UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

RESPONSE OF MAR-BOW VALUE PARTNERS, LLC
TO "STATUS REPORTS" FILED BY MCKINSEY
(This relates to Dkt. Nos. 1586 and 1626.)

BACKGROUND

On February 20, 2019, to distract attention from McKinsey's patent lack of disinterestedness and multiple violations of Rule 2014 in this case, McKinsey and the Debtor filed a Joint "Emergency" Motion seeking this Court's endorsement of McKinsey's proposed efforts to develop "new disclosure protocols for McKinsey RTS in this and other cases." (Dkt. 1422, ¶ 5.)[1] At the same time, McKinsey asked that it be permitted to engage in a judicially-endorsed public relations campaign by filing periodic self-serving "status reports" regarding its progress. (*Id*. at ¶ 6.) Less than twenty-four hours later, without allowing Mar-Bow, the U.S. Trustee, or any other interested party an opportunity to respond, the Court endorsed McKinsey's proposed order,

[1] Paragraph 4 of the Joint "Emergency" Motion, in which McKinsey wraps itself in the mantle of public confidence and commitment to compliance with the law, is particularly galling. The truth is that, when McKinsey started out in the restructuring industry almost twenty years ago, it refused to disclose a single connection to an interested party. It hewed to that approach, which has never been adopted by any other industry professional, consistently for years in case after case, yielding only when Judge Huenekens forced it to name some specific connections in the *Alpha Natural Resources* case at Mar-Bow's prompting. Even then, McKinsey did not fully comply. And as recently as March 27, McKinsey has publicly insisted that it has a good faith belief that it is not required to disclose *any* of its connections to interested parties by name, only by *descriptive category*. (Dkt. 1659, at 17.) In short, McKinsey has been dragged kicking and screaming through any modest steps toward compliance it has made to date, and its purported commitment to "full compliance with applicable law" and "[p]ublic confidence in the integrity of the bankruptcy system" only arose when it understood that its brazen failure to comply with the law was jeopardizing its fees.

thereby eschewing the regular process of motion practice: motion followed by opposition, reply, and decision in the normal course.

Before McKinsey entered the restructuring business two decades ago and began submitting Rule 2014 disclosures that failed to identify a single connection by name, no one even considered the need for a Rule 2014 disclosure "protocol." The language of Rule 2014 and the case law applying it was (and is) functioning perfectly well for the entire industry – except McKinsey. However, McKinsey considered itself too important for the rules. It viewed its connections as too "confidential" for disclosure and abhorred the prospect of revealing that its investment arm, the MIO, was secretly profiting from its work in Chapter 11 cases. McKinsey knows that Rule 2014 requires it to disclose the MIO's investments in the Debtors and in Interested Parties. It simply does not want to disclose those connections and has no intent to do so. It has never disclosed them, except when forced to do so by Judge Huennekens, and even then it did not fully disclose its investment connections.

Jay Alix spent years trying to educate and convince McKinsey to follow the law. When it refused to do so, and indeed dismissed Rule 2014 as not a "serious law" (Dkt. 905, Ex. A, T224:6-12), Mr. Alix took action to protect the industry. And yet somehow, McKinsey and the Debtor persuaded this Court to allow McKinsey to arrogate to itself the right to develop a new "protocol" that literally no one in the industry believed was necessary except for the one participant (McKinsey) that refused to follow the rules.

ARGUMENT

I. THE ORDER SHOULD BE VACATED BECAUSE IT WAS ENTERED WITHOUT AN OPPORTUNITY TO BE HEARD.

This case is under close scrutiny by the bankruptcy bar, the legal and business communities, and the media. The process for developing the so-called "protocol" was begun with undue haste and without a reasonable opportunity for objection or input by anyone. This irregular approach on an issue of critical importance to the broader bankruptcy community is inconsistent with due process and the public interest. It is McKinsey's attempt to launder its own misconduct, past and future. For that reason alone, the order should be vacated and a reasonable opportunity to be heard should be afforded all interested parties and members of the public. *E.g., Brown Publ'g Co. Liquidating Tr. v. AXA Equitable Life Ins. Co.*, 519 B.R. 13, 24 (E.D.N.Y. 2014) (vacating bankruptcy court order entered without opportunity for opponent to respond).

