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IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re: OLD ANR, LLC., *et al*., Debtors.	Misc. Proceeding No. 19-00302

McKINSEY RECOVERY & TRANSFORMATION SERVICES U.S., LLC'S
CERTIFICATION REGARDING SETTLEMENT PAYMENT

BACKGROUND TO CERTIFICATION SUBMISSION

On April 19, 2019, the Court approved a settlement (the "Settlement") between the United States Trustee Program and McKinsey Recovery & Transformation Services U.S., LLC ("RTS") and certain of its affiliates (collectively, "McKinsey")[1] (Order, Dkt. 45), previously announced on February 19, 2019. (Mediator's Notice, Dkt. 18.) Pursuant to the Settlement, McKinsey agreed to make a $5 million payment (the "Settlement Payment") to the reorganized debtor in this case—Contura Energy Inc. ("Contura" or "Reorganized Debtor")—and represented that "[i]f any of the [Settlement Payment] is distributed to McKinsey, it will be refunded by McKinsey to the distributing party." (*See* Exhibit 1 to Joint Notice of Motion for Entry of Consent Order Approving the Settlement between McKinsey and the United States Trustee, Dkt. 28 at 11.)

At an April 23, 2019 hearing, the Court, invoking the Settlement, ordered "a certification from McKinsey that they are not going to receive any benefit, directly or indirectly, in any way whatsoever, again pursuant to the terms of the [S]ettlement, from the distribution." (*See* Dkt. 51 (Notice of Filing); April 23 Hearing Tr. 52:16-20.) Thereafter, at a May 29, 2019 hearing, the Court clarified that it sought confirmation that there was no "beneficial interest in the enterprise through some indirect ownership interest" in Contura, including an interest held by McKinsey employees. (*See* Dkt. 65 (Notice of Filing); May 29 Hearing Tr. 22:3-4; 24:20.)

McKinsey can certify that it will not receive any of the monies that are distributed to the Reorganized Debtor, and that no McKinsey entity has a direct holding in Contura stock. Based on policies and information available to McKinsey, it can also certify that no employee should have any direct holding in Contura. This certification fully satisfies McKinsey's obligations

[1] As used herein, "McKinsey" means, collectively, McKinsey & Company, Inc.; McKinsey Holdings, Inc.; McKinsey & Company, Inc. United States; and RTS.

under the Settlement entered into with the U.S. Trustee: to refund any unforeseen distribution of the Settlement Payment *to McKinsey*—a defined term in the Settlement that includes neither McKinsey's investment affiliate, MIO Partners, Inc. ("MIO") nor McKinsey employees. (Order, Dkt. 45 at 2 n.1.)

McKinsey recognizes that the Court has requested a certification covering "direct or indirect benefits" that goes beyond the language in the Settlement and McKinsey worked diligently to investigate the possibility of any such benefit in accordance with the Court's direction. However, for a number of reasons set forth more fully below, McKinsey cannot certify that its employees (or McKinsey & Company, Inc., in its capacity as sponsor for certain foreign defined benefit plans (hereinafter, the "Plan Sponsor")) will not indirectly receive so much as a "peppercorn" of indirect benefit from the Settlement Payment. As explained herein, McKinsey's inability to provide such a certification is the result of both the inherently speculative nature of the inquiry and informational deficiencies inherent to the fund-of-funds investment strategy of MIO.[2] Specifically:

- McKinsey cannot determine whether the Settlement Payment increased the stock price of Contura, thereby benefiting Contura's shareholders.
- McKinsey cannot determine whether MIO is an indirect holder of Contura stock. MIO delegates investment discretion to roughly 170 third-party managers. In most cases, including for the relevant managers here, MIO lacks information regarding the underlying investments made by the third-party funds in which MIO fund monies are invested by those third-party managers. Accordingly, MIO does not know whether a third-party manager has invested MIO monies in third-party funds that invest in Contura. This is analogous to the mutual fund structure under which federal judges must disclose the funds they invest in but are not required to ascertain the holdings within those funds.

