UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	Chapter 11
WESTMORELAND COAL COMPANY, *et al.*,[1]	Case No. 18-35672 (DRJ)
Debtors.	(Jointly Administered)

STATEMENT OF MCKINSEY RECOVERY & TRANSFORMATION SERVICES U.S., LLC'S REGARDING MAR-BOW VALUE PARTNERS, LLC'S "RESPONSES" TO MCKINSEY'S STATUS REPORTS

[1] Due to the large number of debtors in these chapter 11 cases, which are consolidated for procedural purposes only, 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 proposed claims and noticing agent in these chapter 11 cases at www.donlinrecano.com/westmoreland. Westmoreland Coal Company's service address for the purposes of these chapter 11 cases is 9540 South Maroon Circle, Suite 300, Englewood, Colorado 80112.

PRELIMINARY STATEMENT

Mar-Bow Value Partners, LLC ("Mar-Bow") has recently filed two "responses"[2] to McKinsey Recovery & Transformation Services U.S., LLC's ("RTS") court-mandated status reports on the protocol process, each of which is nothing more than a rehash of Mar-Bow's previous attacks on this Court's order deferring consideration of the application to retain RTS while RTS confers with the Debtors and expert advisors to develop a thoughtful protocol for its new retention disclosures. While Mar-Bow is filing these serial pleadings, RTS is regularly reporting to this Court on implementation of the successful mediation before Judge Isgur. Pursuant to that process, RTS will present a proposed disclosure protocol to this Court for review within the coming weeks. As previously noted, RTS welcomes any guidance from the Court as to a process for public comment on the protocol, including potentially a hearing. Mar-Bow's steady stream of pleadings in the meantime is unnecessary, and any included requests for relief should be denied.

BACKGROUND

On February 19, 2019, the Honorable Marvin Isgur filed a Mediator's Notice in this case reporting the outcome of the mediation among McKinsey & Co., Inc. ("McKinsey"), RTS, the Debtors in these chapter 11 cases, the U.S. Trustee Program, and Mar-Bow. Dkt. 1406 at 1. The Mediator's Notice reported a successful settlement among McKinsey, RTS, and the U.S. Trustee Program to "resolve the parties' good faith disputes concerning the application of Bankruptcy Rule 2014," *id.* at Ex. A, and an agreement between RTS and Westmoreland pursuant to which RTS would develop, in conjunction with an expert, a new protocol for reviewing its connections

[2] In addition to these two filings, on April 9, 2019, Mar-Bow filed an Emergency Motion for Entry of an Order Compelling McKinsey Recovery and Transformation Services, U.S., LLC, to Disclose all of the Investments of its Affiliate MIO Partners, Inc., and any other McKinsey Affiliate in any of the Debtors or Their Creditors in These Cases. Dkt. 1701. One day later, this Court denied Mar-Bow's motion. Dkt. 1702.

in bankruptcy cases to ensure that its disclosures fully comply with Rule 2014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), *id.* at Ex. B. (Mar-Bow did not reach agreement with any party in the mediation.)

On February 21, 2019, this Court granted a joint motion from Westmoreland and RTS to defer consideration of the pending RTS retention application until after RTS develops its new protocol, applies it to the Westmoreland case, and files new disclosures. Dkt. 1427 ("Post-Mediation Order"). The protocol is being developed under the guidance of D.J. ("Jan") Baker,[3] who has agreed to lead this effort on an unpaid basis. As required by the Post-Mediation Order, RTS has filed regular reports describing its progress on March 6, 2019, and March 20, 2019. *See* Dkt. 1586 ("McKinsey Initial Status Report"); Dkt. 1626 ("McKinsey Second Status Report").

