UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-2268

In re: ALPHA NATURAL RESOURCES, INCORPORATED,

Debtor.

MAR-BOW VALUE PARTNERS, LLC,

Creditor - Appellant,

v.

MCKINSEY RECOVERY & TRANSFORMATION SERVICES US LLC, (Turnaround Advisor for Alpha Natural Resources),

Defendant - Appellee,

and

ALPHA NATURAL RESOURCES, INCORPORATED,

Defendant.

No. 17-2269

In re: ALPHA NATURAL RESOURCES, INCORPORATED,

Debtor.

MAR-BOW VALUE PARTNERS, LLC,

Creditor - Appellant,

v.

MCKINSEY RECOVERY & TRANSFORMATION SERVICES US LLC,

Defendant - Appellee.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. M. Hannah Lauck, District Judge. (3:16-cv-00612-MHL; 3:16-cv-00799-MHL)

Submitted: August 24, 2018 Decided: September 6, 2018

Before MOTZ, AGEE, and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Susan M. Freeman, Daniel A. Arellano, LEWIS ROCA ROTHGERBER CHRISTIE LLP, Phoenix, Arizona; Steven Rhodes, STEVEN RHODES CONSULTING, LLC, Ann Arbor, Michigan; David R. Ruby, William D. Prince IV. Michael G. Matheson, THOMPSONMC-MULLAN, P.C., Richmond, Virginia; Sheldon S. Toll, LAW OFFICES OF SHELDON S. TOLL PLLC, Southfield, Michigan, for Appellant. Bruce H. Matson, Christopher L. Perkins, LECLAIRRYAN, PLLC, Richmond, Virginia; Martin J. Bienenstock, Ehud Barak, Joshua A. Esses, PROSKAUER ROSE LLP, New York, New York; Roy T. Englert, Jr., Lukman Azeez, ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

In these consolidated appeals, Mar-Bow Value Partners, LLC, appeals from the district court's orders dismissing MarBow's [sic] appeals from numerous bankruptcy court orders in the underlying Chapter 11 proceeding. The district court dismissed the appeals as equitably moot and/or for lack of standing. We have reviewed the record included on appeal, as well as the parties' briefs, and we find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Servs. U.S., LLC*, Nos. 3:16-cv-00612-MHL; 3:16-cv-00799-MHL (E.D. Va. Sept. 30,

2017). We deny Mar-Bow's motions for judicial notice, for leave to file a supplemental brief, and to hold the appeals in abeyance, and we dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MAR-BOW VALUE PARTNERS, LLC,

Appellant,

v. **Civil Action No. 3:16cv612**
("*Mar-Bow I*")

MCKINSEY RECOVERY & TRANSFORMATION SERVICES US, LLC

and

ALPHA NATURAL RESOURCES, INC.,

Appellees.

MEMORANDUM OPINION

(Filed Sep. 30, 2017)

This matter comes before the Court on Appellant Mar-Bow Value Partners, LLC's ("Mar-Bow") appeal from several orders[1] of the United States Bankruptcy

[1] The appeals in this case will be referred to as "*Mar-Bow I*." A different case pends in which Mar-Bow has filed an appeal of other rulings of the Bankruptcy Court. *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Servs.,* (*Mar-Bow II*) No. 3:16cv799. The Memorandum Opinion in *Mar-Bow II* (the "*Mar-Bow II* Memorandum Opinion") addresses Mar-Bow's appeal of the Bankruptcy Court's grant of McKinsey's Third Interim and Final Fee Applications. This Memorandum Opinion addresses Mar-Bow's appeal of the Bankruptcy Court's rulings on Mar-Bow's objections regarding the Reorganization Plan and Mar-Bow's Motion to Compel Compliance with Rule 2014.

Court for the Eastern District of Virginia (the "Bankruptcy Court"), Appellee McKinsey Recovery & Transformation Services US, LLC's ("McKinsey") Motion to Dismiss Appeal of Mar-Bow Value Partners, LLC as Equitably Moot (the "Motion to Dismiss as Equitably Moot"), (ECF No. 32), and McKinsey's Motion to Dismiss Appeal of Mar-Bow Value Partners, LLC for Lack of Standing (the "Motion to Dismiss for Lack of Standing"), (ECF No. 37). Mar-Bow, McKinsey, and Alpha Natural Resources ("ANR") have all filed their respective briefs, (ECF Nos. 24, 35, 38, 47), Mar-Bow has responded to the Motion to Dismiss as Equitably Moot and the Motion to Dismiss for Lack of Standing (ECF Nos. 33, 43), and McKinsey has replied, (ECF Nos. 34, 46). The Court dispenses with oral argument because the materials before it adequately present the facts and legal contentions, and argument would not aid the decisional process. Accordingly, the matters are ripe for disposition. The Court exercises jurisdiction pursuant to 28 U.S.C. § 158(a)(1).[2] For the reasons that follow,

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As discussed more fully below, *see infra* note 32, Mar-Bow filed duplicative notices of appeal as to the Fee Application Rulings in this case and in *Mar-Bow II*. The Court addresses Mar-Bow's appeals of the Fee Application Rulings *only* in the *Mar-Bow II* Memorandum Opinion.

Given Mar-Bow's numerous appeals in both cases and the related nature of the facts underlying the appeals, the Court notes throughout this Memorandum Opinion which rulings it assesses in this appeal, and which rulings it evaluates in the Memorandum Opinion in the *Mar-Bow II* Memorandum Opinion.

[2] "The district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders, and decrees . . . of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under [28 U.S.C. § 157]. . . ." 28 U.S.C. § 158(a)(1).

the Court will grant both motions to dismiss and dismiss Mar-Bow's appeal.

I. Standard of Review

"When reviewing a decision of the bankruptcy court, a district court functions as an appellate court and applies the standards of review generally applied in federal courts of appeal." *Paramount Home Entm't Inc. v. Circuit City Stores, Inc.*, 445 B.R. 521, 526–27 (E.D. Va. 2010) (citing *In re Webb*, 954 F.2d 1102, 1103–04 (5th Cir. 1992)). The district court reviews the bankruptcy court's legal conclusions *de novo* and its factual findings for clear error. *In re Harford Sands Inc.*, 372 F.3d 637, 639 (4th Cir. 2004). A finding of fact is clearly erroneous if a court reviewing it, considering all of the evidence, "is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); *accord In re Mosko*, 515 F.3d 319, 324 (4th Cir. 2008). In cases where the issues present mixed questions of law and fact, the Court will apply the clearly erroneous standard to the factual portion of the inquiry and *de novo* review to the legal conclusions derived from those facts. *Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond*, 80 F.3d 895, 905 (4th Cir. 1996).

II. Factual Background[3]

[3] The issues on appeal in this Court have little to do with the facts underlying the bankruptcy case. The Court, therefore, will provide only the factual background necessary to establish

Although this appeal arises in the context of a chapter 11 bankruptcy,[4] the dispute before the Court has little to do with the bankruptcy itself. The conflict before the Court is between McKinsey, a professional firm employed by ANR and many of its subsidiaries, the debtors in the underlying bankruptcy action (collectively, the "Debtors"), and Mar-Bow, an unsecured creditor of the Debtors. From the time Mar-Bow first appeared in the bankruptcy action, it objected strenuously and continually to the sufficiency of disclosures that the Bankruptcy Rules require McKinsey, employed to assist with the Debtors' reorganization in this bankruptcy action, to make.[5] Each appeal before the Court attempts to revisit that same issue: whether McKinsey fully complied with Federal Rule of Bankruptcy Procedure 2014.[6]

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context, but will recount the facts relevant to Mar-Bow's appeal in detail. And although the factual background in this case substantially overlaps with the background in *Mar-Bow II*, the Court recounts the relevant factual background in both opinions for clarity's sake.

[4] Chapter 11 permits reorganization of a debtor's business, rather than liquidation of all assets. *See* 11 U.S.C. §§ 1101, *et seq*.

[5] Indeed, the record in the underlying bankruptcy case shows that *all* of Mar-Bow's actions pertained to this one issue: the sufficiency of McKinsey's Rule 2014 disclosures. Even when Mar-Bow succeeded on some motions, it continued challenging what it perceived as a partial denial.

[6] As discussed more fully below, Rule 2014 requires that professionals employed in a bankruptcy action disclose "connections" with, *inter alia*, the debtor, creditor, and any other parties in interest to the bankruptcy. Fed. R. Bankr. P. 2014(a).

A. The Parties Relevant to the Instant Appeal

The Debtors—Alpha Natural Resources and many of its subsidiaries—are "one of the largest coal suppliers in the United States." (McKinsey Br. 15, ECF No. 38.) The Debtors filed for chapter 11 protection in August 2015 in part because of an "historic downturn in their industry." (July 7, 2016 Hr'g Tr. 23.)

McKinsey Recovery and Transformation Services ("McKinsey") "is a global, full service restructuring advisory and crisis management firm that . . . support[s] companies through all aspects of recovery and transformation." (First Carmody Decl. 3, App. 31.) Essentially, McKinsey advises struggling businesses on how to improve their profitability, and helps businesses implement the changes it suggests. McKinsey has experience providing chapter 11 advisory services, and in helping struggling businesses increase their profitability.

Mar-Bow, as relevant to the bankruptcy action, is an unsecured creditor of the Debtors. On March 23, 2016, almost nine months after the Debtors began their chapter 11 reorganization, Mar-Bow filed a proof of claim[7] in the amount of $1,250,000.00.[8] The record

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[7] A proof of claim is the document that a creditor of bankruptcy debtor files in order to register the amount and nature of the debt owed to the creditor.

[8] McKinsey asserts that, after the Debtors retained McKinsey, "Mar-Bow purchased an inconsequential claim. . . . [solely] to litigate against McKinsey RTS." (McKinsey Br. 19, ECF No. 38.)

lacks clarity about the precise nature of Mar-Bow's business, but Mar-Bow is "beneficially owned and funded by" Jay Alix, the founder of the firm "AlixPartners." (Alix Decl. 1, Mar-Bow Mot. Compel Ex. A, App. 431.) AlixPartners is a consulting firm that competes with McKinsey in the turnaround consulting business.

B. Background of the Underlying Bankruptcy Case

On August 3, 2015, the Debtors began the bankruptcy proceedings by filing voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code, which allows for reorganization—rather than liquidation—of a bankruptcy estate. The Bankruptcy Court consolidated all the petitions for procedural purposes only, meaning that one chapter 11 bankruptcy action was pending.

Three weeks later, on August 24, 2015, the Debtors filed an application in the Bankruptcy Court requesting permission to employ McKinsey as a turnaround advisor for the pendency of the bankruptcy case (the "Retention Application").[9] The Debtors sought to retain

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No party contests, however, that Mar-Bow properly filed a proof of claim and remains an unsecured creditor of the Debtors.

[9] The full title of the Retention Application was "Application of the Debtors, Pursuant to Sections 327(a), 328(a) and 1107(b) of the Bankruptcy Code, Bankruptcy Rule 2014(a) and Local Bankruptcy Rule 2014-1, for an Order Authorizing Them to Retain and Employ McKinsey Recovery & Transformation Services U.S., LLC[,] as Turnaround Advisor for the Debtors, Effective as of the Petition Date." (Retention Appl. 1, App. 1.)

McKinsey "as their turnaround advisor . . . to assist the Debtors with the development and refinement of their strategic business plan." (Retention Appl. 2–3, App. 2–3.) On September 17, 2015, the Bankruptcy Court granted the Retention Application and authorized the Debtors to retain McKinsey as turnaround advisor.

On March 23, 2016, more than six months after McKinsey's employment had been approved, Mar-Bow filed its proof of claim against ANR, entering the bankruptcy proceeding. On May 1, 2016, Mar-Bow filed its first notice of appearance in the bankruptcy proceeding. Since entering the bankruptcy proceeding, Mar-Bow has raised the issue of McKinsey's Rule 2014 disclosures to the Bankruptcy Court formally at least five times.[10] The Court does not see—and neither party

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Section 327(a) permits the employment of "professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons," to assist in conducting bankruptcy proceedings. 11 U.S.C. § 327(a). Section 328(a) governs the "terms and conditions" of "the employment of a professional person under section 327," 11 U.S.C. § 328(a), and Rule 2014(a) states the procedures by which an application for professional employment must be filed, Fed. R. Bank. P. 2014(a). Section 1107(b) authorized the Debtors to employ McKinsey during the bankruptcy, even though they had employed McKinsey "before the commencement of the case." 11 U.S.C. § 1107(b). Finally, Local Bankruptcy Rule 2014-1 governs service of motions. E.D. Va. Loc. Bankr. R. 2014-1.

[10] The Court discusses Mar-Bow's objections to McKinsey's Rule 2014 disclosures in detail later in the Memorandum Opinion. Mar-Bow's five objections include three that the Court addresses in this Memorandum Opinion: (1) Mar-Bow's Motion to Compel Rule 2014 Compliance; (2) Mar-Bow's Motion to Clarify

identifies—any other action by Mar-Bow in the Bankruptcy Court.

On July 12, 2016, five days after a lengthy evidentiary hearing on the matter, the Bankruptcy Court entered a written order confirming the Debtors' Reorganization Plan.[11] The Reorganization Plan became effective on July 26, 2016. Additional proceedings have taken place in the Bankruptcy Court since then, and Mar-Bow has continued to object to McKinsey's Rule 2014 disclosures.

C. McKinsey's Employment as Turnaround Advisor for the Debtors

On August 24, 2015, three weeks after filing for bankruptcy, the Debtors filed the Retention Application in the Bankruptcy Court requesting permission to employ McKinsey as a turnaround advisor for the pendency of the bankruptcy case. The Debtors sought to retain McKinsey "as their turnaround advisor . . . to

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the Order Granting Mar-Bow's Motion to Compel; and, (3) Mar-Bow's Objection to the Reorganization Plan. Mar-Bow also formally objected two other times, which the Court addresses in the *Mar-Bow II* Memorandum Opinion. Those objections are: (1) Mar-Bow's Objection to McKinsey's Third Interim Fee Application; and, (2) Mar-Bow's Objection to McKinsey's Final Fee Application. Finally, Mar-Bow admits that, before filing its Motion to Compel or any other objections to McKinsey's Rule 2014 disclosures, it "brought [the] matter to the attention of the [U.S. Trustee] on March 7, 2016." (Mar-Bow Mot. Compel. 7, Supplemental Appendix ("Supp.") 1509.)

[11] Reorganization is the ultimate goal of a chapter 11 bankruptcy proceeding, and the Reorganization Plan is the method by which chapter 11 debtors emerge from bankruptcy.

assist the Debtors with the development and refinement of their strategic business plan." (Retention Appl. 2–3, App. 2–3.)

In accordance with Federal Rule of Bankruptcy Procedure 2014(a),[12] the Debtors attached to the Retention Application a copy of the "Amended and Restated

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[12] Rule 2014(a) sets forth the required contents of an application in a bankruptcy court for the employment of a bankruptcy professional. Rule 2014(a) states in full:

> An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

Fed. R. Bankr. P. 2014(a). Relevant to the Engagement Letter, Rule 2014(a) requires that an application to employ a professional include "the professional services to be rendered, [and] any proposed arrangement for compensation." Fed. R. Bankr. P. 2014(a).

Agreement" Letter, (the "Engagement Letter") which detailed the proposed terms of McKinsey's employment as turnaround advisor for the Debtors, and the proposed fee arrangement. As turnaround advisor, McKinsey's role was to help the Debtors save money and become more profitable, which would in turn increase the bankruptcy estate and result in maximum recovery for the Debtors' creditors.[13] The Debtors requested that McKinsey's employment be approved as of August 3, 2015, the date the Debtors filed for bankruptcy, because McKinsey had been working with the Debtors since June 29, 2015, before the Debtors filed for bankruptcy.

As a term of McKinsey's employment, the Debtors agreed to indemnify McKinsey for a broad array of potential liabilities arising out of McKinsey's employment as turnaround advisor. McKinsey would *not* be indemnified, however, from liabilities resulting from

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[13] As stated in the Retention Application, McKinsey's role was to

> assist the Debtors with the development and refinement of their strategic business plan. . . . [and] provid[e] chapter 11 advisory services, which include contingency planning, interim management, cash flow and liquidity assessment, forecasting and management, analysis and/or development of business and strategic plans, development and implementation of creditor and/or supplier strategies and development and implementation of operational and/or financial improvement or turnaround plans.

(Retention Appl. 3, App. 3.)

its own "willful misconduct or gross negligence."[14] (Engagement Letter 6, App. 24.)

The Retention Application was unopposed, and on September 17, 2015, the Bankruptcy Court granted the Retention Application, approved the terms of the Engagement Letter, and authorized the Debtors "to employ and retain [McKinsey] as turnaround advisor." (Retention O. 1–6, Supp. 291–97.) These events all occurred six months before Mar-Bow first appeared in the bankruptcy case.

D. McKinsey's Rule 2014 Disclosures

Federal Rule of Bankruptcy Procedure 2014(a) requires that any application for the employment of professionals

> be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

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[14] Specifically, the Engagement Letter provided, *inter alia*, that the Debtors would indemnify McKinsey for all "losses, claims, penalties, damages[,] or liabilities" arising out of McKinsey's engagement, except for "any loss, claim, damage, penalty, liability, cost, fee[,] or expense which is finally judicially determined by a court of competent jurisdiction on the merits to have resulted from the willful misconduct or gross negligence of [McKinsey]." (Engagement Letter 5–6, App. 23–24.)

Fed. R. Bankr. P. 2014(a). On its own and in response to motions, McKinsey filed multiple declarations pursuant to Rule 2014. Mar-Bow objected repeatedly to these disclosures, even as they became increasingly more specific and detailed. Mar-Bow, it seems, especially objected—and continues to object—to the aspect of McKinsey's disclosures that the Bankruptcy Court reviewed only *in camera*. Mar-Bow seeks to place these disclosures on the public record. A summary of McKinsey's Rule 2014 disclosures follows.

1. McKinsey's First Set of Rule 2014 Disclosures

Pursuant to Rule 2014, the Debtors attached to the Retention Application the "Declaration of Kevin Carmody" (the "First Carmody Declaration"), which included a "Disclosure Regarding [McKinsey's] Disinterestedness." (First Carmody Decl. 10–18, App. 39–47.) In the Disclosure Regarding Disinterestedness, Carmody explained the process McKinsey used[15] to

[15] McKinsey took the following steps to determine what connections it had with parties on the interested parties list:

> (a) emailed members of McKinsey RTS and the McKinsey RTS Team and searched its global client database to determine the existence of any client services provided by such employees within the last three years to parties in interest (the "Interested Parties") identified on the interested parties list . . . , (b) emailed members of McKinsey RTS, the McKinsey RTS Team and partners at affiliates that provide consulting services to determine the existence of client services provided by employees within the last three years to any client that focused on a direct commercial relationship or

identify any connections it had with the Debtors, the United States Trustee and the Bankruptcy Court, and parties "identified on the interested parties list," (the "Interested Parties"). (*Id.* at 10–18, App. 39–47.) The First Carmody Declaration also outlined McKinsey's connections with the Interested Parties.

The First Carmody Declaration disclosed McKinsey's connections by category, number of connections, and general nature of work performed for the connection, rather than identifying connections with the interested parties by name. For example, McKinsey disclosed that a member of its team "attended a proposal meeting and submitted a proposal to *a Major Competitor* that was not accepted." (*Id.* at 12, App. 41 (emphasis added).) McKinsey also reported specific connections with "one Major Unsecured Noteholder, one Lender Under A/R Facility, three Major Customers, one Revolving Facility Lender, one Other Major Supplier of Goods and Services, one Party to Material Unexpired Leases, and one Party to Joint Ventures," among numerous other categories and connections. McKinsey's initial disclosure of its connection with Interested Parties by category became a source of controversy in Mar-Bow's subsequent objections to McKinsey's Rule 2014 disclosures.

> transaction with the Debtors and (c) emailed all employees of McKinsey RTS and its affiliates to request information on any relationships with the Debtors, the United States Trustee and the Bankruptcy Court, as well as equity ownership in the Debtors.

(First Carmody Decl. 11, App. 40.)

The Bankruptcy Court reviewed the First Carmody Declaration before entering the Retention Order approving McKinsey's employment as turnaround advisor. (Retention O. 2, Supp. 292.) On September 17, 2015, after its review, the Bankruptcy Court found that McKinsey qualified as "a 'disinterested person' as such term is defined under section 101(14) of the Bankruptcy Code."[16] (Retention O. 2, Supp. 292.)

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[16] Section 101(14) states in full:

The term "disinterested person" means a person that—

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and

(C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.

11. U.S.C. § 101(14).

2. McKinsey's Subsequent Rule 2014 Disclosures

McKinsey filed two supplemental Rule 2014 Disclosures, even before any objections had been lodged to its initial disclosures. On November 9, 2015, and March 25, 2016, McKinsey filed Supplemental Declarations of Kevin Carmody (respectively, the "Second Carmody Declaration" and the "Third Carmody Declaration"). Each declaration was "in support of" the Retention Application, and intended to "provide certain additional information." (Second Carmody Decl. 2, App. 67; Third Carmody Decl. 1–2, App. 72–73.) In each declaration, Carmody swore that McKinsey "continues to monitor the list of parties on the Interested Parties List against its own client records." (Second Carmody Decl. 3, App. 68; Third Carmody Decl. 2, App. 73.) Carmody also disclosed additional connections—again by category, number, and general nature of the work McKinsey completed for the connection.

E. The Rule 2014 Objections

As discussed earlier, and most relevant to MarBow's objections to McKinsey's Rule 2014 disclosures, Federal Rule of Bankruptcy Procedure 2014(a) requires that a professional seeking employment in a bankruptcy proceeding file "a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in

the office of the United States trustee." Fed. R. Bankr. P. 2014(a). Rule 2014 contains no definition of "connections," nor does it explain further the level of detail required in a professional's Rule 2014 disclosures.

1. The U.S. Trustee's Rule 2014 Objection: The U.S. Trustee's Motion to Compel

The Bankruptcy Court first heard an objection to McKinsey's Rule 2014 disclosures when the United States Trustee (the "U.S. Trustee")[17] filed a motion to compel McKinsey to comply with Rule 2014[18] (the "U.S. Trustee Motion to Compel"). The U.S. Trustee filed its Motion to Compel on May 3, 2016, nine months after the bankruptcy proceeding began and two days after Mar-Bow first appeared in the proceeding.[19] In its

[17] "U.S. Trustees are officers of the Department of Justice who protect the public interest by aiding bankruptcy judges in monitoring certain aspects of bankruptcy proceedings." *United Artists Theatre Co. v. Walton*, 315 F.3d 217, 225 (3d Cir. 2003).

[18] The full title of the U.S. Trustee Motion to Compel was "Motion of the United States Trustee to Compel McKinsey Recovery & Transformation Service U.S., Turnaround Advisor for the Debtors, to Comply with the Requirements of Bankruptcy Rule 2014." (U.S. Trustee Mot. Compel. 1, App. 78.)

[19] The record indicates that the U.S. Trustee filed its Motion to Compel at least partially at Mar-Bow's urging. In Mar-Bow's later objection to McKinsey's Rule 2014 disclosures, Mar-Bow asserts that "Mar-Bow and its counsel had brought [the possible deficiency in McKinsey's Rule 2014 disclosures] to the attention of the United States Trustee Program on March 7, 2016, and expected that the United States Trustee's consequent motion to compel would result in McKinsey's full compliance with Rule 2014." (Mar-Bow Mot. Compel 7, App. 389.)

Motion to Compel, the U.S. Trustee asserted that McKinsey's Rule 2014 disclosures failed to comply with Bankruptcy Rules. Specifically, McKinsey's "declarations disclosed only vague and amorphous connections to creditors and other major parties in interest," and "neither identified these connections by name nor provided any insight into the nature of the connections." (U.S. Trustee Mot. Compel 1–2, App. 78–79.) The U.S. Trustee asked the Bankruptcy Court to compel McKinsey to file additional disclosures, including

> a supplemental declaration stating, at a minimum, (a) the identity of the entities on the Interested Parties List . . . with which McKinsey RTS and any of its affiliates have a connection . . . and (b) a general description of the connection with or work performed for these entities.

