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13 Attorneys for Plaintiff Asarco LLC

14
15 IN THE UNITED STATES DISTRICT COURT
16 FOR THE DISTRICT OF ARIZONA, TUCSON DIVISION

17 ASARCO LLC, a Delaware corporation,
18
19 Plaintiff,
20 v.
21 UNION PACIFIC RAILROAD
COMPANY, a Utah corporation,
22
23 Defendant.

No.
COMPLAINT
JURY DEMANDED

24 Plaintiff ASARCO LLC (“Asarco”) complains of Defendant and alleges:

25
26 **NATURE OF THE ACTION**

27 1. Defendant Union Pacific Railroad Company (“UPRR”) created a metals
28 refinery and smelter on the banks of the Missouri River near downtown Omaha,

1 Nebraska, in 1871, and jointly contributed to its operations and management with Asarco
2 for almost seventy-five years.

3 2. This is a civil action brought by Asarco against UPRR for breach of a
4 certain Tolling Agreement contract formed by UPRR with Asarco in October, 2010. This
5 Tolling Agreement deferred litigation of certain claims (“Contribution Claims”) asserted
6 by Asarco against UPRR under the Comprehensive Environmental Response,
7 Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. §§ 9601-
8 9675, for contribution and cost recovery at what is known as the Omaha Lead Site
9 (“OLS”).

10 3. Asarco has taken responsibility for the cleanup of all of its known liabilities
11 for any “releases” under CERCLA Section 107(a), *et seq.*, 42 U.S.C. § 9607(a), *et seq.*,
12 from Asarco’s historic smelting operations at the OLS, and Asarco has settled all of its
13 liability at the site with the United States Environmental Protection Agency (“EPA”) and
14 the State of Nebraska.

15 4. Asarco paid over \$214 million to settle all of its CERCLA-related liability at
16 the OLS. This settlement included costs to clean up and control contamination coming
17 from UPRR’s activities.

18 5. But for UPRR’s breach of the Tolling Agreement, UPRR would owe
19 equitable contribution under CERCLA to Asarco at the OLS.

20 6. UPRR has broken its promise made in the Tolling Agreement to recognize
21 that Asarco’s Contribution Claim would be preserved “unaltered” throughout the tolling
22 period. This broken promise has damaged Asarco by at least \$100 million.

23 **PARTIES**

24 7. Plaintiff Asarco is a limited liability company organized under the laws of
25 the state of Delaware. Originally organized in 1899 as American Smelting and Refining
26 Company, Asarco has operated for over 112 years—first as a holding company for diverse
27 smelting, refining, and mining operations throughout the United States and now as a
28 Tucson-based integrated copper-mining, smelting, and refining company.

1 **GENERAL ALLEGATIONS and BACKGROUND FACTS**

2 **A. UPRR and Asarco Jointly Owned and Operated a Smelter in Omaha**

3 14. In 1871, on the banks of the Missouri River near downtown Omaha,
4 Nebraska, Asarco and UPRR created a metals refinery and smelter and jointly contributed
5 to its operations and management for almost seventy-five years. Asarco then continued
6 operating the smelter until it was closed in 1997.

7 15. Union Pacific owned and operated the smelter site for 75 years from 1871 to
8 1946. Asarco purchased the property from Union Pacific in 1947 and operated it as a
9 smelter for 50 years, until its close in 1997.

10 16. During UPRR’s ownership, UPRR required Asarco to run the smelter on the
11 site. Asarco’s lease with UPRR required the property to be used only and “solely for the
12 purpose of conducting and transacting thereon, its business of smelting and refining ore.”

13 17. In addition to owning and financing the smelter, UPRR operated the
14 smelter. UPRR provided to Asarco free and discounted shipping, management and
15 operational personnel, free locomotive switching on the site, preferential treatment over
16 other shippers, and conditioned its lease to Asarco upon continued operation of the
17 smelter with UPRR’s own management, direction, and operational personnel.

18 18. UPRR had a financial interest in the success of the smelter and invested in
19 Asarco, including providing track and facilities, participating in the management of the
20 facility, and providing membership and leadership on Asarco’s board.

21 19. Union Pacific not only provided land, track, logistics, engine and yard crews
22 necessary for the active operation of the smelter, but also maintained ownership and
23 operational control of all rail related facilities within the smelter.

