

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	CASE NO.
	§	
WESTMORELAND COAL COMPANY,	§	18-35672 (DRJ)
<i>et al.</i> ¹	§	(Chapter 11)
	§	
DEBTORS	§	(Jointly Administered)

**ACTING UNITED STATES TRUSTEE'S
OBJECTION TO MCKINSEY RECOVERY AND TRANSFORMATION SERVICES
U.S., LLC'S MOTION IN FURTHERANCE OF MEDIATION AGREEMENT**

TO THE HONORABLE DAVID R. JONES
CHIEF UNITED STATES BANKRUPTCY JUDGE:

COMES NOW Henry G. Hobbs, Jr., the Acting United States Trustee for Region 7 (the "U.S. Trustee"), by and through the undersigned counsel, who respectfully objects to *McKinsey Recovery and Transformation Services U.S., LLC's Motion in Furtherance of Mediation Agreement* (the "Motion") [Dkt. No. 1947] stating:

I. Preliminary Statement

1. On November 18, 2018, certain of the Debtors filed an application seeking the Court's authorization to retain McKinsey Recovery & Transformation Services, U.S., LLC ("McKinsey RTS") as performance improvement advisors (the "Application"). Dkt. Nos. 452, 810. Although the Application remains pending before the Court, and despite McKinsey RTS's

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 (collectively herein "Debtors"). 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.

ability to—and indeed suggestions that it would—file supplemental disclosures to address existing deficiencies in that Application necessary to satisfy the requirements of 11 U.S.C. § 327 and Fed. R. Bankr. P. 2014, McKinsey RTS instead filed a motion seeking to withdraw that Application and file a new application.² Although it is not evident why a new application is necessary, McKinsey RTS now appears to want the Court to consider its employment in these cases on a completely new basis. McKinsey RTS further seeks to file the new application on a *nunc pro tunc* basis, including the waiver of this Court’s local rule that otherwise requires it to explain, among other things, the circumstances warranting *nunc pro tunc* relief and how other parties in interest may be prejudiced. McKinsey RTS has not justified why the Court should grant the extraordinary relief it seeks.

2. Moreover, even though it is unclear that the relief requested in the Motion is necessary or warranted, the Court should not afford McKinsey RTS relief at the expense of any other party. Specifically, McKinsey RTS does not state what impact, if any, withdrawal has on the matters that have been litigated, settled, or remain pending in these cases with respect to its pending Application. For example, the United States Trustee Program entered into a settlement with McKinsey RTS that resolved pending disclosure disputes with McKinsey RTS but expressly reserved rights with respect to material omissions, misrepresentations, and fraud, as well as any actual conflicts of interest related to the Application. Those rights should remain unaffected by any withdrawal.

II. Jurisdiction, Venue, and Constitutional Authority to Enter a Final Order

3. The Court has jurisdiction to consider this matter under 28 U.S.C. § 1334. This is

² Interestingly, McKinsey RTS seeks to withdraw the Application that was filed by the Debtors. McKinsey RTS represents that the Debtors consent to the relief sought therein. *See* Motion at ¶ 9.

a core proceeding under 28 U.S.C. § 157(b)(2). Venue is proper in this district under 28 U.S.C. § 1408.

4. The Court has constitutional authority to enter a final order in this matter. If it is determined that the bankruptcy judge does not have the constitutional authority to enter a final order or judgment in this matter, the U.S. Trustee consents to the entry of a final order or judgment by this Court in this matter.

5. Henry G. Hobbs, Jr. is the duly appointed Acting United States Trustee for Region 7 under 28 U.S.C. § 581(a)(7). Pursuant to 11 U.S.C. § 307, the U.S. Trustee has standing to appear and be heard on any issue in a case or proceeding under the Bankruptcy Code. Pursuant to 28 U.S.C. § 586(a)(3), the U.S. Trustee is statutorily obligated to monitor the administration of cases commenced under the Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (the “Code”). Specifically, the U.S. Trustee is charged with a number of supervisory responsibilities in reorganization bankruptcy cases under chapter 11 of the Code, including monitoring the progress of such cases and taking such actions as the U.S. Trustee deems to be appropriate to prevent undue delay. 28 U.S.C. § 586(a)(3)(G).

III. Background

6. On November 8, 2018, the Debtors filed the Application seeking to employ McKinsey RTS as performance improvement advisors. Dkt. No. 452. The U.S. Trustee filed an objection to the Application on December 14, 2018, based in part on the inadequacy of McKinsey RTS’s disclosures of connections. Dkt. No. 785.