(*Id.* at 2, App. 79.)

The U.S. Trustee expressed concern that McKinsey's "failure to provide complete disclosures may also cast a cloud over the Debtors' restructuring strategy." (*Id.* at 11, App. 88.) Because McKinsey had assisted the Debtors in negotiating the terms of a financing agreement and the overall restructuring strategy, the U.S. Trustee argued that the Bankruptcy Court "should order McKinsey to supplement its disclosures so that all

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As noted, Mar-Bow filed its proof of claim on March 23, 2015, and entered its first appearance in the bankruptcy proceeding on May 1, 2016. Thus, it appears that Mar-Bow contacted the U.S. Trustee regarding McKinsey's Rule 2014 disclosures even before it was involved in the underlying bankruptcy proceeding.

interested parties can meaningfully consider whether the Proposed Plan Transactions may be tainted by divided loyalties." (*Id.* at 12, App. 89.) Apparently anticipating that McKinsey might cite confidentiality concerns as a reason for limiting its disclosures, the U.S. Trustee asserted that "McKinsey's private contractual agreements do not and cannot supersede the ethics and disclosure requirements of the Bankruptcy Code and Rules." (*Id.* at 13, App. 90.)

On May 19, 2016, sixteen days later, the U.S. Trustee submitted a "Stipulation Resolving Motion of the [U.S. Trustee Motion to Compel]" (the "U.S. Trustee Stipulation"). The U.S. Trustee Stipulation stated that U.S. Trustee and McKinsey had engaged in "extensive discussions" to resolve the U.S. Trustee's concerns regarding McKinsey's Rule 2014 disclosures. (U.S. Trustee Stip. 2, App. 105.) After these discussions, McKinsey had agreed to file an additional declaration disclosing more information about its connections with Interested Parties.

The same day, pursuant to the U.S. Trustee Stipulation, McKinsey filed a third Supplemental Declaration of Kevin Carmody (the "Fourth Carmody Declaration"). The Fourth Carmody Declaration included more detailed information about McKinsey's connection to the Interested Parties. It also disclosed the names of various Interested Parties that McKinsey had "served" in the past two years. Carmody swore that McKinsey had only served those clients "on matters unrelated to the Debtors and their chapter 11 cases." (Fourth Carmody Decl. 6, App. 99.)

McKinsey still omitted the names of at least three connections, which it identified as "confidential clients." (*Id.*) Before filing the Fourth Carmody Declaration, McKinsey "reviewed its confidentiality obligations to each of its clients identified as a Major Stakeholder or Major Competitor and, to the extent necessary, . . . request[ed] the consent of such client to disclose its name" in the Fourth Carmody Declaration. (*Id.* at 3, App. 96.) Clients who did not consent to the disclosure of their names were identified as "confidential clients." (*Id.* at 4, App. 97.)

The U.S. Trustee stated that it was satisfied that McKinsey's additional disclosures in the Fourth Carmody Declaration complied with Rule 2014.

2. Mar-Bow Remained Unsatisfied with McKinsey's Disclosures

a. Mar-Bow's First Rule 2014 Objection: Mar-Bow's Motion to Compel

On June 6, 2016, dissatisfied with the U.S. Trustee's proposed resolution of McKinsey's disclosures, Mar-Bow filed a 44-page Motion to Compel McKinsey to Comply with Rule 2014 (the "Mar-Bow Motion to Compel"). Mar-Bow asserted that "McKinsey's four disclosure declarations have not allowed the Court the opportunity to . . . independently assess McKinsey's qualifications to serve as a fiduciary for the Debtors." (Mar-Bow Mot. Compel 5, App. 387.) Mar-Bow voiced sweeping policy arguments that McKinsey's allegedly insufficient disclosures threatened both the bankruptcy

system's ability to function[20] and the integrity of the bankruptcy proceeding itself.[21]

Mar-Bow argued that McKinsey's disclosures were insufficiently specific to allow the Bankruptcy Court to evaluate McKinsey's disinterestedness. "McKinsey's broad, generic statements cannot supersede the specific descriptions of connections that case law interpreting Rule 2014 requires and cannot trump the obligation to perform a good faith investigation and to comply with the rule's requirements." (*Id.* at 21, App. 403.) Mar-Bow also contended that the process by which McKinsey conducted its search for connections was inadequate, rendering its disclosures insufficient.[22]

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[20] For example, Mar-Bow asserted that "[t]he systemic issues raised here are of grave importance to the credibility and proper functioning of the bankruptcy system. The court and all bankruptcy professionals should aspire to maintain a transparent bankruptcy system and a level field for all creditors and stakeholders." (Mar-Bow Mot. Compel 8, App. 390.)

[21] Mar-Bow contended that "[s]olicitations of bankruptcy representation opportunities 'go to the integrity of the process,' and must be disclosed by all professionals under Rule 2014, even if attorney rules of professional responsibility are inapplicable." (Mar-Bow Mot. Compel 28, App. 410 (quoting *In re Universal Bldg. Prods.*, 486 B.R. 650, 664 n.16 (Bankr. D. Del. 2010).)

[22] Because "McKinsey apparently cannot discover from the entire McKinsey & Company database checking system whether it was or is involved in any matter adverse to the Debtors," its "disclosures are built upon a foundation that is too deficient to carry the weight of the requirements of Rule 2014." (Mar-Bow Mot. Compel 30, 35, App. 412, 417.)

The Mar-Bow Motion to Compel sought an order from the Bankruptcy Court requiring McKinsey to submit significant additional disclosures and detail regarding McKinsey's connections to the interested parties in the case. Mar-Bow also asked the Bankruptcy Court to suspend payment of McKinsey's fees, and to disgorge all of McKinsey's previously paid fees "in the event that McKinsey fails to comply with the Court's order or the Court determines that McKinsey is not qualified to serve as a professional" in the case. (*Id.* at 42–43, App. 424–25.) Mar-Bow further requested an order that "McKinsey, its affiliates, and its professionals, shall not be entitled to a release, indemnity[,] or exculpation of any kind or nature in this case, whether through a plan of reorganization or otherwise." (*Id.* at 44, App. 426.)

i. <u>The Bankruptcy Court's Hearing on Mar-Bow's Motion to Compel</u>

On June 28, 2016, the Bankruptcy Court held a hearing on Mar-Bow's Motion to Compel. In the hearing, the Bankruptcy Court allowed lengthy argument from both sides, actively engaging the parties as to their positions. Brushing aside some of McKinsey's procedural arguments in opposition to Mar-Bow's Motion to Compel, the Bankruptcy Court stated,

> And that's the point I was . . . trying to get across a few minutes ago about why it is so important that parties in interest bring these kinds of matters to the attention of the Court so the Court can deal with them. And just

> because we've got a great watering-down of Rule 2014 because nobody is, apparently, complying with the rule, doesn't mean that the rule shouldn't be enforced. It should be enforced.

(June 28, 2016 Hr'g Tr. 127, App. 2905.) The Bankruptcy Court identified "three different categories of things" that would affect its decision on the Mar-Bow Motion to Compel:

> One is these 121 actual known clients that have not been identified. Second is the investments of McKinsey Investment in other entities that [McKinsey] say[s] that if it does exist, should be disclosed. . . . And third is, . . . what were the results to the [email] survey?

(*Id.* at 134, App. 2912.)

The Bankruptcy Court solicited a statement from the U.S. Trustee, who "g[a]ve the Court pretty much a synopsis of what came about, and how [the Trustee Motion to Compel] ended up being withdrawn at the end." (*Id.* at 143, App. 2921.) Specifically, the U.S. Trustee stated that, after McKinsey filed the Fourth Carmody Declaration, "the U.S. Trustee was satisfied that McKinsey possessed no conflicts and had greatly improved the public record of its connections." (*Id.* at 145, App. 2923.) When asked whether the U.S. Trustee believed that McKinsey's disclosures satisfied Rule 2014, the Trustee responded, "If it were left up to me, I think my solution to this problem would be for [McKinsey] to make the list [of their confidential clients] available

and file it and ask that it be filed under seal." (*Id.* at 145–46, App. 2923–24.)

After lengthy argument in which the Bankruptcy Court heard from Mar-Bow, McKinsey, the U.S. Trustee, and ANR, the Bankruptcy Court ruled that it would require McKinsey to provide the Bankruptcy Court with additional information. The Bankruptcy Court stated that it would "require McKinsey to disclose the 121 [confidential] clients. . . . to the Court in camera." (*Id.* at 157, App. 2935.) The Bankruptcy Court "allow[ed] McKinsey to negotiate . . . with the debtor, with the committee, with the Office of the U.S. Trustee, and [Mar-Bow]" in order to have "the proper confidentiality provisions before anything is disclosed." (*Id.*) The Bankruptcy Court stated that its

> purpose here is not to destroy McKinsey's business model [of confidentiality].[23] It's certainly not to give a competitive advantage to a competitor. The Court's going to be

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[23] In the hearing, *Mar-Bow* discussed in great detail McKinsey's confidentiality practices:

> [McKinsey] holds out that it maintains a strict policy of confidentiality regarding its clients. Its Web site proclaims, "We guard client confidences." And then again, "We don't publicize our work for our clients."
>
> . . . .
>
> The code of ethics [McKinsey's founder] promoted included this commitment to confidentiality, and as a result, McKinsey never talks about its clients. Its clients can talk about McKinsey, and some of them have[,] but McKinsey never talks about its clients.

(June 28, 2016 Hr'g Tr. 93–94, App. 2871–72.)

> completely respectful of all of that, but I am not going to do anything to impair the integrity of Rule 2014. . . .
>
> . . . McKinsey's a professional. . . . They're a fiduciary. They're employed by the fiduciary. They're held to the same standard.

(*Id.* at 158, App. 2936.) The Bankruptcy Court also ordered that McKinsey provide it with information that "the [Bankruptcy] Court needs to have . . . in order to make the disclosures that have been provided in this case meaningful." (*Id.*)

ii. The Bankruptcy Court's Order Compelling Compliance[24]

On July 1, 2016, three days after argument on Mar-Bow's Motion to Compel, the Bankruptcy Court entered an order granting Mar-Bow's Motion to Compel in certain respects, as stated at the June 28, 2016 Hearing (the "Order Compelling Compliance"). Specifically, the Bankruptcy Court ordered McKinsey to deliver to the Bankruptcy Court, for *in camera* review:

> (1) "A list containing the names of the 121 undisclosed connections discussed at the hearing, together with sufficient information for the Court to determine (1) whether any of those connections constitute an interest that is adverse to the estate and (2) whether McKinsey is

[24] Mar-Bow appeals the Order Compelling Compliance, which the Court addresses in this Memorandum Opinion.

disinterested, all as required by 11 U.S.C. § 327";

(2) "Identification of Interested Parties that manage investments for MIO Partners, Inc.," a McKinsey affiliate;

(3) "Identification of Interested Parties in which MIO owns securities," subject to several limitations"; and,

(4) "The survey response rates to the email surveys" sent by McKinsey to determine the presence of connections, "together with sufficient information for the Court to determine (1) whether any of those connections constitute an interest that is adverse to the estate and (2) whether McKinsey is disinterested, all as required by 11 U.S.C. § 327."

(O. Compelling Compliance 2–3, App. 1520–21.)

b. <u>Mar-Bow's Second Rule 2014 Objection: Mar-Bow's Motion to "Clarify"</u>

On July 5, 2016, four days later, Mar-Bow filed a "Motion to Clarify" the Bankruptcy Court's July 1, 2016 Order. Mar-Bow contended that, although the Order Compelling Compliance provided for *in camera* review of McKinsey's additional disclosures and allowed the U.S. Trustee and professionals employed by the Debtors to review the additional information, the Order Compelling Compliance "does not appear to allow Mar-Bow's professionals to review" the information.

(Mot. Clarify 1–2, App. 1525–56.) Although Mar-Bow expressly stated that its Motion to Clarify was "not a motion for reconsideration," (*id.* at 1, App. 1525), Mar-Bow devoted more than a full page to argument about why Mar-Bow should be allowed to review the additional information because Mar-Bow was the party "that first shed light on McKinsey's failure to comply with Rule 2014," and the party who "has demonstrated the greatest commitment to assist the Court in fulfilling its obligation to maintain the integrity of its processes through strict enforcement of . . . Rule 2014," (*id.* at 2–3, App. 1526–27).

i. <u>The Bankruptcy Court's Rulings on Mar-Bow's Motion to "Clarify"</u>

On July 7, 2016, the Bankruptcy Court heard argument on Mar-Bow's Motion to Clarify. Mar-Bow reasserted its position that "it seems a bit anomalous, and frankly, a bit inequitable [for Mar-Bow] to do all the work to negotiate the confidentiality agreement, and then not participate in the process that that confidentiality agreement designs." (July 7, 2016 Hr'g Tr. 16, App. 2988.) The Bankruptcy Court also heard from McKinsey and the U.S. Trustee, and stated that it would "reserve for a later time whether Mar-Bow or anybody else was going to receive [McKinsey's additional disclosures]." (*Id.* at 21, App. 2993.)

At the time of hearing, the Bankruptcy Court—remarkably, given the timing of Mar-Bow's Motion to

Clarify—had already reviewed the additional information it ordered McKinsey to disclose. The Bankruptcy Court stated, based on its review of the *in camera* production, that it was "completely satisfied that there is not any type of disinterested problem with McKinsey going forward." (*Id.*) It further stated that it was "very satisfied with the information in" McKinsey's *in camera* disclosure. (*Id.*)

On July 15, 2016, the Bankruptcy Court entered an Order addressing Mar-Bow's Motion to Clarify (the "Clarification Order").[25] The Bankruptcy Court ordered that twenty-one days after the parties had reviewed the accompanying Confidentiality Order, the U.S. Trustee could file "a recommendation with the Court whether any further public disclosures should be made." (Clarification O. 2, App. 1950.) After the U.S. Trustee filed its recommendation, the Bankruptcy Court would determine whether McKinsey would be required to file "further public disclosures." (*Id.*) The Bankruptcy Court denied any further requests in Mar-Bow's Motion to Clarify. (*Id.*)

Also on July 15, 2016, the Bankruptcy Court entered a "Confidentiality Order Pursuant to Order Dated July 1, 2016" (the "Confidentiality Order").[26] The Confidentiality Order governed the "information submitted to the [Bankruptcy] Court for in *camera review*

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[25] Mar-Bow appeals the Clarification Order, which the Court addresses in this Memorandum Opinion.

[26] Mar-Bow appeals the Confidentiality Order, which the Court addresses in this Memorandum Opinion.

[sic] pursuant to the July 1 Order, relating to the disclosure of [McKinsey's] connections under Bankruptcy Rule 2014 and any further information McKinsey . . . provides to satisfy such requirements." (Confidentiality O. 2, App. 1977.) The Confidentiality Order provided that McKinsey could designate a document as confidential by placing the words "CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER" on the document, which would constitute a "certification by McKinsey . . . that the information is treated as confidential by McKinsey . . . and its affiliates." (*Id.* at 2–3, App. 1977–78.) The Confidentiality Order also designated categories of persons allowed to review confidential information, and expressly excluded people who are "employees, directors, or officers of a competitor of McKinsey RTS and its affiliates" or people who are "a direct competitor of McKinsey RTS or its affiliates."[27] (*Id.* at 4, App. 1979.)

ii. The U.S. Trustee Recommended that McKinsey Publicly File Additional Rule 2014 Disclosures

On August 5, 2016, the U.S. Trustee filed a "Statement of the Recommendation of the United States Trustee on Public Disclosures by McKinsey RTS" (the "U.S. Trustee Recommendation"). The U.S. Trustee acknowledged that the Bankruptcy Court had already found that McKinsey was a disinterested person, and

[27] This exclusion meant that no employee, director, or officer of Mar-Bow could view the confidential information.

"the sole issue for adjudication now is what further public disclosures McKinsey . . . should make." (U.S. Trustee Rec. 3, App. 2353.) The U.S. Trustee recommended that McKinsey make additional public disclosures "[b]ecause Rule 2014 does not define connections, and because transparency is critical to the integrity of the bankruptcy process." (*Id.*) The U.S. Trustee recommended that McKinsey make the following additional disclosures:

1) "Every name on the list of interested parties provided by the Debtors ("interested parties' list") with whom either McKinsey RTS or personnel borrowed from an affiliate thereof, has a connection and a statement whether any services provided were related to or adverse to the Debtors . . . for a period of three years before the petition date";

2) "Every name on the interested parties' list who was a client of any McKinsey RTS affiliate with respect to 'a direct commercial relationship or transaction' with the Debtors . . . for a period of three years before the petition date";

3) "Every name on the interested parties' list that previously employed McKinsey RTS personnel . . . for a period of three years before the petition date"; and,

4) "Every name of a professional on the interested parties' list that represents or represented McKinsey RTS or its

> affiliates . . . for a period of three years before the petition date."

(*Id.* at 3–4, App. 2353–54.) The U.S. Trustee asserted that "[t]he disclosures made to date, with the additional disclosures recommended here, will satisfy Rule 2014." (*Id.* at 4, App. 2354.)

iii. McKinsey Publicly Filed Additional Rule 2014 Disclosures

The same day, McKinsey filed the "Declaration of Kevin Carmody in Respect of Recommendation of [U.S.] Trustee" (the "Fifth Carmody Declaration"). The Fifth Carmody Declaration "provide[d] th[e] disclosure" that the U.S. Trustee recommended. (Fifth Carmody Decl. 2, App. 2392.)

F. The Debtors' Reorganization Plan

While Mar-Bow and McKinsey were litigating the sufficiency of McKinsey's Rule 2014 disclosures, the rest of the bankruptcy proceedings continued to move forward. On May 25, 2016, the Debtors filed the "Second Amended Joint Plan of Reorganization of Debtors and Debtors in Possession" (the "Reorganization Plan" or "Plan"), which set forth the proposed reorganization terms.

1. Mar-Bow's Third Rule 2014 Objection: Mar-Bow's Reorganization Plan Objection

On June 29, 2016, Mar-Bow filed its "Preliminary Objection . . . to the Joint Plan" (the "Mar-Bow Reorganization Plan Objection"). Mar-Bow objected to confirmation of the Reorganization Plan because McKinsey's

> disclosures of its connections are insufficient to enable [Mar-Bow] to determine whether (a) the proposed sale is in the best interests of the creditors of these Estates, one of which is [Mar-Bow], or (b) the "confidential offer for certain assets of the Debtors" is included in this or any other transaction contemplated by the Plan.

(Mar-Bow Reorganization Plan Obj. 2–3, App. 1485–86.) Mar-Bow further argued that provisions of the Plan that released, excused, and indemnified various professionals from liability for actions taken in connection with the restructuring were not appropriate, as applied to McKinsey, "given that McKinsey . . . has not disclosed all of its connections as required by Rule 2014. Without that complete disclosure, [Mar-Bow] is unable to determine whether the Plan is in its best interests or is tainted by a lack of disinterestedness or a conflict of interest." (*Id.* at 4, App. 1487.)

a. <u>The Bankruptcy Court Heard Mar-Bow's Reorganization Plan Objection</u>

On July 7, 2016, after hearing argument on Mar-Bow's Motion to Clarify, the Bankruptcy Court conducted a four-and-a-half-hour long evidentiary hearing (the "Plan Confirmation Hearing"). At the Plan Confirmation Hearing, the Bankruptcy Court heard testimony and received declarations offered as exhibits. It also heard argument on Mar-Bow's Reorganization Plan Objection.

Mar-Bow asserted that its objection was "in the nature of a limited objection. And it's based on the fact the disclosure has not been made—sufficient disclosure has not been made." (July 7, 2016 Hr'g Tr. 113, App. 3085.) Mar-Bow suggested that "the way [its] limited objection could be satisfied would be to carve McKinsey's exculpation and release out of the [P]lan pending the resolution of the [Rule 2014] dispute." (*Id.* at 114, App. 3086.)

Expressing confusion about the link between Mar-Bow's objection and the remedy it sought, the Bankruptcy Court asked, "[W]hy would [additional Rule 2014 disclosures from McKinsey] make any difference with regard to the exculpation provisions in the [P]lan?" (*Id.* at 115, App. 3087.) Mar-Bow responded that it did not "believe that an adequate disclosure has been made," and that it was its "belief that McKinsey has connections with or represents, if not all, virtually all of the lenders in this case." (*Id.* at 116, App. 3088.)

Mar-Bow seemed to argue, essentially, that McKinsey could not "demonstrate that it has undivided loyalty to the debtor, and therefore, [Mar-Bow] believe[s] that they're not disinterested, and therefore, they should not have the benefit of an exculpation or a release in this case." (*Id.*)

Trying again to discern the basis for Mar-Bow's objection to the release and exculpation provisions, the Bankruptcy Court stated

> [M]aybe I'm confused about what you're actually objecting to as far as exoneration is concerned. . . .
>
> Because [the exoneration provision] just sets the standard of proof, does it not. . . . [I]t's just negligence and such that receives the benefit of exoneration and it has to be brought before this Court. . . .
>
> . . . [W]e have an affirmative statement from McKinsey that says we are disinterested. . . . And if they're intentionally shown that that's not the case, then why would anything—exoneration make any difference as far as [Mar-Bow]?

(*Id.* at 117–18, App. 3089–90.) Mar-Bow responded, "I don't necessarily agree with the proposition, Your Honor. I believe that exoneration and release will effectively preclude our ability to get to the bottom of this matter." (*Id.* at 118, App. 3090.)

In argument, McKinsey expressed the same confusion the Bankruptcy Court had: "I think a party

standing up and saying I don't know certain names does not connect the dots as to why that has anything to do with the exculpation and releases in the plan." (*Id.*) Counsel for the Debtors conveyed similar bewilderment:

> We have, as far as I know, an order on the docket finding disinterestedness. So we would suggest that to the extent there is some issue that needs to be addressed by the Court in due course, it can be done, but it should not affect [the Plan] confirmation.
>
> . . . [I]f there was some effort to defraud the Court and not disclose something, that would not be, by its terms, covered by our releases and exculpation. And it sounds like that's the concern and I don't think that's something we're asking the Court to give people a free pass on.

(*Id.* at 120–21, App. 3092–93.)

The Bankruptcy Court overruled Mar-Bow's objection, stating, "I think I've dealt with that And I'm absolutely satisfied, as I said before, McKinsey is [a] disinterested party based on everything that I've seen, which was far more than adequate submission that I received yesterday." (*Id.* at 121–22, App. 3093–94.)

b. <u>The Bankruptcy Court's Factual Findings Regarding the Reorganization Plan</u>

During the Plan Confirmation Hearing, the Bankruptcy Court made numerous factual findings about the Reorganization Plan, the release and exculpation provisions, and the role the professionals played in developing the Plan and making it successful.[28] Specifically, the Bankruptcy Court found:

- "[T]he contributions of the released parties are significant in this case. In fact, this reorganization would not occur but for those [contributions]." (*Id.* at 176, App. 3148)
- The release and exculpation provisions were appropriate, in part because of "the significant contribution of assets, the fact that it was essential to the reorganization, that there was overwhelming acceptance of the plan, and that there wouldn't be a distribution to any of these parties without it, and in fact, no parties that are participating in any of this are getting—are objecting to the release." (*Id.*)
- "And so I think also very, very importantly in this case, . . . the releases. . . . are part of a plan. It was put into the plan, and all the creditors got to vote on this. And I think that that is extremely important, that it was baked into the plan, part of the plan, and everybody got a

[28] Mar-Bow challenged none of these findings at the hearing, and it challenges none of these findings in this appeal or in its *Mar-Bow II* appeal.

> chance to be a part of that. . . . [That's] something that I consider very, very highly in approving these releases." (*Id.*)

- The Plan "has a substantial consensus of the various constituencies, [and] significant support of all of the creditors and other parties-in-interest." (*Id.* at 191, App. 3163)
- "[A]ll of the professionals involved in the case [contributed to]. . . . a very, very successful resolution to [the Plan]." (*Id.* at 192, App. 3164)

c. <u>The Bankruptcy Court's Order Confirming the Reorganization Plan</u>[29]

On July 12, 2016, the Bankruptcy Court entered a written order confirming the Reorganization Plan and overruling objections to it. The Bankruptcy Court found that the Plan's basic transaction would not occur without the release and exculpation provisions:

> NewCo will not enter into the Stalking Horse APA and consummate the transactions contemplated thereby, thus adversely affecting the Debtors' Estates and undermining the ability of the Debtors to consummate the Plan, if: . . . the injunction, exculpation and release provisions in the Plan were not approved by the Bankruptcy Court.