II. THE ORDER SHOULD BE VACATED BECAUSE MCKINSEY'S "PROTOCOL" PROCESS IS UNLAWFUL AND UNNECESSARY.

The "protocol" that McKinsey is in the midst of drafting for the Court's approval is wholly unnecessary and unlawful. The "protocol" process is clearly designed to make new law by opinion poll, not apply existing law to McKinsey's disclosures. And even if the "protocol" process *was* limited to assisting McKinsey in applying existing law to its disclosure procedures, it remains illegitimate.

A. The True Goal of the "Protocol" is to Revise Rule 2014 Through Illegitimate and Unlawful Means.

In its March 27, 2019 response to Mar-Bow's Motion to Reconsider and to Set a Discovery Hearing, McKinsey described the protocol process as follows:

> Mr. Baker plans to refine and test the initial draft protocol by seeking the inputs and comments of a cross-section of respected industry professionals, advisors, and other parties interested in bankruptcy matters. Collecting these viewpoints, by means of interviews conducted by Mr. Baker, is designed to ensure that the final protocol considers current disclosure practices and methods of searching for connections, which vary widely at present. Mr. Baker intends to revise the initial draft protocol after conducting the survey, distribute that revised protocol to the survey participants, and then have another industry expert, Paul Singerman, perform a "fresh eyes" review before further revising.

(Dkt. 1659, at 6 (citations omitted)). In other words, the "protocol" is designed not to ensure compliance with ***existing law***, but rather to dictate what the law ***should be*** based on a straw poll of individuals who are neither federal judges, nor legally charged with the responsibility of rulemaking. There is no legal precedent or basis for such an exercise. More importantly, no uniform or variable "industry practice" has any bearing whatsoever on what the law ***actually is***. Under McKinsey's nonsensical reasoning, if an entire industry violates the law, the law is thereby changed to accommodate the common illegal practice. Incredibly, McKinsey's reconsideration reply asserts that the "protocol" is intended to "resolve thorny disclosure questions that have not to date received close attention and as to which there is no standard industry practice." (*Id*. at 8.) This is nothing short of an admission that, in McKinsey's view, the law is nothing more than whatever a random cross-section of industry opinion says it is. Further, McKinsey has plainly anointed itself and its experts as the final "unimpeachable" word on supposedly "thorny disclosure questions."

Thus, the ultimate aim of the "protocol" is not simply to devise new disclosures for McKinsey in the *Westmoreland* case. The real goal is to make new law – to create a custom Rule 2014 regime specifically for McKinsey, and to legitimize a proven serial violator of Rule 2014 as the driving force behind a new methodology that will purportedly teach the whole country how Rule 2014 *really* works. As noted above, however, the industry already knows how compliance with Rule 2014 *really* works. The language of Rule 2014 and the interpretive case law has functioned properly for decades. Only McKinsey is feigning confusion. For that reason alone, the "protocol" process should be discarded immediately as a pointless waste of time that serves no purpose other than to allow McKinsey to attempt to rewrite the rules to enable its continuing wrongdoing.

Moreover, the "protocol" process sets a dangerous precedent that will soon dilute the important protections embodied in Rule 2014. It will do so by encouraging competing professionals to essentially create their own private judiciary, enlisting teams of experts to bless their compliance with Rule 2014. Their argument will essentially be, "If McKinsey can do it, so can we." In fairly short order, Rule 2014 disclosures will be governed not by the comprehensive body of existing law, but rather by a series of *ad hoc*, custom-made "protocols" created by purported experts at the behest of private litigants. The result will be a grave disservice to the bankruptcy system and the public trust.

