

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

)	
In re:)	Chapter 11
)	
WESTMORELAND COAL COMPANY, <i>et al.</i> , ¹)	Case No. 18-35672 (DRJ)
)	
Debtors.)	(Jointly Administered)
)	

MOTION OF MCKINSEY RECOVERY & TRANSFORMATION SERVICES U.S., LLC IN FURTHERANCE OF MEDIATION AGREEMENT

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 21 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.

THERE WILL BE A HEARING ON THIS MOTION ON JUNE 26, 2019 AT 1:00 PM (CT) BEFORE THE HONORABLE DAVID R. JONES, 515 RUSK STREET, COURTROOM 400, HOUSTON, TEXAS 77002.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

McKinsey Recovery & Transformation Services U.S., LLC (“McKinsey RTS”) respectfully states the following in support of this motion.

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

Jurisdiction, Venue and Procedural Background

1. The United States Bankruptcy Court for the Southern District of Texas (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the *Amended Standing Order of Reference from the United States District Court for the Southern District of Texas*, dated May 24, 2012. McKinsey RTS confirms its consent, pursuant to rule 7008 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), to the entry of a final order by the Court in connection with this motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The basis for the relief requested herein is section 105(a), 327(a) and 328(a) of title 11 of the United States Code, 11 U.S.C. §§ 101–1532, Bankruptcy Rule 2014(a) and rule 2014-1 of the Bankruptcy Local Rules for the Southern District of Texas (the “Bankruptcy Local Rules”).

Relief Requested

3. On November 8, 2018, Westmoreland Coal Company and certain of its subsidiaries (other than the WMLP Debtors²) (collectively the “WLB Debtors”) filed an application seeking the Court’s authorization to retain McKinsey RTS as performance improvement advisors (the “Application”). Dkt. 452, 810.

4. On January 16, 2019, after certain objections to the Application were filed, this Court entered an order appointing United States Bankruptcy Judge Marvin Isgur as mediator to mediate disputes between certain parties. Dkt. 1088.

² “WMLP Debtors” means Westmoreland Resource GP, LLC, Westmoreland Resources, LP (“WMLP”), and WMLP’s subsidiaries. For the avoidance of any doubt, the WMLP Debtors did not seek to retain, and will not seek to retain, McKinsey RTS for any purpose in these chapter 11 cases. Furthermore, the WMLP Debtors have not paid, and will not pay, any fees or expenses of McKinsey RTS in connection with these chapter 11 cases.

5. On February 19, 2019, Judge Isgur filed notice of a mediation agreement reached between the WLB Debtors and McKinsey RTS (the “Mediation Agreement”). Dkt. 1406. Pursuant to that agreement, the parties stated that although the WLB Debtors “ha[ve] observed no conflict [of interest] and believe[] that [they have] received unconflicted advice” from McKinsey RTS, McKinsey RTS agreed to retain an expert to work with it to develop new disclosure procedures and to apply such new procedures in the *Westmoreland* case. Mediation Agreement ¶ 2. Following such process and the WLB Debtors’ satisfaction with these procedures, McKinsey RTS would prepare new disclosures, and the WLB Debtors would seek Court approval of retention of McKinsey RTS at that time.

6. On February 20, 2019, the WLB Debtors and McKinsey RTS filed a joint motion (the “Mediation Motion”) in furtherance of the Mediation Agreement seeking the Court’s permission to implement the procedures contemplated by the Mediation Agreement. Dkt. 1422.³ On February 21, 2019, this Court entered an order (the “Order in Furtherance of Mediation”) granting the Mediation Motion and deferring consideration of the application to employ McKinsey RTS until the procedures set forth in the Mediation Motion and the Mediation Agreement were complete. Dkt. 1427.

7. McKinsey RTS agreed to file a status report every two weeks following the entry of the Order in Furtherance of Mediation. *See* Mediation Motion at ¶ 6. Accordingly, McKinsey RTS filed eight status reports with this Court, detailing progress of the development of new disclosure procedures by D.J. (Jan) Baker and Paul Singerman, consistent with its commitment to transparency and ensuring public confidence in the bankruptcy process. *See id.* & Dkts. 1586, 1626, 1686, 1759, 1803, 1842, 1894 & 1907.

³ On February 21, 2019, the WLB Debtors and McKinsey RTS filed a supplement to the Mediation Motion. Dkt. 1423.

8. That process culminated in the Houston Disclosure Protocol, which was filed with this Court on May 31, 2019. Dkt. 1907-1. As contemplated at the April 16, 2019 hearing (the “April 16 Hearing”), and in light of the procedures contemplated by the Houston Disclosure Protocol, McKinsey RTS files this Motion to confirm that the WLB Debtors and McKinsey RTS will file a new application to retain McKinsey RTS, *nunc pro tunc* to the Petition Date (the “New Application”). See Apr. 16 Hr’g 22-23, 39-51.

