No. 3:19-cv-00552-DJN

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

MAR-BOW VALUE PARTNERS, LLC,

Appellant,

v.

MCKINSEY RECOVERY & TRANSFORMATION SERVICES U.S., LLC,

Appellee.

On Appeal from the United States Bankruptcy Court
for the Eastern District of Virginia (Huennekens, J.)
Chapter 11 Case No. 15-33896

BRIEF OF APPELLEE MCKINSEY RECOVERY & TRANSFORMATION SERVICES U.S., LLC

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CORPORATE DISCLOSURE STATEMENT

McKinsey Recovery & Transformation Services U.S., LLC ("McKinsey RTS") is a direct wholly owned subsidiary of McKinsey & Company, Inc. United States, which, in turn, is a direct wholly owned subsidiary of McKinsey Holdings, Inc., which, in turn, is a direct wholly owned subsidiary of McKinsey & Company, Inc. No other publicly held corporation owns 10% or more of the stock of McKinsey RTS.

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JURISDICTIONAL STATEMENT

Appellee McKinsey Recovery & Transformation Services U.S., LLC ("McKinsey RTS") does not dispute the statement of the bankruptcy court's jurisdiction in the Brief of Appellant Mar-Bow Value Partners, LLC ("Mar-Bow") and does not dispute that this Court has jurisdiction to determine whether it has jurisdiction. Because standing is itself a jurisdictional issue, however, McKinsey RTS does dispute that this Court has jurisdiction to address any issue beyond Mar-Bow's lack of standing.

COUNTER-STATEMENT OF ISSUES ON APPEAL AND 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." *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Servs. US, LLC*, 578 B.R. 325, 328 (E.D. Va. 2017). This appeal raises the following issues:

1. Whether the law of the case—as established in this Court's prior opinions and affirmed by the Fourth Circuit—requires dismissal of this appeal for lack of appellate standing and supports the bankruptcy court's holding that Mar-Bow lacked standing under Section 1109(b) of the Bankruptcy Code to bring its motion for relief from judgment because Mar-Bow holds no pecuniary interest in any fees and expenses that the bankruptcy court might order disgorged by McKinsey RTS.

Application of the law of the case is reviewed *de novo*, *United States v. Hammonds*, 703 F. App'x 161, 162 (4th Cir. 2017), but "[w]hether a challenger has a pecuniary interest in a bankruptcy order is a question of fact . . . review[ed] for clear error," *In re Holly Marine Towing, Inc.*, 669 F.3d 796, 800 (7th Cir. 2012).

2. If the law of the case is not dispositive, whether the bankruptcy court correctly held that Article III of the U.S. Constitution and Section 1109(b) of the Bankruptcy Code require all litigants who invoke the jurisdiction of the bankruptcy court—including those like Mar-Bow who seek relief from a judgment under Federal Rule of Civil Procedure 60(d)(3)—to establish standing.

Legal questions regarding standing are reviewed *de novo*. *In re Alexandria Surveys Int'l, LLC*, 500 B.R. 817, 820 (E.D. Va. 2013), *aff'd sub nom. Alexandria Consulting Grp., LLC v. Alexandria Surveys Int'l LLC*, 589 F. App'x 126 (4th Cir. 2014).

3. If Mar-Bow has standing to appeal and had standing to raise the issue below, whether the bankruptcy court abused its discretion in concluding that McKinsey RTS's certification that it would not benefit from a settlement payment to the reorganized debtors in this case complied with the bankruptcy court's own order asking for such a certification.

A "bankruptcy court's interpretation of its own order . . . warrants customary appellate deference," as the bankruptcy court is "in the best position to interpret its own orders." *In re Tomlin*, 105 F.3d 933, 941 (4th Cir. 1997) (quotation marks omitted). This deference is "substantial." *Id.*

STATEMENT OF THE CASE

Appellee McKinsey RTS advises debtors on how to turn around their businesses and return to profitability. Bankruptcy Rule 2014(a), implementing 11 U.S.C. § 327, requires professionals employed by a debtor to disclose their "connections with the debtor" and other persons involved in a bankruptcy case. McKinsey RTS filed several Rule 2014(a) disclosures in support of the application of Alpha Natural Resources, Inc. (the "Debtor," and with its affiliates "Debtors") to retain McKinsey RTS as a restructuring advisor.

