

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re: § Chapter 11
WESTMORELAND COAL COMPANY § Case No. 18-35672 (DRJ)
et al.,¹ §
Debtors. § (Jointly Administered)

JOINT MOTION BY THE ACTING UNITED STATES TRUSTEE
AND MCKINSEY RECOVERY & TRANSFORMATION SERVICES U.S., LLC
AND CERTAIN OF ITS AFFILIATES
IN FURTHERANCE OF MEDIATION AGREEMENT

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

A HEARING WILL BE HELD ON THIS MATTER ON MARCH ____, 2019, at _____ (CT) BEFORE THE HONORABLE DAVID R. JONES, 515 RUSK STREET, COURTROOM 400, HOUSTON, TEXAS 77002.

TO THE HONORABLE DAVID R. JONES
CHIEF UNITED STATES BANKRUPTCY JUDGE:

COMES NOW Henry G. Hobbs, Jr., the Acting United States Trustee for Region 7 (the “Acting United States Trustee”), and McKinsey² and represent as follows:

I. Jurisdiction, Venue & Constitutional Authority to Enter a Final Order

1. The United States Bankruptcy Court for the Southern District of Texas (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the *Amended*

¹ Due to the large number of debtors in these chapter 11 cases, for which joint administration has been granted, a complete list of the debtors and the last four digits of their tax identification, registration, or like numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors’ claims and noticing agent in these chapter 11 cases at www.donlinrecano.com/westmoreland. Westmoreland Coal ice address for the purposes of these chapter 11 cases is 9540 South Maroon Circle, Suite 300, Englewood, Colorado 80112.

² As used herein, “McKinsey” means, collectively, McKinsey & Company, Inc., McKinsey Holdings, Inc., McKinsey & Company, Inc. United States, and McKinsey Recovery & Transformation Services U.S., LLC.

Standing Order of Reference from the United States District Court for the Southern District of Texas, dated May 24, 2012.

2. The Acting United States Trustee and McKinsey confirm their consent, pursuant to rule 7008 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), to the entry of a final order by the Court in connection with this motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The basis for the relief requested herein is section 105(a) of title 11 of the United States Code, 11 U.S.C. §§ 101–1532.

III. Factual Background

4. On January 16, 2019, the Court entered an Order (Docket No. 1088) appointing Honorable Marvin Isgur as mediator (the “Mediator”) to mediate disputes between certain parties, including the Acting United States Trustee and McKinsey. On February 19, 2019, the Mediator filed a Notice to Court (the “Mediator’s Notice,” Docket No. 1406) regarding the resolution of issues between the United States Trustee Program and McKinsey in multiple cases (the “USTP/McKinsey Agreement”). The core terms of the USTP/McKinsey Agreement are set forth in the Term Sheet attached as Exhibit A to the Mediator’s Notice.

IV. Relief Requested

5. The Acting United States Trustee and McKinsey have incorporated the terms of the USTP/McKinsey Agreement into a proposed agreed order (the “Agreed Order”) and hereby request that the Court enter the Agreed Order. A true and correct copy of the Agreed Order is attached as Exhibit “A” and incorporated by reference. Among other things, the Agreed Order provides:

- a) An aggregate payment of \$15 million by McKinsey for distribution in the Alpha, SunEdison and Westmoreland cases;
- b) As specifically described therein, a mutual release of claims by the United States Trustee Program and McKinsey in certain identified cases.
- c) Specific reservation of certain objection rights in the Westmoreland case by the Acting United States Trustee for matters not related to the adequacy of McKinsey’s past retention disclosures;
- d) Deferral of McKinsey’s retention in the Westmoreland case pending additional disclosures;

- e) Specific language preserving rights of the United States, the right of the United States Trustee Program to share information with other agencies of the United States, and an acknowledgement that the Agreed Order does not impact the rights of non-parties; and
- f) The Agreed Order and the Term Sheet (and their contents) are not and shall not be used as an admission of liability, violation, or wrongdoing by McKinsey, and all of its agents, directors, officers, attorneys, partners and employees acting on its behalf, solely with respect to actions taken in the course and scope of their duties with McKinsey, to any person or entity or on any legal or equitable theory.