7. On January 16, 2019, the Court entered an order appointing United States Bankruptcy Judge Marvin Isgur as mediator (the “Mediator”) to mediate disputes between certain

parties relating to the Application, including with respect to the U.S. Trustee's objection (the "Mediation Order"). Dkt. No. 1088.

8. The mediation process led to a comprehensive resolution of disclosure disputes across multiple cases between the United States Trustee Program and McKinsey RTS. The core terms of the settlement were set forth in a term sheet filed with the Court as part of the Mediator's Notice to Court (the "Notice") filed on February 19, 2019. Dkt. No. 1406. Consistent with the Mediation Order, the parties thereafter incorporated the term sheet into a proposed order, which was submitted to the Court for its review and consideration. After a hearing on April 16, 2019, the Court entered an order approving the settlement between the United States Trustee Program and McKinsey & Company, Inc., including McKinsey RTS (the "USTP/McKinsey Settlement"). Dkt. No. 1769.

9. The Mediator's Notice also disclosed that the Debtors had reached a separate agreement with McKinsey RTS, the terms of which were set forth in a separate term sheet attached to the Notice (the "Mediated Agreement"). Pursuant to the Mediated Agreement, the Debtors sought to have McKinsey RTS continue to serve as its financial advisor in these cases, and McKinsey RTS committed to filing revised disclosures in these cases.

IV. Grounds for Objection

A. McKinsey RTS has a pending Application seeking its employment and fails to explain the necessity for its withdrawal.

10. More than seven months ago, the Debtors filed the Application supported by multiple declarations seeking to retain McKinsey RTS. Although the Application remains pending, McKinsey RTS proposes to withdraw that and file a new application, which it requests be considered *nunc pro tunc* to October 9, 2018, the date the Debtors filed these cases (the "Petition

Date”).³ The Motion fails to explain the reasons for withdrawing the Application.

11. Instead, McKinsey RTS simply makes a conclusory statement that, “in accordance with the Mediation Agreement . . . the WLB Debtors and McKinsey RTS propose to file the New Application by July 3, 2019, and withdraw the prior Application simultaneously.” Motion at ¶ 9. But the Mediation Agreement says nothing about a new application, instead referring to filing “revised disclosures.” See Mediator’s Notice to Court, Dkt. No. 1406 at Exhibit B, ¶ 3.

12. McKinsey RTS also suggests that the Court endorsed its withdrawal of the Application and the filing of a new *nunc pro tunc* application in its remarks at the hearing to consider the USTP/McKinsey settlement on April 16, 2019. See Motion at ¶ 8. Contrary to McKinsey RTS’s assertion, the Court merely outlined all of the possible options that McKinsey RTS could pursue as a next step to resolving fully and finally its retention issues in these cases. As explained by the Court at the hearing, “. . . I’m going to want a date certain . . . for McKinsey to file an amended application and amended disclosure or a withdrawal of its application.” Apr. 16 Hr’g 22-23. Moreover, McKinsey RTS only discussed filing *amended* disclosures at the hearing, and stated nothing about filing an entirely new application or seeking *nunc pro tunc* relief. *Id.* at 40.

13. Although the Motion does not explain why a new application is necessary to meet its disclosure obligations under the Bankruptcy Code and Rules, it also fails to explain why McKinsey RTS could not instead amend its Application and file supplemental disclosures, which would completely avoid the necessity of the extraordinary *nunc pro tunc* relief requested in the Motion.

³ The Debtors filed the pending Application seeking to retain McKinsey RTS on November 18, 2018, almost six weeks after the Petition Date. The Application seeks *nunc pro tunc* relief to the Petition Date.

B. *Nunc pro tunc* relief should only be granted in exceptional circumstances and the Motion fails to meet that burden.

14. McKinsey RTS has requested that its new application be considered *nunc pro tunc* to the Petition Date. McKinsey RTS must establish cause for the relief and meet the necessary burden of proof—something that the Motion does not even attempt to do. Instead, it summarily asks that McKinsey RTS be excused from even having to meet that burden. *See* Motion at ¶ 10.

15. It is well settled that approval of *nunc pro tunc* retention requires “exceptional circumstances.” *Fanelli v. Hensley (In re Triangle Chemicals Inc.)*, 697 F.2d 1280, 1289 (5th Cir. 1983) (“bankruptcy court retains equitable power in the exercise of its sound discretion, under exceptional circumstances, to grant such approval *nunc pro tunc*, upon proper showing”). McKinsey RTS has failed to establish why there are exceptional circumstances here when it would otherwise appear that it could amend its pending Application, which already seeks *nunc pro tunc* relief, to supplement its disclosures in order to meet the requirements of section 327 and Rule 2014.

