual, in serial, or in final fee applications. Indeed, the challenges here involved a range of professional services, billing practices and issues. According to Baker Botts, ASARCO "launched an all-out assault…attack[ing] everything—time-entry descriptions, task codes in invoices, staffing choices, and the necessity and quality of various legal services." Pet. Brief at 11. That range of potential challenges is not unfamiliar in the bankruptcy courts, and it should inform the Court's decision here. Fee challenges are rarely wholesale—all or nothing—as they can be portrayed at this stage of this litigation and in most civil litigation. The range of fee objections and the process for resolving them in Chapter 11 are too nuanced and incremental for that.

D. The Practical Approach Developed in the *American Airlines* and *General Motors* Proceedings Provides Context for the Court's Decision Here.

To state the obvious, Chapter 11 proceedings that involve large companies correlate—though not invariably—with significant professional fees.[9] The amount of the fees requested correlates in turn with the complexity of the case and the number of professionals involved in it—that is, those professionals retained by the debtor, by the creditors' committees, and occasionally by *ad hoc* committees seeking compensation under section 503(b).

ASARCO notes that 191 timekeepers, including 150 attorneys, worked on the defense of the law firms' compensation request. For comparative purposes, it is a matter of public record that the professional applications in the *Lehman Brothers* proceeding reflected the work of 5,300 timekeepers altogether and, in *AMR*, the work of about 2,200 timekeepers, though in each instance those totals encompassed the entire proceeding, not just professional compensation issues. The question presented here does not directly involve the size or length of the proceeding, or the amount of compensation requested from the estates—$120 million altogether—or the number and billing

[9] *E.g.*, Stephen J. Lubben, *Corporate Reorganization & Professional Fees*, 82 Am. Bankr. L.J. 77 (2008); Nancy B. Rapoport, *Rethinking Professional Fees in Chapter 11 Cases*, 5 J. Bus. & Tech. L. 263 (2010).

rates of timekeepers for the Baker Botts petitioners.[10]

Ideally, and most often in practice, professional compensation issues—including disagreements over "fees for fees"—are resolved consensually. In the *Lehman* proceedings, the bankruptcy court, with one exception, had no need to resolve contested fee disagreements during the four years of the proceeding. *See In re Lehman Bros. Holdings Inc.*, No. 13-CIV-2211, 2014 WL 3408574 (S.D.N.Y. June 26, 2014). So, too, in the *AMR* case. In another noteworthy Chapter 11 proceeding, however, the bankruptcy court did address contested compensation for the defense of professional fees.

In *General Motors*, the bankruptcy court established a practical standard that integrated the American Rule with the unique requirements of the Bankruptcy Code:

> While the reasonable costs of [preparing] required fee applications are compensable, that doesn't mean that the costs of defending objections to those fee applications are necessarily compensable as well—since as Chief Judge Bernstein of this Court observed in *CCT Communications*, [No. 07-10210, 2010 WL 3386947, at *8-9 (Bankr. S.D.N.Y. Aug. 24, 2010),] there's no parallel statutory requirement to defend against an objection to a fee application, or to receive compensation

[10] The Debtors' principal law firm in *AMR* filed applications totaling about $80 million, and the principal law firm in *Lehman* requested $442 million in compensation.

> for the legal fees incurred in that defense. Rather, as a general matter, fee litigants, like other litigants, must generally bear their own legal expenses under the "American Rule."
>
> But I also agree with Judge Bernstein that professionals shouldn't be penalized by the cost of defending meritless objections. Failing to allow professionals the costs of defending meritless objections would dilute fee awards, and encourage parties to file frivolous objections.
>
> Thus, where the outcome is a split decision, or the fee applicant otherwise fails to substantially prevail, I believe that the applicant should indeed bear its own legal expenses for addressing the objection to its fees, under the American Rule. But as in *CCT*, I believe that I should authorize payment of the costs of defending against the objection if the fee applicant substantially prevails.

In re Motors Liquidation Co., No. 09-50026, 2010 WL 285359, at *1 (Bankr. S.D.N.Y. Nov. 23, 2010) [Docket No. 7896].

This standard modifies the American Rule to fit the unique requirements of the Bankruptcy Code and, indirectly, the law involving fee-shifting statutes. Referring to a "split decision," the standard articulated by the bankruptcy court in *General Motors* also recognized that the burden of proof always rests with the applicant. *See In re Engel*, 124 F.3d 567, 573 (3d Cir. 1997).

The fee examination process in *AMR* and *Exide* followed a similar approach. The fee examiner, an amicus here, collected the relevant cases and developed a protocol that recognized the generally consensual nature of the review process, through negotiation, when that process involves a fee examiner or a fee review committee.

> The Fee Examiner will generally recommend that time be treated as compensable when spent (a) preparing an initial response to the Preliminary Report…[that is, the preliminarily analysis of the fee application by the fee examiner]; (b) in an initial meeting or teleconference with the Fee Examiner as to a Preliminary Report; and/or (c) considering a single revised resolution proposal or response by the Fee Examiner….Continued negotiations after that time will likely be treated as solely for the benefit of the Retained Professional and as not compensable. The Fee Examiner, however, reserves the right to challenge ***any*** time spent…if the Fee Application is materially deficient and such deficiencies precipitated any inquiries or objections…or where the Fee Examiner determines that all or part of any such response is not in good faith and/or not supported by a reasonable interpretation of prevailing law or guidelines.

