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 OBJECTION TO MOTION OF MCKINSEY RECOVERY & TRANSFORMATION SERVICES U.S., LLC IN FURTHERANCE OF MEDIATION AGREEMENT
(This relates to Dkt. 1947)

Mar-Bow Value Partners, LLC ("Mar-Bow") respectfully objects to the Motion filed by McKinsey Recovery & Transformation Services U.S., LLC ("McKinsey") on June 3, 2019 (the "Motion").

I. Preliminary Statement

McKinsey seeks the extraordinary relief of withdrawing the Debtor's prior application to employ it as a professional ("the Prior Application"), and replacing it with an as-yet unfiled new application ("the New Application") to be filed *nunc pro tunc*. McKinsey does so despite a Court order directing it to file an *amended* application, and despite having previously committed to the Court that it would file an *amended* application. Apr. 16, 2019 Hr'g Tr. at 22:24-23:2, 40:14-19.[1] The Motion is riddled with procedural defects, most notably McKinsey's blithe request – unsupported by any legal or factual analysis whatsoever – that the Court "waive" the crucial

[1] Notably, McKinsey's emergency motion in furtherance of its mediation agreement sought to "supplement the current application" after developing the protocol. (Dkt. 1422, 2/20/2019.) The Court approved that request and deferred consideration of McKinsey's *original* application until after McKinsey completed its "protocol." (Dkt. 1427, 2/21/2019.) *Nunc pro tunc* relief was neither mentioned, requested, nor approved.

requirements of Local Rule 2014-1(b), which is designed to ensure that *nunc pro tunc* relief is truly justified and will not prejudice any interested parties.

It is unclear why McKinsey decided to pursue *nunc pro tunc* relief rather than file the amended application it promised and the Court directed. Mar-Bow suspects that it is a not-so-subtle attempt to airbrush the history of its initial defective disclosures and the massive unnecessary expenditure of time and resources they engendered. As explained in detail below, the law is clear that McKinsey's request to withdraw the Debtor's original application and for *nunc pro tunc* relief is improper and prejudicial. Ultimately, however, Mar-Bow is less concerned with the procedural device McKinsey uses to file its new disclosures than with the practical consequences of that device. Regardless of whether the Court grants the Motion, what must be preserved is Mar-Bow's right to obtain discovery regarding McKinsey's original disclosures in this case, and seek appropriate relief for the filing of those deficient disclosures. Indeed, as this Court has plainly stated: "I've always told you that when we got to the right point, you were going to get discovery and you were going to get your day in court to tell me what was wrong." Apr. 16, 2019 Hr'g Tr. at 43:15-18.

II. McKinsey's Request for Withdrawal of the Prior Application Is Procedurally Improper and Unfairly Prejudicial to Mar-Bow

The Court should not allow McKinsey and the Debtor to withdraw the Prior Application because Mar-Bow is entitled to its day in Court on its objection to that application and the disclosures filed in support of it.

The Prior Application is a "contested matter" under Rule 9014 of the Federal Bankruptcy Rules of Procedure, and is therefore subject to Rule 7041 of the Federal Bankruptcy Rules of Procedure, which makes applicable Rule 41 of the Federal Rules of Civil Procedure. Rule 41 provides that, once a party has responded to a complaint, it cannot be dismissed without that party's consent or a Court order. In this context, the rule does not allow McKinsey unilaterally to withdraw its prior application. *See*, *e.g.*, *In re Mocella*, 540 B.R. 342, 344, 346 (Bankr. N.D. Ohio 2015) ("Nationstar cannot simply withdraw the Third Motion for Relief because the Debtors have filed a response opposing the relief sought. . . . [A]bsent a stipulated agreement with the Debtors, Nationstar cannot withdraw the Third Motion for Relief without an order of the Court.").