16. Moreover, Local Rule 2014-1(b) requires that any request for retention on a *nunc pro tunc* basis explain “why the order authorizing employment is required *nunc pro tunc*,” and “to the best of the applicant’s knowledge, how approval of the application may prejudice any parties-in-interest.” McKinsey RTS has provided neither. To the contrary, it asks that the Court wholly excuse it from complying with Local Rule 2014-1.

C. Any relief provided to McKinsey RTS should not affect parties in interest, including with respect to matters that have been litigated or settled on the record in these cases.

17. Any relief that McKinsey RTS obtains under the Motion should include an express acknowledgment that it does not affect any rights with respect to matters that have been litigated or settled in these cases, or otherwise limit or impact the rights of interested parties. For example,

the USTP/McKinsey Settlement includes express reservations with respect to McKinsey RTS's representations or omissions in connection with the Application that otherwise would have rendered it disinterested. Withdrawal of the Application and affording *nunc pro tunc* relief as to a new application should have no impact on that reservation or those rights.

18. For good reason, Local Rule 2014-1(b) includes a requirement that a professional seeking to file a *nunc pro tunc* application must explain how approval of its application on a *nunc pro tunc* basis may prejudice any parties-in-interest. McKinsey RTS has failed to provide that explanation, instead seeking a waiver of the requirement. Nevertheless, should the Court permit McKinsey RTS to withdraw its Application and file a new *nunc pro tunc* application, protections should be included in any order affording such relief to ensure that no other interested parties' rights are impacted by the relief.

19. Finally, although it is unclear what McKinsey RTS seeks to accomplish by withdrawing and refileing *nunc pro tunc*—instead of amending and supplementing its Application—any order affording such relief should also make clear that any new application must fully comply with the Bankruptcy Code and Rules, including 11 U.S.C. § 327 and Fed. R. Bankr. P. 2014. Such application should fully disclose all connections and not require further supplementation. Furthermore, to the extent that McKinsey RTS continues to seek to withhold the identity of confidential client connections, it should be required to simultaneously seek relief under 11 U.S.C. § 107 so that the Court and parties can evaluate the appropriateness of sealing that information. As the Court stated at the April 16th hearing: “[T]his will be, what? [T]he third attempt to amend . . . It will be the last attempt. So whatever [McKinsey RTS] . . . intends to do, it's going to live with the next application, disclosure, withdrawal -- whatever it is, it's going to be the last one.” Apr. 16 Hr'g at 23.

V. Conclusion

20. The issues surrounding McKinsey RTS' retention in these cases need to be resolved—and need to be resolved efficiently and transparently. McKinsey RTS must establish cause for withdrawing the Application and refiling *nunc pro tunc*, which the Motion does not even attempt. Instead, it summarily asks that McKinsey RTS be excused from meeting that burden. *See* Motion at ¶ 10. The Court should deny the Motion unless and until McKinsey RTS establishes cause for the relief requested. And any order granting relief in connection with the Motion should: (1) include a reservation that McKinsey RTS' withdrawal of the Application does not impact any other interested party's rights; (2) require that McKinsey RTS will fully comply with the requirements of the Bankruptcy Code and Rules in connection with any new application, without further right to supplement or amend; and (3) simultaneously seek relief under 11 U.S.C. § 107 to the extent that McKinsey RTS continues to seek to withhold the identity of confidential client connections.

VI. Certificate of Conference

21. On Monday June 24, 2019, the U.S. Trustee discussed this matter with counsel for the Movant. Without admitting the necessity for same, Movant's counsel expressed that Movant was likely amenable to a reservation of rights acceptable to the U.S. Trustee. Movant's counsel also stated the justification for *nunc pro tunc* relief which the U.S. Trustee believes should be made an express part of the record in this proceeding for the Court to properly determine its applicability.

WHEREFORE, the U.S. Trustee respectfully requests that this Court enter an order denying the Motion unless McKinsey RTS cures the defects cited herein, and order any and all further relief as may be equitable and just.

Dated: June 24, 2019

Respectfully Submitted,

HENRY G. HOBBS, JR.
ACTING UNITED STATES TRUSTEE
REGION 7, SOUTHERN and WESTERN
DISTRICTS OF TEXAS

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic means via ECF transmission or BNC noticing to all PACER System participants in these bankruptcy cases, on the 24th day of June, 2019.

/s/ Hector Duran
Hector Duran