1. The "Protocol" Violates the Rules Enabling Act

In the federal judiciary, there is only one legitimate process for McKinsey to invoke in seeking a modification of its disclosure obligations under Rule 2014. It is the process authorized and set forth in the Rules Enabling Act, 28 U.S.C. §§ 2071-2077. The McKinsey "protocol" blatantly violates that Act. The Rules Enabling Act authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for the federal courts. Congress, through the Act, delegated the essential rulemaking function to a co-equal branch of government while retaining the ability to review and reject any rule adopted by the Supreme Court. Pursuant to Section 2073 of the Rules Enabling Act, the Judicial Conference has established procedures to govern the work of the Standing Committee and its advisory rules committees.

The Judicial Conference's Committee on Rules of Practice and Procedure (the "Standing Committee") and its five advisory rules committees "carry on a continuous study of the operation and effect" of the federal rules as directed by the Rules Enabling Act. Suggestions and recommendations on the rules are submitted to the Secretary of the Standing Committee. The Secretary acknowledges suggestions and forwards them to the appropriate advisory committee for consideration. Advisory Committees on Appellate, Bankruptcy, Civil, Criminal, and Evidence

Rules evaluate proposals for rules amendments in the first instance. The advisory committee's reporter normally analyzes suggestions and makes appropriate recommendations. If the advisory committee decides to pursue the proposal, it may seek empirical research assistance from the Federal Judicial Center. When an advisory committee decides that a proposal has merit, it will forward a draft amendment and an explanatory committee note to the Standing Committee. If an advisory committee pursues a proposal, it may seek permission from the Standing Committee to publish a draft of the contemplated amendment. Based on comments from the bench, bar, and general public, the advisory committee may then choose to discard, revise, or transmit the amendment as contemplated to the Standing Committee.

The Standing Committee independently reviews the findings of the advisory committees. It reviews the draft and then, if worthy of publication, broadly circulates the preliminary draft with a call for public comment. The Standing Committee also schedules twice-yearly public hearings on the proposed changes to coincide with the public comment period. If satisfied, the Standing Committee recommends changes to the Judicial Conference, which in turn recommends changes to the Supreme Court. The Supreme Court considers the proposals and, if it concurs, officially promulgates the revised rules by order before May 1, to take effect no earlier than December 1 of the same year unless Congress enacts legislation to reject, modify, or defer the pending rules. The process normally takes 3 to 4 years.

McKinsey is certainly free to invoke the foregoing process to request any changes or clarifications to Rule 2014. McKinsey need only email its proposal to the Standing Committee.[2] But nothing in the Rules Enabling Act allows this Court to approve McKinsey's "protocol." The Rules Enabling Act sets forth the only legitimate process for amending or clarifying Rule 2014,

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[2] RulesCommittee_Secretary@ao.uscourts.gov

and McKinsey's process for developing its "protocol" is a blatant circumvention of that process. The only contested matter before the Court is the Debtors' application for approval of McKinsey's employment. Because, through the MIO, McKinsey and its partners and employees hold equity interests in the Debtors and in Interested Parties, McKinsey is not qualified to serve as a professional in this case. The Debtors' application must be denied.

2. The "Protocol" Is Inconsistent with Recent Action of the Advisory Committee on Bankruptcy Rules.

McKinsey's clear aim is to develop a "protocol" that declares its investment interests in interested parties immune from disclosure because of a fictitious "wall" between the MIO and McKinsey RTS, despite the clear dictate of 11 U.S.C. 327 and 11 U.S.C. 101(14) that such ownership interests are disqualifying. Accordingly, it is important to bring to the Court's attention the outcome of the most recent request to modify and reduce the disclosure obligations of Rule 2014. In 2013, the American Bankruptcy Institute's Task Force on National Ethics Standards proposed to limit the required disclosures to "relevant connections" as the Task Force proposed to define that term in its proposed amendment to Rule 2014.[3] However, in 2015, the Advisory Committee on Bankruptcy Rules rejected that proposal.[4] The Committee took that action based on a report by its Subcommittee on Attorney Conduct and Healthcare.[5] That report stated: "[T]he Subcommittee recommends no action on this matter at this time because it is not convinced the burdens of the current Rule outweigh its benefits, or that there is any proposed change to the Rule that would alleviate the burdens without creating other problems."[6] Most importantly, the Subcommittee's report stated: "Ultimately, however, no member of the Subcommittee was

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[3] *See* https://www.uscourts.gov/file/17367/download.