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[29] Mar-Bow appeals narrow provisions of the Order Confirming the Reorganization Plan, which the Court addresses in this Memorandum Opinion.

(Reorganization Plan ¶ WW, App 1763.) The Bankruptcy Court also found that "the provisions of the Plan constitute a good faith compromise and settlement of all Claims and controversies resolved pursuant to the Plan." (*Id.* ¶ GGG, App. 1767.) The Reorganization Plan became effective on July 26, 2016, and it was "deemed to be substantially consummated" on that day. (*Id.* at 84, App. 1824.)

2. Mar-Bow Moved to Stay Implementation of the Reorganization Plan

Three days later, on July 15, 2016, Mar-Bow appealed narrow provisions of the Order Confirming the Reorganization Plan, and moved to stay implementation of the Reorganization Plan pending appeal (the "Motion to Stay"). Mar-Bow did not request an expedited hearing, and the Bankruptcy Court heard Mar-Bow's Motion to Stay on August 25, 2016, almost one month after the Reorganization Plan had become effective.

a. The Bankruptcy Court's Hearing on Mar-Bow's Motion to Stay

At the hearing on Mar-Bow's Motion to Stay, Mar-Bow acknowledged that part of why it sought a stay of the Confirmation Order was to "preserve and protect its appeal rights [because s]ome courts have suggested that the failure to seek a stay and the failure to obtain the stay will deprive the appellant of appeal rights on the basis of equitable mootness." (Aug. 25, 2016 Hr'g

Tr. 13, App. 3459.) Mar-Bow asserted that it "is not contesting the plan, is not contesting the feasibility of the plan, is not trying to undo the plan, is not trying to impose any current or potential liability on McKinsey as it relates to its performance as the turnaround advisor, except with respect to failures to disclose." (*Id.* at 18, App. 3464.) Twice in the hearing, Mar-Bow asserted that "if the Court were to rule today that the exculpation and release provisions do not apply to McKinsey's obligations under Rule 2014 and the consequences that flow from its failure to satisfy its obligations, Mar-Bow wouldn't need a stay." (*Id.* at 13, 33, App. 3459, 3479.) The Bankruptcy Court, expressing some of the same confusion it displayed when discussing Mar-Bow's objections to the Reorganization Plan, stated, "[E]xculpation has to do with the fact that there's a burden of proof that if they've done something wrong—I mean, if it doesn't apply to Rule 2014, that's a different issue." (*Id.* at 28, App. 3474.)

b. <u>The Bankruptcy Court Denied Mar-Bow's Motion to Stay</u>

The Bankruptcy Court denied Mar-Bow's Motion to Stay, concluding that Mar-Bow had not made the requisite showing to support granting a stay of the Reorganization Plan. The Bankruptcy Court also stated that it

> just can't see how the disclosures that have been made in this case were not adequate, how McKinsey should not have been entitled to the exculpation and release provisions that

> were an integral part of the plan and they very much were and the Court made specific findings with regard to that. There was no evidence offered at the confirmation hearing that would contradict that and, in fact, all of the evidence was in favor of that.

(*Id.* at 47, App. 3493.)

On August 29, 2016, the Bankruptcy Court entered an order denying Mar-Bow's Motion to Stay (the "Stay Order"), and a Memorandum Opinion explaining its reasoning (the "Stay Memorandum Opinion").[30] The Stay Memorandum Opinion contains a thorough discussion of the background of the underlying bankruptcy case and the litigation between Mar-Bow and McKinsey regarding Rule 2014 disclosures. The Stay Memorandum Opinion reiterated the Bankruptcy Court's findings that: (1) the Confirmation Plan "was universally accepted . . . by all the impaired creditor classes that were entitled to vote," (Stay Mem. Op. 1, App. 2449); (2) the Reorganization Plan involved a "web of interrelated settlements that had been painstakingly woven together," (*id.* at 15, App. 2463); (3) after the Bankruptcy Court "thoroughly reviewed the *[i]n [c]amera* Disclosures, . . . it was satisfied that McKinsey . . . had complied in good faith with the Order Compelling Compliance and that McKinsey . . . was a 'disinterested person' under the Bankruptcy Code," (*id.* at 16, App. 2464); (4) "McKinsey . . . w[as]

[30] Mar-Bow appeals both the Stay Order and the Stay Memorandum Opinion, which the Court addresses in this Memorandum Opinion.

essential to the formulation and prosecution of a largely consensual plan of reorganization, . . . [and a]bsent the involvement of these professionals, and their extensive efforts to reach the interconnected settlements . . . , this Bankruptcy Case could have become mired in costly, protracted litigation," (*id.* at 17, App. 2465); and, (5) "the Plan incorporates a delicate balance of settlements involving numerous parties," and "Mar-Bow threatens to disrupt the hard-fought global peace achieved among the Debtors and all of their major stakeholders that is memorialized in the confirmed Plan," (*id.* at 24, App. 2472). The Stay Memorandum Opinion also included the Bankruptcy Court's denial of Mar-Bow's request to require McKinsey to make public any more of its Rule 2014 disclosures that the Bankruptcy Court had reviewed *in camera*. The Bankruptcy Court did so at least in part to "accommodate the anticompetitive concerns raised by McKinsey." (*Id.* at 10 n.15, App. 2458.)

III. Procedural History

On July 19, 2016, Mar-Bow filed its Appeal in this Court, noting its appeal from the Order Compelling Compliance, "but only as to ¶¶ 2–4." (ECF No. 1.) On July 20, 2016, Mar-Bow filed a second appeal, noting its appeal from the Reorganization Plan, "but only as to Findings of Fact ¶¶ J (final sentence), III–KKK, and Order ¶¶ D.31-33, J.52, J.53, and attached Second Amended Joint Plan of Reorganization of Debtors and Debtors in Possession, . . . §§ III.5, III.E.6, III.E.7, and only as to [McKinsey]." (*Mar-Bow Value Partners, LLC*

v. McKinsey Recovery & Transformation Servs., 3:16cv613, ECF No. 1-1.) On September 29, 2016, "in the interest of judicial economy, and based upon the agreement of the parties," the Court consolidated two of Mar-Bow's appeals into this case.[31] (Sept. 29, 2016 0.1, ECF No. 21.) Mar-Bow later filed several amended notices of appeal, noting its appeal from the following additional rulings by the Bankruptcy Court: (1) the Clarification Order; (2) the Stay Order; and, (3) the Stay Memorandum Opinion.[32] (*See* App. 2711.) In all,

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[31] Mar-Bow also had a third appeal pending at the time the Court consolidated the two appeals—*Mar-Bow II*. McKinsey, however, opposed consolidation of all three appeals. The Court consolidated only the two appeals.

[32] On December 29, 2016, Mar-Bow filed a "Third Amended and Supplemental Notice of Appeal" (the "Third Amended Notice"). (ECF No. 41.) In the Third Amended Notice, Mar-Bow added an appeal of: (1) the "December 20, 2016 Memorandum Opinion"; (2) the "Order Granting [McKinsey's] Motion to Dismiss [Mar-Bow's] Final Fee Objection"; and, (3) the Order Granting McKinsey's Final Fee Application. The same day, Mar-Bow filed a "Second Amended and Supplemental Notice of Appeal" in *Mar-Bow II*. That notice also appealed these three additional rulings of the Bankruptcy Court.

The Court cannot discern why Mar-Bow attempts to appeal the same three rulings in two different cases. Mar-Bow not only fails to acknowledge its duplicative appeals in the filings before this Court, but also directs the Court to no authority—substantive or procedural—entitling it to appeal the same orders two separate times. The Court, therefore, will address Mar-Bow's appeal of the December 20, 2016 Memorandum Opinion, the Order Granting McKinsey's Motion to Dismiss Mar-Bow's Final Fee Objection, and the Order Granting McKinsey's Final Fee Application in the *Mar-Bow II* Memorandum Opinion.

the following orders of the Bankruptcy Court are before the Court in this appeal:

(1) Order Compelling Compliance;

(2) Clarification Order;

(3) Confidentiality Order;

(4) Order Confirming the Reorganization Plan, but only narrow provisions;

(5) Stay Order; and,

(6) Stay Memorandum Opinion.

Mar-Bow filed its Opening Brief, ANR and McKinsey both responded, and Mar-Bow replied. McKinsey also filed two motions to dismiss. First, McKinsey moved to dismiss Mar-Bow's appeal of the Reorganization Plan, the Stay Order, and the Stay Memorandum Opinion as equitably moot. Mar-Bow responded, and McKinsey replied. McKinsey also moved to dismiss Mar-Bow's appeal of the Order Compelling Compliance, the Clarification Order, and the Confidentiality Order for lack of standing. Mar-Bow responded, and McKinsey replied.

For the reasons that follow, the Court will grant both of McKinsey's motions to dismiss. The Court will dismiss Mar-Bow's appeal of the Plan, the Stay Order, and the Stay Memorandum Opinion as equitably moot. The Court will dismiss Mar-Bow's appeal of the Order Compelling Compliance, the Clarification Order, and

the Confidentiality Order for lack of standing.[33] The Court will dismiss each of Mar-Bow's appeals of the Bankruptcy Court's rulings.

IV. Analysis: Mar-Bow's Appeal of the Reorganization Plan Rulings

Mar-Bow appeals three of the Bankruptcy Court's rulings relating to the Reorganization Plan. First, Mar-Bow appeals narrow provisions of the Reorganization Plan itself, as outlined below. Second, Mar-Bow appeals the Bankruptcy Court's denial of its Motion to Stay, as ruled on in the August 25, 2016 hearing and set forth in the Stay Order, and the Stay Memorandum Opinion.[34]

A. The Scope of Mar-Bow's Reorganization Plan Rulings Appeal

Mar-Bow appeals only several narrow aspects of the Reorganization Plan itself. Specifically, Mar-Bow appeals the Reorganization Plan "only as to Findings

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[33] As previously discussed, Mar-Bow also filed a Notice of Appeal in this case purporting to appeal (1) the December 20, 2016 Memorandum Opinion; (2) the Order Granting McKinsey's Motion to Dismiss Mar-Bow's Final Fee Objection; and, (3) the Order Granting McKinsey's Final Fee Application. Because those rulings are on appeal in *Mar-Bow II*, the Court does not address them in this case. To the extent that a ruling on those opinions is necessary, the Court dismisses Mar-Bow's appeal of those rulings for the reasons set forth in its *Mar-Bow II* Memorandum Opinion.

[34] For readability, the Court will refer to these three rulings collectively as "the Reorganization Plan Rulings."

of Fact ¶¶ J (final sentence), III–KKK, and Order ¶¶ D.31–33, J.52, J.53, and attached Second Amended Joint Plan of Reorganization of Debtors and Debtors in Possession, . . . §§ III.5, III.E.6, III.E.7," and "only as to [McKinsey]." (*Mar-Bow I*, No. 3:16cv613, ECF No. 1–1.) As clarified in the extensive briefing before the Court and in Mar-Bow's arguments to the Bankruptcy Court, Mar-Bow appeals the portions of the Reorganization Plan that indemnify, exculpate, and release McKinsey from liability in certain circumstances. According to Mar-Bow,

> [n]either the release nor the exculpation are appropriate, given that McKinsey . . . has not disclosed all of its connections as required by Rule 2014. Without that complete disclosure, [Mar-Bow] is unable to determine whether the [Confirmation Plan] is in its best interests or is tainted by a lack of disinterestedness or a conflict of interest.

(Mar-Bow Plan Obj. 4, App. 1487.) The Bankruptcy Court overruled Mar-Bow's objection, stating that it was "absolutely satisfied, as I said before, McKinsey is a disinterested party based on everything that I've seen, which was far more than adequate submission that I received yesterday." (July 7, 2016 Hr'g Tr. 122, App. 3094.) The Bankruptcy Court approved the Reorganization Plan, and Mar-Bow appealed.

The specific sections of the Plan that Mar-Bow appeals are the Bankruptcy Court's findings that:

> The Plan's indemnification, exculpation, release[,] and injunction provisions have been

> negotiated in good faith, and are consistent with sections 105, 1123(b)(6), 1129[,] and 1142 of the Bankruptcy Code and applicable law in this Circuit.

(Reorganization Plan ¶ J, App. 1752.)

> the release, exculpation and injunction provisions set forth in the Plan (collectively, the "Plan Releases") are necessary and fair because: (1) the non-Debtor Released Parties have contributed substantial assets to the reorganization and/or were critical contributors to the Settlements that make Confirmation of the Plan possible; (2) the Plan Releases are (i) essential to the Debtors' reorganization, . . . (iii) essential consideration for the substantial concessions and contributions made by the Released Parties throughout the Chapter 11 Cases, (iv) a critical element of the integrated and related Settlements that are the foundation of the Plan and (v) integral to the structure of the Plan and formed part of the agreement among all parties in interest embodied thereby; (3) all impaired Classes entitled to vote on the Plan have voted overwhelmingly to accept the Plan; . . . and (5) the Plan Releases do not relieve any Released Party of any liability arising out of an act or omission constituting gross negligence or willful misconduct.

(*Id.* ¶ III, App. 1769–70.)

> the third-party releases (including non-consensual third party releases) contemplated by the Plan are necessary and fair

> under the circumstances of the Chapter 11 Cases and consistent with applicable law; and (3) the Plan Releases were proposed in good faith, are essential to the Plan, are appropriately tailored, are intended to promote finality and prevent parties from attempting to circumvent the Plan's terms and are consistent with the Bankruptcy Code and applicable law and, therefore, valid and binding. The third-party releases were disclosed in the Disclosure Statement and the Ballots and therefore consented to by all parties who voted in favor of the Plan. . . . In light of all the circumstances, the Plan Releases are consistent with the prevailing law in this District and are fair to the releasing parties.

(*Id.* ¶ JJJ, App. 1770.) Mar-Bow also appeals the sections of the Reorganization Plan's orders that grant and implement the releases. Mar-Bow appeals each of these orders "only as to [McKinsey]."[35] (Not. Appeal 1, App. 1994.)

In its opening appellate brief, Mar-Bow devoted three pages of its sixty-one page brief to arguing that the Bankruptcy Court erred in confirming the Reorganization Plan and entering the Plan Confirmation Order. In its statement of the issues presented, Mar-Bow framed the question before the Court as:

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[35] The Court will refer collectively to the sections of the Reorganization Plan that Mar-Bow has appealed as "the release and exculpation provisions" unless specifically referring to individual provisions appealed.

> Did the bankruptcy court err in confirming the Debtors' reorganization plan insofar as it provided for releases and exculpation as to McKinsey before McKinsey publicly disclosed all connections required by Bankruptcy Rule 2014, *if and to the extent* such provisions bar court consideration of compliance with the Rule and sanctions for non-compliance?

(Mar-Bow Br. 3, ECF No. 24 (emphasis added).)[36] Mar-Bow argues that the Bankruptcy Court should not have approved the release and exculpation provisions for McKinsey "[i]f and to the extent that [those provisions] indeed bar the [C]ourt from ruling that McKinsey failed to comply with Rule 2014, or bar court sanctions for disclosure omissions." (*Id.* at 60.)

Mar-Bow, however, seems to admit that the Bankruptcy Court never ruled on whether the release and exculpation provisions prevent this Court or would in the future prevent the Bankruptcy Court from considering any potential Rule 2014 violation by McKinsey: "[W]hile the bankruptcy court held that McKinsey had earned the release and exculpation provisions, *it did not address their effect on potential McKinsey sanctions*." (Mar-Bow Reply Br. 28 (emphasis added).) Moreover, Mar-Bow asserts that "[t]here is absolutely no evidence that any parties expected that the release

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[36] In so contending, Mar-Bow argues—as it does throughout all its filings in this Court—that the twenty-five pages of "connections" McKinsey identified in its four different publicly filed Rule 2014 disclosures remain insufficient, even though McKinsey's disclosures satisfied both the U.S. Trustee and the responsive and thorough Bankruptcy Court.

and exculpation provisions in the Plan would impede court consideration of McKinsey's Bankruptcy Rule 2014 disclosure violations or possible reductions of McKinsey's fee requests." (Mar-Bow Resp. McKinsey Mot. Dismiss Equitably Moot 18, ECF No. 33.)

McKinsey counters that "Mar-Bow cannot appeal conditionally on how the District Court interprets the release. If Mar-Bow believes the release is ambiguous, it must ask the Bankruptcy Court what it thought it was approving. It cannot ask this Court for an interpretation and then determine whether it wants the interpretation reversed." (McKinsey Br. 54, ECF No. 38.) McKinsey further argues that, because Mar-Bow appeals the Reorganization Plan "if and to the extent" that it would prevent this Court from considering Mar-Bow's Rule 2014 challenges or the Bankruptcy Court from issuing sanctions against Mar-Bow for not complying with Rule 2014, the appeal "is no longer an 'appeal' within the meaning of Part VIII of the Bankruptcy Rules."[37] (McKinsey Reply Br. 3, ECF No. 34.) McKinsey contends that "[t]here is no such thing as an appeal of an order in which appellant asks the appellate court to interpret what the order means before asking the appellate court to reverse it," and that Mar-Bow's appeal of the Reorganization Plan Rulings therefore must be dismissed. (*Id.*)

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[37] Part VIII of the Bankruptcy Rules govern, *inter alia*, "the procedure in a United States district court and a bankruptcy appellate panel on appeal from a judgment, order, or decree of a bankruptcy court." Fed. R. Bankr. P. 8001(a).

McKinsey also argues that, even if Mar-Bow's appeal of the Reorganization Plan Rulings is properly before the Court, it should be dismissed as equitably moot. McKinsey asserts that the Court should "deploy the doctrine of equitable mootness to block the retroactive deprivation of releases that Mar-Bow now seeks in the appeal." (Mot. Dismiss Equitably Moot 8, ECF No. 32.) McKinsey argues that the Court should dismiss Mar-Bow's appeal as equitably moot because: (1) Mar-Bow failed to obtain a stay of the Reorganization Plan pending Appeal; (2) the Plan has been substantially consummated; (3) failure to apply the release and exculpation provisions to McKinsey would imperil the success of the Plan; and, (4) the relief Mar-Bow requests would unfairly prejudice third parties.

Mar-Bow argues that equitable mootness should not bar its appeal because the relief Mar-Bow seeks "is very narrow and does not impair plan effectiveness or the rights of third parties that relied upon the confirmation order." (Mar-Bow Resp. Mot. Dismiss Equitably Moot 1.) Mar-Bow asserts that equitable mootness does not merit dismissal of its appeal because "Mar-Bow's appeal challenges only a small part of the Plan, not its very foundation, and even then seeks only a narrow holding regarding the effect of that provision." (*Id.* at 10.) Mar-Bow contends that because it has "argued only that the bankruptcy court erred in approving the application of these provisions to McKinsey *if and to the extent* they barred the court from ruling that McKinsey violated Rule 2014 and sanctioning its

non-compliance," the Court should not dismiss its appeal as equitably moot. (*Id.* at 12.)

B. The Court Will Dismiss Mar-Bow's Appeal of the Reorganization Plan Rulings as Equitably Moot

"The doctrine of equitable mootness represents a pragmatic recognition by courts that reviewing a judgment may, after time has passed and the judgment has been implemented, prove 'impractical, imprudent, and therefore inequitable.'" *In re U.S. Airways Group, Inc.*, 369 F.3d 806, 809 (4th Cir. 2004) (quoting *Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002)). Because the doctrine is "based on practicality and prudence, its application does not employ rigid rules. Rather, a court must determine whether judicial relief on appeal can, as a pragmatic matter, be granted." *Mac Panel*, 283 F.3d at 625. "Unlike constitutional mootness, which turns on the threshold question of whether a justiciable case or controversy exists, equitable mootness . . . is concerned with whether a particular remedy can be granted without unjustly upsetting a debtor's plan of reorganization."[38] *In re Charter Commc'ns, Inc.*, 691 F.3d 476, 481 (2d Cir. 2012).

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[38] The doctrine of equitable mootness is different from the doctrine of constitutional mootness. *See*, *e.g.*, *Alexander v. Barnwell Cty. Hosp.*, 498 B.R. 550, 556 (D.S.C. 2013) ("Mootness in bankruptcy appeals arises in two forms: constitutional mootness and equitable mootness."). Because equitable mootness is based on a pragmatic consideration and not constitutional mootness's "threshold question of whether a justiciable case or controversy

The United States Court of Appeals for the Fourth Circuit has "identified certain factors that aid the determination of whether the requested relief can, as a practical matter, be granted." *In re US Airways*, 369 F.3d at 809. Those factors include:

> (1) whether the appellant sought and obtained a stay; (2) whether the reorganization plan or other equitable relief ordered has been substantially consummated; (3) the extent to which the relief requested on appeal would affect the success of the reorganization plan or other equitable relief granted; and[,] (4) the extent to which the relief requested on appeal would affect the interests of third parties.

Mac Panel, 283 F.3d at 625. No one factor of this four-part balancing test is dispositive, and the "question . . . is whether these factors, taken together, suggest that, irrespective of the merits of the appeal, it would be imprudent to disturb the Plan at this late date." *In re Anderson*, 349 B.R. 448, 454 (E.D. Va. 2006). "Equitable mootness in the bankruptcy setting thus requires the

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exists," equitable mootness presents issues of fairness and prudence, not issues of jurisdiction. *See Charter Commc'ns, Inc.*, 691 F.3d at 481. Thus, unlike a constitutional mootness challenge in which the appellant, as the party invoking a court's power, would bear the burden of proving jurisdiction, the movant bears the burden of proving equitable mootness. *See In re Anderson*, 349 B.R. at 454. *But see Alexander*, 498 B.R. at 557 (examining challenges in a bankruptcy appeal that the appeal was both constitutionally and equitably moot and stating broadly that "the appropriate means for challenging the mootness of a case is a motion" challenging the court's subject matter jurisdiction, on which the burden "rests with the plaintiff, as the party invoking" jurisdiction).

district court to carefully balance the importance of finality in bankruptcy proceedings against the appellant's right to review and relief."[39] *Charter Commc'ns*, 691 F.3d at 481. The Court must consider "the totality of [the] circumstances," *Mac Panel*, 283 F.3d at 62, and McKinsey, as the moving party, bears the burden of proving that Mar-Bow's appeal is equitably moot, *In re Anderson*, 349 B.R. at 454.

The Court finds that each of the four factors weighs in favor of finding Mar-Bow's appeal of the Reorganization Plan Rulings equitably moot, and that, considering the totality of the circumstances, it would be imprudent and inequitable to upset the Reorganization Plan at this late date.

1. Mar-Bow Failed to Obtain a Stay

It is undisputed that, although Mar-Bow moved for a stay of the Reorganization Plan on July 15, 2016, Mar-Bow did not seek expedited consideration of its

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[39] The unique nature of bankruptcy litigation justifies the application of specialized legal doctrines. In part because parties in bankruptcy actions might "tak[e] advantage of bankruptcy procedures to place barriers in the way of . . . competitor[s]," *Mac Panel*, 283 F.3d at 627, doctrines such as equitable mootness have special importance in bankruptcy proceedings. *See*, *e.g.*, *id.* at 627 n* (noting the countervailing interests in place when a debtor's creditor is also a major competitor: "The longer MAC Panel remains in bankruptcy, the longer MAC Panel must compete against a competitor who not only is in a position to utilize MAC Panel's presence in Chapter 11 to gain competitive advantage but, in its dual status as a creditor, also is in a position to oppose and prolong MAC Panel's efforts to emerge from bankruptcy").

Motion to Stay, and the Bankruptcy Court did not hear Mar-Bow's Motion to Stay until August 25, 2016, almost one month after the Plan had become effective. The Bankruptcy Court orally denied Mar-Bow's Motion to Stay at the hearing, and entered an Order and Memorandum Opinion memorializing its ruling and reasoning on August 29, 2016. Although Mar-Bow has appealed the Bankruptcy Court's denial of its Motion to Stay, it failed to move in this Court for either a stay or an expedited appeal.