[2] As previously disclosed to this Court, MIO is an independent subsidiary of McKinsey that follows a "fund of funds" investment approach to "manag[ing] assets for" McKinsey's pension plan, which is administered through the McKinsey Master Retirement Trust for the benefit of current and former McKinsey employees. MIO also manages certain after-tax investments for current and former McKinsey partners and their families through the same fund of funds strategy. MIO assets thus are the assets of roughly 30,000 McKinsey employees and former employees, partners and former partners, and their families—not the assets of McKinsey.

- Even if an MIO fund is indirectly invested in Contura through a third-party managed fund, MIO may have offsetting short positions in other third-party managed funds that make its net position impossible to determine.

- At least one McKinsey entity (McKinsey & Company, Inc.) could, in theory, benefit from an indirect investment in Contura through third-party managed funds because, as Plan Sponsor, it invests in MIO funds solely to backstop certain obligations it has to German and Japanese defined benefit plans. However, for the reasons stated above, McKinsey cannot determine whether MIO has an indirect interest in Contura stock that might affect its obligations to these plans.

Despite McKinsey's inability to rule out the possibility that it or its employees might receive some remote, indirect *de minimis* benefit from the Settlement Payment, on account of third parties' holdings of Contura stock, the certification that McKinsey makes here is broadly consistent not only with the terms of the Settlement, but also with the certification required of federal judges—a standard this Court has repeatedly referenced.[3] Moreover, to the extent that even the potential that McKinsey or its employees might receive some benefit, however minimal, troubles the Court, McKinsey is willing to make an "offsetting" charitable contribution in an amount determined reasonable by the Court.

I. It Is Not Possible to Determine Whether or Not the Settlement Payment Increased the Stock Price of Contura

In its May 22, 2019 filing with the Court, the Reorganized Debtor confirmed that it will not make a direct distribution of the Settlement Payment to its shareholders, but rather will use the funds as part of its working capital to fund operations and comply with reclamation obligations. (*See* Dkt. 60, Reorganized Debtors' May 22, 2019 Br. ¶¶ 1, 34.) Accordingly, the only way that a direct or indirect shareholder of Contura would benefit from the Settlement Payment would be if the stock price of Contura increased as a result of the $5 million Settlement Payment. The Court recently stated that it is not interested in holding a "lengthy hearing on the

[3] *E.g.*, May 29 Hearing Tr. 18:12-15; *see also In re ANR*, Dkt. 4193, Jan. 15, 2019 Hearing Tr. at 30:15-24.

stock price." (May 29 Hearing Tr. at 21:24-25.) McKinsey agrees that no such exercise is warranted here.

Determining the impact, if any, of the Settlement Payment on the share price of Contura would require expert analysis, including expert judgment regarding how to try to isolate any effect of the Settlement Payment from other events or market conditions that may have also impacted the stock price on the relevant date.[4] Indeed, there are entire litigations that hinge on whether a specific action or inaction resulted in a change in the price of a publicly-traded equity. *See, e.g.*, *Bricklayers and Trowel Trades Intern. Pension Fund v. Credit Suisse Securities (USA) LLC*, 752 F.3d 82, 86 (1st Cir. 2014) (explaining that proving loss causation in securities fraud cases "usual[ly]—it is fair to say 'prefer[ably]'" is done "through an event study").

Where, as here, the triggering event is the announcement of a five-million-dollar settlement for a one-billion-dollar company, the resulting impact on the stock price—if any—of the Settlement Payment would almost certainly be negligible. To assess whether there was, in fact, any impact on Contura's stock price from the Settlement Payment, McKinsey would need to engage an expert to conduct an "event study" designed to compare the impact of a given event on the "expected return" of a stock on the event date, in light of the overall market conditions.[5] However, courts generally do not accept event studies to prove an effect on stock price absent

[4] *See* Robert Schweitzer, How Do Stock Returns React to Special Events?, https://www.phil.frb.org/-/media/research-and-data/publications/business-review/1989/brja89rs.pdf ("The event study methodology calls for examining the returns on a firm's stock around the date selected and separating our the portion of the total that is a reaction to the event.").