On March 6, 2019, Mar-Bow moved for reconsideration of the Post-Mediation Order. Dkt. 1585. Just two days after RTS filed its response, and before this Court could even reach Mar-Bow's reconsideration motion, Mar-Bow filed another pleading that was an unsolicited "response" to McKinsey's court-ordered status reports, renewing its complaints about the protocol process and seeking again to undo the Post-Mediation Order. Response of Mar-Bow Value Partners, LLC to "Status Reports" Filed by McKinsey, Dkt. 1672 ("Mar-Bow's First Response"). After RTS filed its next status report on April 3, 2019, Mar-Bow filed yet another response complaining about a settlement McKinsey had reached in another chapter 11 case pending in New York, and for a third time asked this Court to vacate the Post-Mediation Order. Mar-Bow Partners LLC's Response to Third Status Report of McKinsey Recovery & Transformation Services U.S. LLC, Dkt. 1699 ("Mar-Bow's Second Response" and, together with the Mar-Bow First Response, the "Mar-Bow Responses"). The Mar-Bow Responses are

[3] Mr. Baker, the former president of the American College of Bankruptcy, is indisputably a highly qualified and independent professional, with extensive experience in the restructuring arena.

procedurally improper and substantively wrong. The Court should reject these repeated attempts to turn a good-faith, deliberative process into a litigation sideshow.

ARGUMENT

I. Mar-Bow's Responses Are Procedurally Improper

Mar-Bow has already filed a motion for reconsideration of the Post-Mediation Order. This Court should not indulge Mar-Bow's attempts to get a second and third bite at the apple. The Court will surely rule on Mar-Bow's reconsideration motion in due course, and Mar-Bow's additional filings are nothing more than an attempt to inject argument beyond the motion sequence permitted by any Bankruptcy Rule, including Rule 9023. Much of Mar-Bow's "responses" simply repeat the unfounded allegations it leveled against RTS in its reconsideration motion, and attack a good-faith settlement that McKinsey reached with a third party in a separate bankruptcy case in a different district. The remaining points not only come too late, but lack any merit, as detailed below.

II. Mar-Bow Offers No Reason to Vacate the Post-Mediation Order

A. The Post-Mediation Order Is Fully Consistent With the Rules Enabling Act and The Federal Rules of Bankruptcy Procedure

Mar-Bow's contention that the Post-Mediation Order runs afoul of the Rules Enabling Act and Rule 9029 should be rejected for several reasons. Mar-Bow's First Response at 5-10. First, any arguments about what the protocol will (or will not) require are obviously premature, since the protocol has not been finalized or released. *See, e.g.*, *id.* at 9 ("The Court's approval of a 'McKinsey Protocol' would in all probability violate . . . Rule 9029(a)(1)."). Pursuant to the Post-Mediation Order (Post-Mediation Order at 2), once the protocol is final, it will be presented to this Court for consideration, and McKinsey will then file a new Rule 2014 declaration. As McKinsey previously explained in its response to Mar-Bow's motion for reconsideration of the

Post-Mediation Order, that process will afford parties ample opportunity to be heard. *See* Dkt. 1659 at 9-14.

Second, and even more importantly, Mar-Bow's objections rest on a faulty premise—that RTS is seeking to amend Rule 2014 rather than to propose a framework for how Rule 2014 applies to RTS. *E.g.*, *id.* at 4. Case law regarding certain issues relating to the application of Rule 2014, such as its application to affiliates—the core issue put in dispute by Mar-Bow—is undeveloped, and indeed the survey of other prominent professionals' disclosures appended to RTS's Third Status Report confirms that industry practices vary widely.[4] The protocol will address precisely these questions as they apply to the scope of disclosures that RTS must file in Westmoreland.

Mar-Bow's contention that the process set forth in the Post-Mediation Order violates the Rules Enabling Act or Bankruptcy Rule 9029 should be dismissed out of hand. RTS is looking for guidance from a highly-esteemed expert on the application of Rule 2014 in different contexts, not seeking to rewrite the Rule. By comparison, under the Rules Enabling Act, an amendment to the Bankruptcy Rules substantively alters the Rules. For example, the 2017 amendment to Rule 3002(a) enlarged the application of the Rule to secured creditors, by providing expressly that failure to timely file a proof of claim may bar a secured creditor from receiving any distribution from a confirmed bankruptcy plan.[5] *See* 2017 Advisory Comm. Notes to Rule 3002. For the same reason, the Post-Mediation Order does not violate Rule 9029: the disclosure protocol

[4] *See* McKinsey Recovery & Transformation Services U.S., LLC's Third Status Report in Accordance with Order on Joint Motion in Furtherance of Mediation Agreement, Exhibit A (excerpting and contrasting relevant disclosure language and practices of numerous prominent professionals who are regularly retained in chapter 11 cases). Dkt. 1686.

