

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

In re:) Chapter 11
)
) Case No. 18-35672 (DRJ)
WESTMORELAND COAL COMPANY, *et al.*,)
) (Jointly Administered)
)
Debtors.)
) **Re: Docket No. 1406**

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

In re:) Chapter 11
)
) Case No. 19-00302 (KRH)
OLD ANR, LLC, *et al.*,)
) (Jointly Administered)
)
Debtors.)
) **Re: Docket No. 18**

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

In re:) Chapter 11
)
) Case No. 16-10992 (SMB)
SUNEDISON, INC., *et al.*,)
) (Jointly Administered)
)
Debtors.)
) **Re: Docket No. 5082**

**REPLY OF MCKINSEY RECOVERY & TRANSFORMATION
SERVICES U.S., LLC AND CERTAIN AFFILIATES IN FURTHER
SUPPORT OF SETTLEMENT WITH THE
UNITED STATES TRUSTEE PROGRAM**

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McKinsey and Co., Inc. respectfully submits this reply in support of the 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 (the “Joint Motion”) filed on March 7, 2019.

PRELIMINARY STATEMENT

1. In February of this year, the Honorable Marvin Isgur mediated the disputes among McKinsey & Co., Inc. and certain of its affiliates including RTS (“McKinsey”¹), the U.S. Trustee Program (“USTP”), Mar-Bow Value Properties, LLC (“Mar-Bow”), and the debtors in the *Westmoreland* Case. On February 19, 2019, Judge Isgur reported that he had successfully resolved McKinsey and the USTP’s “good faith disputes concerning the application of Bankruptcy Rule 2014” and reached a “definitive settlement of all issues between those parties.”² No party objects to that settlement. By contrast, Mar-Bow persists in asserting its meritless claims, which are based on its own extreme and incorrect view of the law.

2. Judge Isgur’s mediation report was made in each of the above-captioned bankruptcy cases (“*ANR*”, “*SunEdison*”, and “*Westmoreland*”; collectively the “Cases”).³ The January 16, 2019 Order referring the parties to mediation had specified that any agreement reached as a result of the mediation should be made “available for review on the Courts’ respective dockets” and “subject to Court approval after notice and opportunity for a hearing.” Mediation Order, *Westmoreland* Dkt. 1088 ¶ 11. Accordingly, on March 7, 2019, McKinsey and

¹ Capitalized terms used but not defined in this Reply have the meanings ascribed to them in the Proposed Order Approving Settlement Agreement Between United States Trustee Program and McKinsey & Company, Inc. and Certain of Its Affiliates (the “Proposed Order”). See, e.g., *In re Westmoreland Coal Co.*, No. 18-35672 (DRJ) (Bankr. S.D. Tex. filed Nov. 8, 2018) (“*Westmoreland*”), Dkt. 1589.

² Mediator’s Notice, *Westmoreland*, Dkt. 1406 ¶ 3.

³ *In re Alpha Natural Resources, Inc.*, No. 15-33896 (KRH) (Bankr. E.D. Va. filed Aug. 3, 2015); *In re SunEdison, Inc.*, Case No. 16-10992 (SMB) (Bankr. S.D.N.Y. filed Apr. 21, 2016).

the USTP submitted the Joint Motion, which proposed a settlement agreement (the “Settlement”) resolving their good-faith disputes.

3. The Settlement is the successful outcome of a mediation process ordered concurrently by the bankruptcy judges presiding over the Cases and conducted by Judge Isgur. Judge Isgur, to whom all the settling parties have rightly expressed deep appreciation, conducted an intensive mediation, receiving and considering voluminous written submissions and materials and conferring separately and together with the parties over a period of several weeks.

4. Mar-Bow did not reach a settlement with any party, but McKinsey and the USTP were able to resolve outstanding disputes related to past disclosures, not only in these Cases but in all other chapter 11 cases in which McKinsey had been retained as a professional.⁴ The principal terms of the Settlement provide for:

(i) Payment of \$15 million by McKinsey for equal distribution in the *ANR* Case, the *SunEdison* Case, and the *Westmoreland* Case, “in accordance with the terms of the confirmed plans in those cases or other applicable law,” Proposed Order ¶¶ 2-3;

(ii) Mutual release of claims by the USTP and McKinsey in fourteen bankruptcy cases, subject to certain carve-out rights retained by the USTP, including reservation of certain objection rights in the *Westmoreland* Case, *Id.* ¶¶ 5-8;

(iii) Deferral of the consideration of McKinsey’s retention in the *Westmoreland* Case pending additional disclosures by McKinsey, *Id.* ¶ 11;

(iv) Preservation of certain retained rights by the United States and the USTP, *Id.* ¶¶ 9-10;

(v) Agreement that the Settlement, Proposed Order, and the Term Sheet 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, *Id.* ¶ 13; and

(vi) Preservation of the rights and claims of any non-party, which will not be bound or prejudiced by the settlement, *Id.* ¶ 15.