24 [F]or and in consideration of the covenants and agreements of
25 the smelting company hereinafter written, as well as of the
26 mutual covenants and agreements herein contained” (section
27 1, art. 2), leased to the defendant a tract of land in the city of
28 Omaha, Neb., containing about 19 acres, excepting and
reserving to the said Pacific Company the exclusive
ownership, possession, right of possession and right to the
exclusive use of all of the railroad tracks, side tracks and
switches now upon, or which may hereafter, at any time

1 during the term of this lease, be constructed in or upon the
 2 said premises, or any part thereof, the said premises and said
 3 tracks being further shown and described upon the map hereto
 4 annexed, marked Exhibit A and made a part hereof, and
 5 excepting and reserving further *the exclusive right to said*
 6 *Pacific Company to lay down and construct, and thereafter*
 7 *maintain and operate any additional railroad tracks, side*
 8 *tracks and switch connections within and upon said*
 9 *premises, which the said smelting company may require to*
 10 *be laid or constructed for the hauling of its freight or*
 11 *material in the prosecution of the said business of the said*
 12 *smelting company upon the said premises.*

7 *To have and to hold the same unto the said smelting*
 8 *company for the said term [January 1, 1937] for the purpose*
 9 *of maintaining and operating thereon its buildings and*
 10 *appliances now situated thereon, and any other such*
 11 *buildings and appliances as it may, during the term hereby*
 12 *created, erect thereon, and of conducting thereon the*
 13 *business of handling, smelting and refining ores,* and doing
 14 such other business pertaining to or connected with the
 15 handling, smelting and refining of ores as said smelting
 16 company may, during the said term, engage in upon said
 17 premises.

13 *American Smelting & Refining Co. v. Union Pac. R. Co.*, 256 F. 737, 738, 739 (8th Cir.
 14 1919). (*emphasis added*). The lease (and the Eighth Circuit’s description thereof) makes
 15 clear that UPRR’s ownership, possession and right to use the property would be exclusive
 16 to UPRR. *Id.* at 739.

17 20. In addition to “exclusive ownership, possession, right of possession and
 18 right to the exclusive use of all of the railroad tracks” within the smelter facility, UPRR
 19 also provided all track and grading at the smelter “free of charge” to Asarco: Section 2,
 20 art. 2, of the lease, reads as follows:

21 And for the consideration aforesaid the said Pacific Company
 22 covenants and agrees to furnish all material for and to lay
 23 upon the grading therefor, as hereinafter set forth, all
 24 necessary tracks over and upon said premises, which the said
 25 smelting company may require to be laid for the handling of
 26 its freight and material in the prosecution of its business and
 27 do all switching of its cars within its premises necessary in
 28 placing the same for loading and unloading freight or material
 therefor free of charge to said smelting company.

Id.

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1 21. The historical record establishes that UPRR was not only an owner but also
2 a joint and active owner/operator at the site under CERCLA from 1871 to 1946.

3 22. The majority of lead emitted from the smelter, over its life of operations,
4 was during the period of UPRR's ownership and active operations.

5 23. UPRR was the principal or only transporter of bullion into the smelter and
6 ore concentrate coming out of the smelter. Waste products from the smelter were only
7 transported from the smelter by UPRR.

8 24. Smelting produces a waste product known as slag.

9 25. Slag is replete throughout Omaha. It was removed from the smelter to
10 create riverbank. It was used as a construction material throughout Omaha. It was placed
11 in lakes and parks in Omaha. It is found in residential yards. It was transported off-site
12 for disposal. It was even used to pave sidewalks.

13 26. UPRR shares responsibility for the slag spread throughout Omaha as it
14 impacts the OLS and contributes lead and other hazardous substances to the environment
15 in Omaha.

16 27. UPRR also bears sole responsibility for its disposal of slag in its railroad
17 ballast throughout Omaha. The highest concentration of lead contamination in Omaha
18 and the location of the very high lead residential soils areas is associated with UPRR's
19 historic rail corridor through Omaha. This is the same corridor where UPRR would have
20 arranged for the disposal of slag underneath its tracks and transported waste for disposal
21 off-site (in addition to transporting bullion to the smelter and ore concentrate from the
22 smelter).

23 28. EPA and the State of Nebraska have alleged that the UPRR and Asarco-
24 owned smelter's smoke stacks emitted lead and other metals into the atmosphere, along
25 with lead from other fugitive sources at the smelter. EPA has alleged that the combined
26 action of airborne diffusion and gravitational settling transported the lead and other metals
27 downwind to be deposited on residential areas of Omaha, and that fallout from the Omaha
28 smelter is a source of residential soil contamination in Omaha.