[5] *See also, e.g.*, Fed. R. Bankr. P. 2019 advisory committee's note to 2011 amendment ("substantially ... expand[ing] the scope of [Rule 2019's] coverage and the content of its disclosure requirements").

envisioned by the Post-Mediation Order will propose a methodology for RTS's compliance, rather than adopting a new rule that governs all matters within the court's jurisdiction.

While Mar-Bow argues that the protocol under consideration will inevitably be inconsistent with the Advisory Committee on Bankruptcy Rules' 2015 decision not to adopt a rule limiting disclosures to "relevant connections,"[6] the protocol would not in any way usurp the Advisory Committee's role. Again, RTS is not seeking to amend Rule 2014. The Subcommittee on Attorney Conduct and Health Care, which considered the proposal that Mar-Bow references, acknowledged "the difficulty of determining just what 'connections' a professional should disclose to a bankruptcy court." 2015 Advisory Comm. Notes to Bankr. Rules at 187. Nowhere did the Subcommittee even address—let alone purport to resolve—whether or how Rule 2014 applies to affiliates.

Should other courts and professionals look to the protocol developed in this Court as useful precedent, there would be nothing unusual or inappropriate about that process. Indeed, bankruptcy courts have regularly applied two other bankruptcy protocols to debtor professionals—the Blackstone Protocol and the Jay Alix Protocol—when interpreting professional retention and fee issues. *See, e.g.*, *In re Relativity Fashion, LLC*, No. 15-11989, 2016 WL 8607005 (Bankr. S.D.N.Y. Dec. 16, 2016) (recognizing the Blackstone Protocol's development and widespread application in bankruptcy cases, and interpreting its applicability in the context of a particular dispute); *In re Nine West Holdings, Inc.*, 588 B.R. 678, 690 (Bankr. S.D.N.Y. 2018) ("For fourteen years, the crisis and interim management industry has relied on the implicit consent of the U.S. Trustee that such firms can be retained in a bankruptcy case pursuant to section 363 rather than section 327 if they meet the requirements of the [Alix]

[6] Mar-Bow appears to invoke the Advisory Committee's inaction as an affirmative statement of policy – which it decidedly is not.

Protocol, and the industry has developed its business model based on the understanding that the U.S. Trustee would enforce this policy consistently and fairly.").[7]

B. The Post-Mediation Order Was Properly Issued.

This Court acted well within its discretion in adopting the Post-Mediation Order, and Mar-Bow's unrelenting efforts to undo it should be rejected.[8] Neither RTS nor Mr. Baker are usurping the role of any rulemaking body, as detailed above. Nor does approving the protocol process impinge on this Court's authority in any respect. Contrary to what Mar-Bow contends, RTS does not seek to introduce Mr. Baker's recommendations as conclusions of law. Mar-Bow's First Response at 11. Mr. Baker is designing a proposed methodology for RTS's complex disclosures under Rule 2014. The Court will decide, as it always does, if the proposed template meets the requirements of Rule 2014. RTS and Westmoreland are simply enlisting the assistance of leading advisors familiar with the obligations imposed by the Bankruptcy Code to ensure appropriate disclosures, just as any professional seeking chapter 11 retention does, and bolstering the efforts of those professionals through a searching and thoughtful review of best-practices for professional retention disclosures with input from many others in the industry.

Further, Mar-Bow's complaint that the process for developing the protocol lacks transparency is particularly misplaced. As RTS noted in its response to Mar-Bow's reconsideration motion, this Court could provide an opportunity for commentary, including a hearing, when RTS presents its protocol to the Court in just over a month. Once the protocol is

[7] *See also In re Northwest Airlines Corp.*, 382 B.R. 632, 642 (Bankr. S.D.N.Y. 2008) (applying the Jay Alix Protocol as part of an analysis into whether certain fees sought by a retained professional had been approved under section 328); *In re Saint Vincent's Catholic Med. Ctrs. of New York*, 2007 WL 2492787, at *13-14, 18- 19, 22-23 (Bankr. S.D.N.Y. Aug. 29, 2007) (reducing fees sought by debtor's counsel due, in part, to a failure to appropriately advise the debtor regarding the consequences of failing to comply with the Jay Alix Protocol).