⁴ McKinsey and the debtors in *Westmoreland* reached a separate settlement that is not the subject of the Joint Motion.

5. McKinsey concurs with the USTP's view of the applicable legal standard that the Settlement should be approved so long as it is a good-faith, fair, and reasonable compromise of the disputes between McKinsey and the USTP.⁵ This Court's standard for review of the Settlement should be even less stringent than the deferential Rule 9019 standard that would apply if the applicable debtors sought approval of a settlement—for example, if the proposed settlement resolved claims of the bankruptcy estate or affected the rights of non-settling third parties, which this Settlement does not.

6. McKinsey also fully agrees with the USTP that the Settlement was manifestly made in good faith and represents a fair and reasonable compromise of their disputes. The records of the Cases amply document the parties' disagreements—which, as set forth below (*see infra* at ¶ 23), are numerous and profound. It is equally a matter of record, in each of the cases, that McKinsey believes strongly it has always complied with Rule 2014 and has never misrepresented any matter in a bankruptcy case.

7. In these circumstances, and notwithstanding the contrary views the USTP has set forth with equal conviction, it was fair and reasonable for the USTP to resolve its disputes with McKinsey on the terms reached. Doing so served the familiar, universally accepted objective of avoiding the expense, delay, and risks of protracted and hard-fought litigation.

8. For these reasons, the Settlement should be approved. Like the USTP (U.S. Trustees' Statement in Support of Settlement ¶¶ 9, 22), McKinsey does not believe that it is necessary to take evidence beyond the well-developed record of these cases to decide the question of whether the Settlement should be approved. McKinsey, nevertheless, will have available at the April 16, 2019 hearing Michael Silber, a Senior Partner and Chief Financial

⁵ See United States Trustees' Statement in Support of Settlement Agreement Between United States Trustee Program and McKinsey & Company, Inc. and Certain of its Affiliates (the "U.S. Trustees' Statement in Support of Settlement"), *Westmoreland* Dkt. 1685 item I and ¶¶ 9, 14.

Officer of McKinsey and McKinsey's representative at the mediation, in the event that the Court decides to hear witnesses on topics relevant to the good faith of the parties, the parties' arms-length negotiations, and the fairness, and reasonableness of the Settlement.

BACKGROUND

A. McKinsey and the USTP's Good-Faith Disputes Regarding Rule 2014

9. Since 2001, McKinsey and RTS have filed Rule 2014 declarations in fourteen bankruptcy cases in good faith, and believed that those declarations complied with Rule 2014.⁶ In late 2018, however, the USTP made submissions in two Cases—*ANR* and *Westmoreland*—in which it argued that RTS's declarations failed to comply with Rule 2014. Specifically, in *ANR*, on November 30, 2018, the USTP argued that RTS had failed to be candid about the separation between its investment and consulting affiliates.⁷ RTS responded in part to these arguments in a submission made the same day.⁸ At court conferences on January 9 and 15, 2019, RTS also indicated its readiness to file a response to the USTP's Comments.⁹

10. The Honorable Kevin R. Huennekens thereafter ruled in *ANR* that the Court would determine whether Mar-Bow had standing before considering the above-referenced

⁶ The first bankruptcy in which RTS sought to be retained, after its formation, was *In re Harry & David Holdings, Inc.*, Case No. 11-10884 (MFW) (Bankr. D. Del filed March 29, 2011).

⁷ November 30, 2018 Comments of United States Trustee Regarding McKinsey RTS's Opposition to Mar-Bow Partners, LLC's (I) Motion to Reopen Case and (II) Motion for Relief from Judgments and for Indicative Ruling ("Trustee's Comments"), *ANR* Dkt. 4164.

⁸ *See* Motion of McKinsey RTS to Strike Mar-Bow Value Partners LLC's Supplemental Memorandum in Response to Affidavits Filed by McKinsey RTS, *ANR* Dkt. 4165.