1 29. This smelter facility is no longer in operation. Asarco voluntarily paid for
2 the *total* remediation of the site and surrounding areas and donated the former site to the
3 City of Omaha for use as a park along the banks of the Missouri River. Following
4 Asarco's voluntary remediation efforts, the former smelter site is now a popular riverbank
5 park known as the Lewis and Clark Landing, which includes an expansive area for public
6 festivals where a free summer concert series is held, and interpretive educational exhibits
7 related to the Lewis and Clark expedition. In 2008, Region VII of EPA recognized
8 Asarco for its Lewis and Clark Landing project finding that it was one of the most
9 successful remediation projects in the United States.

10 30. UPRR made no contribution whatsoever to the remediation of the former
11 UPRR and Asarco-owned smelter.

12 **B. Asarco Has Settled All Enforcement Actions Related to the OLS**

13 31. EPA designated the OLS as a National Priorities List, or "Superfund" site,
14 EPA ID# NESFN0703481, and named Asarco and UPRR as among the principal
15 potentially responsible parties ("PRPs") under CERCLA.

16 32. The OLS designation traces a boundary beyond the footprint of the former
17 UPRR and Asarco-owned smelter property, in an area of Omaha allegedly impacted by
18 the former UPRR and Asarco-owned smelter.

19 33. After designating the OLS as a CERCLA site in 2003, EPA commenced
20 enforcement actions under CERCLA against Asarco. EPA sought recovery from Asarco
21 of the entire liability alleged for the OLS on a joint and several basis.

22 34. EPA sought damages of over \$400 million from Asarco.

23 35. With EPA's OLS CERCLA enforcement action (the "Enforcement Action")
24 against Asarco pending, on August 9, 2005, Asarco filed a voluntary petition for relief
25 under Chapter 11 of the United States Bankruptcy Code in the Bankruptcy Court for the
26 Southern District of Texas (the "Bankruptcy Court").

27 36. On March 12, 2009, Asarco filed a motion in the Bankruptcy Court for
28 approval of a settlement pursuant to CERCLA whereby Asarco would pay the United

1 States and State of Nebraska \$187.5 million to resolve its CERCLA liabilities at the OLS
 2 (“OLS Settlement”). In addition, over \$25 million was designated to be paid from the
 3 Asarco Environmental Trust towards remediation costs at the OLS, rather than returned to
 4 Asarco. The OLS Settlement was approved by the Bankruptcy Court and United States
 5 District Court. The Bankruptcy Court determined that the OLS Settlement was consistent
 6 with the National Contingency Plan (“NCP”). The OLS Settlement was to be funded
 7 upon court approval of a plan of reorganization.

8 37. On December 9, 2009 Plaintiff’s Plan of Reorganization became effective,
 9 enabling disbursement of funds for environmental settlements, including funds for the OLS
 10 Settlement. Asarco fully funded the OLS Settlement at one hundred cents on the dollar as
 11 part of its reorganization. The OLS Settlement constitutes a judicially approved
 12 settlement which stems from enforcement action taken pursuant to Section 106 or Section
 13 107 of CERCLA.

14 38. The OLS Settlement funds a cleanup at the OLS that addresses fully all of
 15 Asarco’s “releases” under CERCLA at the OLS, in addition to covering or funding the
 16 liability, at least in part, of UPRR for its ownership and operations of the smelter.

17 **C. EPA Withheld Critical Exculpatory Documents From Asarco’s**
 18 **Enforcement Action that Later—Through The Benefit of the Tolling**
 19 **Agreement—Became Available to UPRR**

20 39. During the pendency of the Enforcement Action, based on testimony by
 21 certain EPA, Asarco sought additional information under the Freedom of Information Act
 22 (“FOIA”) related to a “Recontamination Study” that EPA was performing at the OLS.
 23 Information related to recontamination issues was absolutely critical to Asarco’s defense
 24 of EPA’s CERCLA Enforcement Action.

25 40. The Recontamination Study would definitively establish whether the
 26 contamination in the OLS was nearly wholly attributable to peeling and cracking lead-
 27 based paint and dust from Omaha’s older housing, rather than from UPRR and Asarco’s
 28 long-dormant (and now remediated) smelter.