Allowing McKinsey to withdraw the Prior Application would prejudice Mar-Bow, which has not consented to withdrawal and has already expended significant resources identifying the problems with McKinsey's prior disclosures. *See In re Dworek*, 589 B.R. 267, 272 (Bankr. W.D. Pa. 2018) ("The primary purpose of Rule 41(a)(2) is to thwart voluntary dismissals by plaintiffs that would result in clear legal prejudice to defendants."); *In re Wotkyns*, 274 B.R. 690, 694 (Bankr. S.D. Tex. 2002) (holding that under Fed. R. Civ. P. 41, as adopted by Fed. R. Bankr. P. 9014 and 7041, "it would be inequitable" to permit withdrawal of a contested matter); *In re Fairchild*, 969 F.2d 866, 868 (10th Cir. 1992) (finding "no cause" for withdrawal of a contested matter).

The Court has offered McKinsey one "last attempt" to "file an amended application and amended disclosure or a withdrawal of its application." Apr. 16, 2019 Hr'g Tr. at 22:24-23:11. The choice was clear: either press forward and answer for the objections to the Prior Application and the disclosures made in support of it, or withdraw it from consideration entirely. McKinsey's effort to thread the needle and avoid accountability should be rejected. If McKinsey is allowed to withdraw the Prior Application, it should be with prejudice to any future motion for retention or compensation in these cases, and accompanied by an order requiring McKinsey to pay the attorney fees and costs of all interested parties incurred to date in litigating its deficient disclosures.

III. <u>McKinsey Is Not Entitled to *Nunc Pro Tunc* Treatment of Any New Application</u>

A. *Nunc Pro Tunc* Relief Is Premature

The Court should not consider McKinsey's request for *nunc pro tunc* relief until the New Application is submitted. It is well established that "[w]hen considering whether to grant an application to employ a professional *nunc pro tunc*, a bankruptcy court must ***first*** determine whether it would have granted the application pursuant to the applicable provisions of the Bankruptcy Code if the application was otherwise timely filed." *In re Lyons*, 439 B.R. 401, 404-05 (Bankr. S.D. Tex. 2010) (emphasis added). Here, the Court cannot evaluate an application that has not yet been submitted.

And if McKinsey's forthcoming disclosures follow the "protocol" that McKinsey submitted on May 31, 2019,[2] the New Application will not satisfy the Bankruptcy Rules. As set forth in Mar-Bow's recent Response to McKinsey's Protocol, *see* Dkt. 2020, McKinsey's protocol is riddled with myriad deficiencies, illegally constricts the disclosures required by Rule 2014, and thereby improperly limits the information that the Court critically needs to evaluate McKinsey's conflicts of interest and qualifications to serve as a professional under 11 U.S.C. § 327.

B. McKinsey Fails to Make a Proper Showing to Justify *Nunc Pro Tunc* Relief

McKinsey fails to make a "proper showing" to justify *nunc pro tunc* relief, an equitable remedy that the Fifth Circuit has limited to "rare or exceptional circumstances." *In re Triangle Chem., Inc.*, 697 F.2d 1280, 1289 (5th Cir. 1983). In *Triangle Chemicals*—the only case cited in

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[2] Dkt. 1907-1 ("McKinsey's protocol"). Mar-Bow declines to identify the protocol by the name that McKinsey arrogantly gave it. McKinsey's protocol does not deserve that name because the protocol was developed with no input from the judges of the United States Bankruptcy Court for the Southern District of Texas and almost no input from the professionals whose regular practice is subject to § 327 in that Court.

McKinsey's Motion—the Fifth Circuit held that "the bankruptcy court retains equitable power in the exercise of its sound discretion, under exceptional circumstances . . . [and] upon a proper showing" to grant *nunc pro tunc* relief "where through oversight the attorney has neglected to obtain . . . prior approval but has continued to perform services for the debtor/debtor in possession[.]" *Id*. *Nunc pro tunc* relief is thus designed to remedy late filing by justifiable oversight—not to excuse the illegality of prior disclosures. Moreover, the Fifth Circuit cautioned that "[w]hile equitable powers may permit *nunc pro tunc* appointment in rare or exceptional circumstances, we do not intend by our holding to encourage any general non-observance of the contemplated preemployment court approval." *Id*. That caution should apply with even greater force where, as here, "[u]ndoubtedly, strong reasons against circumventing the rule's requirement exist for not exercising this discretion." *Id*. at 1284.