Mar-Bow is an entity beneficially owned by Jay Alix, the founder of AlixPartners LLP, which competes with McKinsey RTS. Alix formed Mar-Bow specifically to object to McKinsey RTS's Rule 2014(a) disclosures in this and other cases. In this case, after the Debtor entered bankruptcy, Mar-Bow purchased some of its unsecured debt and filed a proof of claim. Since then, Mar-Bow has launched repeated objections to McKinsey RTS's Rule 2014(a) disclosures. Before plan confirmation, the bankruptcy court considered and (after ordering certain supplemental disclosures by McKinsey RTS) rejected Mar-Bow's contentions that McKinsey RTS's disclosures were deficient and approved McKinsey RTS's retention. Pre-confirmation, the bankruptcy court treated Mar-Bow as having standing because of its status as a creditor. Post-confirmation, however, the bankruptcy court held that Mar-Bow no longer had standing to challenge the adequacy of McKinsey RTS's disclosures because its pecuniary interest became fixed upon plan confirmation. App.2582-83 & n.18.

On appeal, this Court (Lauck, J.) agreed that Mar-Bow no longer had any pecuniary interest in McKinsey RTS's Rule 2014 disclosures and therefore held that Mar-Bow lacked appellate standing. *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Servs. U.S., LLC* (*Mar-Bow I*), 578 B.R. 325, 355 (E.D. Va. 2017); *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Servs. U.S., LLC* (*Mar-Bow II*), No. 3:16-CV-799, 2017 WL 4414155, at *1 (E.D. Va. Sept. 30, 2017). The Fourth Circuit affirmed, without argument, "for the reasons stated by" this Court. *In re Alpha Nat. Res., Inc.*, 736 F. App'x 412, 413 (4th Cir. 2018). Mar-Bow sought Supreme Court review, broadly challenging the "pecuniary interest" requirement for bankruptcy standing. The Supreme Court denied certiorari. *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Servs. U.S. LLC*, 139 S. Ct. 1601 (2019).

While those appeals were pending, Mar-Bow went for yet another bite at the apple and moved to reopen the bankruptcy proceedings below based on a purported fraud on the court pursuant to Federal Rule of Civil Procedure 60(d)(3). Despite Mar-Bow's fervid (and, let there be no mistake, incorrect) factual assertions, and its legal assertion that Rule 60(d)(3) motions are exempt from standing requirements, the bankruptcy court denied Mar-Bow's Rule 60(d)(3) motion for lack of standing.[1]

This Court need look no further than the law-of-the-case doctrine to dismiss the appeal or affirm the decisions below. The Court need devote no greater resources to this frivolous appeal, which merely rehashes standing arguments already rejected at four levels of the judiciary in this closed bankruptcy case.

1. McKinsey RTS "is a global, full service restructuring advisory and crisis management firm that supports companies through all aspects of recovery and transformation." *Mar-Bow I*, 578 B.R. at 329 (alteration marks omitted). "McKinsey [RTS] advises struggling businesses on how to improve their profitability, and helps businesses implement the changes it suggests." *Id.* "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 [RTS] as a turnaround advisor for the pendency of the bankruptcy case." *Id.* at 330. The bankruptcy court granted the unopposed application. *Id.* at 331.

[1] Mar-Bow has pressed similar arguments regarding Rule 60(d)(3) in three other bankruptcy courts—all of which have similarly denied Mar-Bow's motions for lack of standing. *See In re SunEdison, Inc.*, No. 16-10992 (SMB), 2019 WL 2572250 (Bankr. S.D.N.Y. June 21, 2019) (denying Mar-Bow's Rule 60(d) motion for relief from prior orders approving McKinsey RTS's retention for lack of standing); *In re NII Holdings Inc.*, No. 14-12611 (Bankr. S.D.N.Y. Aug. 15, 2019), DE # 1041 (same); *In re SRC Liquidation LLC,* No. 15-10541 (BLS), 2019 WL 4386373, at *1 (Bankr. D. Del. Sept. 12, 2019) (same).