1 41. Recontamination was a definitive issue because if newly remediated
 2 properties were becoming recontaminated decades after Asarco’s smelter had been shut
 3 down, then Asarco’s smelter could not be a primary source of the contamination in the
 4 OLS.

5 42. EPA possessed but did not produce—despite repeated requests both through
 6 FOIA and through formal discovery—exculpatory Recontamination Study documents and
 7 data which would have established that Asarco was not responsible for the contamination
 8 at the OLS above threshold action levels.

9 43. As part of its efforts to obtain the exculpatory information Asarco suspected
 10 was being unlawful withheld by EPA, Asarco, Incorporated¹ (“Asarco Inc.”) filed a
 11 standard FOIA request on April 22, 2008.

12 44. EPA unlawfully denied Asarco Inc.’s request.

13 45. On May 15, 2008, while EPA’s Enforcement Action against Asarco was
 14 pending, EPA’s Region VII FOIA officer denied any information existed responsive to
 15 Asarco Inc.’s FOIA request. Asarco Inc. appealed, but EPA failed to substantively
 16 respond.

17 46. Having exhausted its administrative remedies, Asarco Inc. filed a FOIA
 18 complaint in the District of Columbia on August 1, 2008, *ASARCO, Inc. v. United States*
 19 *Environmental Protection Agency*, Civil Action No. 08-1332 (EGS-JMF) (“DC FOIA
 20 Action”).

21 47. EPA continued its campaign to unlawfully withhold documents from Asarco
 22 and Asarco Inc. At the same time, EPA proceeded with its Enforcement Action against
 23 Asarco.

24 48. On September 8, 2008, EPA answered Asarco Inc.’s complaint, stating
 25 “Defendant denies that there are responsive documents to Plaintiff’s FOIA Request.”

26 49. EPA’s answer was false. Hundreds of documents have subsequently been
 27 identified that existed at the time of the request and were unlawfully withheld.

28 _____
¹ Asarco, Incorporated, is the sole shareholder of the plaintiff to this action, Asarco, LLC.
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1 *Protection Agency, et al.*, 8:10-cv-00235-LSC -FG3 (“Omaha FOIA Action”). As a result
2 of the Omaha FOIA Action, UPRR discovered multiple e-mail correspondence strings
3 showing that EPA’s Project Manager for the OLS was intentionally and methodically
4 ordering OLS documents destroyed, including documents exculpatory to Asarco. EPA’s
5 Project Manager ordered to be destroyed e-mails and technical documents that he
6 anticipated would be responsive to FOIA requests, and induced or ordered others at the
7 agency to do the same, so that these documents would not be available to FOIA requests
8 or to discovery in expected litigation.

9 55. EPA’s Project Manager sent these and similar emails to colleagues,
10 subordinates and contractors directing them also to destroy responsive documents, stating
11 for example, “I hope everone [sic] is deleting these types of messages . . . since they will
12 be releasable, if saved, for the next FOIA”; and, “as these emails are subject to FOIA and
13 probably discovery requests later, delete messages like this one after they are sent so you
14 don’t end up getting subpoenaed.”

15 56. Based on this record of government negligence and misconduct, Asarco
16 informed UPRR of its desire to intervene in the Omaha FOIA Action. Asarco also
17 planned to seek to reopen the DC FOIA Action and obtain relief from the judgment, based
18 in part on government misconduct.

19 57. In the meantime, Asarco’s CERCLA contribution claim against UPRR at
20 the OLS, based on the OLS Settlement, had ripened. Asarco communicated its intent to
21 initiate a CERCLA contribution claim against UPRR related to the OLS in approximately
22 August 2010.

23 58. Asarco and UPRR also both had an interest in discovering additional
24 wrongfully withheld exculpatory documents, which would make clear that EPA had
25 unlawfully attempted to assign liability for OLS contamination to Asarco and UPRR.

26 59. In August 2010, UPRR had not settled its environmental liabilities under
27 CERCLA at the OLS. UPRR informed Asarco, however, that neither was it actively
28

1 engaged in any discussions with EPA to address its OLS CERCLA liabilities. Its
2 litigation was entirely focused on the Omaha FOIA Action.

3 60. Because of the aligned interests of Asarco and UPRR in prosecuting the
4 Omaha FOIA Action and continued and further proceedings related to the DC FOIA
5 Action, Asarco and UPRR began discussion of a Tolling Agreement contract that would
6 defer any consideration of Asarco's Contribution Claim against UPRR at the OLS until
7 after resolution of the Omaha FOIA Action.