This factor, therefore, weighs in favor of finding that Mar-Bow's appeal of the Reorganization Plan Rulings is equitably moot. *See U.S. Airways*, 369 F.3d at 810.

2. <u>The Plan Has Been Substantially Consummated</u>

Mar-Bow, appropriately, does not contest that the Plan has been substantially consummated. Substantial consummation, as defined within the Bankruptcy Code, requires three events:

> **(A)** transfer of all or substantially all of the property proposed by the plan to be transferred;
>
> **(B)** assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and[,]

> **(C)** commencement of distribution under the plan.

11 U.S.C. § 1101(2); *see also Mac Panel*, 283 F.3d at 625–26.

First, the Plan itself provides that it is "deemed to be substantially consummated" on the day it became effective—here, July 26, 2016. (Reorganization Plan 84, App. 1824.) Mar-Bow does not challenge that provision of the Plan on appeal.

Moreover, a substantial amount of the transactions contemplated by the Reorganization Plan have taken place. The core transaction of the Plan, the Stalking Horse APA, occurred on the effective date of the Plan. Also on the effective date, executory contracts and unexpired leases were assumed, assumed and assigned, or rejected. Numerous settlements of creditors' claims were approved by the Bankruptcy Court on the effective date. Every encumbrance against the NewCo assets was "deemed to be released" as of the effective date. (Reorganization Plan 36, App. 1776.) Thus, not only did the Plan *state* that it would be "deemed to be substantially consummated" on the Plan's effective date, but the terms of the Plan also provide that the majority of the reorganization occurring under the Plan would happen on the effective date. The Plan was substantially consummated, as defined by 11 U.S.C. § 1101(2), on July 26, 2016, three months before Mar-Bow filed its opening brief in this case, and nearly six months before the briefing in this appeal was completed.

This factor, therefore, also weighs in favor of finding that Mar-Bow's appeal of the Reorganization Plan Rulings is equitably moot. *See*, *e.g.*, *Mac Panel*, 283 F.3d at 626–27 (finding a reorganization plan was substantially consummated when, *inter alia*, funds had been transferred and used to satisfy creditors, disputed claims had been settled, and creditors had been paid).

3. The Relief Mar-Bow Requests Would Significantly Affect the Success of the Plan

The Bankruptcy Court made several factual findings regarding the interrelated nature of the Plan provisions that Mar-Bow has not challenged on appeal, and those findings remain the law of the case. During the Plan Confirmation Hearing, the Bankruptcy Court stated that "the releases. . . . are part of a plan[, and were] . . . baked into the plan." (July 7, 2016 Hr'g Tr. 176, App. 3148). Moreover, the Plan's core transaction was conditioned in part on the release and exculpation provisions applying to all involved professionals:

> NewCo will not enter into the Stalking Horse APA and consummate the transactions contemplated thereby, thus adversely affecting the Debtors' Estates and undermining the ability of the Debtors to consummate the Plan, if: . . . the injunction, exculpation and release provisions in the Plan were not approved by the Bankruptcy Court.

(Reorganization Plan ¶ WW, App. 1763.)

The Bankruptcy Court also found that the Reorganization Plan involved a "web of interrelated settlements that had been painstakingly woven together," (Stay Mem. Op. 15, App. 2463), and that Mar-Bow's attempt to prevent the Release and Exculpation Provisions from applying to McKinsey "threatens to disrupt the hard-fought global peace achieved among the Debtors and all of their major stakeholders that is memorialized in the confirmed Plan," (*id.* at 24, App. 2474). Although Mar-Bow has appealed these findings of the Bankruptcy Court, Mar-Bow has pointed to nothing indicating that the findings are clearly erroneous and, considering all the evidence in the record, the Court cannot so find. *See Bessemer City*, 470 U.S. at 573 (stating that a finding of fact is clearly erroneous if a court reviewing it, considering all of the evidence, "is left with the definite and firm conviction that a mistake has been committed").

Thus, based on the Bankruptcy Court's factual findings and the provisions of the Reorganization Plan itself, if this Court were to grant Mar-Bow the relief it requests—a ruling that the release and exculpation provisions do not apply to McKinsey—it would risk not only disrupting the core transaction of the Plan, the Stalking Horse APA, but unravelling the "web of interrelated settlements that had been painstakingly woven together" and the "hard-fought global peace" that the Plan achieved. (Stay Mem. Op. at 15, 24, App. 2463, 2474.) This factor, therefore, also weighs in favor of

finding that Mar-Bow's appeal is equitably moot.[40] *See*, *e.g.*, *Mac Panel*, 283 F.3d at 626–27 (finding that,

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[40] Mar-Bow argues that it

> has not challenged the Debtors' entire Plan. It has not even sought to excise the release and exculpation provisions. Mar-Bow has argued only that the bankruptcy court erred in approving the application of these provisions to McKinsey *if and to the extent* they barred the court from ruling that McKinsey violated Rule 2014 and sanctioning its non-compliance.

(Mar-Bow Resp. Mot Dismiss Equitably Moot 12, ECF No. 33.) That argument, however, takes Mar-Bow out of the frying pan and puts it into the fire. Were the Court to find that Mar-Bow appealed the release and exculpation provisions only "if and to the extent" they bar a ruling that McKinsey violated Rule 2014, the Court likely would have to dismiss Mar-Bow's appeal of those provisions for lack of jurisdiction.

28 U.S.C. § 158(a) grants this Court jurisdiction to hear appeals, as relevant here, "from final judgments, orders, and decrees" of bankruptcy courts. 28 U.S.C. § 158(a)(1). It grants no jurisdiction to interpret the rulings of bankruptcy courts on issues not before the Court. The Court can find nowhere in the record that the Bankruptcy Court ruled that the release and exculpation provisions would bar a ruling that McKinsey violated Rule 2014 or prevent a court from sanctioning such noncompliance, and Mar-Bow identifies none. To the contrary, even Mar-Bow asserts that, "while the bankruptcy court held that McKinsey had earned the release and exculpation provisions, *it did not address their effect on potential McKinsey sanctions.*" (Mar-Bow Reply Br. 28, ECF No. 47 (emphasis added).) Moreover, Mar-Bow itself appears to acknowledge that the Bankruptcy Court made no such ruling by phrasing the issue it wants this Court to rule on as a hypothetical. This Court is not in the business of issuing advisory opinions.

In an abundance of caution, so as not to deny Mar-Bow the consideration of its appeal, the Court will therefore interpret Mar-Bow's appeal of the release and exculpation provisions in accordance with the issues Mar-Bow identified in its Notice of Appeal and will rule on them accordingly.

although "an order [granting the appellant the relief it requested] could be drafted," doing so would undo one of the conditions on which the reorganization plan was premised).

4. The Relief Mar-Bow Requests Would Significantly Affect the Interests of Third Parties

The Bankruptcy Court held that the release and exculpation provisions in the Plan were important, in part because McKinsey and the other professionals involved had expended "extensive efforts to reach the interconnected settlements in the face of multiple, significant[,] and competing interests," and they "should not be subject to the potential of frivolous future litigation as a result of their efforts." (Stay Mem. Op. 17, App. 2465.) The Bankruptcy Court also found that, "[a]ny professional, including McKinsey . . . , that is not released and exculpated, will have to implead other professionals and parties in the event it is sued. It will have to take discovery from other professionals and other parties, as well." (*Id.* at 23, App. 2471.) Based on those and other findings, the Bankruptcy Court found that Mar-Bow's appeal of the release and exculpation provisions "threatens to disrupt the hard-fought global peace achieved among the Debtors and all of their major stakeholders that is memorialized in the confirmed Plan." (*Id.* at 24, App. 2472.)

Mar-Bow attempts to refute these findings by asserting that the evidence the Bankruptcy Court relied

on in coming to these conclusions—the declaration of Andy Eidson, Executive Vice President and Chief Financial Officer of ANR—"were generic and made no reference to McKinsey or other professionals." (Mar-Bow Resp. Mot. Dismiss Equitably Moot 5.) The record, however, belies Mar-Bow's arguments and supports the Bankruptcy Court's factual findings.

Importantly, McKinsey's Engagement Letter with the Debtors provided that the Debtors would indemnify McKinsey for all "losses, claims, penalties, damages[,] or liabilities" arising out of McKinsey's engagement, except for "any loss, claim, damage, penalty, liability, cost, fee[,] or expense which is finally judicially determined by a court of competent jurisdiction on the merits to have resulted from the willful misconduct or gross negligence of [McKinsey]." (Engagement Letter 5–6, App. 23–24.) Thus, if the release and exculpation provisions were excised from the Reorganization Plan, even only as to McKinsey, McKinsey would be entitled to seek indemnification from the Debtors. Any amount of indemnification would come from the Estate, and its cost would be borne by the remaining creditors.

Moreover, Mar-Bow cannot demonstrate that the Bankruptcy Court's factual findings were clearly erroneous simply by asserting that the declarations on which they were based were not specific enough. No evidence in the record rebuts the declaration of Eidson, who swore that

> the release, exculpation[,] and injunction provisions set forth in the Plan . . . : (a) confer

> substantial benefits upon the Estates; . . . (c) are in the best interests of the Debtors, their Estates[,] and parties in interest; (d) are an integral element of the settlements and transactions incorporated into the Plan; and[,] (f) are important to the overall objectives of the Plan. . . .

(Eidson Decl. ¶ 36, ECF No. 33-1.) Not only is Eidson's testimony unrebutted, but it is consistent with general bankruptcy practice. *See In re Chemtura Corp.*, 439 B.R. 561, 610 (S.D.N.Y. 2010) ("[E]xculpation provisions are included so frequently in chapter 11 plans because stakeholders all too often blame others for failures to get the recoveries they desire; seek vengeance against other parties; or simply wish to second guess the decisionmakers in the chapter 11 case."). When "professionals have created substantial value for the estates through their efforts . . . , they should not be subjected to future litigation involving . . . frivolous claims." *In re Health Diagnostic Lab., Inc.*, 551 B.R. 218, 234 (E.D. Va. 2016). The Bankruptcy Court found that the professionals—including McKinsey—involved in the chapter 11 reorganization had made significant contributions, and "[i]n fact, this reorganization would not occur but for those [contributions]." (July 7, 2016 Hr'g Tr. 176, App. 3148.) Mar-Bow has not established that the Bankruptcy Court's finding that the release and exculpation provisions conferred a benefit on the Estate, which would therefore be harmed without them, was clearly erroneous.

Finally, if the Court were to grant Mar-Bow the relief it requests and find that McKinsey is not entitled to the protection of the release and exculpation provisions, it would "shake the reliance that businesses, investors, and the public place on the finality of bankruptcy confirmation orders. . . . [and] would render substantially more difficult the successful completion of large reorganization efforts such as the present one." *U.S. Airways*, 369 F.3d at 810–11. Mar-Bow has provided the Court with no compelling reason to do so, and the Court sees none. This factor, therefore, also weighs in favor of finding that Mar-Bow's appeal is equitably moot.

The Court finds that McKinsey has sufficiently established that each of the four factors weighs in favor of finding Mar-Bow's appeal equitably moot. Mar-Bow failed to obtain a stay of the Reorganization Plan pending appeal, the Plan has been substantially consummated, and granting Mar-Bow the relief it requests would significantly affect the success of the plan and the interests of third parties. Considering the totality of the circumstances in this case, it would be imprudent and inequitable to disturb the Reorganization Plan at this late date. The Court will dismiss Mar-Bow's Reorganization Plan Appeal as equitably moot.

V. Analysis: Mar-Bow's Appeal of the Rule 2014 Rulings

Mar-Bow appeals three of the Bankruptcy Court's rulings regarding McKinsey's Rule 2014 disclosures:

(1) the Order Compelling Compliance; (2) the Clarification Order; and, (3) the Confidentiality Order.[41]

A. The Scope of Mar-Bow's Rule 2014 Rulings Appeal

Mar-Bow asserts that the Bankruptcy Court erred in failing to order McKinsey to file publicly additional information about the "connections" it had with the Interested Parties and in allowing McKinsey to submit information regarding its email response rates to the Court *in camera.* For relief, Mar-Bow asks the Court to

> [d]irect the bankruptcy court to (i) order that McKinsey's *in camera* submissions be filed in the public record; (ii) require McKinsey to make [additional] disclosures . . . if the *in camera* submissions are inadequate to meet Rule 2014 requirements; (iii) order McKinsey to undertake a thorough search for all connections with all parties on the IP List . . . and disclose the results in a filed supplemental Rule 2014 disclosure; (iv) re-determine McKinsey's disinterestedness after receiving all disclosures required by Rule 2014.

(Mar-Bow Br. 60–61, ECF No. 24.)

McKinsey counters that its Rule 2014 disclosures were adequate in the circumstances of this case, and that the information the Bankruptcy Court ordered to be filed *in camera* is not a "connection" that Rule 2014

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[41] For readability, the Court will refer to these three rulings collectively as "the Rule 2014 Rulings."

requires to be filed, and is therefore immaterial in determining whether McKinsey complied with Rule 2014. McKinsey also has moved to dismiss Mar-Bow's appeal of the Rule 2014 Rulings for lack of standing. McKinsey argues that "not a penny would further inure to Mar-Bow's benefit—even if McKinsey . . . were forced to disgorge all its fees[, and a] party must have a financial interest to possess the requisite standing to maintain an appeal from a bankruptcy court order." (McKinsey Standing Mot. Dismiss 1, ECF No. 37.) McKinsey asserts that Mar-Bow has no standing to appeal the Rule 2014 Rulings because Mar-Bow lacks the requisite financial interest in those rulings, and its appeal must therefore be dismissed.

Mar-Bow acknowledges that courts generally require a party to have a pecuniary interest in the outcome in order to have standing to appeal a bankruptcy court's ruling, but asserts that this "rule is a prudential standing limitation, not an Article III one." (Mar-Bow Resp. Standing Mot. Dismiss 7, ECF No. 43.) According to Mar-Bow, courts have recognized exceptions to the pecuniary interest standing requirement and "afford[ed] appellate standing to preserve the integrity of the bankruptcy system and vindicate the public interest." (*Id.* at 8.) Thus, Mar-Bow asserts, although it "might not realize a pecuniary benefit from an order compelling McKinsey to comply fully with Rule 2014," (*id.* at 13), "Mar-Bow's appeal presents issues central to the integrity of the bankruptcy system," and the Court therefore should not dismiss it as equitably moot, (*id.* at 19).

B. The Court Will Dismiss Mar-Bow's Appeal of the Rule 2014 Rulings Because Mar-Bow Lacks a Pecuniary Interest in the Outcome of the Appeal

"The test for standing to appeal a bankruptcy court's order to the district court is well-established: the appellant must be a *person aggrieved* by the bankruptcy order." *In re Urban Broad. Corp.*, 401 F.3d 236, 243 (4th Cir. 2005) (citing *In re Clark*, 927 F.2d 793, 795 (4th Cir. 1991)). The "person aggrieved" test was originally codified in the original Bankruptcy Code, but abandoned when Congress repealed it in 1978. *In re Clark*, 927 F.2d at 795. Courts, however, continue to use the test. *Id.* "[I]t is well-established that a person aggrieved is a party directly and adversely affected pecuniarily."[42] *In re Urban Broad.*, 401 F.3d at 244 (quotations and citations omitted). In other words, in order to have standing to appeal a bankruptcy court order, the appellant "must show that the order . . . 'diminishes [its] property, increases [its] burdens[,] or

[42] "United States trustees, who never have pecuniary interests in cases, could not of course meet this standard, but there are other standards applicable to parties such as . . . trustees." *In re Clark*, 927 F.2d at 795; *see also In re Revco D.S., Inc.*, 898 F.2d 498, 499–500 (6th Cir. 1990) (holding that the U.S. Trustee, despite having no pecuniary interest in the outcome of bankruptcy court rulings, has standing to appeal because of the Trustee's unique role as "a watchdog rather than an advocate" who is "responsible for protecting the public interest and ensuring that bankruptcy cases are conducted according to law") (internal quotation and citation omitted). Normally, of course, an individual lacks standing when seeking "not remediation of its own injury[,] . . . but vindication of the rule of law—the 'undifferentiated public interest.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106 (1998).

impairs [its] rights.'" *In re Kaiser Aluminum Corp.*, 327 B.R. 554, 558 (D. Del. 2005) (quoting *In re Combustion Eng'g*, 391 F.3d 190, 214 (3d Cir. 2004)). The application of the "person aggrieved" standard to establish standing in a bankruptcy appeal "reflect[s] the understandable concern that if appellate standing is not limited, bankruptcy litigation will become mired in endless appeals brought by the myriad of parties who are indirectly affected by every bankruptcy court order." *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 642 (2d Cir. 1988). Mar-Bow cannot meet this standard in the context of its Rule 2014 Appeal, and therefore lacks standing to bring them.

As an initial matter, the relief that Mar-Bow purports to seek in this Appeal might itself divest Mar-Bow of standing because Mar-Bow seeks nothing that would necessarily result in a pecuniary gain. Mar-Bow asks the Court to direct the Bankruptcy Court to enter orders requiring McKinsey to: (1) file its "*in camera* submissions . . . in the public record"; (2) make unspecified additional disclosures "sufficient in detail and description to permit the court and any party in interest to ascertain whether McKinsey has a disqualifying connection";[43] and, (3) perform a "thorough search for all connections . . . to correct defects in its search[,] and disclose the results in a filed supplemental Rule 2014 disclosure." (Mar-Bow Br. 60–61.) Mar-Bow also asks this Court to order the Bankruptcy Court to then

[43] Mar-Bow appears to seek these unspecified additional disclosures only "if the *in camera* submissions are inadequate to meet Rule 2014 requirements." (Mar-Bow Br. 60–61.)

"re-determine McKinsey's disinterestedness." (*Id.* at 61.) Mar-Bow does not, in this appeal, argue that because McKinsey's Rule 2014 disclosures were allegedly insufficient, all of McKinsey's fees *must* be disgorged and returned to the estate, nor can it.[44] *See*, *e.g.*, *In re Crivello*, 134 F.3d 831, 839 (7th Cir. 1998) ("Bankruptcy courts have wide latitude in connection with fact-intensive matters, like the terms and conditions of the employment of professionals . . . [because] a bankruptcy judge is in the best position to gauge the ongoing interplay of factors and to make the delicate judgment calls which such a decision entails.") (internal quotation marks and citation omitted). None of Mar-Bow's requested relief, even if the Court granted it *all*, would result in any pecuniary gain to *anyone*—let alone Mar-Bow. Accordingly, Mar-Bow likely has pled itself out of any pecuniary interest it might have otherwise had by seeking relief that is entirely unrelated to monetary recovery.

However, even had Mar-Bow sought relief that was pecuniary in nature, Mar-Bow lost any pecuniary interest in the outcome of the Rule 2014 Appeal on July 12, 2016, when the Reorganization Plan was confirmed. When the Plan was finalized, the expected recovery for Mar-Bow's class of claim became fixed.[45] All

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[44] As noted earlier, Mar-Bow has noticed an appeal of the Bankruptcy Court's final fee determination. *See supra* note 32. Because Mar-Bow also appealed that ruling in another case, the Court addresses that issue separately—in the *Mar-Bow II* Memorandum Opinion.

[45] Mar-Bow's unsecured claim represents $1.25 million of ANR 7.5% second lien notes due August 1, 2020. Mar-Bow, a Class

additional cash will be distributed to holders of "Allowed Secured First Lien Lender Claims," which does not include Mar-Bow. Therefore, even if the Court were to grant Mar-Bow's requested relief by remanding the case to the Bankruptcy Court with all of Mar-Bow's proposed mandates, and even if the Bankruptcy Court sanctioned McKinsey by disgorging *all* of McKinsey's fees, those fees would return as cash to the Estate and be distributed to holders of "Allowed Secured First Lien Lender Claims." Mar-Bow would receive no pecuniary benefit at all.

Mar-Bow lacks any pecuniary interest in the outcome of the Rule 2014 Appeal, it is not a "person aggrieved" by the Bankruptcy Court's order, and it therefore lacks standing to appeal those rulings. The Court will dismiss Mar-Bow's appeal of the Rule 2014 Rulings.

VI. Conclusion

For the foregoing reasons, the Court will grant McKinsey's Motion to Dismiss the Appeal of the Reorganization Plan Rulings, (ECF No. 32), and dismiss Mar-Bow's appeal of the Confirmation Order as equitably moot. The Court will grant McKinsey's Motion to Dismiss the Appeal of the Rule 2014 Rulings, (ECF No. 37), and dismiss Mar-Bow's appeal of the Rule 2014

6B claimant under the Plan, shares in the "Category 2 General Unsecured Claims Asset Pool," the amount of which was fixed at the time the Plan became final. Mar-Bow's recovery from the Estate will not change.

Rulings for lack of standing. The Court will dismiss Mar-Bow's appeal.[46] An appropriate order will issue.

/s/ [Illegible]
M. Hannah Lauck
United States District Judge

Date: 9/30/2017
Richmond, Virginia

[46] Because the Court will dismiss Mar-Bow's appeals for the reasons stated above, it need not reach the merits of Mar-Bow's numerous Rule 2014 appeals. That said, this Court sees a record replete with patient, efficient, and thorough determinations on a series of complicated matters. Certainly, the Bankruptcy Court addressed—repeatedly and comprehensively—each objection Mar-Bow presented to it. Moreover, this Court expresses no reservation about the competence or integrity with which the Bankruptcy Court reviewed McKinsey's *in camera* disclosures or declined to order that they be publicly filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

MAR-BOW VALUE PARTNERS, LLC,

Appellant,

v.

Civil Action No. 3:16cv799 ("*Mar-Bow II*")

MCKINSEY RECOVERY & TRANSFORMATION SERVICES US, LLC

Appellee.

MEMORANDUM OPINION

(Filed Sep. 30, 2017)

This matter comes before the Court on Appellant Mar-Bow Value Partners, LLC's ("Mar-Bow") appeal from several orders[1] of the United States Bankruptcy

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[1] The appeals in this case will be referred to as "*Mar-Bow II*." A different case pends in which Mar-Bow has filed an appeal of other rulings of the Bankruptcy Court. *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Servs.,* (*Mar-Bow I*) No. 3:16cv612. The Memorandum Opinion in *Mar-Bow I* (the "*Mar-Bow I* Memorandum Opinion") addresses Mar-Bow's appeal of the Bankruptcy Court's rulings on Mar-Bow's objections regarding the Reorganization Plan and Mar-Bow's Motion to Compel Compliance with Rule 2014. This Memorandum Opinion addresses Mar-Bow's appeal of the Bankruptcy Court's grant of McKinsey's Third Interim and Final Fee Applications.

As discussed more fully below, *see infra* note 38, Mar-Bow filed duplicative notices of appeal as to the Fee Application Rulings in this case and in *Mar-Bow I*. The Court addresses Mar-Bow's

Court for the Eastern District of Virginia (the "Bankruptcy Court"), and Appellee McKinsey Recovery & Transformation Services US, LLC's ("McKinsey") Motion to Dismiss Appeal of Mar-Bow Value Partners, LLC for Lack of Standing (the "Motion to Dismiss"), (ECF No. 36). Mar-Bow and McKinsey have filed their respective appellate briefs.[2] (ECF Nos. 45, 49, 51.) Mar-Bow replied to the Motion to Dismiss, (ECF No. 42), and McKinsey replied, (ECF No. 48). The Court dispenses with oral argument because the materials before it adequately present the facts and legal contentions, and argument would not aid the decisional process. Accordingly, the matters are ripe for disposition. The Court exercises jurisdiction pursuant to 28 U.S.C. § 158(a)(1).[3] For the reasons that follow, the Court will grant the motion to dismiss and dismiss Mar-Bow's appeal.

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appeals of the Fee Application Rulings *only* in this Memorandum Opinion.

Given Mar-Bow's numerous appeals in both cases and the related nature of the facts underlying the appeals, the Court notes throughout this Memorandum Opinion which rulings it assesses in this appeal, and which rulings it evaluates in the Memorandum Opinion in the *MarBow I* Memorandum Opinion.