[4] *See* https://www.uscourts.gov/file/19787/download.

[5] *See* Memorandum Re: Suggestion to Amend Rule 2014 attached at Exhibit A.

[6] Ex. A at 1.

prepared to endorse the core of the ABI Task Force's suggestion: namely, a restriction in the scope of the required disclosures."[7] The Subcommittee instead suggested its full support for the current Rule, noting that Rule 2014 currently requires a professional to disclose "*all of the person's connections* with the debtor, creditors, any party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.'" (Emphasis in original.)

The Subcommittee noted that the Task Force's proposed change to Rule 2014 "would alleviate the burden of what often is referred to as the 'phonebook disclosures' provided by professionals, particularly in the larger chapter 11 cases."[8] But the Subcommittee responded, "as the United States trustee noted, there are times when such disclosures are necessary and helpful."[9] The Subcommittee then added:

> The Subcommittee explored alternative approaches, including one maintaining the current disclosure standard, but allowing a professional to request, and the court to order, more limited disclosures "for cause shown in a particular case." This approach did not, however, mitigate the concerns about restricting disclosures. It also arguably could lead to litigation regarding the "for cause" standard and to a routine practice of limited disclosures.10

The Subcommittee concluded, "Accordingly, on balance, the Subcommittee recommends no action on this matter at this time."[11]

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[7] Ex. A at 3.

[8] *Id.*

[9] *Id.*

[10] *Id.* (footnote omitted).

[11] Ex. A at 4.

The Subcommittee considered that the Task Force's proposal to overhaul Rule 2014 and restrict the disclosures that it requires was "thoughtful and comprehensive."[12] Nevertheless, it rejected it. The unanimous and strong message in that rejection is highly relevant here: Because of the crucial function of Bankruptcy Rule 2014 in the chapter 11 process, no weakening or compromise of its disclosure obligations is appropriate. If McKinsey's "protocol" respects that message, as it must, it will be redundant and unnecessary. If it disregards that message, it will be, by definition, unlawful and illegitimate, and result in additional litigation over its application, just as the Committee feared with the ABI proposal.

3. The "McKinsey Protocol" Violates Bankruptcy Rule 9029.

Moreover, the Court's approval of a "protocol" that compromises Rule 2014 in even the slightest degree would violate Bankruptcy Rule 9029 in several important ways. Rule 9029(a)(1) states in pertinent part:

> Each district court acting by a majority of its district judges may make and amend rules governing practice and procedure in all cases and proceedings within the district court's bankruptcy jurisdiction which are consistent with—but not duplicative of—Acts of Congress and these rules and which do not prohibit or limit the use of the Official Forms. Rule 83 F.R.Civ.P. governs the procedure for making local rules.

The Court's approval of a "McKinsey Protocol" would in all probability violate the explicit requirement in Rule 9029(a)(1) that local rules must be "consistent with" Acts of Congress and the Federal Rules of Bankruptcy Procedure. Moreover, it would violate the specific requirement in Rule 9029(a)(1) that the procedure of the adoption of such a protocol must comply with Rule 83 of the Federal Rules of Civil Procedure, which requires "public notice and an opportunity for comment." The Court's approval of a "protocol" that compromises Rule 2014 would also violate

[12] Ex. A at 2.

Rule 9029(b), which states in pertinent part: "A judge may regulate practice in any manner consistent with federal law, these rules, Official Forms, and local rules of the district."

B. Even If the Purpose Of The "Protocol" Is Merely to Revise McKinsey's Disclosures In The Case Under Existing Law, It Is Unnecessary And Improper.