⁹ January 9, 2019 Hearing Tr., *ANR*, at 11:13-15; 13:5-7 ("[W]e would welcome the opportunity to make an additional submission on the subject of the U.S. Trustee's reply, and we are anxious to get into some of the substantive points"; "[W]e would be prepared to move very quickly to file an additional submission in response to the U.S. Trustee submission."); January 15, 2019 Hearing Tr., *ANR*, at 35:10-12 ("We have committed to [a schedule to respond to the U.S. Trustee submission]. We'll keep to it. We may even get the brief sooner, if we can, to the U.S. Trustee.").

allegations.¹⁰ By order dated January 16, 2019, and entered jointly with Judge David R. Jones in *Westmoreland*, Judge Huennekens referred the *ANR* parties to mediation and appointed Judge Isgur as the mediator.¹¹

11. In the *Westmoreland* Case, on December 14, 2018, the USTP joined Mar-Bow's objection to the Debtors' application to retain RTS, which had been filed on November 29, 2018 and amended on December 3, 2018.¹² The USTP also argued that RTS's initial Rule 2014 declaration failed to comply with Rule 2014.¹³ . RTS responded to the USTP's objections in the Supplemental Hojnacki Declaration, filed December 17, 2018;¹⁴ in its Pre-Conference Submission, filed December 17, 2018;¹⁵ and in its Response to the U.S. Trustee's Objection to the Motion to Seal and Request for Further Consideration, filed January 2, 2019.¹⁶ RTS provided information responsive to the U.S. Trustee's objection, insofar as the USTP recommended that the Court hear Mar-Bow's objection, in its December 11, 2018 Preliminary Response to the Amended Objection of Mar-Bow Value Partners, LLC to the Debtors' Application for Approval of Employment, *Westmoreland* Dkt. 763.

12. As noted, on January 19, 2019, Judge Jones ordered the *Westmoreland* parties to mediation before Judge Isgur on the same date, and by the same order, as the *ANR* parties. After

¹⁰ January 9, 2019 Hearing Tr., *ANR*, at 32:10-11 (“[O]ne of the matters I need to hear quickly at the front end is, quite frankly, your standing to be here.”).

¹¹ Order Appointing United States Bankruptcy Judge as Mediator, *In re Old ANR, LLC*, Case No. 19-00302, Dkt. 5 (Bankr. E.D. Va., opened Jan. 16, 2019).

¹² Acting United States Trustee's (1) Objection to Debtors' Application for Entry of an Order Authorizing the Retention and Employment of McKinsey Recovery & Transformation Services U.S., LLC as Performance Improvement Advisors to the Debtors Nunc Pro Tunc to the Petition Date; and (2) Response to the Court's Order Dated November 30, 2018 (“U.S. Trustee's *Westmoreland* Objection”), *Westmoreland* Dkt. 785.

¹³ *Id.* ¶¶ 7-18.

¹⁴ First Supplemental Declaration of Mark W. Hojnacki, *Westmoreland* Dkt. 810.

¹⁵ McKinsey Recovery and Transformation Services U.S. LLC's Pre-Conference Submission, *Westmoreland* Dkt. 812.

¹⁶ McKinsey Recovery and Transformation Services U.S. LLC's Response to the U.S. Trustee's Objection to the Motion to Seal and Request for Further Consideration, *Westmoreland* Dkt. 920.

Judge Isgur filed his Mediator's Notice on February 19, 2019, reporting the results of the mediation, RTS and Westmoreland reported to Judge Jones their own agreement to develop a disclosure protocol to be followed by RTS in making amended disclosures in *Westmoreland* and in future bankruptcy cases.¹⁷ Judge Jones ordered that the consideration of RTS's retention application in *Westmoreland* be deferred until after the protocol could be developed and implemented.¹⁸

13. On January 22, 2019, in the *SunEdison* Case, Mar-Bow filed a motion to vacate the years-old orders approving RTS's retention and fees, among other relief.¹⁹ On January 25, 2019, Judge Stuart M. Bernstein referred the *SunEdison* Case to the mediation before Judge Isgur.²⁰