8 **D. Asarco and UPRR Enter the Tolling Agreement to Allow UPRR Time**
9 **to Prosecute the Omaha FOIA Action to Obtain More Exculpatory**
10 **Documents Related to the Enforcement Case Against UPRR**

11 61. In October, 2010, Asarco and UPRR entered into a Tolling Agreement
12 related to certain claims ("Contribution Claim") asserted by Asarco against UPRR under
13 CERCLA for contribution and cost recovery. This Tolling Agreement, as executed on
14 October 18, 2010, is attached to this Complaint as Exhibit A.

15 62. As set forth in the Tolling Agreement, Asarco's CERCLA Contribution
16 Claim against UPRR was related to Asarco's settlement with the United States and the
17 State of Nebraska under CERCLA for all of Asarco's OLS CERCLA-related liability. As
18 described above, Asarco settled its liability for approximately \$214 million.

19 63. The Tolling Agreement agreed to by UPRR preserved Asarco's CERCLA
20 Contribution Claim against UPRR "unaltered" for up to two years after the end of the
21 Omaha FOIA that both parties – Asarco and UPRR, were prosecuting against EPA.

22 64. As expressed in the Tolling Agreement, both Asarco and UPRR made a
23 strategic decision to defer further consideration of Asarco's Contribution Claim until after
24 UPRR and Asarco completed their efforts to secure the exculpatory materials unlawfully
25 withheld by EPA. The timing of the Tolling Agreement was specifically linked to the
26 conclusion of the Omaha FOIA Action.

27 65. Additionally, both UPRR and Asarco agreed that any savings to UPRR from
28 the successful development of the record through the FOIA Actions to enhance UPRR's
defense of EPA's enforcement claim against UPRR at OLS would be available to Asarco

1 through later contribution claims. The expected value of EPA’s claim against UPRR at
 2 OLS prior to the FOIA Actions was similar to the value of the claim settled by Asarco at
 3 OLS – at least \$200 million.

4 66. After entering into the Tolling Agreement, Asarco—with the support of
 5 UPRR—intervened in the Omaha FOIA Action.

6 67. As a result of the FOIA Actions, EPA complied with its responsibilities to
 7 provide exculpatory materials related to its OLS enforcement case. These materials
 8 suggested that EPA had manipulated environmental testing data to attempt to bolster its
 9 environmental enforcement case against Asarco and UPRR at the OLS.

10 68. The delay established by the Tolling Agreement also had a double benefit to
 11 both parties: As EPA provided more and more unlawfully withheld exculpatory
 12 documents related to its enforcement case (which applied to both Asarco and Union
 13 Pacific), Asarco had an enhanced factual basis to challenge or set aside the judgment in
 14 which its OLS Settlement was approved. This would reduce the amount of Asarco’s OLS
 15 Settlement, and proportionally reduce the amount that Asarco would seek from UPRR in
 16 contribution.

17 69. The October 2010 Tolling Agreement states:

18 WHEREAS, Asarco asserts that Union Pacific is a [PRP] at
 19 the OLS and has expressed its intention to recover from Union
 20 Pacific, pursuant to CERCLA and the doctrines of
 contribution and indemnity, a portion of the costs incurred as a
 result of the Settlement (the “Contribution Claims”); and

21 * * * *

22 **the Parties have agreed to toll any applicable statute of**
 23 **limitations on the Contribution Claims** until two years after
 24 the conclusion of the FOIA Litigation,² **without any**
 25 **admission of liability by the Parties or in any way altering**
 26 **the claims, defenses, or counterclaims available to any**
 27 **Party hereto.**

28 * * * *

² The “FOIA Litigation” referred to in the Tolling Agreement is the Omaha FOIA Action as discussed in this Complaint.
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To respect the wishes of the Parties to defer resolution of the Contribution Claims until after the conclusion of the FOIA Litigation, the Parties wish to extend the applicable statute of limitations for the Contribution Claims pursuant to CERCLA such that ASARCO may commence proceedings related to its Contribution Claims only during the first two years after a final judgment is obtained in the FOIA Litigation.

Tolling Agreement at 1-2 (emphasis added). The parties explicitly agreed that for up to two years after the end of the FOIA Litigation, in no way would Asarco’s Contribution Claims against UPRR be altered.