"These events all occurred six months before Mar-Bow first appeared in the bankruptcy case." *Id.*

2. Mar-Bow is a special-purpose vehicle created, beneficially owned, and funded by Alix, the founder and 35% owner of AlixPartners. *Id.* at 329; App.682. AlixPartners competes with McKinsey RTS for work advising Chapter 11 debtors. *Mar-Bow I*, 578 B.R. at 329. After the Debtors retained McKinsey RTS, and almost nine months after the petition date, Mar-Bow purchased a claim for second-lien debt. *Id.* Mar-Bow thus became an unsecured creditor of the Debtors.

3. "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 . . . to make." 578 B.R. at 328. Judge Lauck's opinions recount the long history of Mar-Bow's objections. *E.g.*, *Mar-Bow I*, 578 B.R. at 331-43.

4. On July 12, 2016, the Bankruptcy Court confirmed the *Second Amended Joint Plan of Reorganization of Debtors and Debtors in Possession* ("the Plan").[2] App.2382. As with most complex Chapter 11 reorganizations, the Plan "incorporated a delicate balance of interrelated settlements involving numerous

[2] The Plan was the first and only approved plan of reorganization. The words "second" and "amended" in its title reflected the existence of proposed plans that were not confirmed.

parties." App.135. All impaired creditor classes entitled to vote accepted the Plan in accordance with Section 1126(c) of the Bankruptcy Code. *Id.*

5. As the holder of unsecured debt, Mar-Bow was a Class 6B claimant under the Plan. Plan confirmation permanently established the rights of all 6B claimants, and each such claimant, including Mar-Bow, "received its full and final distribution in accordance with the Plan." App.135 & n.10. The Plan requires that any cash entering the bankruptcy estate in the future be distributed to the holders of "Allowed Secured First Lien Lender Claims"—a class to which Mar-Bow does not belong. *Mar-Bow II*, 2017 WL 4414155, at *18. In no event will Mar-Bow or any other Class 6B claimant be entitled to such funds. *Id.*

6. In *Mar-Bow I*, this Court dismissed as equitably moot Mar-Bow's appeal of three orders related to the approval of the Plan. 578 B.R. at 345-52. The Court held that "it would be imprudent and inequitable to upset the Reorganization Plan at this late date." *Id.* at 349.

This Court then dismissed Mar-Bow's appeals of three orders regarding McKinsey RTS's Rule 2014 disclosures for lack of appellate standing, holding that Mar-Bow was not "a party directly and adversely affected pecuniarily" by a bankruptcy court order, as the law requires for appellate standing. *Id.* at 353-54. The Court concluded, as had the bankruptcy court, that

> 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. 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 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.

Id. at 355 (emphasis in original) (footnote omitted).

7. In *Mar-Bow II*, issued the same day, this Court addressed Mar-Bow's appeal of additional orders. 2017 WL 4414155, at *16. The Court again dismissed the appeals for lack of appellate standing because Mar-Bow had "lost any pecuniary interest in the approval of McKinsey's Fee Applications" on plan confirmation. *Id.* at *17-18. The Court also noted that Mar-Bow likely lacked constitutional standing under Article III. *Id.* at *18. Even if Mar-Bow could point to a specific injury-in-fact, none of Mar-Bow's requested relief—allowing it to be heard on the fee applications or even disgorgement of McKinsey's fees—would "redress Mar-Bow's alleged injury [of] deprivation of 'access to judicial records.'" *Id.* at *19.

8. The court of appeals affirmed both decisions, without oral argument, "for the reasons stated by the district court." *In re Alpha Nat. Res., Inc.*, 736 F. App'x at 413. Mar-Bow petitioned for certiorari, which was denied. 139 S. Ct. 1601 (2019).