To the extent the McKinsey Protocol is designed to revise McKinsey's Rule 2014 disclosures under existing law, it is totally unnecessary and unlawful. Every professional must determine what disclosures are required of it under Rule 2014. Every professional is free to consult with experts to ensure that its disclosures are complete and accurate. Until now, no industry professional has thought to ask a federal bankruptcy court to turn this ordinary process into a judicially sanctioned marketing campaign with the primary goal of burnishing its badly tarnished public image.[13] And of course, McKinsey's discussion of the "protocol" process to date glosses over the inconvenient fact that its new-found desire to hire an expert to help it figure out how to comply with Rule 2014 is essentially an admission that it brazenly shirked its obligation to ensure compliance in the first instance. That alone is grounds for disqualification.

Further, the Order's expressed enthusiasm for McKinsey's "protocol" before work on it had even begun is, respectfully, an ill-advised endorsement of a litigant during a contested motion over the propriety of its employment. If the Court wants to give McKinsey time to try to fix its disclosures, that is well within its discretion. But to provide advance endorsement of McKinsey's process as the best hope for a nationwide Rule 2014 disclosure standard before pen was even put

[13] Contrary to McKinsey's suggestion, Mar-Bow sincerely hopes that McKinsey's new disclosures will comply with the law. However, until McKinsey abandons its ludicrous, self-serving position that it is not required to disclose ownership interests in interested parties (and it clearly will not), compliance is impossible. Further, the "protocol" process as it currently exists is the wrong approach. The Court should give McKinsey a deadline to re-file its disclosures, and allow the process to proceed from there without the Court-sanctioned public relations campaign, which is demeaning to, and reflects poorly on, the bankruptcy system.

to paper, all in the midst of a hotly-contested disqualification motion, was mistaken and should be revisited and abandoned.

In addition, McKinsey is essentially attempting to co-opt this Court's authority to adjudicate its compliance with the law. In effect, McKinsey is appointing itself a private judge to create a "protocol," declare itself in compliance with it, and thereby inoculate itself from any further judicial scrutiny of its disclosures. However, the interpretation of the disclosure obligations of Rule 2014 is purely an issue of law to be resolved by the federal judiciary. It is not, therefore, an issue that is subject to expert testimony under Rule 702 of the Federal Rules of Evidence. That Rule provides in pertinent part:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue[.]

According to paragraph 1 of the "Agreement for Consulting Services," McKinsey retained Mr. Baker for the following services:

> The Consultant is hereby engaged to advise McKinsey RTS with respect to its policies and procedures related to [its Rule 2014] disclosure obligations and to assist McKinsey RTS in complying with such obligations, including the development of a protocol to provide procedural and substantive guidelines regarding such obligations ("Services").[14]

The engagement is therefore clearly for Mr. Baker to provide legal advice in his capacity as a retired bankruptcy practitioner. In clear recognition of the dilemma, paragraph 1 of the Agreement hastily recites, "For the avoidance of doubt, Consultant is not being engaged by McKinsey RTS as an attorney or to provide any legal advice[.]" The mere fact that McKinsey thought it necessary

[14] Dkt. 1626-1, at 2.

to include that defensive disclaimer alone establishes that Mr. Baker is indeed providing legal advice regarding McKinsey's disclosure obligations under Rule 2014.

Because the services for which McKinsey retained Mr. Baker are legal services and because McKinsey's compliance with Rule 2104 is strictly an issue of law for the Court, Mr. Baker cannot "help the trier of fact to understand the evidence or to determine a fact in issue," as Rule 702 requires for expert testimony. The Fifth Circuit so held in *Amica Mut. Ins. Co. v. Moak*, 55 F.3d 1093, 1096 n. 5 (5th Cir.1995) ("The interpretation of a contract is a question of law for the court. Any reliance on th[e] 'expert' opinion by the court below was misplaced.").