WHEREFORE, the Acting United States Trustee and McKinsey respectfully request that the Court enter the Agreed Order, granting the relief requested herein and such other relief as the Court deems appropriate under the circumstances.

Dated: March 7, 2019

Respectfully Submitted,

HENRY G. HOBBS, JR.
ACTING UNITED STATES TRUSTEE
REGION 7, SOUTHERN and WESTERN
DISTRICTS OF TEXAS

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By: /s/ M. Natasha Labovitz

M. Natasha Labovitz (*pro hac vice*)

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic means on all PACER participants on March 7, 2019.

/s/ Zack A. Clement

Zack A. Clement

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

IN RE: §
§
SUNEDISON, INC., et al., § **CASE NO: 16-10992 (SMB)**
§ **CHAPTER 11**
§ **(Jointly Administered)**
Debtors. §

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

IN RE: §
§
OLD ANR, LLC, et al., § **CASE NO: 19-00302 (KRH)**
§ **MISCELLANEOUS PROCEEDING**
§
Debtors. §

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE: §
§
WESTMORELAND COAL COMPANY, et al., § **CASE NO: 18-35672**
§ **CHAPTER 11**
§ **(Jointly Administered)**
§
Debtors. §

**ORDER APPROVING SETTLEMENT AGREEMENT BETWEEN
UNITED STATES TRUSTEE PROGRAM AND MCKINSEY & COMPANY, INC.
AND CERTAIN OF ITS AFFILIATES**

RECITALS

Whereas, certain McKinsey¹ entities provide financial and consulting services to chapter 11 bankruptcy debtors-in-possession.

Whereas, issues and concerns have been raised by several United States Trustees with respect to the adequacy and completeness of disclosures of connections made by McKinsey pursuant to Fed. R. Bankr. P. 2014 (“Rule 2014”) in seeking retention in the above-captioned cases under 11 U.S.C. § 327, as set forth more specifically herein.

Alpha Natural Resources

Whereas, on May 3, 2016, the then-serving United States Trustee for Region 4 filed a motion in *In re Alpha Natural Resources, Inc.*, Case No. 15-33896-KRH (Bankr. E.D. Va.) (including all jointly administered cases and the Old ANR Miscellaneous Proceeding,² collectively the “Alpha Case”), to compel McKinsey to comply with Rule 2014 (the “Motion to Compel”). On May 19, 2016, McKinsey supplemented its disclosures to resolve the Motion to Compel. Pursuant to a separate Court Order requiring McKinsey to produce additional information pertaining to its connections, including those of the McKinsey Investment Office (the “Supplemental Alpha Disclosures”), McKinsey submitted the Supplemental Alpha Disclosures *in-camera* to the Alpha Court on July 6, 2016.

Whereas, after the Alpha Court’s entry of the final decree closing the Alpha Case, on July 18, 2018, Mar-Bow Value Partners, LLC (“Mar-Bow”) moved to reopen the Alpha Case and for relief from certain judgments (“Mar-Bow Alpha Motion”). On November 30, 2018, the current Acting United States Trustee for Region 4 filed comments regarding the Mar-Bow Alpha Motion and McKinsey’s response thereto (the “Alpha Comment Pleading”), requesting that the Alpha Court reopen the Alpha Case and impose remedies against McKinsey. On January 16, 2019, the Alpha Court entered an Order reopening the Alpha Case (the “Reopening Order”) and directed the Clerk of the Court to open the Old ANR Miscellaneous Proceeding.³ On January 16, 2019, the Alpha Court filed the Supplemental Alpha Disclosures on the public docket in the Old ANR Miscellaneous Proceeding.