9. While those appeals were pending, Mar-Bow tried again to lodge objections to McKinsey RTS's Rule 2014 disclosures. The bankruptcy court had

issued an order on June 28, 2018, closing the bankruptcy case because the estates had been fully administered in accordance with the Plan. Appellee.App.1. Mar-Bow moved to reopen the case so that it could raise new factual allegations to challenge McKinsey RTS's disclosures under Federal Rule of Civil Procedure 60(d)(3) ("Rule 60(d) Motion"). App.2597. Without ruling on the merits, the bankruptcy court reopened the case solely to open a "Miscellaneous Proceeding" to address the Rule 60(d) Motion. App.3643 ¶ 3.

By January 2019, Mar-Bow had raised similar challenges to McKinsey RTS's disclosures in two other bankruptcy proceedings.[3] To streamline the proceedings and facilitate resolution, the bankruptcy judges in all three cases jointly appointed a mediator—Bankruptcy Judge Marvin Isgur—to try to reach a global resolution of the issues raised by Mar-Bow. Appellee.App.9. As a result of the mediation, McKinsey RTS and the U.S. Trustee settled all claims concerning McKinsey RTS's disclosures. The mediator reported that McKinsey RTS and the U.S. Trustee had resolved "good faith disputes concerning the application of Bankruptcy Rule 2014." Appellee.App.11 ¶ 3. All three bankruptcy courts approved the settlement.[4] Mar-Bow refused to settle.

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[3] *In re Westmoreland Coal Co.*, No. 18-35672-DRJ (Bankr. S.D. Tex.) (Jones, J.), and *In re SunEdison, Inc.*, No. 16-10992-SMB (Bankr. S.D.N.Y.) (Bernstein, J.).
[4] *See* Appellee.App.37; *In re Westmoreland Coal Co.*, No. 18-35672-DRJ (Bankr. S.D. Tex. Apr. 22, 2019), DE # 1769; *In re SunEdison, Inc.*, No. 16-10992-SMB (Bankr. S.D.N.Y. Apr. 19, 2019), DE # 5924.

Although McKinsey RTS disputed the U.S. Trustee's allegations, and all settling parties agreed that the settlement was not and could not be used as an admission of fault or liability,[5] the McKinsey entities (McKinsey RTS and certain of its affiliates) agreed to pay $5 million to the reorganized debtors or bankruptcy estates in each of the *ANR*, *SunEdison*, and *Westmoreland* cases. Bankr. Appellee.App.40. The Settlement Agreement provided that, if any portion of the $15 million combined payment were ultimately "distributed to McKinsey, it [would] be refunded by McKinsey to the distributing party." *Id.*

10. During a hearing on April 23, 2019, the bankruptcy court *sua sponte* requested "a certification from McKinsey that they are not going to receive any benefit, directly or indirectly, in any way whatsoever" from the $5 million payment to the reorganized debtors. App.115. At a status conference on May 29, 2019, the court clarified that it wished to see "certification that there is no direct or indirect benefit that McKinsey would receive as a result of the distribution of these funds," including "indirect distributions . . . because it affects the stock price even

[5] The Settlement Agreement stated:

> This Order and the Term Sheet (and their contents) are not and shall not be used as an admission of liability, violation, or wrongdoing by McKinsey, and all of its agents, directors, officers, attorneys and employees acting on its behalf, solely with respect to actions taken in the course and scope of their duties with McKinsey, to any person or entity or on any legal or equitable theory.

Appellee.App.42 ¶ 13.

marginally." App.520. McKinsey RTS said that it was "very comfortable with certif[ying] that none of the monies that [we]re distributed to the reorganized debtor [we]re going to make their way to McKinsey" and was "very confident in being able to certify that no McKinsey entity ha[d] a direct holding of" stock in Contura, the parent of the reorganized debtors. App.523. With respect to McKinsey employees who owned pension plans managed by third-party funds, McKinsey RTS explained that it lacked sufficient information about the contents of the pension plans to certify that these employees did not have remote interests in Contura (such as interests through mutual funds). App.524-25. The court directed McKinsey RTS to "give to me what you're proposing" and "we'll see where we go from there." App.526.

