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)
/	

MAR-BOW VALUE PARTNERS LLC'S RESPONSE TO THIRD STATUS REPORT OF MCKINSEY RECOVERY & TRANSFORMATION SERVICES U.S. LLC
(This relates to Dkt. 1686)

From the outset of McKinsey's self-serving "protocol" process (including in Mar-Bow's pending motion for reconsideration), Mar-Bow has warned that McKinsey, a deliberate and serial violator of Rule 2014, will never comply with Rule 2014 and is the worst possible candidate to develop a disclosure procedure for the bankruptcy system. The events of this past week eliminate any and all doubts in that regard.

At an April 2 hearing in the *SunEdison* case on Mar-Bow's Motion for Relief, Judge Bernstein ordered McKinsey to turn over its settlement agreement with the SunEdison Litigation Trust (which is controlled by SunEdison creditors). That agreement, produced in court for the first time to anyone, revealed that on December 27, 2018, McKinsey *secretly* settled claims by the Trust for ***$17.5 million***. (See **Exhibit A**.) That sum is in addition to the $15 million McKinsey agreed to pay in its settlement with the U.S. Trustee in this case, *ANR*, and *SunEdison*. It is *also* in addition to the $1.2 million preference payment that McKinsey has already disgorged in this case. Thus, to date, in every case that Mar-Bow has raised issues with McKinsey's disclosures, McKinsey has written a check to sweep the allegations under the rug. So far, McKinsey has paid $33.7 million – to Mar-Bow's knowledge, the largest sanction that any professional in U.S. bankruptcy history has ever paid. And McKinsey has parted with that massive sum before a single hearing has been conducted on the merits, or even a single document has been exchanged in discovery. These facts are highly relevant to the viability of the "protocol" process.[1] They also illustrate the impropriety of allowing a serial violator of Rule 2014 to create any protocol worthy of use in this case, never mind for nationwide use.

Initially, from the day Mr. Alix publicly raised his allegations concerning McKinsey's illegal disclosure practices in mid-2016, McKinsey has attacked his character and motives in court and in the media. McKinsey has also repeatedly insisted that Mr. Alix's allegations have no merit, and that no one other than Mr. Alix has a problem with McKinsey's disclosure practices.[2] The

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[1] When the *SunEdison* court abruptly ordered McKinsey to turn over the secret SunEdison Litigation Trust settlement agreement on April 2, within hours McKinsey leaked it to the press in an attempt to "get ahead of the story" with its "positive spin." But there is no "positive spin" on paying almost $34 million (and counting) to settle allegations of Title 18 criminal conduct that have yet to be subjected to any discovery whatsoever.

[2] *See, e.g.*, Dkt. 763 (McKinsey's Response to Mar-Bow's Am. Obj.) at 5 ("No other party has objected to the Debtor's application to employ RTS."); Dkt. 923 (McKinsey's Motion for an Expedited Order) at 18 ("Mr. Alix purports to have discovered a fraud that no other person with access to the same public information has ever detected."); *In re SunEdison, Inc.*, No. 16-BK-10992(SMB) (Bankr. S.D.N.Y.) ("***SunEdison***"), Dkt. 5815 (McKinsey's Objection to Mar-Bow's Motion for Relief, filed Feb. 21, 2019) at 34 ("***Indeed, RTS*** consistently has provided value to its clients and ***has faced*** **no objection** ***from any debtor or creditor with a pecuniary interest in any of the estates that RTS has served. The only creditor that has raised issues about RTS in any of the bankruptcy cases in which it has served debtors is Mar-Bow.***") (emphasis added); *Alix v. McKinsey & Co., Inc. , et al.*, No. 18-CV-04141(JMF) (S.D.N.Y.) (**"*RICO Case*"**), Dkt. 63 (Defendants' Motion to Dismiss) at 12 ("No other parties to the proceeding joined Alix's complaint [in *ANR*]."); *id.* at 26 (stating that the RICO Complaint "alleges a dispute between competitors—and no one else—about the form and adequacy of McKinsey's Rule 2014(a) disclosures."); *id.* at 14 ("Alix was the only party unsatisfied by this result [in *ANR*]."; *RICO Case* Dkt. 89 (Defendants' Motion to Dismiss Amended Complaint) at 10 ("Alix—acting alone and without the support of any of the hundreds of Interested Parties in these bankruptcies—began a campaign to undermine McKinsey's ability to provide consulting services to chapter 11 debtors and to eliminate it as one of AlixPartners's principal competitors."); *id.* at 12 ("No other parties to the *ANR* case joined Alix's complaint. . . . Alix was the only part unsatisfied with this result."); *id.* at 35 ("[N]o one challenged the good faith of McKinsey US or RTS's disclosures prior to ANR . . . ."); *RICO Case* Dkt. 95 (Defendants' Reply Brief on Their Motion to Dismiss, filed Dec. 19,