70. The Tolling Agreement’s recitals indicate that both UPRR and Asarco understand that Asarco intends to pursue “Contribution Claims,” but that under the Tolling Agreement, Asarco will forebear asserting these claims to allow the parties to pursue additional documents that will be helpful to UPRR through further FOIA litigation. The Tolling Agreement is intended to preserve the “claims, defenses, or counterclaims available to any Party” with respect to the Contribution Claims.

71. The Tolling Agreement further states:

4. To respect the wishes of the Parties to defer resolution of the Contribution Claims until after the conclusion of the FOIA Litigation, the Parties wish to extend the applicable statute of limitations for the Contribution Claims pursuant to CERCLA such that Asarco may commence legal proceedings related to its Contribution Claims only during the first two years after a final judgment is obtained in the FOIA Litigation and any appeals therefrom are exhausted (the "FOIA Judgment Date").

* * * *

10. The Parties reserve all rights and defenses which they may have, except as set forth in this Agreement, to contest or defend any claim or action the other Party may assert or initiate against them.

Tolling Agreement at 2-3 (emphasis added). This further confirms that Asarco is agreeing to delay asserting its immediately exercisable rights to prosecute its Contribution Claims to allow the Omaha FOIA Action to proceed unimpeded, and further clarifies that Asarco’s right to pursue its Contribution Claims is preserved.

72. The Tolling Agreement further states:

1 13. Asarco's intervention in the FOIA Litigation and the
 2 subject matter litigated in that case shall not be asserted by
 3 either Party to constitute a waiver of any claim or position
 4 related to the **Contribution Claims that either Party may**
 5 **have against the other Party to be resolved subsequently in**
 6 **ADR between the Parties.** Asarco agrees not to file or serve
 any pleadings, motions, discovery or other litigation materials
 in the FOIA Litigation without prior review by Union Pacific.
 However, such prior review by Union Pacific shall not be
 construed as Union Pacific's endorsement of or agreement
 with the content of such litigation materials.

7 Tolling Agreement at 3 (emphasis added). Importantly, the Tolling Agreement expressly
 8 recognized that the Contribution Claims would be litigated *after* the FOIA Litigation.

9 73. Lastly, Section 14 of the Tolling Agreement states:

10 14. The Parties enter into this Agreement with the intention of
 11 avoiding prolonged and complicated litigation regarding the
 12 Contribution Claims and expediting and promoting efficient
 resolution of the FOIA Litigation.

13 Tolling Agreement at 3.

14 **E. UPRR's Breach of the Tolling Agreement**

15 74. Following the revelations that EPA destroyed exculpatory documents,
 16 UPRR settled its own CERCLA-related claims for the OLS with EPA.

17 75. When Asarco learned that UPRR had achieved an apparent settlement in the
 18 Omaha FOIA Action, Asarco requested that the parties begin ADR of the Contribution
 19 Claims under the terms of the Tolling Agreement.

20 76. UPRR did not dispute that a settlement had been reached in the Omaha
 21 FOIA Action, but merely noted that the matter "is not actually concluded until the Court
 22 enters an order dismissing the case." UPRR, however, stated that it "is not opposed to
 23 beginning the planning and scheduling for ADR."

24 77. UPRR informed Asarco it wanted to expand the scope of the consideration
 25 of Asarco's Contribution Claims to include not just Asarco's claims at OLS, but all sites
 26 where Asarco had achieved a settlement in its bankruptcy and at which UPRR was
 27 potentially liable to Asarco for contribution under CERCLA.
 28

1 78. Asarco agreed with UPRR's approach to expand the ADR process to
2 include claims at other sites.

3 79. Asarco followed up on UPRR's suggestion to expand the ADR to include all
4 pending Asarco and UPRR CERCLA Contribution Claims on August 9, 2011.

5 80. Only after the time had expired for Asarco to challenge UPRR's settlement
6 in *United States v. Union Pacific Railroad Company*, Case No. 8:11-cv-00195-LSC-FG3,
7 on August 18, 2011, did UPRR ever "clarify" for the first time that it intended to assert,
8 and did in fact assert, that it had received "contribution protection" pursuant to 42 U.S.C.
9 § 9613(f)(2), and that it did not view its potential contribution protection as "inconsistent"
10 with the Tolling Agreement.