9. In accordance with the Mediation Agreement and the timing agreed to at the April 16 Hearing, the WLB Debtors and McKinsey RTS propose to file the New Application by July 3, 2019, and withdraw the prior Application simultaneously.⁴ Consistent with this Court’s direction at the April 16 Hearing, the New Application will be accompanied by a declaration of McKinsey RTS that sets forth its disclosures in accordance with the Houston Disclosure Protocol, which will then be considered by this Court pursuant to a schedule to be determined after the New Application is filed. Therefore, in furtherance of the Mediation Agreement and the procedure agreed at the April 16 Hearing, McKinsey RTS hereby requests that this Court enter a procedural order authorizing the filing of the New Application on a *nunc pro tunc* basis and deeming the prior application to be withdrawn upon the filing of the New Application.

10. McKinsey RTS also respectfully requests that the requirements of Bankruptcy Local Rule 2014-1(b) regarding *nunc pro tunc* motions be waived in light of the unique circumstances present here and the fact that the filing of the New Application is to implement the Mediation Agreement and the Order in Furtherance of Mediation. Such relief is consistent with the Court’s jurisdiction and appropriate exercise of discretion to implement and effectuate settlements, and to approve *nunc pro tunc* relief for retention applications in light of the circumstances presented. See Order in Furtherance of Mediation ¶ 6; 11 U.S.C. § 105(a); see also, e.g., *Matter of Triangle Chemicals, Inc.*, 697 F.2d 1280, 1289 (5th Cir. 1983).

⁴ The WLB Debtors support this proposal.

11. McKinsey RTS respectfully submits that the relief requested herein is appropriate, reasonable and necessary in order to further implement the Mediation Agreement.

Waiver of Bankruptcy Rule 6004(a) and 6004(h)

12. To implement the foregoing successfully, McKinsey RTS requests that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6004(a) and that McKinsey RTS has established cause to exclude such relief from the 14-day stay period under Bankruptcy Rule 6004(h).

Notice

13. McKinsey RTS will provide notice of this motion to the following parties or their respective counsel: (a) the Office of the United States Trustee for the Southern District of Texas; (b) the Official Committee of Unsecured Creditors; (c) the indenture trustee under the WLB Debtors' 8.75% senior secured notes due 2022; (d) the ad hoc group of lenders under the WLB Debtors' prepetition term loan facility due 2020 and the WLB Debtors' 8.75% senior secured notes due 2022; (e) the administrative agent under the WLB Debtors' prepetition term loan facility due 2020; (f) the administrative agent under the WMLP Debtors' term loan facility due 2018; (g) the ad hoc committee of certain lenders under the WMLP Debtors' term loan facility due 2018; (h) the administrative agent under the WLB Debtors' debtor-in-possession financing facility; (i) the lenders under the WLB Debtors' debtor-in-possession financing facility; (j) any statutory committee appointed in these cases; (k) the United States Attorney's Office for the Southern District of Texas; (l) the Internal Revenue Service; (m) the Environmental Protection Agency and similar state environmental agencies for states in which the WLB Debtors conduct business; (n) the offices of the attorneys general for the states in which the WLB Debtors operate; (o) the Securities and Exchange Commission; (p) Mar-Bow Value Partners, LLC; and (q) any party that has requested notice pursuant to Bankruptcy Rule 2002. McKinsey RTS submits that, in light of the relief requested herein, no other or further notice need be given.

WHEREFORE, McKinsey RTS respectfully requests that the Court grant the relief requested herein and such other relief as the Court deems appropriate under the circumstances.

Houston, Texas
June 3, 2019

/s/ Zack A. Clement

Zack A. Clement
ZACK A. CLEMENT PLLC
3753 Drummond Street
Houston Texas 77025
Telephone: (832) 274-7629
E-mail: zack.clement@icloud.com

- and -

Faith E. Gay (*pro hac vice*)
Christine H. Chung (*pro hac vice*)
Jennifer M. Selendy (*pro hac vice*)
SELENDY & GAY PLLC
1290 Avenue of the Americas.
New York, New York 10104
Telephone: (212) 390-9000
Email: fgay@selendygay.com
cchung@selendygay.com
jselendy@selendygay.com

- and -

M. Natasha Labovitz (*pro hac vice*)
John Gleeson (*pro hac vice*)
Erica S. Weisgerber (*pro hac vice*)
DEBEVOISE & PLIMPTON LLP
919 Third Avenue.
New York, New York 10022
Telephone: (212) 909-6000
Email: nlabovitz@debevoise.com
jgleeson@debevoise.com
eweisgerber@debevoise.com

Attorneys for McKinsey RTS

Certificate of Service

I certify that on June 3, 2019, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Zack A. Clement

Zack A. Clement