[5] *See, e.g.,* Jill E. Fisch, Jonah B. Gelbach, and Jonathan Klick, The Logic and Limits of Event Studies in Securities Fraud Litigation, 95 Tex. L. Rev. 553, 557; *see Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 280 (2014) (describing an event studies as "regression analyses that seek to show that the market price of the defendant's stock tends to respond to pertinent publicly reported events").

"highly unusual" deviations from normal price changes.[6] Given the small percentage of Contura revenue represented by the Settlement Payment and the stock price history available from an Internet search, it is highly unlikely that an event study in this case would reveal any statistically significant impact on the price of Contura stock. In fact, reviewing the historical stock prices available through Internet research reveals that Contura's share price closed *down* on the day the Settlement Payment was announced.[7] In light of the foregoing, there is no reasonable basis for concluding that the Settlement Payment increased the share price of Contura.

II. McKinsey Holds No Investment in Contura and Will Not Receive Any Direct Benefit from the Settlement Payment; McKinsey Requires Preclearance for Securities Trading and Has No Record of Any Purchases or Sales of ANR or Contura

Even assuming, for the sake of argument, that there were an increase in Contura's stock price due to the Settlement Payment, there is no possibility of McKinsey receiving a direct benefit from the Settlement Payment. McKinsey does not invest directly in equities like Contura and has never held ANR or Contura stock. Nor does MIO make such direct investments.

As the Court knows, roughly 90% of MIO's managed funds are invested through third-party managers. Although MIO professional staff directly invest approximately 10% of MIO assets under management, MIO maintains a strict policy that prohibits direct investments in single-name securities such as Contura in order to avoid the possibility that MIO might invest in any actual or potential client of McKinsey's consulting business. Thus, even to the extent that

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[6] *Id.* at 574 ("Typically courts and experts have treated an event-date effect as statistically insignificant unless the event-date's excess return is among the 5% most extreme values one would expect to observe in the absence of any fraudulent activity.").

[7] Data from Bloomberg Finance shows Contura opened at $62.99 and closed at $62.64 on February 19, 2019 (a drop of 0.56%), the day the U.S. Trustee's office issued a press release announcing the Settlement Payment. On February 19th, the Dow Jones U.S. Coal Index closed down 0.19% from the previous close, which means that Contura performed worse than the relevant index on that day. On April 18th, the day the Settlement Payment was approved, the Dow Jones Coal Index closed up by 1.27%, whereas Contura was again down, by 0.63%.

the Settlement Payment could have a positive impact on Contura's stock price, no McKinsey entity or employee would realize any benefit through any direct investment made by MIO.

Likewise, McKinsey prohibits employees from buying or selling the stock of any McKinsey client and requires that employees "pre-clear" any trading at all in individual publicly-traded securities.[8] There is no record of *any* McKinsey employee obtaining approval from the firm to trade in or out of ANR or Contura stock at any time at least since July 2015.

III. MIO Has Limited Visibility into the Allocation and Investment of Its Third-Party Managers and Any Indirect Benefit to McKinsey or Its Employees Through Such Investments Would Be *De Minimis*

At the May 29, 2019 hearing, the Court confirmed it sought a certification that neither McKinsey nor any of its employees received any *indirect* benefit from the Settlement Payment to the Reorganized Debtors.

The only known potential for indirect benefit to McKinsey employees from the Settlement Payment would come from those portions of employees' pension and other investments held through MIO that are directed and managed by third parties. And there are several information barriers that prevent McKinsey and its employees from having visibility into the nature and allocation of such investments of MIO and its third-party managers.

A. McKinsey and MIO Are Physically and Operationally Separate

By design, MIO and McKinsey do not share information concerning MIO investments. Strict policies concerning informational separation are coupled with both technological and physical barriers to prevent MIO employees from learning about McKinsey engagements, and to prevent McKinsey employees from learning about MIO investments. *See* Supplemental

[8] While McKinsey employees must pre-clear trades in single corporate-named securities, it is possible that McKinsey employees hold investments in third-party mutual funds or other passive investment vehicles outside of the MIO context.