[2] Mar-Bow and McKinsey originally filed opening briefs that addressed only Mar-Bow's first Notice of Appeal. (ECF Nos. 18, 32.) After Mar-Bow filed an Amended Notice of Appeal, Mar-Bow and McKinsey filed a joint motion to withdraw and replace their opening briefs, (ECF No. 33), which the Court granted, (ECF No. 35).

[3] "The district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders, and decrees . . . of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under [28 U.S.C. § 157]. . . ." 28 U.S.C. § 158(a)(1).

I. Standard of Review

"When reviewing a decision of the bankruptcy court, a district court functions as an appellate court and applies the standards of review generally applied in federal courts of appeal." *Paramount Home Entm't Inc. v. Circuit City Stores, Inc.*, 445 B.R. 521, 526–27 (ED. Va. 2010) (citing *In re Webb*, 954 F.2d 1102, 1103–04 (5th Cir. 1992)). The district court reviews the bankruptcy court's legal conclusions *de novo* and its factual findings for clear error. *In re Harford Sands Inc.*, 372 F.3d 637, 639 (4th Cir. 2004). A finding of fact is clearly erroneous if a court reviewing it, considering all of the evidence, "is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); *accord In re Mosko*, 515 F.3d 319, 324 (4th Cir. 2008). In cases where the issues present mixed questions of law and fact, the Court will apply the clearly erroneous standard to the factual portion of the inquiry and *de novo* review to the legal conclusions derived from those facts. *Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond*, 80 F.3d 895, 905 (4th Cir. 1996).

II. Factual Background[4]

Although this appeal arises in the context of a chapter 11 bankruptcy,[5] the dispute before the Court has little to do with the bankruptcy itself. The conflict before the Court is between McKinsey, a professional firm employed by ANR and many of its subsidiaries, the debtors in the underlying bankruptcy action (collectively, the "Debtors"), and Mar-Bow, an unsecured creditor of the Debtors. From the time Mar-Bow first appeared in the bankruptcy action, it objected strenuously and continually to the sufficiency of disclosures that the Bankruptcy Rules require McKinsey, employed to assist with the Debtors' reorganization in this bankruptcy action, to make.[6] Each appeal before the Court attempts to revisit that same issue: whether

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[4] The issues on appeal in this Court have little to do with the facts underlying the bankruptcy case. The Court, therefore, will provide only the factual background necessary to establish context, but will recount the facts relevant to Mar-Bow's appeals in detail. And although the factual background in this case substantially overlaps with the background in *Mar-Bow I*, the Court recounts the relevant factual background in both opinions for clarity's sake.

[5] Chapter 11 permits reorganization of a debtor's business, rather than liquidation of all assets. *See* 11 U.S.C. §§ 1101, *et seq*.

[6] Indeed, the record in the underlying bankruptcy case shows that *all* of Mar-Bow's actions pertained to this one issue: the sufficiency of McKinsey's Rule 2014 disclosures. Even when Mar-Bow succeeded on some motions, it continued challenging what it perceived as a partial denial.

McKinsey fully complied with Federal Rule of Bankruptcy Procedure 2014.[7]

A. The Parties Relevant to the Instant Appeals

The Debtors—Alpha Natural Resources and many of its subsidiaries—are one of the largest coal suppliers in the United States. The Debtors filed for chapter 11 protection in August 2015 in part because of a drastic downturn in the coal industry.

McKinsey Recovery and Transformation Services ("McKinsey") "is a global, full service restructuring advisory and crisis management firm that . . . support[s] companies through all aspects of recovery and transformation." (First Carmody Decl. 3, App. 3.) Essentially, McKinsey advises struggling businesses on how to improve their profitability, and helps businesses implement the changes it suggests. McKinsey has experience providing chapter 11 advisory services, and in helping struggling businesses increase their profitability.

Mar-Bow, as relevant to the bankruptcy action, is an unsecured creditor of the Debtors. On March 23, 2016, almost nine months after the Debtors began their chapter 11 reorganization, Mar-Bow filed a proof

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[7] As discussed more fully below, Rule 2014 requires that professionals employed in a bankruptcy action disclose "connections" with, *inter alia*, the debtor, creditor, and any other parties in interest to the bankruptcy. Fed. R. Bankr. P. 2014(a).

of claim[8] in the amount of $1,250,000.00.[9] The record lacks clarity about the precise nature of Mar-Bow's business, but Mar-Bow is "beneficially owned and funded by" Jay Alix, the founder of the firm "AlixPartners." (Alix Decl. 1, Mar-Bow Mot. Compel Ex. A, Supp. 1551.) AlixPartners is a consulting firm that competes with McKinsey in the turnaround consulting business.

B. Background of the Underlying Bankruptcy Case

On August 3, 2015, the Debtors began the bankruptcy proceedings by filing voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code, which allows for reorganization—rather than liquidation—of a bankruptcy estate. The Bankruptcy Court consolidated all the petitions for procedural purposes only, meaning that one chapter 11 bankruptcy action was pending.

Three weeks later, on August 24, 2015, the Debtors filed an application in the Bankruptcy Court requesting permission to employ McKinsey as a turnaround advisor for the pendency of the bankruptcy case (the

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[8] A proof of claim is the document that a creditor of bankruptcy debtor files in order to register the amount and nature of the debt owed to the creditor.

[9] McKinsey asserts that, after the Debtors retained McKinsey, "Mar-Bow purchased an inconsequential claim. . . . [solely] to litigate against McKinsey RTS." (McKinsey Br. 12, ECF No. 49.) No party contests, however, that Mar-Bow properly filed a proof of claim and remains an unsecured creditor of the Debtors.

"Retention Application").[10] The Debtors sought to retain McKinsey "as their turnaround advisor . . . to assist the Debtors with the development and refinement of their strategic business plan." (Retention Appl. 2–3, App. 2–3.) On September 17, 2015, the Bankruptcy Court granted the Retention Application and authorized the Debtors to retain McKinsey as turnaround advisor.

On March 23, 2016, more than six months after McKinsey's employment had been approved, Mar-Bow filed its proof of claim against ANR, entering the bankruptcy proceeding. On May 1, 2016, Mar-Bow filed its first notice of appearance in the bankruptcy proceeding. Since entering the bankruptcy proceeding,

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[10] The full title of the Retention Application was "Application of the Debtors, Pursuant to Sections 327(a), 328(a) and 1107(b) of the Bankruptcy Code, Bankruptcy Rule 2014(a) and Local Bankruptcy Rule 2014-1, for an Order Authorizing Them to Retain and Employ McKinsey Recovery & Transformation Services U.S., LLC[,] as Turnaround Advisor for the Debtors, Effective as of the Petition Date." (Retention Appl. 1, App. 1.)

Section 327(a) permits the employment of "professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons," to assist in conducting bankruptcy proceedings. 11 U.S.C. § 327(a). Section 328(a) governs the "terms and conditions" of "the employment of a professional person under section 327," 11 U.S.C. § 328(a), and Rule 2014(a) states the procedures by which an application for professional employment must be filed, Fed. R. Bank. P. 2014(a). Section 1107(b) authorized the Debtors to employ McKinsey during the bankruptcy, even though they had employed McKinsey "before the commencement of the case." 11 U.S.C. § 1107(b). Finally, Local Bankruptcy Rule 2014-1 governs service of motions. E.D. Va. Loc. Bankr. R. 2014-1.

Mar-Bow has raised the issue of McKinsey's Rule 2014 disclosures to the Bankruptcy Court formally at least five times.[11] The Court does not see—and neither party identifies—any other action by Mar-Bow in the Bankruptcy Court.

On July 12, 2016, five days after a lengthy evidentiary hearing on the matter, the Bankruptcy Court entered a written order confirming the Debtors' Reorganization Plan.[12] The Reorganization Plan became effective on July 26, 2016. Additional proceedings have taken place in the Bankruptcy Court since then, and Mar-Bow has continued to object to McKinsey's Rule 2014 disclosures.

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[11] The Court discusses Mar-Bow's objections to McKinsey's Rule 2014 disclosures in detail later in the Memorandum Opinion. Mar-Bow's five objections include two that the Court addresses in *this* Memorandum Opinion: (1) Mar-Bow's Objection to McKinsey's Third Interim Fee Application; and, (2) Mar-Bow's Objection to McKinsey's Final Fee Application. Mar-Bow also formally objected three other times, which this Court addresses in its *Mar-Bow I* Memorandum Opinion: (1) Mar-Bow's Motion to Compel Rule 2014 Compliance; (2) Mar-Bow's Motion to Clarify the Order Granting Mar-Bow's Motion to Compel; and, (3) Mar-Bow's Objection to the Reorganization Plan. Finally, Mar-Bow admits that, before filing its Motion to Compel or any other objections to McKinsey's Rule 2014 disclosures, it "brought [the] matter to the attention of the [U.S. Trustee] on March 7, 2016." (Mar-Bow Mot. Compel. 7, App. 389.)

[12] Reorganization is the ultimate goal of a chapter 11 bankruptcy proceeding, and the Reorganization Plan is the method by which chapter 11 debtors emerge from bankruptcy.

C. McKinsey's Employment as Turnaround Advisor for the Debtors

On August 24, 2015, three weeks after filing for bankruptcy, the Debtors filed the Retention Application in the Bankruptcy Court requesting permission to employ McKinsey as a turnaround advisor for the pendency of the bankruptcy case. The Debtors sought to retain McKinsey "as their turnaround advisor . . . to assist the Debtors with the development and refinement of their strategic business plan." (Retention Appl. 2–3, App. 2–3.)

In accordance with Federal Rule of Bankruptcy Procedure 2014(a),[13] the Debtors attached to the Retention

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[13] Rule 2014(a) sets forth the required contents of an application in a bankruptcy court for the employment of a bankruptcy professional. Rule 2014(a) states in full:

> An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the

Application a copy of the "Amended and Restated Agreement" Letter, (the "Engagement Letter") which detailed the proposed terms of McKinsey's employment as turnaround advisor for the Debtors, and the proposed fee arrangement. As turnaround advisor, McKinsey's role was to help the Debtors save money and become more profitable, which would in turn increase the bankruptcy estate and result in maximum recovery for the Debtors' creditors.[14] The Debtors requested that McKinsey's employment be approved as of August 3, 2015, the date the Debtors filed for bankruptcy, because McKinsey had been working with the

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> person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

Fed. R. Bankr. P. 2014(a). Relevant to the Engagement Letter, Rule 2014(a) requires that an application to employ a professional include "the professional services to be rendered, [and] any proposed arrangement for compensation." Fed. R. Bankr. P. 2014(a).

[14] As stated in the Retention Application, McKinsey's role was to

> assist the Debtors with the development and refinement of their strategic business plan. . . . [and] provid[e] chapter 11 advisory services, which include contingency planning, interim management, cash flow and liquidity assessment, forecasting and management, analysis and/or development of business and strategic plans, development and implementation of creditor and/or supplier strategies and development and implementation of operational and/or financial improvement or turnaround plans.

(Retention Appl. 3, App. 3.)

Debtors since June 29, 2015, before the Debtors filed for bankruptcy.

As a term of McKinsey's employment, the Debtors agreed to indemnify McKinsey for a broad array of potential liabilities arising out of McKinsey's employment as turnaround advisor. McKinsey would *not* be indemnified, however, from liabilities resulting from its own "willful misconduct or gross negligence."[15] (Engagement Letter 6, App. 24.)

The Retention Application was unopposed, and on September 17, 2015, the Bankruptcy Court granted the Retention Application, approved the terms of the Engagement Letter, and authorized the Debtors "to employ and retain [McKinsey] as turnaround advisor." (Retention O. 1–6, Supp. 86–91.) These events all occurred six months before Mar-Bow first appeared in the bankruptcy case.

D. McKinsey's Rule 2014 Disclosures

Federal Rule of Bankruptcy Procedure 2014(a) requires that any application for the employment of professionals

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[15] Specifically, the Engagement Letter provided, *inter alia*, that the Debtors would indemnify McKinsey for all "losses, claims, penalties, damages[,] or liabilities" arising out of McKinsey's engagement, except for "any loss, claim, damage, penalty, liability, cost, fee[,] or expense which is finally judicially determined by a court of competent jurisdiction on the merits to have resulted from the willful misconduct or gross negligence of [McKinsey]." (Engagement Letter 5–6, App. 23–24.)

> be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

Fed. R. Bankr. P. 2014(a). On its own and in response to motions, McKinsey filed multiple declarations pursuant to Rule 2014. Mar-Bow objected repeatedly to these disclosures, even as they became increasingly more specific and detailed. Mar-Bow, it seems, especially objected—and continues to object—to the aspect of McKinsey's disclosures that the Bankruptcy Court reviewed only *in camera*. Mar-Bow seeks to place these disclosures on the public record. A summary of McKinsey's Rule 2014 disclosures follows.

1. McKinsey's First Set of Rule 2014 Disclosures

Pursuant to Rule 2014, the Debtors attached to the Retention Application the "Declaration of Kevin Carmody" (the "First Carmody Declaration"), which included a "Disclosure Regarding [McKinsey's] Disinterestedness." (First Carmody Decl. 10–18, App. 39–47.) In the Disclosure Regarding Disinterestedness, Carmody explained the process McKinsey used[16] to identify any

[16] McKinsey took the following steps to determine what connections it had with parties on the interested parties list:

> (a) emailed members of McKinsey RTS and the McKinsey RTS Team and searched its global client

connections it had with the Debtors, the United States Trustee and the Bankruptcy Court, and parties "identified on the interested parties list," (the "Interested Parties"). (*Id.* at 10–18, App. 39–47.) The First Carmody Declaration also outlined McKinsey's connections with the Interested Parties.

The First Carmody Declaration disclosed McKinsey's connections by category, number of connections, and general nature of work performed for the connection, rather than identifying connections with the interested parties by name. For example, McKinsey disclosed that a member of its team "attended a proposal meeting and submitted a proposal to a *Major Competitor* that was not accepted." (*Id.* at 12, App. 41 (emphasis added).) McKinsey also reported specific connections with "one Major Unsecured Noteholder, one Lender Under A/R Facility, three Major Customers,

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> database to determine the existence of any client services provided by such employees within the last three years to parties in interest (the "Interested Parties") identified on the interested parties list . . . ,
>
> (b) emailed members of McKinsey RTS, the McKinsey RTS Team and partners at affiliates that provide consulting services to determine the existence of client services provided by employees within the last three years to any client that focused on a direct commercial relationship or transaction with the Debtors and
>
> (c) emailed all employees of McKinsey RTS and its affiliates to request information on any relationships with the Debtors, the United States Trustee and the Bankruptcy Court, as well as equity ownership in the Debtors.

(First Carmody Decl. 11, App. 40.)

one Revolving Facility Lender, one Other Major Supplier of Goods and Services, one Party to Material Unexpired Leases, and one Party to Joint Ventures," among numerous other categories and connections. (*Id.*) McKinsey's initial disclosure of its connection with Interested Parties by category became a source of controversy in Mar-Bow's subsequent objections to McKinsey's Rule 2014 disclosures.

The Bankruptcy Court reviewed the First Carmody Declaration before entering the Retention Order approving McKinsey's employment as turnaround advisor. On September 17, 2015, after its review, the Bankruptcy Court found that McKinsey qualified as "a 'disinterested person' as such term is defined under section 101(14) of the Bankruptcy Code."[17] (Retention O. 2, Supplemental Appendix ("Supp.") 87.)

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[17] Section 101(14) states in full:

> The term "disinterested person" means a person that—
>
> **(A)** is not a creditor, an equity security holder, or an insider;
>
> **(B)** is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and
>
> **(C)** does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.

11. U.S.C. § 101(14).

2. McKinsey's Subsequent Rule 2014 Disclosures

McKinsey filed two supplemental Rule 2014 Disclosures, even before any objections had been lodged to its initial disclosures. On November 9, 2015, and March 25, 2016, McKinsey filed Supplemental Declarations of Kevin Carmody (respectively, the "Second Carmody Declaration" and the "Third Carmody Declaration"). Each declaration was "in support" of the Retention Application, and intended to "provide certain additional information." (Second Carmody Decl. 2, App. 67; Third Carmody Decl. 1–2, Supp. 1289–90.) In each declaration, Carmody swore that McKinsey "continues to monitor the list of parties on the Interested Parties List against its own client records." (Second Carmody Decl. 3, App. 68; Third Carmody Decl. 2, Supp. 1290.) Carmody also disclosed additional connections—again by category, number, and general nature of the work McKinsey completed for the connection.

E. The Rule 2014 Objections

As discussed earlier, and most relevant to MarBow's objections to McKinsey's Rule 2014 disclosures, Federal Rule of Bankruptcy Procedure 2014(a) requires that a professional seeking employment in a bankruptcy proceeding file "a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in

the office of the United States trustee." Fed. R. Bankr. P. 2014(a). Rule 2014 contains no definition of "connections," nor does it explain further the level of detail required in a professional's Rule 2014 disclosures.

1. The U.S. Trustee's Rule 2014 Objection: The U.S. Trustee's Motion to Compel

The Bankruptcy Court first heard an objection to McKinsey's Rule 2014 disclosures when the United States Trustee (the "U.S. Trustee")[18] filed a motion to compel McKinsey to comply with Rule 2014[19] (the "U.S. Trustee Motion to Compel"). The U.S. Trustee filed its Motion to Compel on May 3, 2016, nine months after the bankruptcy proceeding began and two days after Mar-Bow first appeared in the proceeding.[20] In its

[18] "U.S. Trustees are officers of the Department of Justice who protect the public interest by aiding bankruptcy judges in monitoring certain aspects of bankruptcy proceedings." *United Artists Theatre Co. v. Walton*, 315 F.3d 217, 225 (3d Cir. 2003).

[19] The full title of the U.S. Trustee Motion to Compel was "Motion of the United States Trustee to Compel McKinsey Recovery & Transformation Service U.S., Turnaround Advisor for the Debtors, to Comply with the Requirements of Bankruptcy Rule 2014." (U.S. Trustee Mot. Compel. 1, App. 75.)

[20] The record indicates that the U.S. Trustee filed its Motion to Compel at least partially at Mar-Bow's urging. In Mar-Bow's later objection to McKinsey's Rule 2014 disclosures, Mar-Bow asserts that "Mar-Bow and its counsel had brought [the possible deficiency in McKinsey's Rule 2014 disclosures] to the attention of the United States Trustee Program on March 7, 2016, and expected that the United States Trustee's consequent motion to compel would result in McKinsey's full compliance with Rule 2014." (Mar-Bow Mot. Compel 7, Supp. 1509.)

Motion to Compel, the U.S. Trustee asserted that McKinsey's Rule 2014 disclosures failed to comply with Bankruptcy Rules. Specifically, McKinsey's "declarations disclosed only vague and amorphous connections to creditors and other major parties in interest," and "neither identified these connections by name nor provided any insight into the nature of the connections." (U.S. Trustee Mot. Compel 1–2, App. 75–76.) The U.S. Trustee asked the Bankruptcy Court to compel McKinsey to file additional disclosures, including

> a supplemental declaration stating, at a minimum, (a) the identity of the entities on the Interested Parties List . . . with which McKinsey RTS and any of its affiliates have a connection . . . and (b) a general description of the connection with or work performed for these entities.

(*Id.* at 2, App. 76.)

The U.S. Trustee expressed concern that McKinsey's "failure to provide complete disclosures may also cast a cloud over the Debtors' restructuring strategy." (*Id.* at 11, App. 85.) Because McKinsey had assisted the Debtors in negotiating the terms of a financing agreement and the overall restructuring strategy, the U.S. Trustee argued that the Bankruptcy Court "should order McKinsey to supplement its disclosures so that all

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As noted, Mar-Bow filed its proof of claim on March 23, 2015, and entered its first appearance in the bankruptcy proceeding on May 1, 2016. Thus, it appears that Mar-Bow contacted the U.S. Trustee regarding McKinsey's Rule 2014 disclosures even before it was involved in the underlying bankruptcy proceeding.

interested parties can meaningfully consider whether the Proposed Plan Transactions may be tainted by divided loyalties." (*Id.* at 12, App. 86.) Apparently anticipating that McKinsey might cite confidentiality concerns as a reason for limiting its disclosures, the U.S. Trustee asserted that "McKinsey's private contractual agreements do not and cannot supersede the ethics and disclosure requirements of the Bankruptcy Code and Rules." (*Id.* at 13, App. 87.)

On May 19, 2016, sixteen days later, the U.S. Trustee submitted a "Stipulation Resolving Motion of the [U.S. Trustee Motion to Compel]" (the "U.S. Trustee Stipulation"). The U.S. Trustee Stipulation stated that U.S. Trustee and McKinsey had engaged in "extensive discussions" to resolve the U.S. Trustee's concerns regarding McKinsey's Rule 2014 disclosures. (U.S. Trustee Stip. 2, Supp. 1296.) After these discussions, McKinsey had agreed to file an additional declaration disclosing more information about its connections with Interested Parties.

The same day, pursuant to the U.S. Trustee Stipulation, McKinsey filed a third Supplemental Declaration of Kevin Carmody (the "Fourth Carmody Declaration"). The Fourth Carmody Declaration included more detailed information about McKinsey's connection to the Interested Parties. It also disclosed the names of various Interested Parties that McKinsey had "served" in the past two years. Carmody swore that McKinsey had only served those clients "on matters unrelated to the Debtors and their chapter 11 cases." (Fourth Carmody Decl. 6, App. 96.)

McKinsey still omitted the names of at least three connections, which it identified as "confidential clients." (*Id.*) Before filing the Fourth Carmody Declaration, McKinsey "reviewed its confidentiality obligations to each of its clients identified as a Major Stakeholder or Major Competitor and, to the extent necessary, . . . request[ed] the consent of such client to disclose its name" in the Fourth Carmody Declaration. (*Id.* at 3, App. 93.) Clients who did not consent to the disclosure of their names were identified as "confidential clients." (*Id.* at 4, App. 94.)

The U.S. Trustee stated that it was satisfied that McKinsey's additional disclosures in the Fourth Carmody Declaration complied with Rule 2014.

2. Mar-Bow Remained Unsatisfied with McKinsey's Disclosures

a. Mar-Bow's First Rule 2014 Objection: Mar-Bow's Motion to Compel

On June 6, 2016, dissatisfied with the U.S. Trustee's proposed resolution of McKinsey's disclosures, Mar-Bow filed a 44-page Motion to Compel McKinsey to Comply with Rule 2014 (the "Mar-Bow Motion to Compel"). Mar-Bow asserted that "McKinsey's four disclosure declarations have not allowed the Court the opportunity to . . . independently assess McKinsey's qualifications to serve as a fiduciary for the Debtors." (Mar-Bow Mot. Compel 5, Supp. 1507.) Mar-Bow voiced sweeping policy arguments that McKinsey's allegedly insufficient disclosures threatened both the

bankruptcy system's ability to function[21] and the integrity of the bankruptcy proceeding itself.[22]

Mar-Bow argued that McKinsey's disclosures were insufficiently specific to allow the Bankruptcy Court to evaluate McKinsey's disinterestedness. "McKinsey's broad, generic statements cannot supersede the specific descriptions of connections that case law interpreting Rule 2014 requires and cannot trump the obligation to perform a good faith investigation and to comply with the rule's requirements." (*Id.* at 21, Supp. 1523.) Mar-Bow also contended that the process by which McKinsey conducted its search for connections was inadequate, rendering its disclosures insufficient.[23]

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[21] For example, Mar-Bow asserted that "[t]he systemic issues raised here are of grave importance to the credibility and proper functioning of the bankruptcy system. The court and all bankruptcy professionals should aspire to maintain a transparent bankruptcy system and a level field for all creditors and stakeholders." (Mar-Bow Mot. Compel 8, Supp. 1510.)

[22] Mar-Bow contended that "[s]olicitations of bankruptcy representation opportunities 'go to the integrity of the process,' and must be disclosed by all professionals under Rule 2014, even if attorney rules of professional responsibility are inapplicable." (Mar-Bow Mot. Compel 28, Supp. 1530 (quoting *In re Universal Bldg. Prods.*, 486 B.R. 650, 664 n.16 (Bankr. D. Del. 2010).)