11 81. 42 U.S.C. § 9613(f)(2) states:

12 A person who has resolved its liability to the United States or
13 a State in an administrative or judicially approved settlement
14 shall not be liable for claims for contribution regarding matters
15 addressed in the settlement. Such settlement does not
16 discharge any of the other potentially liable persons unless its
17 terms so provide, but it reduces the potential liability of the
18 others by the amount of the settlement.

19 82. Therefore, contrary to its material representations to Asarco while it was
20 negotiating the Tolling Agreement, UPRR resolved the Omaha FOIA Action (closed
21 August 12, 2011) and its own CERCLA liabilities to the United States almost
22 simultaneously. *United States v. Union Pacific Railroad Co.*, No. 8:11CV195 (D. Neb.
23 closed Aug. 10, 2011). UPRR's settlement with EPA of its own OLS liabilities was
24 manifested in a consent decree entered by the District of Nebraska in *United States v.*
25 *Union Pacific Railroad Co.*, No. 8:11CV195 (D. Neb. Filed Aug. 9, 2011) ("UPRR-OLS
26 Consent Decree")

27 83. UPRR benefitted from the deferral of Asarco's Contribution Claim by
28 achieving a settlement of EPA's claims against it at OLS for approximately one-ninth of
Asarco's settlement. UPRR settled its liabilities for \$25 million.

1 84. UPRR has asserted the UPRR-OLS Consent Decree as a bar to Asarco's
 2 Contribution Claims, both in its August 18, 2011 letter, and in subsequent mediation and
 3 negotiation. This assertion is a breach of the Tolling Agreement.

4 **F. UPRR Mediated The Tolling Agreement In Bad Faith**

5 85. Despite UPRR's assertion of contribution protection from Asarco's
 6 Contribution Claims, Asarco has attempted to mediate this dispute under the Tolling
 7 Agreement. UPRR has not responded to the mediation in good faith.

8 86. Asarco and UPRR engaged an experienced mediator, a former United States
 9 Attorney and former United States federal district judge. Although UPRR has submitted
 10 token briefs and attended one mediation session, UPRR has not mediated in good faith,
 11 and has failed to engage on critical issues.

12 **CAUSES OF ACTION**

13 **COUNT I**
 14 **BREACH OF CONTRACT**
 15 **(DAMAGES FOR BREACH OF TOLLING AGREEMENT)**

16 87. Plaintiff incorporates by reference paragraphs 1 through 86 as if fully set
 17 forth herein.

18 88. Asarco and UPRR entered into a Tolling Agreement on October 18, 2010.
 19 The Tolling Agreement was a valid and binding contract.

20 89. Asarco fully complied with its obligations under the Tolling Agreement.

21 90. In the Tolling Agreement, Asarco and UPRR agreed that Asarco's
 22 Contribution Claim against UPRR at the OLS would be preserved unaltered throughout
 23 the duration of the tolling period.

24 91. UPRR has asserted a fundamental alteration of the Contribution Claim,
 25 arguing that the claim is now barred because of its subsequent settlement as set forth in
 26 the UPRR-OLS Consent Decree.

27 92. UPRR's assertion of a fundamental alteration of the Contribution Claim is a
 28 breach of the Tolling Agreement.

1 93. UPRR's assertion of contribution protection against Asarco's Contribution
2 Claim has caused damages of at least \$100 million to Asarco.

3 94. WHEREFORE, Asarco respectfully requests that judgment be entered in its
4 favor and against UPRR:

- 5 • Ordering UPRR to pay damages to Asarco in an amount to be
- 6 determined for breach of contract;
- 7 • Awarding Asarco its costs and attorneys' fees pursuant to A.R.S.
- 8 § 12-341.01; and
- 9 • Awarding Asarco all other relief that the Court deems appropriate.

10 **COUNT II**

11 **BREACH OF CONTRACT**
12 **(Covenant of Good Faith and Fair Dealing)**

13 95. Asarco incorporates by reference paragraphs 1 through 94 as if fully set
14 forth herein.

15 96. Every contract, including the Tolling Agreement, contains an implied
16 covenant of good faith and fair dealing.

17 97. In addition to being a breach of the Tolling Agreement, UPRR's assertion of
18 contribution protection to Asarco's Contribution Claims is a breach of the implied
19 covenant of good faith and fair dealing. UPRR has also breached the covenant of good
20 faith and fair dealing as follows:

21 98. UPRR misled Asarco to believe that they were working together under the
22 Tolling Agreement while UPRR apparently entered into the Tolling Agreement to allow it
23 time to attempt to extinguish Asarco's Contribution Claims.