11. In rejecting Mar-Bow's Rule 60(d) Motion, the bankruptcy court asked the parties first to brief whether Mar-Bow had standing. App.3578. McKinsey RTS argued that under 11 U.S.C. § 1109(b) only a "party in interest" has standing to be heard in bankruptcy proceedings; that (aside from the U.S. Trustee, 11 U.S.C. § 307) only one with a pecuniary interest is a "party in interest"; and that three levels of the judiciary had already decided that Mar-Bow lacks a pecuniary interest. Appellee.App.25, 28.

12. Mar-Bow advanced three theories of standing. First, it argued that, as a creditor, it had been a "party in interest" with standing *before* plan confirmation, and thus (contrary to prior holdings by three courts in this case) had a right to be

heard on any issue. App.3. Second, it claimed a "colorable pecuniary interest" in the outcome of its Rule 60(d) Motion on the theory that the bankruptcy court could sanction McKinsey RTS and distribute the proceeds of those sanctions to Mar-Bow. *Id.* Third, it argued that the bankruptcy court could ignore Mar-Bow's lack of standing and exercise its "inherent power" to "maintain[] the integrity of the Court's process" without regard to "whether Mar-Bow has a pecuniary interest." App.4.

13. The bankruptcy court denied Mar-Bow's Rule 60(d) Motion for lack of standing. App.133. First, it held that "whether Mar-Bow has a right to be heard on the Rule 60(d) Motion pursuant to section 1109 of the Bankruptcy Code turns on whether Mar-Bow has a pecuniary interest that would be directly affected by the relief sought in the Rule 60(d) Motion." App.141. Citing *Mar-Bow II*, the court concluded that "[t]he District Court has already held that Mar-Bow has no pecuniary interest in any fees and expenses that may be disgorged by McKinsey RTS" and that "[t]he same logic applies when considering any disgorgement of profits or additional monetary sanctions hypothetically ordered by the Court in response to the Rule 60(d) Motion." App.142.

14. Second, the bankruptcy court explained that Mar-Bow lacked constitutional standing because it suffered no injury:

> Mar-Bow has no legally protected interest in McKinsey RTS's disgorged fees and expenses, disgorged profits, or any other sanctions ordered by the Court. . . . Mar-Bow's only method of accessing those funds would require it to prevail on its fraud on the court claim, obtain the disgorgement and

> monetary sanctions it seeks, and then convince this Court to sidestep the terms of the confirmed Plan to bestow the funds upon the unsecured creditors on a pro rata basis. The Court considers such an interest far too conjectural to constitute an injury in fact.

App.143-44. To the extent Mar-Bow purportedly sought to protect the "integrity of the courts," that "quintessential generalized grievance . . . does not confer standing under Article III." App.144. And "the U.S. Trustee"—not Mar-Bow—"would be the proper party to raise such concerns." App.144 n.22.

15. Finally, the bankruptcy court rejected Mar-Bow's argument that "the issue of standing is fundamentally different in the context of Federal Rule 60(d)(3)." App.145. "[N]othing in the plain text of the rule hints that it permits a plaintiff to evade the ordinary standing requirements established by Article III or the pecuniary interest requirement mandated by Congress to be heard under section 1109(b) of the Bankruptcy Code." App.146. Rather, courts "that have heard Federal Rule 60(d)(3) claims have applied the typical Article III standard for standing." *Id.*

16. Mar-Bow sought reconsideration. App.547. Among other things, Mar-Bow argued that "every creditor [has] the right to be heard on every contested matter in a chapter 11 case *without the need to show a pecuniary interest* in the outcome of that matter." App.558 (emphasis added). Mar-Bow failed to explain how that argument was still viable after it had been rejected by this Court and the Fourth Circuit, and the Supreme Court (by then) had denied certiorari. The bankruptcy court denied reconsideration. App.1234.