SunEdison

Whereas, on May 12, 2016, the United States Trustee for Region 2 objected to the debtor’s application in *In re SunEdison, Inc.*, Case No. 16-10992-SMB (Bankr. S.D.N.Y.) (including all jointly administered cases, the “SunEdison Case”), to retain McKinsey (the “SunEdison Retention Objection”). On June 6, 2016, McKinsey supplemented its disclosures to resolve the SunEdison

¹ As used herein, “McKinsey” means, collectively, McKinsey & Company, Inc., McKinsey Holdings, Inc., McKinsey & Company, Inc. United States, and McKinsey Recovery & Transformation Services U.S., LLC.

² As later described, the Court directed the clerk to open a miscellaneous proceeding captioned “Old ANR, LLC, et al.” (the “Old ANR Miscellaneous Proceeding”).

³ The Court specified that all filings in the Alpha Case prior to the entry of the Reopening Order shall be deemed docketed in the Old ANR Miscellaneous Proceeding.

Retention Objection. After confirmation of the debtors' chapter 11 plan, on January 22, 2019, Mar-Bow filed for relief from certain judgments (the "Mar-Bow *SunEdison* Motion").

Westmoreland

Whereas, on December 14, 2018, the Acting United States Trustee for Region 7 objected to the debtor's application in *In re Westmoreland Coal Company, Inc.*, Case No. 18-35672-DRJ (Bankr. S.D. Tex.) (including all jointly administered cases, the "*Westmoreland* Case"), to retain McKinsey (the "*Westmoreland* Retention Objection").

Mediation Order

Whereas, McKinsey disputes the allegations asserted by the United States Trustees in the *Alpha* Case, the *SunEdison* Case, and the *Westmoreland* Case (collectively, the "Subject Cases").

Whereas, the Courts in the Subject Cases ordered McKinsey and the respective regional United States Trustees to participate in a mediation conducted by United States Bankruptcy Judge Marvin Isgur.

Whereas, as a result of their good-faith negotiations during mediation, the USTP and McKinsey reached an agreement, the core terms of which were set forth in a mediated term sheet (the "Term Sheet") filed with the Courts as Exhibit A to the Mediator's Notice to the Court filed on February 19, 2019 (*Alpha*, Miscellaneous Proceeding Docket No. 18; *SunEdison* Docket No. 5802; and *Westmoreland*, Docket No. 1406). As set forth in the Term Sheet, the Parties contemplated incorporating its terms into a proposed agreed order (this "Order") to be submitted to each of the respective Courts for their consideration and approval.

Now therefore, in consideration of the foregoing, and of the mutual promises and compromises between them, the Executive Office for United States Trustees and the United States Trustees and Acting United States Trustees for Regions 1 through 21 (collectively, the "USTP") and McKinsey (collectively with the USTP, the "Parties") do hereby agree, stipulate, and consent as follows, subject to each respective Court's entry of this Order and the passage of any applicable appeal period.

IT IS ORDERED AS FOLLOWS:

ARTICLE I

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2). Venue in the United States Bankruptcy Courts for the Eastern District of Virginia, Southern District of Texas, and Southern District of New York is proper pursuant to 28 U.S.C. § 1409(a).

ARTICLE II

SETTLEMENT PAYMENT

2. The Parties have agreed that McKinsey shall make a \$15 million payment (the “Settlement Payment”) allocated as follows:

- \$5 million to the reorganized debtors in the *Alpha* Case.
- \$5 million to the reorganized debtors in the *SunEdison* Case.
- \$5 million to the bankruptcy estates in the *Westmoreland* Case.

3. The payment identified in Paragraph 2 will be distributed in accordance with the terms of the confirmed plans in those cases or other applicable law. If any of the \$15 million is distributed to McKinsey, it will be refunded by McKinsey to the distributing party.

4. The Settlement Payment shall be made within 10 days of this Order becoming final and non-appealable. McKinsey shall have no further obligations with respect to the Settlement Payment once it has completed making the payments to the designated entities as set forth in paragraph 2.