[23] Because "McKinsey apparently cannot discover from the entire McKinsey & Company database checking system whether it was or is involved in any matter adverse to the Debtors," its "disclosures are built upon a foundation that is too deficient to carry the weight of the requirements of Rule 2014." (Mar-Bow Mot. Compel 30, 35, Supp. 1532, 1537.)

The Mar-Bow Motion to Compel sought an order from the Bankruptcy Court requiring McKinsey to submit significant additional disclosures and detail regarding McKinsey's connections to the interested parties in the case. Mar-Bow also asked the Bankruptcy Court to suspend payment of McKinsey's fees, and to disgorge all of McKinsey's previously paid fees "in the event that McKinsey fails to comply with the Court's order or the Court determines that McKinsey is not qualified to serve as a professional" in the case. (*Id.* at 42–43, Supp. 1544–45.) Mar-Bow further requested an order that "McKinsey, its affiliates, and its professionals, shall not be entitled to a release, indemnity[,] or exculpation of any kind or nature in this case, whether through a plan of reorganization or otherwise." (*Id.* at 44, App. 1546.)

i. <u>The Bankruptcy Court's Hearing on Mar-Bow's Motion to Compel</u>

On June 28, 2016, the Bankruptcy Court held a hearing on Mar-Bow's Motion to Compel. In the hearing, the Bankruptcy Court allowed lengthy argument from both sides, actively engaging the parties as to their positions. Brushing aside some of McKinsey's procedural arguments in opposition to Mar-Bow's Motion to Compel, the Bankruptcy Court stated,

> And that's the point I was . . . trying to get across a few minutes ago about why it is so important that parties in interest bring these kinds of matters to the attention of the Court so the Court can deal with them. And just

> because we've got a great watering-down of Rule 2014 because nobody is, apparently, complying with the rule, doesn't mean that the rule shouldn't be enforced. It should be enforced.

(June 28, 2016 Hr'g Tr. 127, App. 1480.) The Bankruptcy Court identified "three different categories of things" that would affect its decision on the Mar-Bow Motion to Compel:

> One is these 121 actual known clients that have not been identified. Second is the investments of McKinsey Investment in other entities that [McKinsey] say[s] that if it does exist, should be disclosed. . . . And third is, . . . what were the results to the [email] survey?

(*Id.* at 134, App. 1487.)

The Bankruptcy Court solicited a statement from the U.S. Trustee, who "g[a]ve the Court pretty much a synopsis of what came about, and how [the Trustee Motion to Compel] ended up being withdrawn at the end." (*Id.* at 143, App. 1496.) Specifically, the U.S. Trustee stated that, after McKinsey filed the Fourth Carmody Declaration, "the U.S. Trustee was satisfied that McKinsey possessed no conflicts and had greatly improved the public record of its connections." (*Id.* at 145, App. 1498.) When asked whether the U.S. Trustee believed that McKinsey's disclosures satisfied Rule 2014, the Trustee responded, "If it were left up to me, I think my solution to this problem would be for [McKinsey] to make the list [of their confidential clients] available

and file it and ask that it be filed under seal." (*Id.* at 145–46, App. 1498–99.)

After lengthy argument in which the Bankruptcy Court heard from Mar-Bow, McKinsey, the U.S. Trustee, and ANR, the Bankruptcy Court ruled that it would require McKinsey to provide the Bankruptcy Court with additional information. The Bankruptcy Court stated that it would "require McKinsey to disclose the 121 [confidential] clients. . . . to the Court in camera." (*Id.* at 157, App. 1510.) The Bankruptcy Court "allow[ed] McKinsey to negotiate . . . with the debtor, with the committee, with the Office of the U.S. Trustee, and [Mar-Bow]" in order to have "the proper confidentiality provisions before anything is disclosed." (*Id.*) The Bankruptcy Court stated that its

> purpose here is not to destroy McKinsey's business model [of confidentiality].[24] It's certainly not to give a competitive advantage to a competitor. The Court's going to be

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[24] In the hearing, *Mar-Bow* discussed in great detail McKinsey's confidentiality practices:

> [McKinsey] holds out that it maintains a strict policy of confidentiality regarding its clients. Its Web site proclaims, "We guard client confidences." And then again, "We don't publicize our work for our clients."
>
> . . .
>
> The code of ethics [McKinsey's founder] promoted included this commitment to confidentiality, and as a result, McKinsey never talks about its clients. Its clients can talk about McKinsey, and some of them have[,] but McKinsey never talks about its clients.

(June 28, 2016 Hr'g Tr. 93–94, App. 1446–47.)

> completely respectful of all of that, but I am not going to do anything to impair the integrity of Rule 2014. . . .
>
> . . . McKinsey's a professional. . . . They're a fiduciary. They're employed by the fiduciary. They're held to the same standard.

(*Id.* at 158, App. 1511.) The Bankruptcy Court also ordered that McKinsey provide it with information that "the [Bankruptcy] Court needs to have . . . in order to make the disclosures that have been provided in this case meaningful." (*Id.*)

ii. The Bankruptcy Court's Order Compelling Compliance[25]

On July 1, 2016, three days after argument on Mar-Bow's Motion to Compel, the Bankruptcy Court entered an order granting Mar-Bow's Motion to Compel in certain respects, as stated at the June 28, 2016 Hearing (the "Order Compelling Compliance"). Specifically, the Bankruptcy Court ordered McKinsey to deliver to the Bankruptcy Court, for *in camera* review:

> (1) "A list containing the names of the 121 undisclosed connections discussed at the hearing, together with sufficient information for the Court to determine (1) whether any of those connections constitute an interest that is adverse to the

[25] Mar-Bow appealed the Order Compelling Compliance. The Court addresses that appeal in the *Mar-Bow I* Memorandum Opinion.

estate and (2) whether McKinsey is disinterested, all as required by 11 U.S.C. § 327";

(2) "Identification of Interested Parties that manage investments for MIO Partners, Inc.," a McKinsey affiliate;

(3) "Identification of Interested Parties in which MIO owns securities," subject to several limitations"; and,

(4) "The survey response rates to the email surveys" sent by McKinsey to determine the presence of connections, "together with sufficient information for the Court to determine (1) whether any of those connections constitute an interest that is adverse to the estate and (2) whether McKinsey is disinterested, all as required by 11 U.S.C. § 327."

(O. Compelling Compliance 2–3, App. 898–99.)

b. Mar-Bow's Second Rule 2014 Objection: Mar-Bow's Motion to "Clarify"

On July 5, 2016, four days later, Mar-Bow filed a "Motion to Clarify" the Bankruptcy Court's July 1, 2016 Order. Mar-Bow contended that, although the Order Compelling Compliance provided for *in camera* review of McKinsey's additional disclosures and allowed the U.S. Trustee and professionals employed by the Debtors to review the additional information, the Order Compelling Compliance "does not appear to allow

Mar-Bow's professionals to review" the information. (Mot. Clarify 1–2, Supp. 1598–99.) Although Mar-Bow expressly stated that its Motion to Clarify was "not a motion for reconsideration," (*id* at 1, App. 1598), Mar-Bow devoted more than a full page to argument about why Mar-Bow should be allowed to review the additional information because Mar-Bow was the party "that first shed light on McKinsey's failure to comply with Rule 2014," and the party who "has demonstrated the greatest commitment to assist the Court in fulfilling its obligation to maintain the integrity of its processes through strict enforcement of . . . Rule 2014," (*id.* at 2–3, App. Supp. 1599–1600).

i. <u>The Bankruptcy Court's Rulings on Mar-Bow's Motion to "Clarify"</u>

On July 7, 2016, the Bankruptcy Court heard argument on Mar-Bow's Motion to Clarify. Mar-Bow reasserted its position that it should participate in the process of reviewing McKinsey's Rule 2014 disclosures, evaluating the sufficiency of those disclosures, and determining whether McKinsey qualified as a disinterested person. As discussed in the *Mar-Bow I* Memorandum Opinion, the Bankruptcy Court—remarkably, given the timing of Mar-Bow's Motion to Clarify—had already reviewed the additional information it ordered McKinsey to disclose when the July 7, 2016 Hearing began. The Bankruptcy Court stated, based on its review of the *in camera* production, that it was completely satisfied with McKinsey's

disinterestedness, and that McKinsey's *in camera* disclosures had been entirely sufficient.

On July 15, 2016, the Bankruptcy Court entered an Order addressing Mar-Bow's Motion to Clarify (the "Clarification Order").[26] The Bankruptcy Court ordered that twenty-one days after the parties had reviewed the accompanying Confidentiality Order, the U.S. Trustee could file "a recommendation with the Court whether any further public disclosures should be made." (Clarification O. 2, App. 904.) After the U.S. Trustee filed its recommendation, the Bankruptcy Court would determine whether McKinsey would be required to file "further public disclosures." (*Id.*) The Bankruptcy Court denied any further requests in Mar-Bow's Motion to Clarify. (*Id.*)

Also on July 15, 2016, the Bankruptcy Court entered a "Confidentiality Order Pursuant to Order Dated July 1, 2016" (the "Confidentiality Order").[27] The Confidentiality Order governed the "information submitted to the [Bankruptcy] Court for in *camera review* [sic] pursuant to the July 1 Order, relating to the disclosure of [McKinsey's] connections under Bankruptcy Rule 2014 and any further information McKinsey . . . provides to satisfy such requirements." (Confidentiality O. 2, Supp. 1819.) The Confidentiality Order provided that McKinsey could designate a document as

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[26] Mar-Bow appealed the Clarification Order. The Court addresses that appeal in the *Mar-Bow I* Memorandum Opinion.

[27] Mar-Bow appealed the Confidentiality Order. The Court addresses that appeal in the *Mar-Bow I* Memorandum Opinion.

confidential by placing the words "CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER" on the document, which would constitute a "certification by McKinsey . . . that the information is treated as confidential by McKinsey . . . and its affiliates." (*Id.* at 2–3, Supp. 1819–20.) The Confidentiality Order also designated categories of persons allowed to review confidential information, and expressly excluded people who are "employees, directors, or officers of a competitor of McKinsey RTS and its affiliates" or people who are "a direct competitor of McKinsey RTS or its affiliates."[28] (*Id.* at 4, Supp. 1821.)

ii. The U.S. Trustee Recommended that McKinsey Publicly File Additional Rule 2014 Disclosures

On August 5, 2016, the U.S. Trustee filed a "Statement of the Recommendation of the United States Trustee on Public Disclosures by McKinsey RTS" (the "U.S. Trustee Recommendation"). The U.S. Trustee acknowledged that the Bankruptcy Court had already found that McKinsey was a disinterested person, and "the sole issue for adjudication now is what further public disclosures McKinsey . . . should make." (U.S. Trustee Rec. 3, Supp. 2049.) The U.S. Trustee recommended that McKinsey make additional public disclosures "[b]ecause Rule 2014 does not define connections, and because transparency is critical to the integrity of

[28] This exclusion meant that no employee, director, or officer of Mar-Bow could view the confidential information.

the bankruptcy process." (*Id.*) The U.S. Trustee recommended that McKinsey make the following additional disclosures:

> 1) "Every name on the list of interested parties provided by the Debtors ("interested parties' list") with whom either McKinsey RTS or personnel borrowed from an affiliate thereof, has a connection and a statement whether any services provided were related to or adverse to the Debtors . . . for a period of three years before the petition date";
>
> 2) "Every name on the interested parties' list who was a client of any McKinsey RTS affiliate with respect to 'a direct commercial relationship or transaction' with the Debtors . . . for a period of three years before the petition date";
>
> 3) "Every name on the interested parties' list that previously employed McKinsey RTS personnel . . . for a period of three years before the petition date"; and,
>
> 4) "Every name of a professional on the interested parties' list that represents or represented McKinsey RTS or its affiliates . . . for a period of three years before the petition date."

(*Id.* at 3–4, Supp. 2049–50.) The U.S. Trustee asserted that "[t]he disclosures made to date, with the additional disclosures recommended here, will satisfy Rule 2014." (*Id.* at 4, Supp. 2050.)

iii. McKinsey Publicly Filed Additional Rule 2014 Disclosures

The same day, McKinsey filed the "Declaration of Kevin Carmody in Respect of Recommendation of [U.S.] Trustee" (the "Fifth Carmody Declaration"). The Fifth Carmody Declaration "provide[d] th[e] disclosure" that the U.S. Trustee recommended. (Fifth Carmody Decl. 2, App. 969.)

F. Mar-Bow's Third Rule 2014 Objection: Mar-Bow's Reorganization Plan Objection

While Mar-Bow and McKinsey were litigating the sufficiency of McKinsey's Rule 2014 disclosures, the rest of the bankruptcy proceedings continued to move forward. On May 25, 2016, the Debtors filed the "Second Amended Joint Plan of Reorganization of Debtors and Debtors in Possession" (the "Reorganization Plan" or "Plan"), which set forth the proposed reorganization terms. On June 29, 2016, Mar-Bow filed an objection to the Reorganization Plan, contending that that provisions of the Plan that released, excused, and indemnified various professionals from liability for actions taken in connection with the restructuring should not apply to McKinsey because McKinsey had not fully complied with Rule 2014.

1. The Bankruptcy Court Heard Mar-Bow's Reorganization Plan Objection

On July 7, 2016, after hearing argument on Mar-Bow's Motion to Clarify, the Bankruptcy Court

conducted a four-and-a-half-hour long evidentiary hearing (the "Plan Confirmation Hearing"). At the Plan Confirmation Hearing, the Bankruptcy Court heard testimony and received declarations offered as exhibits. It also heard argument on Mar-Bow's Reorganization Plan Objection.

Mar-Bow asserted that its objection was "in the nature of a limited objection. And it's based on the fact the disclosure has not been made—sufficient disclosure has not been made." (July 7, 2016 Hr'g Tr. 113, Supp. 2227.) Mar-Bow suggested that "the way [its] limited objection could be satisfied would be to carve McKinsey's exculpation and release out of the [P]lan pending the resolution of the [Rule 2014] dispute." (*Id.* at 114, Supp. 2228.)

Expressing confusion about the link between Mar-Bow's objection and the remedy it sought, the Bankruptcy Court asked, "[W]hy would [additional Rule 2014 disclosures from McKinsey] make any difference with regard to the exculpation provisions in the [P]lan?" (*Id.* at 115, Supp. 2229.) Mar-Bow responded that it did not "believe that an adequate disclosure has been made," and that it was its "belief that McKinsey has connections with or represents, if not all, virtually all of the lenders in this case." (*Id.* at 116, Supp. 2230.) Mar-Bow seemed to argue, essentially, that McKinsey could not "demonstrate that it has undivided loyalty to the debtor, and therefore, [Mar-Bow] believe[s] that they're not disinterested, and therefore, they should not have the benefit of an exculpation or a release in this case." (*Id.*)

Trying again to discern the basis for Mar-Bow's objection to the release and exculpation provisions, the Bankruptcy Court stated

> [M]aybe I'm confused about what you're actually objecting to as far as exoneration is concerned. . . .
>
> Because [the exoneration provision] just sets the standard of proof, does it not. . . . [I]t's just negligence and such that receives the benefit of exoneration and it has to be brought before this Court. . . .
>
> . . . [W]e have an affirmative statement from McKinsey that says we are disinterested. . . . And if they're intentionally shown that that's not the case, then why would anything—exoneration make any difference as far as [Mar-Bow]?

(*Id.* at 117–18, Supp. 2231–32.) Mar-Bow responded, "I don't necessarily agree with the proposition, Your Honor. I believe that exoneration and release will effectively preclude our ability to get to the bottom of this matter." (*Id.* at 118, Supp. 2230.)

In argument, McKinsey expressed the same confusion the Bankruptcy Court had: "I think a party standing up and saying I don't know certain names does not connect the dots as to why that has anything to do with the exculpation and releases in the plan." (*Id.*) Counsel for the Debtors conveyed similar bewilderment:

> We have, as far as I know, an order on the docket finding disinterestedness. So we would suggest that to the extent there is some issue that needs to be addressed by the Court in due course, it can be done, but it should not affect [the Plan] confirmation.
>
> [I]f there was some effort to defraud the Court and not disclose something, that would not be, by its terms, covered by our releases and exculpation. And it sounds like that's the concern and I don't think that's something we're asking the Court to give people a free pass on.

(*Id.* at 120–21, Supp. 2234–35.)

The Bankruptcy Court overruled Mar-Bow's objection, stating, "I think I've dealt with that. . . . And I'm absolutely satisfied, as I said before, McKinsey is [a] disinterested party based on everything that I've seen, which was far more than adequate submission that I received yesterday." (*Id.* at 121–22, Supp. 2235–36.)

2. The Bankruptcy Court's Factual Findings Regarding the Reorganization Plan

During the Plan Confirmation Hearing, the Bankruptcy Court made numerous factual findings about the Reorganization Plan, the release and exculpation provisions, and the role the professionals played in

developing the Plan and making it successful.[29] Specifically, the Bankruptcy Court found:

- "[T]he contributions of the released parties are significant in this case. In fact, this reorganization would not occur but for those [contributions]." (*Id.* at 176, Supp. 2290)
- The release and exculpation provisions were appropriate, in part because of "the significant contribution of assets, the fact that it was essential to the reorganization, that there was overwhelming acceptance of the plan, and that there wouldn't be a distribution to any of these parties without it, and in fact, no parties that are participating in any of this are getting—are objecting to the release." (*Id.*)
- "And so I think also very, very importantly in this case, . . . the releases. . . . are part of a plan. It was put into the plan, and all the creditors got to vote on this. And I think that that is extremely important, that it was baked into the plan, part of the plan, and everybody got a chance to be a part of that. . . . [That's] something that I consider very, very highly in approving these releases." (*Id.*)

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[29] Mar-Bow challenged none of these findings at the hearing, and it challenges none of these findings in this appeal or in its *Mar-Bow I* appeal.

- The Plan "has a substantial consensus of the various constituencies, [and] significant support of all of the creditors and other parties-in-interest." (*Id.* at 191, Supp. 2305)
- "[A]ll of the professionals involved in the case [contributed to]. . . . a very, very successful resolution to [the Plan]." (*Id.* at 192, Supp. 2306)

3. The Bankruptcy Court's Order Confirming the Reorganization Plan[30]

On July 12, 2016, the Bankruptcy Court entered a written order confirming the Reorganization Plan and overruling objections to it. The Bankruptcy Court found that the Plan's basic transaction would not occur without the release and exculpation provisions:

> NewCo will not enter into the Stalking Horse APA and consummate the transactions contemplated thereby, thus adversely affecting the Debtors' Estates and undermining the ability of the Debtors to consummate the Plan, if: . . . the injunction, exculpation and release provisions in the Plan were not approved by the Bankruptcy Court.

(Reorganization Plan ¶ WW, Supp. 1628.) The Bankruptcy Court also found that "the provisions of the Plan constitute a good faith compromise and

[30] Mar-Bow appealed narrow provisions of the Order Confirming the Reorganization Plan. The Court addresses that appeal in the *Mar-Bow I* Memorandum Opinion.

settlement of all Claims and controversies resolved pursuant to the Plan." (*Id.* ¶ GGG, Supp. 1632.) The Reorganization Plan became effective on July 26, 2016, and it was "deemed to be substantially consummated" on that day.[31] (*Id.* at 84, Supp. 1689.)

G. Mar-Bow's Fee Application Objections

Mar-Bow also challenged the sufficiency of McKinsey's Rule 2014 disclosures each time McKinsey filed an application for fees in the Bankruptcy Court. The Court discusses those challenges below.

1. McKinsey's Third Interim Fee Application

On June 14, 2016, McKinsey filed its Third Fee Application for services rendered from February 1, 2016, through April 30, 2016 (the "Third Fee Application").

[31] After noting its appeal of the Order Confirming the Reorganization Plan, Mar-Bow sought and was denied a stay of implementation of the Plan pending the outcome of its appeal. That appeal is addressed in the *Mar-Bow I* Memorandum Opinion. Mar-Bow's Motion to Stay and the Bankruptcy Court's ruling on that motion have no bearing on the issues in this appeal, so the Court omits discussion of Mar-Bow's Motion to Stay from this Memorandum Opinion.

a. Mar-Bow's Fourth Rule 2014 Objection: Mar-Bow's Third Fee Application Objection[32]

On July 1, 2016, Mar-Bow objected to McKinsey's Third Fee Application, again raising the issue of McKinsey's alleged Rule 2014 noncompliance (the "Third Fee Application Objection"). Mar-Bow contended that, "[w]ithout full and complete disclosure as required by Rule 2014, Mar-Bow is unable to determine whether the tasks performed or the fees sought are solely for the purpose of representing the Debtors and are in the best interests of the Estates." (Mar-Bow Third Fee Appl. Obj. 3, App. 886.) Mar-Bow further stated that it was objecting to the Third Fee Application

> so as to preserve its ability to supplement this Objection (if necessary) when it obtains complete disclosure as required by Rule 2014, to preserve its ability to object to any additional Interim or Final Fee Applications, and to reiterate and preserve its objection to any release and exculpation provisions of the Plan that apply to McKinsey RTS.

(*Id.* at 5, App. 888.)

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[32] McKinsey's Third Interim Fee Application marked Mar-Bow's first objection to McKinsey's fee applications. Given that the Third Fee Application covered services rendered beginning on February 1, 2016, and Mar-Bow did not enter the bankruptcy case until March 23, 2016, almost two months later, the record implies that the Third Fee Application was Mar-Bow's first opportunity to challenge McKinsey's fees directly.

b. <u>McKinsey Moved to Dismiss Mar-Bow's Objection to the Third Fee Application</u>

On August 1, 2016, McKinsey moved to dismiss Mar-Bow's objection to the Third Fee Application (the "Motion to Dismiss Third Fee Application Objection"). McKinsey argued that Mar-Bow's objection should be dismissed for at least four reasons.

First, McKinsey contended that the issue of McKinsey's disinterestedness and entitlement to fees had been "[r]aised and [d]ecided" when the Bankruptcy Court ruled on Mar-Bow's Motion to Compel. (Mot. Dismiss Third Fee Appl. Obj. 2, App. 944.) Second, McKinsey asserted that the Confirmation Order and the Bankruptcy Court's findings therein "bar and estop Mar-Bow from claiming . . . that it may have received less than its fair entitlements" in the Reorganization Plan for any reason, including any alleged inadequacy of McKinsey's Rule 2014 disclosures. (*Id.* at 3, App. 945.) Third, McKinsey maintained that Mar-Bow lacked standing to object to the Third Fee Application because Mar-Bow's recovery was fixed in the Reorganization Plan, meaning that Mar-Bow had no pecuniary interest in the outcome of its objection. (*Id.*) Finally, McKinsey insisted that Mar-Bow's earlier appeals of the Bankruptcy Court's Rule 2014 Rulings prevented the Bankruptcy Court from ruling, in the context of the Third Fee Application, that McKinsey's Rule 2014 disclosures were inadequate. McKinsey contended that Mar-Bow's appeals divested the Bankruptcy Court of the "power to change or render moot" its earlier

determinations regarding McKinsey's compliance with Rule 2014. (*Id.* at 3–4, App. 945–46.)

c. The Bankruptcy Court Heard and Ruled on Mar-Bow's Third Fee Application Objection

On September 8, 2016, the Bankruptcy Court held a hearing on McKinsey's Third Fee Application, and addressed Mar-Bow's Objection and McKinsey's Motion to Dismiss. Mar-Bow argued at length about McKinsey's Rule 2014 disclosure failings. Mar-Bow ultimately clarified that it sought "no relief other than sanctions against McKinsey." (Sept. 8, 2016 Hr'g Tr. 27, App. 1574.) Mar-Bow contended that "sanctions are justified here. They are not only justified, they are compelled." (*Id.* at 27, App. 1574.) Mar-Bow asserted that, as a sanction, "[a]t a minimum, . . . this third fee application should be denied." (*Id.* at 29, App. 1576.)