public revelation of McKinsey's settlement with the Litigation Trust, coming closely on the heels of its settlement with the U.S. Trustee, has destroyed those duplicitous narratives. Jay Alix did not demand a $17.5 million settlement from McKinsey for its wrongdoing in *SunEdison*. The creditors of SunEdison did through the SunEdison Litigation Trust. They were apparently so disturbed by Mar-Bow's allegations of McKinsey's illegal behavior that they demanded compensation, and McKinsey was obviously so concerned about the merits of Mar-Bow's case that it paid the creditors $17.5 million (a number well in excess of the total fees McKinsey was paid in *SunEdison*). Similarly, the U.S. Trustee, not Jay Alix, extracted $15 million from McKinsey for its lack of candor in its Rule 2014 disclosures. Clearly, then, Jay Alix has significant support from others concerned and complaining about McKinsey's misconduct.

More importantly, the disclosure of the jaw-dropping SunEdison Litigation Trust settlement demonstrates in no uncertain terms that McKinsey has evidently been dishonest with this Court. On December 18, 2018, Mar-Bow and McKinsey appeared before this Court on Mar-Bow's objection to McKinsey's employment. Notably, that objection expressly alleged McKinsey's misconduct in the *SunEdison* case. *See* Dkt. 669 (Mar-Bow's Amended Objection) at Point VII.C. At the December 18 hearing, this Court expressed grave concerns about the allegations of fraud raised by Mar-Bow, and threatened Jay Alix with dire consequences if his claims proved unfounded. For its part, McKinsey blithely assured the Court that Mar-Bow's allegations were baseless and that Jay Alix was motivated by anti-competitive ends, and further insisted that its disclosure practices had at all times been in "good faith." *See* Dkt. 868 (12/18/2018

2018) at 10 (stating "no debtor or Interested Party took issue with McKinsey's disclosures for seventeen years").

Tr.) at 139:20-24, 140:22-25, 141:8-10. Shortly after the hearing, this Court ordered the parties to appear for depositions on a highly expedited basis to assess whether Mar-Bow's claims were made in good faith and grounded in fact.

Because of the disclosure of the SunEdison Litigation Trust settlement last week, we now know that while McKinsey was before this Court in December 2018 vehemently urging its good faith, questioning the motives of Mr. Alix, and touting the lack of any interested parties joining in Mar-Bow's claims, it was secretly finalizing a record $17.5 million settlement to assuage the creditors of the SunEdison estate. Thus, McKinsey, a professional seeking employment as a fiduciary in *Westmoreland*, failed to disclose the Litigation Trust's claims, and failed to disclose the amount of its anticipated settlement, all while professing its total innocence and disparaging Jay Alix before this Court and in the media. Not only that, McKinsey included a confidentiality provision in the SunEdison Litigation Trust settlement agreement in the hopes that this Court would never find out about it, and in fact the Court approved McKinsey's "protocol" process without knowledge of the SunEdison Litigation Trust claims or the secret settlement.