ARTICLE III

RELEASE PROVISIONS

5. Upon the payments contemplated in paragraph 2, the USTP hereby releases all claims against McKinsey (and all of its agents, directors, officers, attorneys, partners and employees acting on its behalf, solely with respect to actions taken in the course and scope of their duties with McKinsey regarding disclosures in the cases referenced below), and shall refrain from instituting, directing or maintaining any contested matter, adversary proceeding, or miscellaneous proceeding, or participating in any contested matter, miscellaneous proceeding, or adversary proceeding by a third party (except that the United States Trustees may participate in an action to the extent ordered by a court provided that the United States Trustees may not seek such a court order formally or informally), against McKinsey (and all of its agents, directors, officers, attorneys, partners and employees acting on its behalf, solely with respect to actions taken in the course and scope of their duties with McKinsey) in which:

- a. it is alleged that McKinsey failed to (i) make full and complete disclosure under applicable law; or (ii) fully comply with Fed. R. Bankr. P. 2014; or
 - b. any remedy is sought that would be barred by *res judicata* or collateral estoppel principles if McKinsey had (i) made full and complete disclosures in accordance with applicable law; and (ii) fully complied with Fed. R. Bankr. P. 2014.
6. For the avoidance of doubt, with respect to paragraph 5(b) above, (x) in the event of:

(i) fraud or a material misrepresentation on the record that would have rendered McKinsey “not disinterested” in any of these bankruptcy cases or that would otherwise have disqualified McKinsey from retention, or (ii) a material omission of fact that if made on the record would have rendered McKinsey “not disinterested” in any of these bankruptcy cases or that would otherwise have disqualified McKinsey from retention, (y) the USTP may pursue appropriate relief including seeking disqualification, and McKinsey reserves all rights to object to such relief.

7. The USTP’s release will apply in the following bankruptcy cases (including any jointly administered cases pertaining to the listed cases):

- a. *Westmoreland Coal Company*, Case No. 18-35672 (Bankr. S.D. Tex.);
- b. *SunEdison, Inc.*, Case No. 16-10992 (Bankr. S.D.N.Y.);
- c. *Alpha Natural Resources, Inc.*, Case No. 15-33896 (Bankr. E.D. Va.);⁴
- d. *The Hayes Lemmerz International, Inc.*, Case No. 01-11490 (Bankr. D. Del.);
- e. *UAL Corporation*, Case No. 02-48191 (Bankr. N.D. Ill.);
- f. *Mirant Corp.*, Case No. 03-46590 (Bankr. N.D. Tex.);
- g. *Lyondell Chemical Company*, Case No. 09-10023 (Bankr. S.D.N.Y.);
- h. *Harry & David Holdings, Inc.*, Case No. 11-10884 (Bankr. D. Del.);
- i. *AMR Corp.*, Case No. 11-15463 (Bankr. S.D.N.Y.);
- j. *AMF Bowling Worldwide, Inc.*, Case No. 12-36495 (Bankr. E.D. Va.);
- k. *Edison Mission Energy*, Case No. 12-49219 (Bankr. N.D. Ill.);
- l. *NII Holdings, Inc.*, Case No. 14-12611 (Bankr. S.D.N.Y.);
- m. *SRC Liquidation, LLC (f/k/a The Standard Register Company)*, Case No. 15-10541 (Bankr. D. Del.); and
- n. *GenOn Energy, Inc.*, Case No. 17-33695 (Bankr. S.D. Tex.).

8. McKinsey will release all claims against the USTP and all of its current and former employees, including all claims under the Equal Access to Justice Act, 28 U.S.C. § 2412, based on the USTP’s investigation and prosecution of claims arising out of or pertaining to the adequacy of McKinsey’s disinterestedness or disclosures in the cases referenced in paragraph 7, except that McKinsey reserves all rights with respect to preserved rights of the USTP herein. McKinsey shall retain all rights to assert requests under the Freedom of Information Act, 5 U.S.C. § 552 provided that such requests are not made for the purpose of enforcing claims or causes of action released herein.