And the Fifth Circuit is not alone in this view of Rule 702. In *Specht v. Jensen*, 853 F.2d 805, 808 (10th Cir. 1988), the Court observed that "a number of federal circuits have held that an expert witness may not give an opinion on ultimate issues of law." The Court then reviewed the consistent holdings of its sister circuits:

> In *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505 (2d Cir.), *cert. denied*, 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed.2d 134 (1977), for example, the Second Circuit held it was error for the trial court to allow a lawyer to render his opinions on the legal obligations arising from a contract and on the legal significance of various facts in evidence. The court stated, "legal opinions as to the meaning of the contract terms at issue ... was testimony concerning matters outside [the witness's] area of expertise. . . . It is not for witnesses to instruct the jury as to the applicable principles of law, but for the judge." 550 F.2d at 509–10. Similarly, the Fourth Circuit decided the testimony of an attorney on the meaning and applicability of "domestic" (as opposed to foreign) law would be inadmissible as an invasion of the province of the judge. *See Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 366 (4th Cir.1986). In *Owen v. Kerr–McGee Corp.*, 698 F.2d 236, 240 (5th Cir.1983), the Fifth Circuit held that a witness's offering a legal conclusion on the contributory negligence of a party infringed upon the jury's role in deciding the case. Finally, in *United States v. Zipkin*, 729 F.2d 384 (6th Cir.1984), the Sixth Circuit reversed the trial court's decision to allow a bankruptcy judge to testify regarding his interpretation of the Bankruptcy Act and his own orders. "It is the function of the trial judge to determine the law of the case," the court stated. "It is

> impermissible to delegate that function to a jury through the submission of testimony on controlling legal principles." 729 F.2d at 387.

See also Stobie Creek Investments LLC v. United States, 608 F.3d 1366, 1383 (Fed. Cir. 2010) ("Under Rule 702, expert testimony must '*assist* the trier of fact to understand the evidence or to determine a fact in issue.' Fed.R.Evid. 702 (emphases added). Because proper interpretation of the tax laws and Treasury Circular 230 are issues of law, it was not an abuse of discretion to exclude expert testimony related to those questions."); *Askanase v. Fatjo*, No. CIV.A.H-91-3140, 1996 WL 33373364, at *6 (S.D. Tex. Apr. 1, 1996) ("In construing Rule 702, courts have generally held that attorneys may not testify as experts and opine as to their view of what law governs a case, what the applicable law means, or whether a party's conduct violated the law. In fact, it constitutes reversible error to admit this sort of testimony."); *Technip Offshore Contractors v. Williams Field Servs.*, No. CIV.A.H 04 0096, 2006 WL 581273, at *6 (S.D. Tex. Mar. 7, 2006) ("As both parties correctly argue in attempting to exclude the other's expert, contract interpretation is a legal question for the court to decide. Parties may present legal arguments and opinions to courts through briefs in support of motions, but expert opinions on legal questions are unnecessary and inappropriate.")

III. THE ORDER SHOULD BE VACATED BECAUSE THE PROCESS IT HAS CREATED IS NOT TRANSPARENT.

Since the day Mar-Bow filed its Objection in this matter, the Court has emphasized the importance of transparency. (Dkt. 1585, ¶ 43.) Indeed, given this Court's expressed hope that the "protocol" will essentially constitute law for the entire country,[15] it is all the more critical that the public be allowed full access to the process of its development. And yet the Second Status Report reveals that the "protocol" process is anything but transparent. Respectfully, the Court's order

[15] McKinsey has seized upon this language, now confident that it has been charged with remaking the disclosure standards for the entire country. Dkt. 1626, at 2.

approving McKinsey's secretive protocol development process amounts to an improper delegation of the public process of rule-making to a private self-interested litigant and admitted serial violator of Rule 2014, and to do so without waiting for any input whatsoever from Mar-Bow, the U.S. Trustee, or any other member of the public, was error.

McKinsey's Second Status Report plainly illustrates that the "protocol" process is failing to provide any semblance of the transparency that this Court has deemed so critical. *First*, without any advance report to the Court or the public, "RTS and its counsel" have apparently met with Mr. Baker "on many occasions, both telephonically and in person." (Dkt. 1626, ¶ 4.) Presumably, none of those conversations were recorded, as they should have been for any process that aspires to decide how the law should be applied for practitioners and judges across the country. No notes or other documents related to those conversations have been provided to the Court or the public.