B. The Mediation Conducted by Judge Isgur

14. The in-person mediation took place on February 7, 2019. In the weeks leading up to the mediation, the parties forwarded voluminous filings and prepared numerous submissions relating to their disagreements about the appropriate application of Rule 2014. These submissions were directly responsive to questions posed by Judge Isgur and were made on a confidential basis for Judge Isgur's eyes only. RTS submitted, for example, nearly 20 written memoranda and other work product, together with exhibits to that work product, as well as court filings. The total volume of material submitted by RTS alone was thousands of pages. Each party and its counsel spent substantial time speaking directly with Judge Isgur before the in-

¹⁷ Joint Emergency Motion by Westmoreland Coal Company and Certain Debtor Affiliates and McKinsey Recovery & Transformation Services U.S., LLC in Furtherance of Mediator's Agreement, *Westmoreland* Dkt. 1422 ¶¶ 5-6.

¹⁸ Order Approving Motion By Westmoreland Coal Company and Certain Debtor Affiliates and McKinsey Recovery & Transformation Services U.S. LLC in Furtherance of Mediation Agreement signed on February 21, 2019 ("Post-Mediation Order"), *Westmoreland* Dkt. 1427 ¶ 3.

¹⁹ Motion of Mar-Bow Value Partners, LLC, A Creditor, For Relief From Orders Under Bankruptcy Rule 9024 and Civil Rule 60(d)(3), *SunEdison* Dkt. 5751.

²⁰ Order Appointing United States Bankruptcy Judge as Mediator, *SunEdison* Dkt. 5756.

person mediation. These discussions and materials ensured that Judge Isgur had a full and detailed understanding of the factual background and legal arguments of each party before beginning the mediation itself.²¹

15. The mediation, conducted in Houston, Texas, was attended by a client representative and legal counsel for each party.²² The negotiations took place over a full day (extending well into the evening) and were hard-fought. McKinsey and the USTP did not achieve a settlement that day, but agreed to continue the mediation to try to bridge the gaps that remained. Mar-Bow did not reach agreement with any party. McKinsey and Mar-Bow agreed to meet for one additional telephonic mediation session, but did not make any further progress on their disputes.

16. Over the next ten days or so, McKinsey and the USTP continued their negotiations. The parties spoke by telephone frequently and, with Judge Isgur's guidance, ultimately agreed on the terms of the proposed settlement, which were filed with the Court on February 19, 2019, together with the Mediator's Notice reporting the resolution of the parties' good-faith disputes.²³ See Mediated Settlement Term Sheet, *Westmoreland* Dkt. 1406, Ex. A.

17. As part of the Settlement, the USTP consented to McKinsey's request for an extension of time to file new disclosures in the *Westmoreland* Case, following development of a new protocol for RTS disclosures. Proposed Order ¶ 11. The USTP also expressly reserved its right to object to McKinsey's disinterestedness or retention on any ground other than raising old

²¹ McKinsey expresses its sincere appreciation to Judge Isgur for the time, attention, and thoughtfulness that he contributed to the mediation process. The Settlement could not have been achieved without his dedication and patience, which were exhibited on a daily basis.

²² As stated above, Michael Silber participated on behalf of McKinsey.

²³ Judge Isgur also reported in the Mediator's Notice that RTS and Mar-Bow were unable to reach a settlement, and that the mediation between those parties was suspended with the possibility of continued involvement by Judge Isgur in the future. Mediator's Notice ¶ 2.

disputes about past disclosure filings. *Id.* ¶ 9. The scope of the Settlement relates to the parties’ disputes over past Rule 2014 disclosure requirements, and does not seek to limit the USTP’s right to object to any future Rule 2014 declarations of RTS, or to seek remedies if evidence emerges (as none has) that McKinsey had actual disqualifying conflicts of interest or engaged in fraud in any bankruptcy. *Id.* ¶ 6.

C. Mar-Bow’s “Limited Objection” to the Settlement

18. Since the mediation, Mar-Bow has continued to vigorously press its arguments. Most recently, it continued its litigation campaign against RTS by filing on March 6, 2019 a Motion For Relief From Orders Under Bankruptcy Rule 9024 and Civil Rule 60(d)(3) in *In re Standard Register*, a bankruptcy case confirmed on November 19, 2015, in which Mar-Bow repeats many of the allegations it has made in other cases. It has also continued to propagate false reports of RTS “fraud” in the media and to lobby members of Congress with the same false information.