[8] As discussed herein, the Post-Mediation Order does not deprive any party of the right to be heard regarding the proposed protocol at a later time. The case Mar-Bow cites, *Brown Publishing Co. Liquidating Tr. v. AXA Equitable Life Ins. Co.*, 519 B.R. 13, 24 (E.D.N.Y. 2014), involved a wholly inapposite court order that *sua sponte* granted summary judgment.

finalized and RTS's disclosures are filed, the question of the scope of those disclosures, along with RTS's fitness for retention under section 327, will be squarely before the Court. All of those steps provide ample opportunity for a fair and thorough examination of the issues presented here. Accordingly, this Court should allow the process set forth in the Post-Mediation Order to proceed.[9]

C. The SunEdison Settlement Reflects McKinsey's Good Faith.

Finally, Mar-Bow's Second Response argues that RTS's good-faith, arms-length settlement with a litigation trust established in the *SunEdison* chapter 11 case, pending in the Southern District of New York, weighs against RTS's retention application in this case. Contrary to Mar-Bow's allegations, there was nothing improper or secretive about that settlement agreement in the *SunEdison* case, nor about the fact that a then-confidential settlement agreement addressing unfiled claims was not disclosed to this Court on December 18, 2018, before it was even executed on December 27, 2018, and where it had (and continues to have) no direct bearing on the issues before this Court.

Moreover, the *SunEdison* plan explicitly provides that the GUC/Litigation Trust has the ability and authority to bring, settle, or release any of the causes of action within its purview without the need for Court approval, which it has been doing in the ordinary course since the SunEdison plan's effective date. *See* SunEdison Plan ¶7.6(b) ("The GUC/Litigation Trust … shall determine whether to bring, settle, release, compromise, or enforce such GUC/Litigation Trust Causes of Action (or decline to do any of the foregoing), and shall not be required to seek

[9] While Mar-Bow attacks the confidentiality provision of Mr. Baker's consulting agreement, (Mar-Bow's First Response at 15), it does not mention the broad carve-out allowing Mr. Baker, among other things, to provide information to the Court as he deems "relevant, appropriate, or necessary," as long as he takes reasonable efforts to limit disclosure to the extent necessary to accomplish his purpose and seeks to seal any confidential commercial information. McKinsey Second Status Report, Ex. A, §6(b).

further approval of the Bankruptcy Court for such action."). There could not have been anything nefarious about the arms-length settlement agreement not being publicly filed, because the GUC/Litigation Trust is not required to seek Court approval of any settlement. In any event, on February 21, 2019, McKinsey disclosed the existence of the settlement with the GUC/Litigation Trust in its very first submission before the *SunEdison* court responding to Mar-Bow's unfounded objections.[10] McKinsey shared the agreement with the Court and Mar-Bow at a hearing on April 2, 2019, and then publicly filed the agreement on April 4, 2019.[11] Like many of Mar-Bow's other complaints, this latest allegation is much ado over nothing.

CONCLUSION

For the foregoing reasons, the Mar-Bow Responses should be disregarded, and Mar-Bow's several pending motions for reconsideration of the Post-Mediation Order should be denied.

10 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, *In re SunEdison, Inc.*, No. 16-10992 (SMB) (S.D.N.Y. filed Feb. 21, 2019), Dkt. 5815, ¶¶ 17-19.

11 Stipulation By and Among The SunEdison Litigation Trust and McKinsey & Company, Inc., Certain Subsidiaries and McKinsey Recovery & Transformation Services U.S., LLC Compromising Claims and Causes of Action, *In re SunEdison*, Dkt. 5884.

Dated: April 11, 2019
Houston, TX

Respectfully submitted,

/s/ Faith E. Gay

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