24 99. UPRR misled Asarco to avoid any objection to the UPRR-OLS Consent
25 Decree by purporting to begin a mediation process under the Tolling Agreement,
26 including offering to expand the scope of any ADR to a global resolution of claims.

27 100. UPRR mediated in bad faith, including the submission of token briefs.
28

COUNT IV

CLAIM FOR CONTRIBUTION UNDER SECTION 113(f) OF CERCLA

105. Asarco incorporates by reference paragraphs 1 through 104 as if fully set forth herein.

106. The OLS and surrounding areas, are “facilities” within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

107. “Hazardous substances,” within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), were disposed of, placed, released, or otherwise became located in the OLS at times relevant to this action by UPRR.

108. UPRR is responsible for “releases” within the meaning of Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), into the environment at or from the OLS at times relevant to this action.

109. Response costs for the OLS are consistent with the NCP, pursuant to Section 107(a)(4)(B) of CERCLA, 42 U.S.C. § 9607(a)(4)(B), and implementing regulations.

110. Any person may seek contribution from any other person who is liable or potentially liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a); 42 U.S.C. § 9613(f)(1).

111. A person is liable under Section 107(a) of CERCLA if the person owned or operated any facility at which such hazardous substances were disposed. 42 U.S.C. § 9607(a)(2).

112. A person is liable under Section 107(a) of CERCLA if the person arranged, by contract or otherwise, with a transporter for transport or disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances. 42 U.S.C. § 9607(a)(3).

113. A person is liable under Section 107(a) of CERCLA if the person accepted any hazardous substances for transport to disposal or treatment facilities, incineration

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1 vessels or sites selected by such person, from which there is a release, or a threatened
2 release which causes the incurrence of response costs. 42 U.S.C. § 9607(a)(4).

3 114. UPRR is a person who is liable for owning and/or operating facilities at or
4 from which hazardous substances were disposed under 42 U.S.C. § 9607(a)(2), for
5 arranging transport or disposal of hazardous substances under 42 U.S.C. § 9607(a)(3),
6 and/or transporting hazardous substances in or near the OLS, under 42 U.S.C.
7 § 9607(a)(4).

8 115. Asarco has resolved CERCLA liability for response actions with the United
9 States through the judicially approved bankruptcy reorganization and may seek
10 contribution pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f).

11 116. To date, Asarco has incurred approximately \$214,000,000 for response
12 actions consistent with the NCP pursuant to 42 U.S.C. § 9607(a)(4)(B). This amount
13 represents more than Asarco's allocable share of costs related to its releases or disposal of
14 hazardous substances in or near the OLS.

15 117. Because UPRR qualifies as a responsible party under CERCLA § 107(a),
16 UPRR is liable for its equitable share of any overpayment incurred by Asarco.

17 118. WHEREFORE, Asarco respectfully requests that judgment be entered in its
18 favor and against UPRR:

- 19 • Ordering UPRR to pay contribution to Asarco in a sum to be
- 20 determined by the Court to be owed to Asarco for response costs;
- 21 • Awarding Asarco its costs and attorneys' fees; and
- 22 • Awarding Asarco all other relief that the Court deems appropriate.

23 **COUNT V**

24 **CLAIM FOR COMMON LAW CONTRIBUTION**

25 119. Asarco incorporates by reference paragraphs 1 through 118 as if fully set
26 forth herein.

27 120. UPRR is liable in tort for any harm to the OLS that occurred in connection
28 with its operations in or near the site.

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121. Asarco has paid the cost of cleaning up hazardous substances and other materials in the OLS for which UPRR is responsible.

122. As a joint tortfeasor, UPRR is responsible for an equitable share of the overall liability for the costs described in the preceding paragraphs.

123. WHEREFORE, Asarco respectfully requests that judgment be entered in its favor and against UPRR:

- Ordering UPRR to pay contribution to Asarco in a sum to be determined by the Court to be owed to Asarco for response costs;
- Awarding Asarco its costs and attorneys’ fees; and
- Awarding Asarco all other relief that the Court deems appropriate.

JURY DEMAND

Plaintiff ASARCO hereby demands a jury trial on any and all issues triable of right by a jury.

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DATED this 30th day of May, 2012.

Respectfully submitted,

SNELL & WILMER L.L.P.

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