19. With respect to the Settlement, after originally characterizing it as “bizarre[], “toothless”, and “incomprehensible,”²⁴ Mar-Bow’s position is now that it “does not object to the Proposed Order.”²⁵ Despite having no actual objection, however, and true to its practice of filing redundant, inflammatory submissions, Mar-Bow still repeatedly asserts that the Settlement is “illegal[]” (*id.* ¶¶ 16, 18) and demands that it include “clarifications.” Limited Objection ¶¶ 4, 8. Mar-Bow also purports to point out “shortcomings” in the Settlement, though, again, “not by way of objection.” *Id.* ¶ 12.

²⁴ Motion of Mar-Bow Value Partners, LLC To (I) Reconsider the Court’s Order Granting the Joint Motion in Furtherance of Mediation Agreement [Dkts. 1422, 1423, 1427] and (II) Set a Hearing Regarding Discovery on Mar-Bow’s Amended Objection to the Debtors’ Application to Employ McKinsey RTS, *Westmoreland* Dkt. 1585 ¶¶ 57-59.

²⁵ Limited Objection of Mar-Bow Value Partners, LLC to the Proposed Settlement Between McKinsey and the United States Trustee (“Limited Objection”), *Westmoreland* Dkt. 1663 ¶ 12.

ARGUMENT

I. The Settlement Should Be Approved By the Court

A. The Settlement Is Fair and Reasonable.

20. As the USTP has stated, the relevant question is whether the Settlement is a “good faith compromise” that is “reasonable.”²⁶ For example, Judge Opperman in the Eastern District of Michigan approved a settlement between the USTP and a professional that did not implicate estate assets upon a finding that the settlement was “fair and reasonable.”²⁷ Indeed, in at least one case in the Southern District of New York, Judge Chapman questioned whether court approval would even be necessary for a USTP settlement with a professional where, as here, the settlement does not impact the rights of any other party.²⁸

21. Here, the parties have submitted the Settlement to the Court for the Court’s review consistent with the Mediation Order that any agreement reached would be “subject to Court approval after notice and opportunity for a hearing.” Mediation Order, *Westmoreland* Dkt. 1088 ¶ 11. The proposed settlement does not, however, utilize or otherwise impact assets of the estate or the reorganized debtors in any of the Cases, other than to provide for new recovery of \$5 million in each Case. *See* Proposed Order ¶ 15 (expressly providing that the Settlement does not impact the rights of any party other than the USTP and McKinsey). Thus, any review here should be even less searching than in the case of a settlement proposed under Rule 9019, under

²⁶ U.S. Trustees’ Statement in Support of Settlement, *Westmoreland* Dkt. 1685 item I and ¶ 3.

²⁷ *In re Belzak*, Case No. 10-23963-DOB, Dkt. 144 (Bankr. E.D. Mich. Mar. 9, 2015), Audio Recording of Settlement Hearing at 16:55–17:27 (approving settlement between U.S. Trustee and JPMorgan Chase upon finding that the settlement was “fair and reasonable”).

²⁸ *See In re GSC Grp., Inc.*, 502 B.R. 673, 715 (Bankr. S.D.N.Y. 2013) (observing that a bankruptcy court “would not stand in the way of the parties working out and implementing their own contractual settlement agreement”).

which bankruptcy courts are granted wide discretion to approve settlements proposed by a debtor that are fair, reasonable, and in the best interests of the estate.²⁹

22. The Settlement—to which no party has objected and which does not use estate assets—should be approved because it is a good-faith, fair, and reasonable compromise of the disclosure-related disputes between McKinsey and the USTP. First, there is no question that the negotiations leading to the Settlement were pursued in good faith and at arms' length. As described above, the mediation was rigorous and hard-fought. In his Mediator's Notice, Judge Isgur explicitly stated that “all parties complied with [the Courts'] respective orders and participated in good faith” in the negotiations. *Westmoreland* Dkt. 1406 ¶ 1.