Declaration of Casey Lipscomb, *In re Alpha Natural Resources*, 15-33896-KRH, Dkt. 4160 ¶¶ 4-5 (E.D. Va. Nov. 9, 2018) (describing the "operational" and technological separation between McKinsey's consultants and MIO). Separation policies are the subject of training and compliance monitoring at both MIO and McKinsey. The recent Final Investigative Report of the Special Counsel to the Financial Oversight and Management Board for Puerto Rico examined the separation between McKinsey and MIO, concluding that "McKinsey employees are not provided with information related to MIO's underlying investments *and have no ability to influence MIO's investment decisions*." Final Investigative Report, *In re FOMB*, No. 17-BK-03283 (D.P.R. filed February 18, 2019), Dkt. 5154 at 3 (emphasis added). In short, "[t]he McKinsey consulting arm is effectively walled off from its investment arm, and there is no sharing of confidential information . . . except in very limited circumstances" between MIO and the consulting affiliates. *Id.* at 81.

In light of the Court's request, however, McKinsey's outside counsel have worked with MIO and its separate outside counsel to determine whether it is possible that MIO investors will receive an "indirect benefit" from the Settlement Payment. The results of that investigation are set out in Sections III.B through III.E and IV.

B. Even MIO Lacks Visibility Into Many of Its Third-Party Managers' Investments

Although McKinsey does not have access to MIO's information, for purposes of this exercise, McKinsey's outside counsel has explored the feasibility of determining whether MIO's third-party managers have invested MIO-managed monies in Contura and, if so, to what extent. However, tracing the theoretical impact of the Settlement Payment through to the retirement or other investment accounts of McKinsey employees presents several intractable problems:

MIO has limited means of determining whether each of its third-party managers invested MIO funds in Contura stock during the relevant time period. MIO employs a "fund of funds" investment strategy and the vast majority of MIO's assets under management are invested through third-party managers either in third-party funds or in separately managed accounts managed by third parties within MIO funds. In either case, approximately 170 third-party asset managers exercise sole investment discretion over roughly 90% of assets under management. Third-party funds, which make up approximately 50% to 60% of MIO's assets under management, are outside investment funds managed by third-party managers. In a third-party fund, MIO is typically one investor among many who have chosen to allocate money to one or more of a particular third-party manager's funds. Separately managed accounts, which make up approximately 30% to 40% of MIO's assets under management, are accounts within an MIO fund for which a third-party manager is retained to manage all or a portion of the assets within that account.

Importantly, MIO does not have investment discretion over the assets managed by any third-party managers, whether in third-party funds or in separately managed accounts, and such managers could make future transactions in Contura stock without notifying MIO. In MIO's separately managed accounts, the MIO fund has custody of the securities purchased by the third-party manager and MIO can identify which securities are held in each account. MIO enters into a written agreement with each third-party manager that authorizes the manager to make all investment decisions on behalf of the MIO fund in accordance with written investment guidelines.

For MIO assets under management invested through third-party funds, MIO cannot confirm which third-party funds own Contura stock. Such data is highly confidential and

proprietary to the third-party managers with which MIO contracts. MIO has no contractual right to demand information from these managers regarding the underlying investments they choose to make in each of their funds. Instead, MIO's access to information about the holdings of third-party funds is limited to the information the manager chooses to share with its investors through newsletters, periodic reports, or other anecdotal and non-comprehensive communications. Thus, although there are public records available that identify approximately 90% of Contura's shareholders, including three third-party managers with whom MIO has invested and which collectively owned roughly two million shares of Contura as of March 31, 2019, each of those managers offers multiple funds and the available records do not identify which of the funds is the holder of Contura stock. Thus, even though MIO can determine from public filings that three managers with whom it invests are Contura shareholders, and MIO knows which funds offered by those managers it has invested in, MIO cannot determine whether those specific funds are the funds that hold the Contura shares or the amount of Contura stock held by each third party fund.[9] For those MIO assets under management invested through separately managed accounts, MIO has identified one third-party manager that has a short position in Contura stock as of May 15, 2019 (*i.e.* MIO funds would benefit from this position if the price of Contura stock dropped).