In re Exide Technologies, *supra* at 3 (emphasis in original), Fee Examiner's Consolidated Final Report Pertaining to the Interim Fee Applications of Certain Retained Professionals for the Period from June 10, 2013 through August 31, 2013 and the

Period from September 1, 2013 through November 30, 2013 at 53 [Docket No. 1921]; *accord*, *In re AMR Corp., supra* at 3 [Docket No. 8270].

The *AMR* and *Exide* fee examiner recognized every professional's right to seek even contested fees and expenses—not only as a matter of due process but because the bankruptcy court has the final and statutory responsibility to review and approve all compensation requests. That recognition came with the caveat reflected in that case and in this brief: the defense of "any actual objections preserved in a Final Report of the Fee Examiner will be treated as not compensable unless the Retained Professional substantially prevails in such defense, as determined by the Court." *Id.*

In both *AMR* and *General Motors*, the court applied the "substantially prevailed" standard in the context of interim compensation applications, usually filed every four months and involving, at times, a series of discrete disagreements over fees for time spent on discrete projects. The time spent (and the associated fees) on a summary judgment motion, for example, might be challenged on the ground that the motion was improvident in light of obviously-contested material facts. In response, the court might find that some of the time spent was warranted but not time spent beyond the initial research and evaluation. Some of the professional fees, in that event, might be compensable as both necessary and reasonable, but the fees charged for seeking compensation would not because the professional would not have "substantially prevailed" on the fee defense issue.

The standard advanced here does not depend on a quantitative determination—though that is a factor. If 100 hours were expended on the project, a determination that 51 of those hours were necessary and reasonable would not yield an award of all of the fees for the entire project, nor would it yield an award of even 51 percent of the time spent defending the fee application. Similarly, in an application for interim compensation, if the fees for five discrete projects were subject to challenge and the professional prevailed on three of them, that too would not necessarily satisfy the "substantially prevailed" standard for an award of defense fees.

A departure from the American Rule for "substantially prevailing" or "prevailing" parties has obvious precedent. Fee shifting is most prominent in actions to enforce federal civil rights laws, including the Civil Rights Act of 1964 and the Individuals with Disabilities Education Act. Congress has extended fee shifting provisions through "[a]t least 34 statutes in 10 different titles of the U. S. Code…." *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 88-89 (1991) (superseded by statute on other grounds). "These statutes encompass diverse categories of legislation, including tax, administrative procedure, environmental protection, consumer protection, admiralty and navigation, utilities regulation, and, significantly, civil rights...." *Id.*

Although the rationale underlying fee shifting—providing an impetus for private litigants to enforce Congressional policies—is distinct from that proposed here, both the concept of allowing courts to shift fees and the definition of "success" are familiar.

For example, a prevailing party for purposes of fee-shifting under section 1988 is one that has "succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (*citing Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). "Accordingly, the outer boundary of the term 'prevailing or substantially prevailing party' is that a party must receive at least some relief on the merits of its claim before being considered a prevailing or substantially prevailing party." *Painewebber Income Properties Three Ltd. P'ship v. Mobile Oil Corp.*, 916 F. Supp. 1239, 1242 (M.D. Fla. 1996) (*citing Hewitt v. Helms*, 482 U.S. 755, 759-60 (1987)).

In *Texas State Teachers Ass'n v. Garland Independent School Dist.*, this Court explained that "Congress clearly contemplated that interim fee awards would be available 'where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues.'" 489 U.S. 782, 790 (*citing* S. Rep., No. 94-1011, at 5 (1976)). The "door" through which a "plaintiff has crossed the threshold to a fee award of some kind" is that "a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Id.* at 791-92 (*citing Hewitt*, 482 U.S. at 760).

However, while success on a significant issue "brings the plaintiff [] across the statutory threshold ... it remains for the district court to determine what fee is 'reasonable.'" *Hensley*, 461 U.S. at 433. In addition to an analysis of whether the fees requested were "reasonably expended" and at a "reasonable

rate," the Court emphasized that the "results obtained" are critical to the analysis. *Id.* at 434.

> This factor is particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief.... In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit....
>
> If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount....

Id. at 435-36.

Petitioners cite *Commissioner, I.N.S. v. Jean*, 496 U.S. 154 (1990), in support of their position that the bankruptcy court has broad discretion to award defense fees. The holding in *Jean* is not inconsistent with the standard proposed here. There, this Court held that once a litigant had met the threshold for eligibility as a prevailing party under the Equal Access to Justice Act, after a finding that the government's position was not "substantially justified," the district court then properly applied a reasonableness determination without yet another "substantially justified" test for the fee issue. *Id.* at 160-163. The standard suggested here is that the professional defending a fee application must "substantially prevail" in the defense of its application to meet the eligibility threshold for compensation for that defense. Once met, the bankruptcy court would then determine a fee award,

applying the reasonable and necessary standards in the Bankruptcy Code.