Second, Mr. Baker has apparently produced an initial draft of the "protocol." (*Id.*, ¶ 4.) It is not attached to the Second Status Report so that the public can see Mr. Baker's initial views after repeatedly meeting with McKinsey personnel. Nor, presumably, can the public expect to see subsequent drafts as they develop.[16]

Third, again without any advance notice to the Court or the public, and without seeking judicial approval, McKinsey and Mr. Baker have apparently selected a group of 15-20 *other* unidentified individuals who will assist in the development of the "protocol." (Dkt. 1626, ¶ 5.) The Second Status Report fails to identify any of these individuals, and provides no meaningful information whatsoever regarding their current or past affiliations with McKinsey, or the selection process. Presumably McKinsey and Mr. Baker do not intend to videotape the interviews they plan to conduct with these 15-20 individuals, or file those recordings publicly.

[16] Mar-Bow has requested a copy of the initial draft protocol from Mr. Baker, but has not received a response to its request.

Fourth, the consulting agreement attached to the Second Status Report contains a broad confidentiality provision that is anathema to a transparent, public process. The Court has expressed hope that McKinsey, which has chronically violated Rule 2014 for almost twenty years, will develop a protocol that will guide professionals throughout the country. McKinsey has voluntarily undertaken to do so in its settlement with the Debtor. Having accepted responsibility for a process that is designed to affect the public, McKinsey cannot possibly be permitted to shroud any aspect of the process in secrecy, and yet it shamelessly displays its agreement with Mr. Baker to prevent him from revealing relevant information.

Fifth, the Second Status Report reveals that yet another expert, Paul Singerman, will be involved in the process. No information is provided as to the selection of Mr. Singerman or any past or current relationship he might have to the various parties in interest (including McKinsey); no approval is sought for his retention; and the terms of his proposed engagement are withheld, presumably (as with Mr. Baker) until they are a *fait accompli*.

Therefore, given the lack of transparency inherent in the "protocol" process, it should be discontinued and rejected.

CONCLUSION

Mar-Bow therefore asks the Court promptly to consider its pending Motion to Reconsider (Dkt. 1585), vacate its prior order approving of McKinsey's private rule-making process, and return to normal order: wait for McKinsey to make its disclosures, allow parties to object, develop a record and be heard, and then rule based on the evidence adduced and existing law.

Respectfully submitted, March 29, 2019.

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Exhibit A

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON ATTORNEY CODUCT AND HEALTHCARE

RE: SUGGESTION TO AMEND RULE 2014

DATE: AUGUST 30, 2015

The Advisory Committee received, and has previously discussed, a suggestion from the American Bankruptcy Institute's Task Force on National Ethics Standards (the "ABI Task Force") concerning Bankruptcy Rule 2014. *See* Suggestion 13-BK-C. After further consideration, and as more fully explained below, the Subcommittee recommends no action on this matter at this time because it is not convinced the burdens of the current Rule outweigh its benefits, or that there is any proposed change to the Rule that would alleviate the burdens without creating other problems.

Suggestion and Past Deliberations

The ABI Task Force undertook an extensive two-year study of ethics, and the application of state ethics rules, in federal bankruptcy cases. One of the recommendations put forth by the ABI Task Force in its Final Report involved the scope and application of Bankruptcy Rule 2014. As the ABI Task Force notes in its suggestion, "The Task Force's suggested amendments to Rule 2014, along with a proposed 'disclosure grid' to accompany the Rule, stem from the difficulty of determining just what 'connections' a professional should disclose to a bankruptcy court when that professional is seeking approval of an employment application and when new 'connections' affect that professional's continued employment."[1] Indeed, the suggestion would, among other things, clarify and limit the "all … connections" language in Rule 2014.

The Subcommittee has thoroughly reviewed the ABI Task Force's suggestion, as well as the Advisory Committee's prior proposals to amend Rule 2014.[2] As the Subcommittee reported to the Advisory Committee at the Fall 2014 meeting, the Subcommittee: (i) examined the strengths and weaknesses of any proposed amendments to Rule 2014; (ii) considered alternative approaches to amending the Rule; and (iii) reviewed likely areas of support for, and opposition to, any amendments to the Rule.[3] The Subcommittee has further deliberated on this matter since that time.