9. The USTP reserves all rights to:

- a. Object to McKinsey’s disinterestedness or its retention in the *Westmoreland* Case on any grounds other than the adequacy of its past retention-related disclosures in the cases referenced in paragraph 7. The *Westmoreland* Retention Objection by the United States Trustee is resolved by this Agreement, without prejudice to the rights of the United States Trustee to assert any issue in any new objection that might be

⁴ For the avoidance of doubt, this includes the Miscellaneous Proceeding captioned “Old ANR, LLC, *et al.*” referenced in footnote 2 herein.

filed; and

- b. Cooperate with or provide assistance to other governmental agencies, including sharing information or discovery arising out of or relating to the issues addressed herein with other governmental agencies; and
- c. Seek and obtain discovery in any bankruptcy case or proceeding, including discovery based on or pertaining to the claims released in Paragraph 5, provided that such discovery is not sought for the purpose of enforcing claims or causes of action released herein.

10. The release in Article III applies to the rights and claims of the USTP only. This Order does not settle, resolve, or prejudice any other rights or claims of the United States, including the Department of Justice and/or other governmental agencies, against McKinsey. Notwithstanding any other provision of this Order, claims with respect to any criminal liability are not released.

ARTICLE IV

WESTMORELAND RETENTION

11. Pursuant to a separate mediated term sheet between McKinsey and the debtors in the *Westmoreland* Case (collectively, the “*Westmoreland Debtors*”) (Docket No, 1406 at Exhibit B), McKinsey has reached an agreement with the *Westmoreland Debtors* pursuant to which McKinsey and the *Westmoreland Debtors* have filed a Joint Emergency Motion in Furtherance of Mediation Agreement (*Westmoreland*, Docket No. 1422) (the “*Mediation Motion*”). The Region 7 U.S. Trustee represents that he consents to the extension of time sought in the *Mediation Motion*.

ARTICLE V

MISCELLANEOUS PROVISIONS

12. The Courts shall retain exclusive jurisdiction over all matters subject to this Order, including disputes arising under this Order, and the construction, interpretation, modification, and enforcement of this Order, and shall retain exclusive jurisdiction to hear and adjudicate any motions related to this Order.

13. This Order and the Term Sheet (and their contents) are not and shall not be used as an admission of liability, violation, or wrongdoing by McKinsey, and all of its agents, directors, officers, attorneys and employees acting on its behalf, solely with respect to actions taken in the course and scope of their duties with McKinsey, to any person or entity or on any legal or equitable theory. This Order is made without trial or adjudication of any issue of fact or law as to the claims released in Article III. Nothing in this paragraph reduces McKinsey’s obligations under this Order or affects the USTP’s authority to enforce any rights hereunder.

14. This Order constitutes the entire agreement between the Parties relating to the

subject matter reflected herein and may not be modified except in writing executed and delivered by the Parties hereto.

15. This Order will not bind or prejudice the rights and claims of any non-party. This order binds McKinsey and its successors and assigns.

16. This Order may be executed by the Parties in one or more counterparts, or via facsimile or electronically scanned signatures, each of which shall be deemed an original, all of which together shall constitute one and the same instrument.

17. This Order shall become effective upon the expiration of any appeal period following its execution by the Parties and its entry by the Court. The Parties hereby waive any right to seek reconsideration of and/or to appeal from this Order if the Order is entered as submitted by the Parties.

18. In the event either Party determines that there has been a violation of this Order, it shall provide notice of such violation to the other Party, and allow 10 days to cure or otherwise purge the conduct deemed to constitute the violation prior to the filing of any motion to enforce this Order with the Courts, unless more time is agreed to by the Parties.

19. If any time period in this Order is stated in days, the Parties shall: (a) exclude the day of the event that triggers the period; and (b) count every subsequent day, including intermediate Saturdays, Sundays, and legal holidays, and include the last day of the period, but if any time period set forth in this Order expires on a Saturday, Sunday, or legal holiday, such time period shall continue to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

[Signature Pages Follow]

Seen and agreed to:

McKINSEY & COMPANY, INC.

/s/ Michael D. Silber

Michael Silber
McKinsey & Company, Inc.
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/s/ M. Natasha Labovitz

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**ACTING UNITED STATES TRUSTEE
FOR REGION 7**



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