17. Meanwhile, on June 13, 2019, McKinsey RTS submitted its "Certification Regarding Settlement Payment" in response to the court's requests during the hearings on April 23 and May 29, 2019. McKinsey RTS confirmed that "McKinsey" (as defined in the Settlement Agreement) would not receive any money distributed to the reorganized debtor. App.574. Likewise, no employee would "have any direct holding in Contura." *Id.* McKinsey RTS then explained that it could not know whether its employees would receive any indirect, *de minimis* benefit through their third-party-managed pension plans, given "the inherently speculative nature of the inquiry and informational deficiencies inherent to the fund-of-funds investment strategy of MIO." App.575. McKinsey RTS and MIO did "not know whether a third-party manager has invested MIO monies in third-party funds that invest in Contura." *Id.* No one objected except Mar-Bow (despite its lack of standing). App.589. The bankruptcy court held that McKinsey RTS's certification "complie[d] with the Settlement Order and the Court's instructions." App.1242. The court denied Mar-Bow's objection for lack of standing and because it was "satisfied with the Certification." *Id.*

18. Mar-Bow appealed to this Court.

SUMMARY OF ARGUMENT

I. To resolve Mar-Bow's appeal, this Court need look no further than *Mar-Bow I* and *Mar-Bow II*, in which this Court dismissed Mar-Bow's prior appeals because, post-confirmation, Mar-Bow lacks a pecuniary interest in these bankruptcy proceedings. The bankruptcy court correctly followed those decisions—which were affirmed by the Fourth Circuit and are the law of the case—when it dismissed Mar-Bow's Rule 60(d) Motion for lack of standing under Section 1109(b) of the Bankruptcy Code, which (like appellate standing) turns on pecuniary interest. This Court need not entertain "repeated reargument" on Mar-Bow's standing. *Baron Fin. Corp. v. Natanzon*, 509 F. Supp. 2d 501, 520 (D. Md. 2007).

In urging departure from this Court's prior determinations that Mar-Bow lacks standing, Mar-Bow offers irrelevant discussions about the subject-matter jurisdiction of the federal courts, the bankruptcy court's broad authority to fashion remedies, and the importance of impartial proceedings in the bankruptcy court. Each argument attempts to distract the Court from the dispositive question: Does Mar-Bow lack a pecuniary interest in the relief sought by its Rule 60(d) Motion and thus lack standing? The answer remains a firm yes.

Even beyond the standing issues addressed on previous appeals, the bankruptcy court correctly held that Mar-Bow lacks Article III standing because its asserted interests in the relief sought are "far too conjectural" or "generalized" to satisfy the injury-in-fact requirement. Mar-Bow's contrary arguments are wrong.

II. Nor can Mar-Bow evade its lack of standing by arguing that standing requirements are inapplicable to fraud-on-the-court motions. As the Fourth Circuit has held, standing requirements are invariable. "[A]ny party who invokes the court's authority must establish standing." *Ansley v. Warren*, 861 F.3d 512, 517 (4th Cir. 2017) (citing *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011)). Rule 60 is no different. Mar-Bow argues that the Court has the power to address allegations of fraud *sua sponte*, but what a court has power to do and what a litigant has standing to ask it to do are altogether different questions. Mar-Bow cites no case holding that an entity without standing can *compel* a court to investigate its assertions of fraud on the court.

III. Finally, Mar-Bow's lack of the unwavering Article III, statutory, and appellate standing requirements also preclude it from challenging the bankruptcy court's order approving McKinsey RTS's certification regarding the settlement payment. Even if Mar-Bow did have standing, moreover, it offers no plausible reason that the bankruptcy court's analysis should be rejected in favor of its own. The bankruptcy court is entitled to "substantial deference" on this question, *In re Tomlin*, 105 F.3d 933, 941 (4th Cir. 1997), and got the issue right.

ARGUMENT

To maintain this (or any) bankruptcy appeal, Mar-Bow must have appellate standing. Nothing material has changed since the last time this Court held that it lacks such standing. To obtain reversal, Mar-Bow also must have had both Article III and statutory standing below. It had neither, for the same reason why it lacked and lacks appellate standing. This appeal is frivolous.