23. Second, the Settlement is a fair and reasonable compromise of the disputes between McKinsey and the USTP. As the USTP has also noted,³⁰ the Court can take judicial notice of the numerous disputes between the USTP and McKinsey, as set forth and argued in the following filings:

- November 30, 2018 Comments of United States Trustee Regarding McKinsey RTS's Opposition to Mar-Bow Partners, LLC's (I) Motion to Reopen Case and (II) Motion for Relief from Judgments and for Indicative Ruling, *ANR* Dkt. 4164;
- November 30, 2018 Motion of McKinsey RTS to Strike Mar-Bow Value Partners LLC's Supplemental Memorandum in Response to Affidavits Filed by McKinsey RTS, *ANR* Dkt. 4165;
- December 14, 2018 Acting United States Trustee's (1) Objection to Debtors' Application for Entry of an Order Authorizing the Retention and Employment of McKinsey Recovery & Transformation Services U.S., LLC as Performance Improvement Advisors to the Debtors Nunc Pro Tunc to the Petition Date; and (2) Response to Court's Order Dated

²⁹ See also *In re Age Refining*, 801 F.3d 530, 541 (5th Cir. 2015) (stating that under Rule 9019, a bankruptcy court does not “conduct a mini-trial to determine the probable outcome of any claims waived in the settlement”); *In re Adelpia Communications Corp.* 327 B.R. 143, 159 (Bankr. S.D.N.Y. 2005) (noting only that the settlement “must fall within the reasonable range of litigation possibilities”) (internal quotations omitted).

³⁰ See U.S. Trustees' Statement in Support of Settlement, *Westmoreland* Dkt. 1685 ¶ 9, n.6, (noting the “extensive legal and factual records before these courts”).

November 30, 2018, *Westmoreland* Dkt. 785 (including joining of Mar-Bow objection);

- RTS court filings responsive to allegations made in the objection of Mar-Bow in *Westmoreland*, which the U.S. Trustee joined by means of *Westmoreland* Dkt. 785:
 - December 11, 2018 McKinsey Recovery and Transformation Services U.S., LLC's Preliminary Response to the Amended Objection of Mar-Bow Value Partners, LLC [Dkt. 669], to the Debtors' Application for Approval of Employment [Dkt. 452], *Westmoreland* Dkt. 763;
 - December 17, 2018 McKinsey Recovery and Transformation Services U.S., LLC's Pre-Conference Submission, *Westmoreland* Dkt. 812;
 - January 2, 2019 McKinsey Recovery and Transformation Services U.S., LLC's Motion for an Order (I) Setting an Expedited Briefing Schedule, (II) Limiting Discovery, and (III) Excluding Fraud Allegations From the Scope of the January 28, 2019 Hearing, *Westmoreland* Dkt. 923;
 - February 21, 2019 McKinsey Recovery & Transformation Services U.S. LLC's Objection to Mar-Bow Value Partners LLC's Motion for Relief from Orders Under Bankruptcy Rule 9024 and Civil Rule 60(d)(3), *SunEdison* Dkt. 5815; and
 - March 27, 2019 McKinsey Recovery and Transformation Services U.S., LLC's Response to Mar-Bow's Motion [Dkt. 1585] to (I) Reconsider the Court's Order Granting the Joint Motion in Furtherance of Mediation Agreement [Dkts. 1422, 1423, 1427] and (II) Set a Hearing Regarding Discovery on Mar-Bow's Amended Objection to the Debtors' Application to Employ McKinsey RTS, *Westmoreland* Dkt. 1659.

Each party was fully prepared to litigate the positions they had taken up in these filings, before being ordered to mediation.

24. The heated, good-faith disputes that the parties were poised to litigate, together with their complexity, likely duration, expense, and uncertain outcome provide ample reasons for both parties to prefer the Settlement to the risk associated with litigation. More specifically, these factors constitute more than "reasonable" justification for agreeing to the central terms of

the Settlement: a \$15 million payment by McKinsey to the three estates, mutual releases in past and pending cases in relation to compliance with Rule 2014, no admission of wrongdoing by RTS, and the resolution of the existing *Westmoreland* objection. Moreover, as the USTP points out, it retains the ability to object to future RTS disclosures or to prior disclosures if evidence later shows that McKinsey has had actual conflicts of interest or made misrepresentations in any bankruptcies.³¹

25. McKinsey further notes that, even if the Rule 9019 standard were applicable (which it is not), the proposed Settlement easily would clear that higher standard as well, as amply demonstrated in this pleading.³² The Settlement was the product of arms-length negotiations, and each party was fully prepared to litigate its position regarding Rule 2014 on the merits but for the Settlement. The Settlement also will avoid the time and expense of complex protracted litigation and is in the best interest of creditors, as McKinsey will pay \$5 million in each of the settled cases, which will be distributed according to the terms of the debtors confirmed plans or other applicable law.