<u>Subcommittee's Review and Recommendation</u>

Overall, the Subcommittee found the ABI Task Force's suggested amendments to Rule 2014 to be thoughtful and comprehensive. The Subcommittee also generally appreciated certain aspects of the suggestion that endeavor to improve efficiency and accuracy in disclosures. For example, the suggestion proposed a disclosure grid that would list in a chart format the connections disclosed by the professional in the application, thereby making it easier for courts to identify relevant potential connections. The suggestion also clarified a professional's obligation to update the disclosures upon the professional obtaining new or otherwise undisclosed relevant information.

[1] *See* Suggestion 13-BK-C.
[2] As set forth more fully in the Subcommittee's memorandum to the Advisory Committee, dated August 21, 2014, the Advisory Committee previously considered, and published for public comment, amendments to Rule 2014 that addressed, among other things, the scope of required disclosures under the Rule. These amendments were published in August 2000. After extensive consideration, the Advisory Committee ultimately voted to table those amendments in 2002. *See* Memorandum from the Subcommittee on Attorney Conduct and Healthcare to the Advisory Committee on Bankruptcy Rules (Aug. 21, 2014).
[3] *See id.*

Ultimately, however, no member of the Subcommittee was prepared to endorse the core of the ABI Task Force's suggestion: namely, a restriction in the scope of the required disclosures. Rule 2014 currently requires a professional to disclose, "to the best of the applicant's knowledge, *all of the person's connections* with the debtor, creditors, any party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." (Emphasis added.) The ABI Task Force's suggestion would clarify and limit a professional's disclosure obligations to "Relevant Connections," which would enable a professional, subject to court review, to determine required disclosures based on materiality and other standards detailed in the suggested amendments.[4] Such a change would alleviate the burden of what often is referred to as the "phonebook disclosures" provided by professionals, particularly in the larger chapter 11 cases. But as the United States trustee noted, there are times when such disclosures are necessary and helpful.

The Subcommittee explored alternative approaches, including one maintaining the current disclosure standard, but allowing a professional to request, and the court to order, more limited disclosures "for cause shown in a particular case."[5] This approach did not, however, mitigate the concerns about restricting disclosures. It also arguably could lead to litigation regarding the "for cause" standard and to a routine practice of limited disclosures. These and other concerns led the full Advisory Committee to return the project to the Subcommittee for

[4] In addition, the suggested amended Rule provides, "With respect to each Relevant Connection, the applicant shall disclose personal and professional relationships and other connections relevant to determining the existence of bias or influence on professional judgment. Any materiality threshold used by the applicant for each Relevant Connection shall be set forth in the application. If the court directs use of a different threshold, the professional shall amend its disclosures to conform to such threshold. The list of Relevant Connections is intended to be comprehensive and encompass connections relevant to the court's consideration of the application. Any additional relevant connections necessary to prevent the application and the professional's verified statement from being materially misleading shall be included." *See* Suggestion 13-BK-C.

[5] *See* Memorandum from the Subcommittee on Attorney Conduct and Healthcare to the Advisory Committee on Bankruptcy Rules (Aug. 21, 2014), at 6-7.

further consideration of all options, including the possibility of taking no further action on the ABI suggestion.

Given the lack of support for a Rule amendment restricting disclosure, the Subcommittee evaluated the potential benefits to moving forward with a more limited amendment addressing, for example, only the presentation of disclosures in a disclosure grid and a clarification of a professional's obligation to update disclosures. As noted above, the Subcommittee generally was appreciative of these aspects of the ABI Task Force's suggestion. Nevertheless, the Subcommittee concluded that such changes did not warrant an amendment to the Rule itself, but were more akin to best practices. To the extent that the United States trustee, bankruptcy courts, or practitioners found value in these measures, they could adopt the practices and would not need a national form or rule to do so.

Accordingly, on balance, the Subcommittee recommends no action on this matter at this time.

Certificate of Service

I certify that on March 29, 2019, I caused a copy of this pleading to be filed through the Court's electronic filing system and thereby served all parties registered to receive such service.

/s/ Christopher Murray
Christopher Murray