Of course, unlike the Equal Access to Justice Act or the Civil Rights Act or other statutes, the Bankruptcy Code contains no express fee-shifting provision.[11] In the absence of any such provision, the standard for achieving the "threshold"—to be even eligible to recover defense fees—is necessarily more stringent, consistent with both the bankruptcy court's statutory obligations *and* its discretion. Rather than merely prevailing on "any significant issue in litigation," the standard advanced here would require that a professional "substantially prevail" on the compensation issues in order to be eligible to be paid by the estate for that fee defense. Only with success on a significant range of issues would a court then turn to the second step of the analysis: whether the fees requested are reasonable.

Here, without examining the professionals' time records, it is not possible to apply a heightened

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[11] Federal antitrust law, 15 U.S.C. § 4304, provides that courts shall award fees to a "substantially prevailing claimant" in a claim based on the conduct of a joint venture. So, too, the Freedom of Information Act provides that a district court "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any [FOIA] case ... in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E)(i). "For purposes of [FOIA], a complainant has substantially prevailed if the complainant has obtained relief through ... a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." 5 U.S.C. § 552(a)(4)(E)(ii); *see Zarcon, Inc. v. N.L.R.B.*, 578 F.3d 892, 894 (8th Cir. 2009); *Judicial Watch, Inc. v. F.B.I.*, 522 F.3d 364, 370 (D.C. Cir. 2008).

standard. Yet the bankruptcy court, on remand, did reduce the amount awarded for defending the fee objection to the core fees (not the enhancement) to $5 million. On a subsequent remand, the bankruptcy court will have the opportunity to reconsider its evaluation, looking at discrete objections to discrete blocks of time, under the new standard—if it has not already done so.

There is wide room for bankruptcy court discretion, as there is for every evaluation of professional fees, but it cannot be the unfettered discretion advocated by the law firms here. Consistent with the standards in statutory fee-shifting cases, integrating the demands of the Bankruptcy Code and the American Rule, the bankruptcy courts should be permitted to award fees for the defense of fee applications for those professionals that substantially prevail on that defense.

A flexible rule also encourages professionals to provide information to the bankruptcy court, to the U.S. Trustee, and to interested parties and to work toward a consensual resolution of fee issues, secure in the knowledge that such compensation will not be automatically diluted (by automatically denying compensation). Denying *all* defense compensation necessarily does result in a dilution of an otherwise allowed award of reasonable and necessary fees. And the virtually automatic denial of defense fees contravenes a precept of the Bankruptcy Code: that bankruptcy professionals be compensated at the same level and on the same terms as non-bankruptcy professionals. Sometimes, defense

fees, in whole or in part, are warranted; sometimes not.

This Court's decision here should avoid any *per se* rule—either generally permitting or generally prohibiting—the compensability of defense fees. Implicitly or explicitly, moreover, the Court should note the practical dimension of the review, resolution, and approval process for professional fees in Chapter 11 proceedings. The facts of this case are, in so many ways, exceptional. With or without a fee committee or a fee examiner, the consensual resolution of fee disagreements is the norm. Any *per se* rule would discourage that resolution. A system without restraint on the award of defense fees could encourage meritless fee requests and a license to defend them beyond reason or necessity. A system that made defense fees virtually unobtainable could encourage meritless objections.

Baker Botts concludes its brief by stating that the Court "need not further define the circumstances when defense fees may or may not be awarded." Pet. Brief at 57. As much as the amici may agree with other dimensions of the petitioners' argument, they disagree with this suggestion. Like Baker Botts, the amici contend that the bankruptcy courts do have the authority to award professional compensation for defending fee applications, but the amici contend as well that the bankruptcy courts' discretion requires some boundary. The "substantially prevailed" standard provides that boundary.

The "broad grant" of discretion to the bankruptcy court sought here—to award compensation for defending fee applications—is not inherently limited to the successful defense of all or even a significant

part of a fee application. To be sure, Baker Botts argues that the "[d]iscretion to compensate *successful* fee-application defenses properly aligns the incentives of both fee applicants and potential objectors." Pet. Brief at 51 (emphasis added). In the context of fee applications generally and the fee review process in bankruptcy in particular, however, "success" and "successful" are relative and often serial or piecemeal concepts.

Here, Baker Botts may well have prevailed on every itemized challenge brought by ASARCO, and that would make a determination on remand under a new standard both brief and relatively painless. It then would be readily apparent that Baker Botts "substantially prevailed." However, for those myriad bankruptcy proceedings yet to be filed and for the fee applications yet to be reviewed, a decision by this Court only affirming—or, for that matter, only reversing—the Court of Appeals' decision without a remand and an articulated standard will provide insufficient guidance.

CONCLUSION

For the reasons stated above, the Court should vacate the opinion of the U.S. Court of Appeals for the Fifth Circuit, recognizing the compensability of defense fees under limited circumstances and remanding the fee dispute for reconsideration and resolution consistent with this Court's opinion.

Respectfully submitted,

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