II. Mar-Bow’s “Limited Objection” Should Be Overruled

26. The requests for “clarification” made by Mar-Bow and the purported “shortcomings” of the Settlement it identifies are either without merit or irrelevant. As such, Mar-Bow’s “limited objection”—which Mar-Bow itself twice insists is *not* an objection—should be overruled.

³¹ U.S. Trustees’ Statement in Support of Settlement, *Westmoreland* Dkt. 1685 ¶¶ 5-6.

³² See *Age Refining*, 801 F.3d at 540; *In re Cajun Elec. Power Coop.*, 119 F.3d 349, 356 (5th Cir. 1997); *In re Mirant Corp.*, 348 B.R. 725, 739-40 (Bankr. N.D. Tex. 2006); see also *In re Iridium Operating LLC*, 478 F.3d 452, 462 (2d Cir. 2007); *In re Frye*, 216 B.R. 166, 174 (Bankr. E.D. Va. 1997); *In re Austin*, 186 B.R. 397, 400 (Bankr. E.D. Va. 1995)

A. Mar-Bow's Proposed "Clarifications" Should Be Rejected.

27. *First*, as a stranger to the Settlement whose rights are nonetheless expressly reserved along with all third-parties, Mar-Bow seeks modification of the Proposed Order to include a lengthy, Mar-Bow-specific reservation of rights that would preserve all of Mar-Bow's "rights, positions or claims in this or any other case" and list numerous rights that Mar-Bow purportedly retains. Limited Objection ¶ 7. Mar-Bow offers no reason why its proposed language is necessary to preserve its rights—nor could it. Paragraph 15 of the Proposed Order already expressly states that third-party rights are not affected by the Settlement. Proposed Order ¶ 15 ("This Order will not bind or prejudice the rights and claims of any non-party.").³³ Rather, Mar-Bow is simply seeking to be treated differently than any other party.

28. As the U.S. Trustee points out,³⁴ the superfluous language Mar-Bow proposes needlessly creates ambiguity where there is none. Accordingly, Mar-Bow's language would undermine the purpose and meaning of the existing Settlement term preserving non-party rights and claims.

29. *Second*, Mar-Bow inappropriately seeks to dictate how the \$15 million payment under the Settlement will be distributed. Mar-Bow declined to participate in the settlement between McKinsey and the USTP despite being included in the meditation. For this reason, among others, it has no right to direct the funds paid to settle the U.S. Trustee's claims against McKinsey or to instruct the Court how best to exercise its own discretion.³⁵ The Settlement, by its terms, provides that the \$15 million payment shall be distributed in accordance with the terms

³³ What is more, Mar-Bow's proposed language purports to vouchsafe rights that Mar-Bow may not have. *See, e.g.*, Limited Objection ¶ 7 (seeking to preserve Mar-Bow's "right to discovery in this case or in any other case").

³⁴ *See* U.S. Trustees' Statement in Support of Settlement, *Westmoreland* Dkt. 1685 ¶¶ 10-12.

³⁵ *See* Limited Objection ¶ 9 ("In the Court's discretion, a more appropriate distribution would be to the parties who were injured by McKinsey's wrongful conduct in this case and on a pro-rata basis.").

of the confirmed plans in the Cases or other applicable law. *See* Proposed Order, ¶ 3. It is the Court's prerogative, not Mar-Bow's, to determine the distribution required by the applicable plans and applicable law, and to decide how and when it will make that determination.

30. Mar-Bow's purported concern that McKinsey will benefit from any distribution of the Settlement also has no basis. The Settlement expressly provides that if any of the \$15 million is distributed to McKinsey, it will be refunded by McKinsey to the distributing party. *Id.* ¶ 3.

31. For these reasons, the "clarifications" requested by Mar-Bow are unnecessary and improper.

B. The Court Should Disregard the Purported "Shortcomings" Mar-Bow Identifies.

32. Mar-Bow augments its non-objection by including seven pages of purported "shortcomings" and "flaws" in the Settlement, which it repeats are "not by way of objection." Limited Objection item III and ¶ 12. The obvious purpose of Mar-Bow's non-response is to reiterate, yet again, its baseless and anti-competitive complaints against McKinsey.

33. Mar-Bow first argues that the Settlement lacks transparency, including for the reason that the "Settlement Approval Motion discloses no facts from which the Court can determine whether to approve the settlement." *See* Limited Objection ¶ 13. As set forth above, and in the U.S. Trustee's submission in support of the Settlement, the public record contains a strong and complete record of the parties' good faith dispute concerning Rule 2014 and ample support for the Settlement.