McKinsey's conclusory allusion to "the unique circumstances present here" comes nowhere close to meeting its burden of making a proper showing "which would warrant the exercise of the narrow discretion authorized by *Triangle Chemicals*." *In re Aladdin Petrol. Co.*, 85 B.R. 738, 739 (Bankr. W.D. Tex. 1988); *see also In re Hydro Servs., Inc.*, 277 B.R. 309, 311 (Bankr. E.D. Tex. 2001) (rejecting request for *nunc pro tunc* relief because the facts "simply do not fall under the rubric 'exceptional'"). Indeed, McKinsey is actively seeking to avoid having to make a proper showing through its request for waiver of Local Rule 2014-1(b), which requires, among other things, "an explanation why the order authorization employment is required *nunc pro tunc*[.]" BLR 2014-1(b)(2)(B). McKinsey's unsupported request for waiver of this requirement acknowledges its inability to make a proper showing.

The circumstances here are nothing like the rare and exceptional circumstances in *Triangle Chemicals*. There, the attorney did not obtain timely approval of his employment because the attorney was "apparently completely unaware of the requirement." 697 F.2d at 1291. But because the attorney continued to perform valuable services and did not otherwise violate the bankruptcy rules, "equitable principles" supported *nunc pro tunc* relief "to award compensation for all or part of the services performed by such attorney that have subsequently benefited the debtor's estate and, consequently, its creditors." *Id*. at 1289. No such misunderstanding of the law exists here, as McKinsey has long been aware of the requirements of Bankruptcy Rule 2014 and 11 U.S.C. § 327.[3]

Moreover, equitable principles do not support *nunc pro tunc* relief here. Indeed, the present circumstances are entirely of McKinsey's own making. The reason a New Application is needed is that McKinsey's prior disclosures violated Rule 2014, as even its own "protocol" now acknowledges. *See* Dkt. 669, Mar-Bow's Amended Objection; Dkt. 2020, Mar-Bow's Response to McKinsey's Protocol. And acceptance of McKinsey's new disclosures *nunc pro tunc* at this late stage is particularly inequitable given McKinsey's pattern of extreme delay in submitting required disclosures in bankruptcy cases across the country.[4] For example, in *In re Alpha Natural Resources*, *Inc.*, No. 15-BK-33896 (Bankr. E.D. Va.), the bulk of McKinsey's disclosures by name were not made until more than eleven months after its initial inadequate disclosures, and almost one month after the bankruptcy plan was confirmed and the case was effectively over. And in *In re GenOn Energy, Inc.*, No. 17-BK-33695 (Bankr. S.D. Tex.), McKinsey did not disclose its relationship with two large GenOn creditors who are also McKinsey clients until after the plan had

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[3] *See*, *e.g.*, Dkt. 1906, Mar-Bow's Response to Seventh Status Report of McKinsey; Dkt. 1906, Ex. A, Mary Williams Walsh, *McKinsey Said Disclosure Rules Were Confusing. It Ignored Its Own Primer*, N.Y. Times, May 27, 2019, at B1.

[4] *See* Amended Complaint, *Alix v. McKinsey & Co., Inc., et al.*, No. 1:18-cv-04141 (S.D.N.Y. Sept. 4, 2018), ECF No. 73.

been confirmed. McKinsey should not be permitted to continue its pattern of withholding and then incrementally and belatedly disclosing critical information in order to evade disqualification.

McKinsey's request for *nunc pro tunc* relief also suffers from an even more fundamental flaw: McKinsey holds and represents interests that are adverse to the estates and it is therefore not disinterested. *See* Dkt. 669, Mar-Bow's Amended Objection. This irremediable conflict is fatal to its request because "[a]t the very least, a professional seeking *nunc pro tunc* approval of employment must comply with the requirements of § 327; that is, he or she must be a disinterested person and must not hold or represent an interest adverse to the estate." *In re Office Prods. of Am., Inc.*, 136 B.R. 675, 683 (Bankr. W.D. Tex. 1992).