After patiently hearing Mar-Bow's challenge of McKinsey's Rule 2014 disclosures—now for at least the fourth time—the Bankruptcy Court granted McKinsey's Third Fee Application. The Bankruptcy Court found that "the work that [McKinsey] performed in this case was vital to the reorganization, and . . . the fees that were charged are reasonable." (*Id.* at 42, App. 1589.) The Bankruptcy Court reiterated its previous finding that McKinsey was disinterested, stating that "[a]ll of the connections that have been disclosed . . . do not show a lack of disinterestedness." (*Id.* at 43, App. 1590.) For those reasons, the Bankruptcy Court

"approve[d] the interim fee application," and "for exactly the same reasons, . . . grant[ed] the motion to dismiss."[33] (*Id.* at 44, App. 1591.)

On September 23, 2016, the Bankruptcy Court entered an order granting McKinsey's Third Fee Application, overruling Mar-Bow's objection to the Third Fee Application, and granting McKinsey's Motion to Dismiss Third Fee Application Objection "in accordance with the Court's ruling on the record at the Hearing" (the "Third Fee Application Order").[34] (Third Fee Appl. O. 3–4, App. 1300–01.) Mar-Bow appealed the Third Fee Application Order that day.

2. McKinsey's Final Fee Application

On September 26, 2016, McKinsey filed its fourth and Final Fee Application for services rendered from May 1, 2016, through July 26, 2016 (the "Final Fee Application").

a. Mar-Bow's Fifth Rule 2014 Objection: Mar-Bow's Final Fee Application Objection

On October 26, 2016, Mar-Bow objected to McKinsey's Final Fee Application, raising the same

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[33] The Bankruptcy Court then clarified that "since I've granted the fees, that it really renders [the Motion to Dismiss] moot to a certain extent." (Sept. 8, 2016 Tr. 45, App. 1592.)

[34] Mar-Bow appeals the Third Fee Application Order, which the Court addresses in this Memorandum Opinion.

arguments it previously had put forth regarding McKinsey's Rule 2014 disclosures. McKinsey moved to dismiss Mar-Bow's objection, advancing the same defenses it previously had asserted, and further contending that Mar-Bow failed to establish that it was entitled to reconsideration of the Bankruptcy Court's previous decisions regarding McKinsey's Rule 2014 disclosures.

b. <u>The Bankruptcy Court Heard and Ruled on Mar-Bow's Final Fee Application Objection</u>

On December 7, 2016, the Bankruptcy Court held a hearing on McKinsey's Final Fee Application. The parties' arguments addressing Mar-Bow's Final Fee Application Objection focused on whether Mar-Bow had constitutional standing to object to McKinsey's Final Fee Application. McKinsey contended that because the Reorganization Plan fixed Mar-Bow's recovery amount, Mar-Bow had no pecuniary interest in McKinsey's fees being disgorged. McKinsey also asserted that the Bankruptcy Court lacked jurisdiction to hear Mar-Bow's Final Fee Application Objection because the Rule 2014 issue raised in Mar-Bow's objection already was before this Court on appeal. According to McKinsey, "[t]he appellate jurisdiction principle is that this [Bankruptcy] Court can't do something that changes the record on appeal to the district court to perhaps moot it." (Dec. 7, 2016 Hr'g Tr. 16–17, App. 2001–02.) Mar-Bow, in turn, argued broadly that "the law is applicable to McKinsey's fee application, whether any

particular party has standing or not," and that "the [Bankruptcy] Court's independent obligation to review fees is not diminished in any sense." (*Id.* at 6, App. 1991.)

The Court granted McKinsey's Motion to Dismiss from the bench, concluding that Mar-Bow lacked constitutional standing, and that the Rule 2014 disclosures were before this Court. (*Id.* at 20, App. 2005.) The Bankruptcy Court commented that it was "not going to do anything to interfere with the district court's ability to be able to resolve the issues it has before it on appeal." (*Id.*)

On December 20, 2016, the Bankruptcy Court entered an order granting McKinsey's Final Fee Application and dismissing Mar-Bow's objection to the Final Fee Application (the "Final Fee Application Order"),[35] an order granting McKinsey's Motion to Dismiss Mar-Bow's Final Fee Application objection (the "Motion to Dismiss Order"),[36] and a memorandum opinion explaining its reasons for dismissing Mar-Bow's objections (the "Motion to Dismiss Memorandum Opinion").[37] In the Final Fee Application Memorandum Opinion, the Bankruptcy Court held that Mar-Bow lacked constitutional standing "to raise the Objection

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[35] Mar-Bow appeals the Final Fee Application Order, which the Court addresses in this Memorandum Opinion.

[36] Mar-Bow appeals the Motion to Dismiss Order, which the Court addresses in this Memorandum Opinion.

[37] Mar-Bow appeals the Motion to Dismiss Memorandum Opinion, which the Court addresses in this Memorandum Opinion.

[to the Final Fee Application], as Mar-Bow no longer has a pecuniary interest in the outcome of the Final Fee Application." (Mot. Dismiss Mem. Op. 5, App. 1938.) The Bankruptcy Court reasoned that because Mar-Bow's expected recovery became fixed at the time the Reorganization Plan was confirmed, Mar-Bow would reap no financial benefit from a denial of McKinsey fees, meaning that Mar-Bow therefore lacked standing to object to its Final Fee Application. (*Id.* at 7, App. 1940.) The Bankruptcy Court also ruled that it lacked subject-matter jurisdiction to address Mar-Bow's Rule 2014 arguments because the Bankruptcy Court's "findings that McKinsey . . . complied with Bankruptcy Rule 2014 and . . . is a 'disinterested person' are both currently pending review by the District Court." (*Id.* at 7–8, App. 1940–41.)

On December 29, 2016, Mar-Bow amended its appeal in this case to include an appeal of the Final Fee Application Order, the Motion to Dismiss Order, and the Motion to Dismiss Memorandum Opinion.[38]

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[38] Mar-Bow also noticed an appeal, in *Mar-Bow I*, of the Final Fee Application Order, the Motion to Dismiss Order, and the Motion to Dismiss Memorandum Opinion. The Court cannot discern why Mar-Bow attempts to appeal the same three rulings in two different cases. Mar-Bow not only fails to acknowledge its duplicative appeals in the filings before this Court, but also directs the Court to no authority—substantive or procedural—entitling it to appeal the same orders two separate times in two different cases. Because Mar-Bow's appeals of rulings regarding McKinsey's Final Fee Application relate to Mar-Bow's appeal of rulings regarding McKinsey's Third Fee Application, the Court addresses the appeals of those four rulings in this Memorandum Opinion.

III. Procedural History

Before the Court are Mar-Bow's appeals of four Bankruptcy Court rulings:

(1) Third Fee Application Order;

(2) Final Fee Application Order;

(3) Motion to Dismiss Order; and,

(4) Motion to Dismiss Memorandum Opinion.

Mar-Bow and McKinsey both filed their Opening Briefs (ECF Nos. 45, 49), and Mar-Bow filed its reply brief, (ECF No. 51). McKinsey moved to dismiss Mar-Bow's appeals for lack of standing. (ECF No. 36.) Mar-Bow responded, (ECF No. 42), and McKinsey replied, (ECF No. 48).

For the reasons that follow, the Court will grant McKinsey's Motion to Dismiss. The Court will dismiss Mar-Bow's appeal for lack of standing.

IV. Analysis: Mar-Bow's Appeal of the Fee Application Rulings[39]

Mar-Bow appeals four rulings of the Bankruptcy Court, all of which relate to Mar-Bow's objections to McKinsey's Fee Applications. Mar-Bow objected to McKinsey's Third Fee Application and McKinsey's Final Fee Application on the grounds that McKinsey had

[39] For readability, the Court will refer to the Bankruptcy Court's rulings at issue in this appeal collectively as "the Fee Application Rulings."

failed to comply with Rule 2014. Mar-Bow suggests that McKinsey's noncompliance with Rule 2014 renders McKinsey ineligible to receive fees and also subjects McKinsey to additional monetary sanctions. Because Mar-Bow lacks standing to appeal the Fee Application Rulings, the Court will not reach the merits of Mar-Bow's arguments.

A. The Scope of Mar-Bow's Fee Application Rulings Appeals

Mar-Bow presents three issues to the Court: (1) whether the Bankruptcy Court erred in dismissing Mar-Bow's Fee Application Objections for lack of standing; (2) whether the Bankruptcy Court erred "in relying on its finding of disinterestedness in declining to sanction McKinsey"; and, (3) whether the Bankruptcy Court abused its discretion in declining to sanction McKinsey.[40] (Mar-Bow Br. 1–2, ECF No. 45.) Mar-Bow asks this Court to "order that Mar-Bow may object and be heard on McKinsey's requests for fees, and [ ]

[40] Mar-Bow argues—as it does throughout all its filings in this Court—that the twenty-five pages of "connections" McKinsey identified in its four different publicly filed Rule 2014 disclosures remain insufficient, even though McKinsey's disclosures satisfied both the U.S. Trustee and the responsive and thorough Bankruptcy Court. Thus, according to Mar-Bow, McKinsey should receive no fees for its professional services. Because the Court grants McKinsey's Motion to Dismiss and dismisses Mar-Bow's appeal for lack of standing, the Court will not evaluate the merits of what amounts to a derivative attack on McKinsey's Rule 2014 disclosures under the guise of a challenge to fees. The Court speaks to additional challenges to McKinsey's Rule 2014 disclosures in its *Mar-Bow I* Memorandum Opinion.

reverse the bankruptcy court's approval of McKinsey's fee applications for failure to comply with Rule 2014." (*Id.* at 47, ECF No. 45.) McKinsey counters that its Rule 2014 disclosures in the bankruptcy proceeding were adequate, that the Bankruptcy Court did in fact hear Mar-Bow on McKinsey's fee requests, and that the Bankruptcy Court correctly determined that Mar-Bow lacked standing to object to McKinsey's fee applications.

McKinsey also has moved to dismiss Mar-Bow's appeal for lack of standing. McKinsey argues that "[n]ow that the Plan has been confirmed and has become effective, Mar-Bow has no financial stake in the outcome of the Interim Fee Objection or any of the Fee Orders" meaning that Mar-Bow lacks the requisite pecuniary interest in the outcome of the appeal. (Mot. Dismiss 10–11, ECF No. 36.) According to McKinsey, because the United States Court of Appeals for the Fourth Circuit has held that a bankruptcy "appellant is required to have a pecuniary interest in the outcome of the appeal to have standing as a person aggrieved," Mar-Bow's appeal of the Fee Application Rulings must be dismissed. (*Id.* at 11, ECF No. 36.)

Mar-Bow implicitly acknowledges that it lacks a pecuniary interest in the outcome of the appeal, but asserts that

> [w]hether a party must satisfy a "pecuniary interest" test for bankruptcy appellate standing is a separate question from whether a party has constitutional standing to maintain an action. The "pecuniary interest" test is

> more stringent than the broader test for Article III standing under the Constitution, which does not require a showing of financial harm.

(Resp. Mot. Dismiss 7, ECF No. 42.) Mar-Bow avers that it possesses Article III standing to appeal the Fee Application Rulings, based on an alleged injury in fact that stems from its deprivation of "access to judicial records," namely, the Rule 2014 disclosures that Mar-Bow asserts McKinsey should have filed. (*Id.* at 8.) Mar-Bow's Article III standing argument unfolds as follows:

> Because Mar-Bow has a colorable claim to access McKinsey's connections under Rule 2014, it has established an injury in fact for purposes of Article III. Having done so, Mar-Bow easily satisfies the other two elements of Article III standing. Its injury in fact is traceable to McKinsey's filing its disclosures *in camera* or failing to disclose its connections altogether. That injury would be redressed by a court order granting Mar-Bow the relief it seeks, namely, access to the in camera disclosures and to as-yet-undisclosed connections.

(*Id.* at 13, ECF No. 42 (internal quotation marks, citations, and quotation alterations omitted).)

B. The Court Will Dismiss Mar-Bow's Appeal for Lack of Standing Because Mar-Bow Lacks a Pecuniary Interest in the Outcome of the Appeal

1. Mar-Bow Has No Pecuniary Interest in the Outcome of the Appeal

"The test for standing to appeal a bankruptcy court's order to the district court is well-established: the appellant must be a *person aggrieved* by the bankruptcy order." *In re Urban Broad Corp*., 401 F.3d 236, 243 (4th Cir. 2005) (citing *In re Clark*, 927 F.2d 793, 795 (4th Cir. 1991). The "person aggrieved" test was originally codified in the original Bankruptcy Code, but abandoned when Congress repealed it in 1978. *In re Clark*, 927 F.2d at 795. Courts, however, continue to use the test. *Id.* "[I]t is well-established that a person aggrieved is a party directly and adversely affected pecuniarily."[41] *In re Urban Broad*, 401 F.3d at 244 (quotations and citations omitted). In other words, in order

[41] "United States trustees, who never have pecuniary interests in cases, could not of course meet this standard, but there are other standards applicable to parties such as . . . trustees." *In re Clark*, 927 F.2d at 795; *see also In re Revco D.S, Inc.*, 898 F.2d 498, 499–500 (6th Cir. 1990) (holding that the U.S. Trustee, despite having no pecuniary interest in the outcome of bankruptcy court rulings, has standing to appeal because of the Trustee's unique role as "a watchdog rather than an advocate" who is "responsible for protecting the public interest and ensuring that bankruptcy cases are conducted according to law") (internal quotation marks omitted). Normally, of course, an individual lacks standing when seeking "not remediation of its own injury[,] . . . but vindication of the rule of law—the 'undifferentiated public interest.'" *Steel Co. v. Citizens for a Better Env't*, 532 U.S. 83, 106 (1998).

to have standing to appeal a bankruptcy court order, the appellant "must show that the order . . . diminishes [its] property, increases [its] burdens[,] or impairs [its] rights." *In re Kaiser Aluminum Corp.*, 327 B.R. 554, 558 (D. Del. 2005). The application of the "person aggrieved" standard to establish standing in a bankruptcy appeal "reflect[s] the understandable concern that if appellate standing is not limited, bankruptcy litigation will become mired in endless appeals brought by the myriad of parties who are indirectly affected by every bankruptcy court order." *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 642 (2d Cir. 1988).

Mar-Bow lacks standing to appeal the Bankruptcy Court's Fee Application rulings because Mar-Bow has no pecuniary interest in the outcome of those appeals. Mar-Bow lost any pecuniary interest in the approval of McKinsey's Fee Applications on July 12, 2016, when the Bankruptcy Court confirmed the Reorganization Plan. When the Plan was finalized, the expected recovery for Mar-Bow's class of claim became fixed.[42] All additional cash will be distributed to holders of "Allowed Secured First Lien Lender Claims," which does not include Mar-Bow. Therefore, even if the Court were to grant Mar-Bow's requested relief by remanding the case to the Bankruptcy Court with all of Mar-Bow's proposed mandates, and even if the Bankruptcy Court

[42] Mar-Bow's unsecured claim represents $1.25 million of ANR 7.5% second lien notes due August 1, 2020. Mar-Bow, a Class 6B claimant under the Plan, shares in the "Category 2 General Unsecured Claims Asset Pool," the amount of which was fixed at the time the Plan became final. Mar-Bow's recovery from the Estate will not change.

then sanctioned McKinsey by disgorging *all* of its fees, those fees would return as cash to the Estate and be distributed to holders of "Allowed Secured First Lien Lender Claims." Mar-Bow would receive no pecuniary benefit at all. Mar-Bow thus lacks any pecuniary interest in the outcome of this appeal, it is not a "person aggrieved" by the Bankruptcy Court's order, and it lacks standing to appeal those rulings.

Mar-Bow argues that "[w]hether a party must satisfy a 'pecuniary interest' test for bankruptcy appellate standing is a separate question from whether a party has constitutional standing to maintain an action." (Resp. Mot. Dismiss 8, ECF No. 42.) According to Mar-Bow, "[t]he 'pecuniary interest' test is more stringent than the broader test for Article III standing under the Constitution," because a party can have an Article III injury-in-fact without being financially harmed. (*Id.*) Mar-Bow urges this Court to decline to hold Mar-Bow to the standard usually applied to determine whether a party has standing to appeal a bankruptcy court decision. Mar-Bow, however, cites no persuasive authority for this Court to do so, and this Court sees no reason to shun the "person aggrieved standard," designed in part to assure that bankruptcy litigation does not become "mired in endless appeals brought by the myriad of parties who are indirectly affected by every bankruptcy court order." *Johns-Manville Corp.*, 843 F.2d at 642.[43]

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[43] Furthermore, the unique nature of bankruptcy litigation justifies the application of specialized legal doctrines. The Fourth

2. Mar-Bow Likely Lacks Article III Standing Because Any Alleged Injury-in-Fact Likely Cannot Be Redressed by the Relief Mar-Bow Seeks in This Appeal

Even if the Court were inclined to apply the Article III[44] standard for standing—rather than the

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Circuit has recognized this when comparing the pragmatic bankruptcy doctrine of equitable mootness with the concept of constitutional mootness, which raises issues of justiciability and jurisdiction. *See Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002). In part because parties in bankruptcy actions might "tak[e] advantage of bankruptcy procedures to place barriers in the way of . . . competitor[s]," *Mac Panel*, 283 F.3d at 627, doctrines such as the "person aggrieved" standard have special importance in bankruptcy proceedings. *See*, *e.g.*, *id.* at 627 n* (noting the countervailing interests in place when a debtor's creditor is also a *major* competitor: "The longer MAC Panel remains in bankruptcy, the longer MAC Panel must compete against a competitor who not only is in a position to utilize MAC Panel's presence in Chapter 11 to gain competitive advantage but, in its dual status as a creditor, also is in a position to oppose and prolong MAC Panel's efforts to emerge from bankruptcy").

[44] Article III provides, in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the

customary "person aggrieved" standard consistently applied in bankruptcy appeals—the Court likely would find that Mar-Bow lacks standing because it has failed to establish a concrete, particularized injury-in-fact that can be redressed by the relief it seeks from this Court.

Federal district courts are courts of limited subject matter jurisdiction. *United States ex rel. Vuyvuru v. Jadhav*, 555 F.3d 337, 347 (4th Cir. 2009) (citing *Exxon Mobile Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005)). Article III, Section 2, clause 1 of the Constitution limits federal court jurisdiction to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. As the Supreme Court of the United States has explained, an "essential and unchanging part of the case-or-controversy requirement" is that a plaintiff must establish Article III standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In *Spokeo v. Robins*, the Supreme Court reiterated that, in order to establish standing, a plaintiff must have: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant;[45] and[,] (3) that is likely to be redressed by a favorable judicial

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Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1.

[45] To show a causal connection, "the injury has to be 'fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560–61 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)).

decision.[46]" 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized." *Dreher v. Experian Info. Sols.*, 856 F.3d 337, 343 (4th Cir. 2017) (citations and quotation marks omitted). As the party invoking federal jurisdiction, Mar-Bow bears the burden of properly alleging standing. *Lujan*, 504 U.S. at 560; *see also Balzer & Assoc., Inc. v. Union Bank & Trust*, 3:09cv273, 2009 WL 1675707, at *2 (E.D. Va. June 15, 2009) ("On a motion to dismiss pursuant to Rule 12(b)(1), the party asserting jurisdiction has the burden of proving subject matter jurisdiction." (citing *Richmond Fredericksburg & Potomac R.R. v. United States*, 945 F.2d 764, 768 (4th Cir. 1991)).

Mar-Bow contends that its "colorable claim to access McKinsey's connections under Rule 2014, . . . has established an injury in fact for purposes of Article III standing." (Resp. Mot. Dismiss 13.) This injury, according to Mar-Bow, is "traceable to McKinsey's filing its disclosures *in camera* or failing to disclose its connections altogether," and "would be redressed by a court order granting Mar-Bow the relief it seeks, . . . access to the *in camera* disclosures and to as-yet-undisclosed connections." (*Id.*) However, even presuming that

[46] A party may establish the third element of standing by showing "that the injury will be [likely] 'redressed by a favorable decision.' " *Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38, 43). A plaintiff cannot have standing where redressability of an injury is merely "speculative." *Id.*

Mar-Bow's alleged informational injury would be sufficient for Article III purposes, the relief Mar-Bow seeks in this appeal would not redress Mar-Bow's alleged harm.

On appeal here are the Bankruptcy Court orders approving McKinsey's Third Interim and Final Fee Orders. In this appeal, Mar-Bow asks this Court to "order that Mar-Bow may object and be heard on McKinsey's requests for fees, and [ ] reverse the bankruptcy court's approval of McKinsey's fee applications for failure to comply with Rule 2014." (Mar-Bow Br. 47.) Reversing the Bankruptcy Court's approval of the Third Interim and Final Fee Orders, granting Mar-Bow all the relief it requests, and even disgorging McKinsey's fees would not redress Mar-Bow's alleged injury: its deprivation of "access to judicial records." (Resp. Mot. Dismiss 8.) In relying on the denial of information to which it was supposedly entitled as its basis for establishing Article III injury-in-fact, Mar-Bow drives a wedge between its alleged injury and the remedy it seeks here.

Mar-Bow's alleged informational injury (its lack of access to additional disclosures from McKinsey) is not *likely* to be redressed by the remedy it seeks (an opportunity to be heard on McKinsey's fees, and a reversal of the Bankruptcy Court's order granting those fees). *See, e.g.*, Lujan, 504 U.S. at 561 ("[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)). Mar-Bow asserts that "even a threatened denial or reduction of fees *could* force McKinsey to disclose those

connections to which Mar-Bow has sought access." (Mar-Bow Br. 20.) Speculative redressability is clearly insufficient to confer Article III standing. *See In re GT Automation Grp.*, 828 F.3d F.3d 602, 604 (7th Cir. 2016) ("Standing is lacking if it is merely 'speculative'—as opposed to 'likely'—that the plaintiff's injury would be redressed by a favorable decision." (citation omitted)). Mar-Bow's creative pleading seemingly would fail. Even assuming that Mar-Bow sufficiently alleges an Article III injury-in-fact, Mar-Bow seeks nothing in this appeal of the Fee Application Rulings that would be likely to redress its alleged informational injury. *See Spokeo*, 136 S. Ct. 1540, 1547 (2016).

The Court concludes that under the well-established "person aggrieved" test consistently applied in this circuit to evaluate bankruptcy appellate standing, *see In re Urban Broad*, 401 F.3d at 243, Mar-Bow lacks standing to appeal the Bankruptcy Court's Fee Application Rulings. And although the Court declines to apply the Article III standard to evaluate Mar-Bow's standing on appeal, Mar-Bow likely would fail to establish standing under Article III in any event.

The Court will dismiss Mar-Bow's appeal of the Fee Application Rulings.

V. Conclusion

For the foregoing reasons, the Court will grant McKinsey's Motion to Dismiss the Appeal of the Fee Application Rulings, (ECF No. 36), and dismiss Mar-Bow's appeal of the Fee Application Rulings for lack of

standing. The Court will dismiss Mar-Bow's appeals.[47] An appropriate Order will issue.

/s/ [Illegible]
M. Hannah Lauck
United States District Judge

Date: 9/30/2017
Richmond, Virginia

[47] Because the Court will dismiss Mar-Bow's appeals for the reasons stated above, it need not reach the merits of Mar-Bow's numerous Rule 2014 appeals. That said, this Court sees a record replete with patient, efficient, and thorough determinations on a series of complicated matters. Certainly, the Bankruptcy Court addressed—repeatedly and comprehensively—each objection Mar-Bow presented to it. Moreover, this Court expresses no reservation about the competence or integrity with which the Bankruptcy Court reviewed McKinsey's *in camera* disclosures or declined to order that they be publicly filed.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

IN RE: ALPHA NATURAL RESOURCES, INC., *et al.,*	Case No. 15-33896-KRH Chapter 11 (Jointly Administered)

Debtors.

ORDER COMPELLING MCKINSEY RECOVERY & TRANSFORMATION SERVICES U.S., LLC, TURNAROUND ADVISOR FOR THE DEBTORS, TO COMPLY WITH THE REQUIREMENTS OF BANKRUPTCY RULE 2014

(Filed Jul. 1, 2016)

This matter having come before the Court on the *Motion of Mar-Bow Value Partners, LLC* ("Mar-Bow") *to Compel McKinsey Recovery & Transformation Services U.S., LLC*, ("McKinsey RTS") *Turnaround Advisor to the Debtors, to Comply with the Disclosure Requirements of Bankruptcy Rule 2014* (ECF No. 2603) (the "Motion");[1] the Court having reviewed the Motion and the objection of McKinsey RTS (ECF No. 2734) and conducted a hearing to consider the relief requested in the Motion; and the Court having considered the Motion and the statements of counsel at the hearing;

IT IS HEREBY FOUND AND DETERMINED THAT:

[1] Capitalized terms not otherwise defined in this Order shall have the meanings given to them in the Motion.