34. Mar-Bow next argues that the Settlement "impairs the rights of the parties in McKinsey's first eleven bankruptcy cases" by granting McKinsey a release with respect to those cases, and "deprives the bankruptcy judges" in those other cases "of their authority and responsibility to review the settlement." Limited Objection ¶¶ 17-18. But the U.S. Trustee has never suggested that McKinsey's alleged "conduct" harmed any parties in McKinsey's first

eleven bankruptcy cases. In fact, the USTP noted in its reply that “no disputes are even pending between the USTP and McKinsey” in those cases.³⁶

35. Finally, consistent with its routine practice, Mar-Bow uses the occasion of any court filing to re-disseminate baseless allegations about McKinsey’s purported failures to comply with Rule 2014 and a myriad of supposed disqualifying conflicts that preclude RTS from being retained in *Westmoreland* or in any future bankruptcy case. Limited Objection ¶¶ 1, 5 19. These allegations, which remain the subject of litigation between McKinsey and Mar-Bow, have no bearing on the fairness or reasonableness of the Settlement between McKinsey and the USTP and should therefore be disregarded.

36. McKinsey pauses over these allegations solely to note that Mar-Bow misrepresents the record when it states that RTS has “never substantively denied the factual basis for” the allegations Mar-Bow repeats. *Id.* ¶ 5 (emphasis removed). RTS has, for example, repeatedly responded to concerns about the Confidential Client in *Westmoreland* that accounted for 17.5% of RTS’s gross annual revenue as of September 30, 2018.³⁷ Significantly, the U.S. Trustee and the Debtor were provided the name of this client,³⁸ key characteristics of the Confidential Client were filed by RTS in the *Westmoreland* record,³⁹ and no other party to the *Westmoreland* bankruptcy objected to RTS’s disclosures as to this client. RTS has likewise responded on multiple occasions to Mar-Bow’s argument that numerous client and MIO

³⁶ U.S. Trustees’ Statement in Support of Settlement, *Westmoreland* Dkt. 1685 ¶ 18.

³⁷ See Declaration of Mark W. Hojnacki, *Westmoreland* Dkt. 452, Ex. B ¶ 77; First Supplemental Declaration of Mark W. Hojnacki, *Westmoreland* Dkt. 810 ¶ 24 ; McKinsey Recovery and Transformation Services U.S. LLC’s Pre-Conference Submission, *Westmoreland* Dkt. 812 at 3-4.

³⁸ McKinsey Recovery and Transformation Services U.S. LLC’s Emergency Motion to Seal and for a Protective Order in Advance of a Deposition that Must be Completed by December 31, 2018, *Westmoreland* Dkt. 885 ¶ 1; January 3, 2019 Hearing Tr., *Westmoreland*, at 52:8-10 (“But on the 107 piece, we provided—and had a very good conversation with Ms. Livingstone this morning—the name of the confidential client to Ms. Livingstone”).

³⁹ See sources cited in note 37.

connections *per se* disqualify RTS from being retained. See Limited Objection ¶ 5. This list presupposes, wrongly in RTS's view, that Mar-Bow is correct in its extreme stance that Section 327 requires disqualification in the case of any client connection, without regard to lookback period, and any connection of any affiliate of the "person" seeking retention, including investment affiliates, without regard to separation between the affiliate and the entity seeking retention.⁴⁰ Finally, RTS has responded to Mar-Bow's allegations of purported "misconduct" in the *GenOn* bankruptcy. See January 2, 2019 Motion, *Westmoreland* Dkt. 923 at 22-23 (demonstrating lack of good-faith basis for Mar-Bow's claims).

37. The Limited Objection should be overruled in its entirety.

CONCLUSION

For the foregoing reasons, McKinsey respectfully requests that the Court approve the Settlement, enter the Proposed Order, overrule the Limited Objection, and grant such other and further relief as this Court may deem just and proper.

⁴⁰ See, e.g., March 27, 2019 Motion, *Westmoreland* Dkt. 1659 at 15-17; February 21, 2019 Motion, *SunEdison* Dkt. 5815 at 15-19.

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Houston, TX

Respectfully submitted,

By: /s/ Zack A. Clement

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2019, I caused the foregoing pleading to be filed with the Court and thereby served by the Court's CM/ECF noticing to all parties registered to receive electronic notice in this case.

/s/ Zack A. Clement