Even if MIO were able to determine whether third-party funds had invested MIO assets into Contura, MIO would need to *also* determine whether any of those third-party funds held offsetting positions (for example, by holding short positions in Contura stock), such that there was no net "indirect benefit" to MIO investors. As noted above, MIO has identified three third-party managers who invest for MIO that are publicly reported to be shareholders of Contura, and

[9] Even if MIO could determine whether its funds are invested in third-party funds that, in turn, own Contura stock, MIO does not know what percentage of any such fund is made up of Contura stock or what percentage of the fund is effectively owned by the MIO fund.

one other third-party manager of a separately managed account who had an offsetting short position in Contura stock as of May 15, 2019, but MIO is unable to determine any net "indirect benefit" to MIO investors that might result from these potentially offsetting positions.

C. Any Indirect Benefits to McKinsey Employees Through MIO Would Be *De Minimis* and Speculative

Not only would it be impossible for McKinsey to determine whether its employees received an "indirect benefit" through one of the complicated pathways set out above with the level of certainty required to make a certification to this Court, the above steps demonstrate why any indirect benefit must necessarily be *de minimis*: a statistically insignificant increase in the share value of Contura would have offset to some degree the decrease in share value that was otherwise observed on the dates the Settlement Payment was announced and approved. That benefit, in turn, flowed through three or more third-party funds in which an MIO fund may have had an interest. Assuming such benefit was not offset by short positions held in other third-party managed funds—and as set out above, MIO has in fact identified a third-party manager with a short position in Contura stock—that "value" would be distributed pro rata to some 30,000 pension participants or after-tax investors to the extent they, in turn, had selected the MIO funds at issue as part of their retirement or after-tax investment strategy.[10] No current employee of McKinsey owns even 1% of the MIO fund based on his or her combined pension and after-tax investments and the vast majority of participants and investors own far less than 1%. Less than one per cent (the employee stake) of a fraction (the possible MIO fund share of a third-party fund invested in Contura) of a statistically insignificant value (the possible increase in the share price of Contura caused by the Settlement Payment) is a *de minimis* interest.

[10] More than 50% of those 30,000 participants or investors are former McKinsey employees.

Not only is any indirect benefit to McKinsey employees likely *de minimis*, it is entirely speculative. MIO funds do not actually realize any return on investments made by third party managers in third party funds unless and until those investments are closed out at a profit by the third party manager and MIO's interest in that third party fund is also redeemed. Thereafter, for any employee to receive a benefit still more has to happen. Such participant or investor has to close out his or her investment in the MIO funds to realize the benefit. This speculative chain demonstrates why it is especially unlikely that any McKinsey employee will benefit, even indirectly, from the Settlement Payment.

D. Theoretical Indirect Benefits Through Foreign Defined Benefit Plans Are *De Minimis* and Speculative

The same analysis applies to the extent McKinsey & Company Inc., as Plan Sponsor, maintains investments in certain MIO funds in order to backstop its obligations under two foreign defined benefit pension plans.[11] In the event that the MIO fund does not return enough to cover the defined benefit in any year, the Plan Sponsor must cover that shortfall.[12] However, it is theoretically possible that an increase in value of the MIO fund caused by a successful third-party manager's investment could mean a reduction in a future obligation of the Plan Sponsor to fund its foreign defined benefit plan obligations. As with the potential indirect benefit to McKinsey employees discussed in Section A above, the potential benefit to the Plan Sponsor from investments by any of approximately 170 different third-party managers in Contura stock is *de minimis*.

[11] Those obligations include funding shortfalls in the defined benefit for certain pensioners when they retire and remain until all employees who participate in those plans retire.

[12] In McKinsey's historical experience the funds invested by the Plan Sponsor typically do not overperform relative to the annual defined benefit. If that were to happen, the money would be used to meet future obligations to the plan and would not accrue to any McKinsey entity for its own purposes.