A. The Court has subject matter jurisdiction over this matter and over the property of the Debtors and their respective bankruptcy estates pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (N), and (O). The statutory predicates for the relief sought herein are 11 U.S.C. §§ 105, and 327; and Bankruptcy Rule 2014. Venue of these cases and the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

B. Mar-Bow is a creditor with standing to file the Motion.

C. Generally, Bankruptcy Rule 2014 requires professional persons to disclose their connections by name.

D. There are no different standards of disclosure for lawyers and other professional persons.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED to the extent provided herein.

2. No later than July 6, 2016 at noon, prevailing Eastern Time, McKinsey shall deliver to the Court, for *in camera* review, the following items:

a. A list containing the names of the 121 undisclosed connections discussed at the hearing, together with sufficient information for the Court to determine (1) whether any of those connections constitute an interest that is adverse to the estate and (2) whether

McKinsey is disinterested, all as required by 11 U.S.C. § 327;

b. Identification of Interested Parties that manage investments for MIO Partners, Inc. or its investment affiliates (collectively, "MIO");

c. Identification of Interested Parties in which MIO owns securities; provided, however, that (i) where MIO invests in or with funds of funds, funds, or third party managers, and has no input or control over investment decisions therein, McKinsey RTS shall disclose only which funds of funds, funds, and third party managers are on the list of Interested Parties, and (ii) where MIO has directed an investment with its investment discretion, McKinsey RTS shall disclose the Interested Parties whose names match with names on MIO's ledgers of investments;

d. The survey response rates to the email surveys sent to McKinsey RTS and its affiliates' personnel in connection with each Carmody declaration filed in this case and any responses thereto showing a connection to an Interested Party together with sufficient information for the Court to determine (1) whether any of those connections constitute an interest that is adverse to the estate and (2) whether McKinsey is disinterested, all as required by 11 U.S.C. § 327.

3. The Debtors, the Unsecured Creditors' Committee, the United States Trustee, McKinsey RTS, and Mar-Bow shall negotiate a confidentiality agreement or proposed confidentiality order under which the United States Trustee, and professionals for the

Debtors and the Unsecured Creditors' Committee may review the foregoing data.

4. If the parties are unable to agree upon a confidentiality agreement or proposed confidentiality order, the Court will provide such an agreement or issue such an order. Upon the entry of a confidentiality order or consummation of a confidentiality agreement, and subject to its terms, the disclosures required by paragraph 2 of this Order shall be disclosed to the legal professionals for the Debtors and the Unsecured Creditors' Committee, and to the United States Trustee.

5. The United States Trustee's withdrawal of its motion is not binding on Mar-Bow.

6. The Court shall retain jurisdiction over any matter or dispute arising from or relating to the implementation, interpretation or enforcement of this Order.

Entered: Jul 1 2016

/s/ Kevin R. Huennekens
UNITED STATES BANKRUPTCY JUDGE

Entered on Docket: Jul 1 2016

[Parties To Receive Copies Omitted]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

IN RE: ALPHA NATURAL RESOURCES, INC., *et al.*,	Case No. 15-33896-KRH Chapter 11 (Jointly Administered)

Debtors.

MEMORANDUM OPINION

(Filed Dec. 20, 2016)

Alpha Natural Resources, Inc., and 149 of its direct and indirect subsidiaries (the "Debtors") commenced these bankruptcy cases on August 3, 2015, in the United States Bankruptcy Court for the Eastern District of Virginia (the "Court")[1] On August 29, 2016, the Court issued a memorandum opinion[2] in support of an order denying the motion of Mar-Bow Value Partners LLC ("Mar-Bow") to stay the effectiveness of an order entered July 12, 2016 (the "Confirmation Order"),[3] that confirmed the *Second Amended Joint Plan of Reorganization of Debtors and Debtors in Possession*,

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[1] On August 5, 2015, the Court entered an order authorizing the joint administration of these chapter 11 cases (collectively, the "Bankruptcy Case"). *See* Fed. R. Bankr. P. 1015.

[2] *See* Memorandum Opinion, *In re Alpha Natural Resources, Inc., et al.*, No. 15-33896-KRH (Bankr. E.D. Va. Aug. 29, 2016), ECF No. 3347.

[3] *See* Order Denying Motion for a Stay Pending Appeal Pursuant to Bankruptcy Rule 8005 and Memorandum of Points and Authorities, *In re Alpha Natural Resources, Inc., et al.*, No. 15-33896-KRH (Bankr. E.D. Va. Aug. 29, 2016), ECF No. 3348.

as modified, (the "Plan").[4] The Plan incorporated a delicate balance of interrelated settlements involving numerous parties. Mar-Bow had objected to certain provisions in the Plan that provided for (i) the transfer of a substantial portion of the Debtors' property to creditors holding first priority liens against the estate and (ii) the exculpation and release of estate professionals as applied to McKinsey Recovery & Transformation Services U.S., LLC ("McKinsey RTS"). The Plan was universally accepted in accordance with 11 U.S.C. § 1126(c) by all impaired creditor classes that were entitled to vote, including the creditor class in which Mar-Bow's claim was included.[5] In confirming the Debtors' Plan, the Court overruled Mar-Bow's objections. Mar-Bow appealed and sought to delay the effectiveness of the Plan.[6]

Mar-Bow became active in this case very late in the plan confirmation process. Only a month before the confirmation hearing, Mar-Bow filed a motion to

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[4] The Plan is attached as exhibit A to the Confirmation Order. *See* Order Confirming Second Amended Joint Plan of Reorganization of Debtors and Debtors In Possession, As Modified, Ex. A, *In re Alpha Natural Resources, Inc., et al.*, No. 15-33896-KRH (Bankr. E.D. Va. July 12, 2016), ECF No. 3038.

[5] "A class of claims has accepted a plan if such plan has been accepted by creditors . . . that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors . . . that have accepted or rejected such plan." 11 U.S.C. § 1126(c).

[6] *See* Notice of Appeal (Confirmation Order), *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Services U.S., LLC (In re Alpha Nat. Res., Inc., et al.)*, No. 3:16-cv-00613-MHL, (E.D. Va. July 20, 2016), ECF No. 1.

compel McKinsey RTS to comply with Rule 2014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rule(s)").[7] At issue was whether McKinsey RTS satisfied the Bankruptcy Code's "disinterested" standard. A debtor in possession may only employ professionals "that do not hold or represent an interest adverse to the estate, and that are disinterested persons. . . ." 11 U.S.C. § 327(a).[8] The Court had approved the employment of McKinsey RTS very early in the Bankruptcy Case, finding at the time that it was "disinterested" based upon the verified statement that accompanied its employment application.[9] Mar-Bow

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[7] Bankruptcy Rule 2014(a) requires a professional state "to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee[]" in his application for employment. Fed. R. Bankr. P. 2014(a). The application must "be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." *Id.*

[8] A "disinterested person" is defined as: one that "(A) is not a creditor, an equity security holder, or an insider; (B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and (C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." 11 U.S.C. § 101(14).

[9] *See* Order, Pursuant to Sections 327(a), 328(a) and 1107(b) of the Bankruptcy Code, Bankruptcy Rule 2014(a) and Local Bankruptcy Rule 2014-1, Authorizing the Debtors to Retain and Employ McKinsey Recovery & Transformation Services U.S.,

argued in its motion to compel that the verified statement filed by McKinsey RTS failed to disclose *by name* all of the entities with which it had connections in the Debtors' Bankruptcy Case.[10] On July 1, 2016, the Court entered an order that required McKinsey RTS to disclose to the Court for its *in camera* review (the "*In Camera* Disclosures"): (i) the names of all entities on the Interested Parties List with which McKinsey RTS had connections; (ii) the identity of any entities on the Interested Parties List that managed investments for an entity named MIO ("MIO") that offered investment products for McKinsey RTS' partners and pension plans; (iii) the identity of any entities on the Interested Parties List in which MIO had directly invested;[11] and (iv) the response rates for the email surveys sent to McKinsey RTS' employees and affiliates (the "Order Compelling Compliance"). The Order Compelling Compliance tasked the Debtors, Mar-Bow, the Unsecured Creditors Committee, the U.S. Trustee, and McKinsey RTS to negotiate in good faith a confidentiality order whereunder the U.S. Trustee, the Debtors and the Unsecured Creditors Committee could review the *In*

LLC as Turnaround Advisor for the Debtors, Effective as of the Petition Date, *In re Alpha Natural Resources, Inc., et al.*, No. 15-33896-KRH (Bankr. E.D. Va. Sept. 17, 2015), ECF No. 476.

[10] McKinsey RTS had disclosed its connections on a category of interested party basis.

[11] McKinsey RTS was also required to disclose any funds or managers that were on the Interested Parties List. However, the Court did not require any disclosure over the investments of any funds where MIO did not have control or input over the investment decisions of the funds.

Camera Disclosures provided to the Court.[12] McKinsey RTS timely complied with the Court's Order Compelling Compliance.

The Court found that the *In Camera* Disclosures adequately supplemented the verified statements filed by McKinsey RTS in full compliance with the requirements of Bankruptcy Rule 2014.[13] After reviewing the *In Camera* Disclosures, the Court was completely satisfied that McKinsey RTS remained a "disinterested person." The Court announced this finding at the Plan confirmation hearing. The Court later requested the Office of the United States Trustee to recommend whether the *In Camera* Disclosures ought to be made publicly available. Within days of receiving a response from the Office of the United States Trustee, McKinsey RTS publicly filed the additional *In Camera* Disclosures.

On June 14, 2016, McKinsey RTS filed an interim fee application (the "Third Interim Fee Application"). Mar-Bow filed an objection to the Third Interim Fee Application (the "Third Interim Fee Application Objection") renewing its arguments that McKinsey RTS had

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[12] The Court did not make provision for Mar-Bow's access to the *In Camera* Disclosures in order to accommodate the anticompetitive concerns raised by McKinsey RTS in its opposition to Mar-Bow's motion to compel.

[13] McKinsey RTS had previously supplemented its original verified statement with three additional public disclosures as it had represented it would do in its employment application in order to ensure no disqualifying conflicts arose during the pendency of the Bankruptcy Case.

not fully complied with the disclosure requirements of Bankruptcy Rule 2014. At a hearing conducted on September 8, 2016, the Court approved the Third Interim Fee Application and dismissed Mar-Bow's Third Interim Fee Application Objection relying on its prior finding made in connection with its entry of the Confirmation Order that McKinsey RTS was a "disinterested person."

The Court has before it now the final application of McKinsey RTS for compensation for services rendered, reimbursement of expenses incurred, and payment of holdbacks (the "Final Fee Application").[14] Once again, Mar-Bow objected, raising the same issues it had previously presented to the Court (the "Objection"). Mar-Bow's Objection asks the Court to reconsider its previous findings that McKinsey RTS is a "disinterested person" and that McKinsey RTS has complied with disclosure requirements under Bankruptcy Rule 2014.

McKinsey RTS filed a motion to dismiss Mar-Bow's Objection pursuant to Bankruptcy Rule 7012(b)(6) for failure to state a claim upon which relief

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[14] *See* Final Application Of McKinsey Recovery & Transformation Services U.S., LLC for Compensation for Services Rendered, Reimbursement of Expenses Incurred and Payment of Holdbacks as Turnaround Advisor for the Debtors and Debtors In Possession for (I) the Final Compensation Period from May 1, 2016 through July 26, 2016 and (II) the Total Compensation Period from August 3, 2015 through July 26, 2016, *In re Alpha Natural Resources, Inc., et al.*, No. 15-33896-KRH (Bankr. E.D. Va. Sept. 26, 2016), ECF No. 3446.

can be granted (the "Motion to Dismiss").[15] A hearing was conducted on December 7, 2016 to consider the Motion to Dismiss (the "Hearing"). For the reasons set forth in this Memorandum Opinion, the Court will grant the Motion to Dismiss of McKinsey RTS and dismiss Mar-Bow's Objection.[16]

First, Mar-Bow lacks standing to raise the Objection, as Mar-Bow no longer has a pecuniary interest in the outcome of the Final Fee Application of McKinsey RTS. In order to entertain the Objection, Mar-Bow must meet the threshold requirement for standing. The "Cases" and "Controversies" requirement of Art. III, § 2 of the Constitution is fundamental to a federal courts' jurisdiction to hear a case. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Raines v.*

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[15] Contested matters, such as the one at bar, are governed by Bankruptcy Rule 9014. Subsection (c) of Bankruptcy Rule 9014 automatically incorporates into contested matters certain of the Bankruptcy Rules set forth in Part VII that pertain to adversary proceedings. Bankruptcy Rule 9014 gives the Court the discretionary authority to apply any or all of the remaining Bankruptcy Rules in Part VII. See Fed. R. Bankr. P. 9014(c). While Bankruptcy Rule 7012 is not mandatory, *see id.*, the Court decided that it was appropriate to apply Bankruptcy Rule 7012 to this contested matter consistent with its obligation "to secure the just, speedy, and inexpensive determination of every case and proceeding[.]" *See* Fed. R. Bankr. P. 1001. Rule 7012(b)(6) of the Federal Rules of Bankruptcy Procedure incorporates by reference Rule 12(b)(6) of the Federal Rules of Civil Procedure.

[16] This Memorandum Opinion sets forth the Court's findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052. Fed. R. Bankr. P. 7052. Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. *See id.*

Byrd, 521 U.S. 811, 818 (1997)); *Cooksey v. Futrell*, 721 F.3d 226, 234 (4th Cir. 2013) (quoting *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006)). "A party must have standing to meet the Article III case or controversy requirement." *In re Alpha Nat. Res. Inc., et al.*, 544 B.R. 848, 854 (Bankr. E.D. Va. 2016). In order to demonstrate standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[17] *Spokeo, Inc. v. Robins*, 136 S. Ct. at 1547 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)). A party has suffered an "injury in fact" when it can show "an invasion of a legally protected interest . . . " that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. at 560 (internal quotations and citations omitted).

In cases before a bankruptcy court, an objecting party demonstrates an "injury in fact" by demonstrating a financial interest in the outcome of a given proceeding. Bankruptcy courts decline to litigate objections to claims when the requested relief will have no financial impact on the litigant. *See In re Mushroom Transp. Co.*, 486 B.R. 148, 154 (Bankr. E.D. Pa. 2013) (finding administrative claimant's objection to a fee

[17] The party seeking relief has the burden of proving the standing elements. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990).

application of special counsel to the chapter 7 trustee moot for lack of pecuniary interest in the outcome); *see also Indiana State Police Pension Trust v. Chrysler LLC (In re Chrysler LLC)*, 576 F.3d 108, 113 (2d Cir. 2009), *cert. granted, judgment vacated with instructions to dismiss appeal as moot*, 558 U.S. 1087, 130 S. Ct. 1015, Order 09-285 (Dec. 14, 2009), *appeal dismissed as moot*, 592 F.3d 370 (2d Cir. 2010). Specifically within the bankruptcy context:

> [A] party does not have standing to object to an application for compensation unless that party has a financial stake in the approval of the application. . . . A party lacks a financial stake when, regardless of the outcome of the application for compensation, that party will not receive a distribution from the estate.

In re Moye, 2012 WL 3217595, at *2 (Bankr. S.D. Tex. Aug. 7, 2012) (internal citations omitted).[18]

Once the Debtors' Plan was confirmed, the expected recovery for the class of claims, in which the claim held by Mar-Bow was included, became fixed.

[18] The Bankruptcy Code also provides an additional statutory standing requirement for a party to be heard in a chapter 11 proceeding. Section 1109(b) provides that "[a] party in interest, including the debtor, the trustee, a creditor's committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter." 11 U.S.C. § 1109(b); *see also In re Alpha Nat. Res., Inc., et al.*, 544 B.R. at 854-55. While Mar-Bow may meet this statutory standard because it was a creditor in the Bankruptcy Case, its status changed when its pecuniary interests became fixed upon confirmation of the Debtors' Plan.

Mar-Bow's proof of claim, dated March 23, 2016, asserts an unsecured claim representing $1.25 million of ANR 7.5% second lien notes due August 1, 2020. The Debtors' Plan accords second lien note holders treatment under Class 3 and Class 6B. Class 3 provides for participation rights, which Mar-Bow declined to exercise. Class 6B claimants share in the Category 2 General Unsecured Claims Asset Pool, which provides distributions in the form of common stock, warrants, contingent revenue payments, and proceeds from the sale of specific assets. Any excess cash, including cash that might be made available from not paying the Final Fee Application of McKinsey RTS, will be distributed to holders of "Allowed Secured First Lien Lender Claims" under the Plan. The treatment accorded Mar-Bow's claim cannot be adversely impacted if the Court grants the Final Fee Application of McKinsey RTS. Accordingly, Mar-Bow can no longer demonstrate a "concrete and particularized injury in fact." Only the Allowed Secured First Lien Lenders would stand to benefit from a denial of McKinsey RTS's fees. Importantly to the case at bar, the Allowed Secured First Lien Lenders do not object to the Final Fee Application of McKinsey RTS.

> Bankruptcy proceedings regularly involve numerous parties, each of whom might find it personally expedient to assert the rights of another party even though that other party is present in the proceedings and is capable of representing himself. Third-party standing is of special concern in the bankruptcy context where, as here, one constituency before the

> court seeks to disturb a plan of reorganization based on the rights of third parties who apparently favor the plan.

Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.), 843 F.2d 636, 644 (2d Cir. 1988).

Second, the Court lacks subject matter jurisdiction to consider Mar-Bow's Objection, as Mar-Bow has appealed the issues raised in the Objection to the United States District Court for the Eastern District of Virginia (the "District Court"). The Court's findings that McKinsey RTS complied with Bankruptcy Rule 2014 and that McKinsey RTS is a "disinterested person" are both currently pending review by the District Court.[19] Mar-Bow's Appeal deprives this Court of subject matter jurisdiction. "The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *see also Grand Jury Proceedings Under Seal v. U.S.*, 947 F.2d 1188, 1190 (4th Cir. 1991) ("The general rule is that the filing

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[19] In addition to the appeal taken to the Court's Confirmation Order, *see supra* note 6, Mar-Bow attempted to appeal two interlocutory orders of the Court dealing with the same issues, *see* Notice of Appeal (Order Compelling Compliance with Rule 2014), *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Services U.S., LLC (In re Alpha Nat. Res., Inc., et al.)*, No. 3:16-cv-00612-MHL, (E.D. Va. July 19, 2016), ECF No. 1 and Notice of Appeal (Third Interim Fee Order), *In re Alpha Nat. Res., Inc., et al.*, No. 3:16-cv-00799-MHL, (E.D. Va. Sept. 28, 2016), ECF No. 1 (cumulatively, the "Appeal").

of a timely and sufficient notice of appeal immediately transfers jurisdiction of all matters relating to the appeal from the district court to the court of appeals.") (internal citation omitted). In the Objection, Mar-Bow renewed the very arguments raised in the Appeal, that McKinsey RTS's Final Fee Application should be denied because McKinsey RTS failed to comply with Bankruptcy Rule 2014 and McKinsey RTS is not a "disinterested person" as required by 11 U.S.C. § 327(a). The Court has been divested of jurisdiction over those two issues, and it cannot revisit its prior rulings as the Objection asks it to do.

At the Hearing, Mar-Bow argued that the Court could not proceed to consider the Final Fee Application of McKinsey RTS. However, Mar-Bow did not obtain a stay of the Court's Confirmation Order pending appeal. The Court's order approving the employment of McKinsey RTS was never appealed and remains in effect.[20] The Confirmation Order also remains in effect unless and until it is overturned on appeal. Furthermore, courts retain jurisdiction to take subsequent action on matters that are collateral to an appeal. *See Northrop Gruman* [sic] *Tech. Serv., Inc. v. DynCorp Int'l LLC*, 2016 WL 3346349, at *5 (E.D. Va. 2016) (internal citations and quotations omitted). This rule is essential and particularly applicable to a bankruptcy case that involves numerous parties with divergent interests that remain engaged in a dynamic process even after discrete issues may have been decided.

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[20] *See supra* note 9.

Resolution of the Final Fee Application of McKinsey RTS will have no impact on the issues that the District Court has before it pertaining to McKinsey RTS's compliance with Bankruptcy Rule 2014 and whether McKinsey RTS is a "disinterested person." Consideration of the Final Fee Application of McKinsey RTS will involve a different set of issues entirely—those are whether the services rendered by McKinsey RTS were "actual" and "necessary" for the effective administration of the estate and whether the compensation requested is "reasonable" under the circumstances. In reaching a determination on these issues, the Court will consider the factors set forth in 11 U.S.C. § 330, which include:

> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. § 330. Mar-Bow did not raise any issue with regard to any of these factors in its Objection. Nor are they factors impacting the Appeal. The Court may consider the Final Fee Application of McKinsey RTS separate and apart from the Objection.

Conclusion

The Court will grant McKinsey RTS's Motion to Dismiss. Mar-Bow lacks standing to file its Objection in this matter because Mar-Bow will not suffer any "injury in fact" resulting from the Court's ruling on the Final Fee Application of McKinsey RTS. But even if Mar-Bow did have standing, the Court would lack subject matter jurisdiction to decide the issues raised in the Objection concerning whether McKinsey RTS complied with Bankruptcy Rule 2014 and whether McKinsey RTS is a "disinterested person" because Mar-Bow has appealed these issues to the District Court.

A separate order shall issue.

Entered: Dec 20 2016

/s/ Kevin R. Huennekens
UNITED STATES BANKRUPTCY JUDGE

Entered on Docket: 12/20/16

U.S. Const. Art. III § 2, cl. 1

Section 2, Clause 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

11 U.S.C. § 101

§ 101. Definitions

Effective: April 1, 2016

(14) The term "disinterested person" means a person that—

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and

(C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.

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11 U.S.C. § 107

§ 107. Public access to papers

Effective: December 22, 2010

(a) Except as provided in subsections (b) and (c) and subject to section 112, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.

(b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may—

(1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or

(2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.

(c)(1) The bankruptcy court, for cause, may protect an individual, with respect to the following types of information to the extent the court finds that disclosure of such information would create undue risk of identity theft or other unlawful injury to the individual or the individual's property:

(A) Any means of identification (as defined in section 1028(d) of title 18) contained in a paper filed, or to be filed, in a case under this title.

(B) Other information contained in a paper described in subparagraph (A).

(2) Upon ex parte application demonstrating cause, the court shall provide access to information protected pursuant to paragraph (1) to an entity acting pursuant to the police or regulatory power of a domestic governmental unit.

(3) The United States trustee, bankruptcy administrator, trustee, and any auditor serving under section 586(f) of title 28—

(A) shall have full access to all information contained in any paper filed or submitted in a case under this title; and

(B) shall not disclose information specifically protected by the court under this title.

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11 U.S.C. § 307

§ 307. United States trustee

The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) or this title.

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11 U.S.C. § 327

§ 327. Employment of professional persons

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

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11 U.S.C. § 328

§ 328. Limitation on compensation of professional persons

(c) Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of

expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

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11 U.S.C. § 1109

§ 1109. Right to be heard

(a) The Securities and Exchange Commission may raise and may appear and be heard on any issue in a case under this chapter, but the Securities and Exchange Commission may not appeal from any judgment, order, or decree entered in the case.

(b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

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28 U.S.C. § 157

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under

title 11 shall be referred to the bankruptcy judges for the district.

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28 U.S.C. § 158

§ 158. Appeals

Effective: December 22, 2010

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

Federal Rules of Bankruptcy Procedure, Rule 2014

Rule 2014. Employment of Professional Persons

(a) Application for an order of employment

An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

(b) Services rendered by member or associate of firm of attorneys or accountants

If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation or individual may act as attorney or accountant so employed, without further order of the court.