C. McKinsey Should Not Be Excused From the Requirements of Local Rule 2014-1(b)

Consistent with the Fifth Circuit's limitation of *nunc pro tunc* relief to rare or exceptional circumstances, "Bankruptcy Local Rule 2014-1(b) sets forth certain requirements that must be satisfied when a professional files a *nunc pro tunc* application for the approval of employment." *In re Lyons*, 439 B.R. at 406. In particular, Local Rule 2014-1(b)(2) requires McKinsey to explain its justification for *nunc pro tunc* relief:

> If an application for the approval of the employment of a professional is made more than 30 days after that professional commences provision of services and the application seeks to make the authority retroactive to the commencement, the application must include:
>
> (A) An explanation of why the application was not filed earlier;
>
> (B) An explanation why the order authorizing employment is required *nunc pro tunc*;
>
> (C) An explanation, to the best of the applicant's knowledge, how approval of the application may prejudice any parties-in-interest.

McKinsey is not above the Local Rules of this Court. As with all other parties seeking *nunc pro tunc* relief, McKinsey must comply with Local Rule 2014-1(b) and explain why it is entitled to such exceptional relief and how approval of its New Application may prejudice any parties-in-interest.

Tellingly, McKinsey does not cite a single case supporting its request for waiver of Local Rule 2014-1(b). This absence of precedent for McKinsey's request is unsurprising, as Bankruptcy Courts in the Southern District of Texas have repeatedly denied *nunc pro tunc* relief when a party fails to satisfy the explanatory requirements of Local Rule 2014-1(b). *See*, *e.g.*, *In re Palacios*, No. 14-70076, 2016 WL 361569, at *13 (Bankr. S.D. Tex. Jan. 27, 2016) ("[T]he Application to Employ is *not* in compliance with BLR 2014-1 and this Court's rules, as it fails to state any reason, even a deficient one, for why the application should be retroactively approved."); *In re Lyons*, 439 B.R. at 406 (holding that a party's "explanations" under Local Rule 2014-1(b) were "insufficient to warrant this Court's approval of the Application"); *In re Jackson*, 484 B.R. 141, 174 (Bankr. S.D. Tex. 2012) (because the party "failed to satisfy the requirements of Bankruptcy Local Rule 2014-1(b) . . . the Court declines to exercise its 'equitable power' and grant" *nunc pro tunc* relief).

Here, McKinsey would file its new application over seven months after the commencement of services. The delay is entirely McKinsey's fault. Instead of disclosing its connections up front, McKinsey dragged the Court and the public through an elaborate disclosure kabuki, culminating in a muddled, inscrutable "protocol" that creates, not alleviates, confusion and uncertainty. The irreparable prejudice is that parties-in-interest were deprived of knowledge of McKinsey's disqualifying connections back when they could have prevented McKinsey's work in this case. McKinsey should not be rewarded for intentionally delaying its compliance with the rules.

IV. Mar-Bow's Right to Discovery Should Not Be Impacted By the Outcome of the Motion

Even if its Motion had merit (and it does not), McKinsey should not be permitted to use its requested relief to escape accountability for what it has done in this case. This Court has made clear that Mar-Bow is entitled to and will receive discovery on the Prior Application. Apr. 16, 2019 Hr'g Tr. 43:15-18. That discovery should proceed regardless of whether the Court grants the Motion, as it is critical that the Court determine whether the Prior Application was part of a deliberate scheme by McKinsey to avoid disclosure of disqualifying connections and financial interests.

V. Conclusion

For the foregoing reasons, McKinsey's Motion should be denied. In the event the Court grants the Motion, it should condition that relief on an order (1) barring any further applications by McKinsey for employment or compensation in this case; (2) permitting full and fair discovery on the Prior Application; (3) permitting Mar-Bow and any other interested party to seek appropriate relief for the filing of the deficient disclosures accompanying the Prior Application; and (4) requiring McKinsey to pay the attorney fees and costs of all interested parties incurred to date in litigating the Prior Application.

Respectfully submitted, June 24, 2019.

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Certificate of Conference

Counsel for Mar-Bow and McKinsey had multiple phone calls on June 23 and 24, 2019, in which they exchanged their views on the Motion, but were unable to reach any agreement regarding the necessity of the Motion or any resolution of Mar-Bow's objections to it.

/s/ Christopher Murray
Christopher Murray

Certificate of Service

I certify that on June 24, 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.

/s/ Christopher Murray
Christopher Murray