E. Disclosure Rules and Practice Imply that Certification Regarding Remote or Theoretical Indirect Benefits Should Not Be Required

The requirements for judicial financial disclosures, which the Court has itself cited in discussing the certification it seeks here,[13] suggest that indirect investments like those at issue here for McKinsey employees need not be disclosed because, importantly, they are not visible to, or controllable by, the investor. As the Court has noted, federal judges generally have to report the source and type of their investment income. But judges are "***not*** required to list the individual holdings of a widely-held investment fund, which is defined as a money market fund, mutual fund, or other such portfolio: (A) that is publicly traded or whose assets are **widely diversified**, and (B) over whose financial interests the filer **neither can nor does exercise control** (i.e., the filer is unable to select the specific stocks, bonds, or other assets)." Guide to Judiciary Policy, Vol. 2D, Ch. 3 §§ 320.20(a), 315.30(c) (emphasis added). While MIO is not a mutual fund, it is a "fund of funds" whose investment approach is to achieve similar diversification and to remove investment discretion from any McKinsey employees, including those who sit on the board of MIO. MIO also places special emphasis on the diversification of its third-party managers, in part to ensure that no single manager, let alone one investment by one or more managers, can have a material effect on the value of MIO's fund.

Similarly, whereas federal judges must disqualify themselves when they have a financial interest in controversy or in a party to the proceeding, "ownership in a mutual or common investment fund that holds securities is **not a 'financial interest' in such securities** unless the judge participates in the management of the fund." 28 U.S.C. § 445 (b), (d)(4)(i); Code of Conduct for United States Judges, Canon 3, (C)(c)(i) (emphasis added). In sum, because federal

[13] *E.g.*, May 29 Hearing Tr. 18:12-15; *see also In re ANR*, Dkt. 4193, Jan. 15, 2019 Hearing Tr. at 30:15-24.

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judges exercise no control over the investment decisions of such investment funds, they are not required to disclose such funds' individual securities holdings and such holdings are not disqualifying.

Likewise, when considering the disinterestedness of bankruptcy professionals, this Court and others approve the retention of professionals despite the potential for both direct and indirect interests in the Debtors. The Court approved the retention of Alvarez & Marsal and Ernst & Young, following disclosures by both professionals that their investment affiliates or employees might have direct or indirect interests in the debtor. *See In re Alpha Natural Resources*, Ex. B to Dkt. 215 at 54, 56 (Declaration in support of retention application of Alvarez & Marsal North America, LLC, listing Whitebox Advisors LLC, an equity investor in the Debtors, as a connection); Ex. B to Dkt. 521 ¶ 19 (Affidavit in Support of Application for Order Authorizing Retention and Employment of Ernst & Young LLP as Tax, Accounting and Valuation Services Provider for the Debtors and Debtors in Possession). That there is some theoretical possibility that McKinsey, as a Plan Sponsor, or its employees could receive an indirect benefit from the Settlement Payment should not be a bar to that payment flowing to the Reorganized Debtors, just as the conflicts rules do not countenance that such indirect interests—if any in fact exist—would be disqualifying.

IV. McKinsey Is Prepared to Make a Contribution to Charity to Alleviate Any Court Concern Regarding a Potential Indirect Benefit from the Settlement Payment

As the Court previously noted there was no requirement that McKinsey and the United States Trustee agree to direct Settlement funds to the Reorganized Debtors—the parties to the Settlement could have, for example, determined to direct Settlement funds to a charitable organization.

To that end, to the extent the Court deems some offset for any "peppercorn" of potential benefit that might flow indirectly from the Settlement Payment is appropriate, McKinsey is willing to make a charitable donation in an amount determined by the Court.

MCKINSEY RECOVERY AND
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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 2019, a true and correct copy of the foregoing was filed with the Court through the Clerk's CM/ECF filing system and served on all persons receiving electronic notice in this case, and/or by first-class mail, postage prepaid, to all parties listed below:

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