Simply stated, ***this Court cannot trust McKinsey***; its concealment of highly relevant information regarding the SunEdison Litigation Trust claims and settlement is yet another grounds to deny its employment application; and allowing McKinsey to proceed with its farcical, self-serving "protocol" process demeans and discredits this Court and the entire bankruptcy system. Further, this is not the first time McKinsey has played fast and loose with this Court. At the January 3, 2019 hearing, just days after the $17.5 million SunEdison Litigation Trust settlement, this Court noted that McKinsey's representative had been highly evasive in his Court-ordered deposition. Dkt. 981 (1/3/2019 Tr.) at 30:22-31:4.

It is now clear that Jay Alix and Mar-Bow have been truthful from the outset, presenting detailed allegations backed up by evidence. Jay Alix was fully forthcoming at the deposition ordered by this Court, never skirting or refusing to answer a question. He acted in good faith. McKinsey, in contrast, has been engaged in obfuscation, impugning Mr. Alix's character; engaging in "duck and cover" deposition tactics; and dismissively assuring this Court that it does not need to look into Mar-Bow's supposedly "meritless" claims. All while, however, McKinsey and its counsel have been behind the scenes orchestrating payments to creditors and the U.S. Trustee. And for all the Court knows, McKinsey has made additional "confidential" payments to creditors in other bankruptcy cases. McKinsey has clearly been acting in bad faith.

Jay Alix has expended a great deal of personal resources in correcting McKinsey's conduct, and absorbed the smears and *ad hominem* attacks of McKinsey's counsel along the way. As the Court can now see, the beneficiaries of Mr. Alix's work, financial resources, and patience in enduring despicable personal attacks are the creditors of the SunEdison estate ($22.5 million), and the estates in the *ANR* ($5 million) and *Westmoreland* ($6.2 million) cases. Indeed, no one can seriously contend that any of the facts concerning McKinsey's illegal disclosures and self-dealing would have been exposed, or that any of the almost $34 million in payments referenced above would have been made, if not for the efforts of Jay Alix and Mar-Bow. And, incredibly, despite pending requests, no court has yet permitted *any* discovery on Mar-Bow's allegations. With almost $34 million already paid on the basis of Mr. Alix's private research *alone*, the Court can only imagine what depredations a thorough investigation supported by compulsory process will reveal.

In addition, the lack of transparency in the "protocol" process identified in Mar-Bow's response to McKinsey's second status report continues unabated. Despite written requests to

Mr. Baker and McKinsey's counsel, the draft protocol has not been made public (or even provided to Mar-Bow), nor has any information whatsoever concerning the substance of the "protocol" been made public. Furthermore, no assurances have been given to the Court or anyone else that the process will be properly recorded and documented to permit full and transparent public scrutiny. To the contrary, despite the concerns regarding the confidentiality provision in the agreement between McKinsey and Mr. Baker raised in Mar-Bow's response to McKinsey's second status report, McKinsey has now locked down Mr. Singerman with yet another confidentiality provision that is anathema to an open and transparent process.

Finally, the "protocol" process represents yet another instance in which McKinsey has demanded and received special treatment. When McKinsey first entered the restructuring business, it insisted it was "special," and therefore did not have to disclose the names of its connections like other professionals. When McKinsey filed its disclosures in this case they were, by McKinsey's own admission, incomplete. After McKinsey filed its revised disclosures and the depositions of Jay Alix and Mark Hojnacki revealed that even those disclosures were inadequate, McKinsey was permitted to scrap everything and start all over again with the "protocol." It was allowed to do so even though (1) this case is essentially over, (2) McKinsey's job (like every other bankruptcy professional) was to submit proper disclosures under the law as it existed at the time of its application, and (3) when given the chance to establish its good faith in the Hojnacki deposition McKinsey failed. And now it is evident that McKinsey also withheld critical information from the Court about the claims of the SunEdison Litigation Trust and McKinsey's settlement of those claims. Despite all this, McKinsey has been indulged with the right to yet another "second chance," and the right to create its own disclosure rules after the fact. No other professional would be or has been afforded this kind of solicitude, and certainly not one with a well-documented history of Rule 2014 violations.

The proper course here is clear. The absurd "protocol" charade should be terminated, and full discovery ordered immediately.

Respectfully submitted, April 9, 2019.

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Certificate of Service

I certify that on April 9, 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.

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