I. THE BANKRUPTCY COURT CORRECTLY HELD (AGAIN) THAT MAR-BOW LACKS STANDING

The bankruptcy court dismissed Mar-Bow's Rule 60(d) Motion for lack of standing because Mar-Bow lacks an interest in "any disgorgement of profits or additional monetary sanctions hypothetically ordered by the Court in response to the Rule 60(d) Motion" and thus "has no pecuniary interest at stake in the current proceeding that would qualify it as a party in interest under section 1109(b)." App.142-43. It also held that Mar-Bow lacks Article III standing because the injuries claimed by Mar-Bow are "far too conjectural to constitute an injury in fact" and are "generalized grievance[s] insufficient to support Article III standing." App.144. The bankruptcy court's well-reasoned opinion was rooted in this Court's prior opinions (which are law of the case) and constitutes a clear-cut application of well-established principles.

A. Mar-Bow's Lack Of Pecuniary Interest—Determined As Law Of The Case—Defeats Its Standing Under Section 1109(b) And Its Appellate Standing.

Under Section 1109 of the Bankruptcy Code, a litigant has standing to be heard in bankruptcy court only if it has some "pecuniary interest" that "would be 'directly affected' by the bankruptcy proceeding." *In re Alpha Nat. Res. Inc.*, 544 B.R. 848, 856 (Bankr. E.D. Va. 2016) (quoting *In re Hutchinson*, 5 F.3d 750, 756 (4th Cir.1993)). "Pecuniary interest is a necessary rather than a sufficient condition of [the right to be heard under 11 U.S.C. § 1109(b)]." *In re C.P. Hall Co.*, 750 F.3d 659, 663 (7th Cir. 2014) (Posner, J.).

This Court and the Fourth Circuit have already determined that Mar-Bow lacks a pecuniary interest. This Court held in *Mar-Bow I* and *Mar-Bow II* that Mar-Bow "lost any pecuniary interest . . . on July 12, 2016, when the Reorganization Plan was confirmed." *Mar-Bow I*, 578 B.R. at 355; *Mar-Bow II*, 2017 WL 4414155, at *18. Under the confirmed plan, "[a]ll additional cash will be distributed to holders of 'Allowed Secured First Lien Lender Claims,' which does not include Mar-Bow." 2017 WL 4414155, at *18. The Fourth Circuit adopted this Court's reasoning as its own. *In re Alpha Nat. Res., Inc.*, 736 F. App'x at 413.

Mar-Bow seeks to accomplish through its Rule 60(d) Motion the same thing it tried three years ago: to make McKinsey RTS disgorge its fees and expenses, disgorge certain profits, and pay additional monetary sanctions. App.8 at ¶ 20. As the bankruptcy court below recognized, this Court already held that, "even if the Court were to . . . sanction[] 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***." App.142 (second emphasis added) (quoting *Mar-Bow II*, 2017 WL 4414155, at *18).

This Court's analysis can end here. Its prior determination that Mar-Bow lacks a pecuniary interest in any relief that the Court may order is the law of the case. "[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 203 F.3d 291, 304 (4th Cir. 2000) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). Furthermore, the Fourth Circuit affirmed this Court, so "the mandate rule"—the "mo[st] powerful version of the law of the case doctrine," *Doe v. Chao*, 511 F.3d 461, 464 (4th Cir. 2007), applies and "forecloses relitigation of issues expressly or impliedly decided by the appellate court," *S. Atl. Ltd. P'ship of Tenn., LP v. Riese*, 356 F.3d 576, 584 (4th Cir. 2004).

The law-of-the-case doctrine "is based on sound public policy that litigation should come to an end and is designed to quickly resolve disputes by preventing continued re-argument of issues already decided." *In re Abengoa Bioenergy Biomass of Kansas, LLC*, No. 16-10446, 2018 WL 2138620, at *4 (Bankr. D. Kan. May 7, 2018). It prevents exactly what the Court faces here: "the burdens of repeated reargument by indefatigable diehards." *Baron Fin. Corp.*, 509 F. Supp. 2d at 520 (quoting 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4478 (2002)).

Courts routinely apply the law of the case to prevent parties from vexatiously rehashing the question of a party's pecuniary interest in bankruptcy proceedings. In *In re Abengoa*, 2018 WL 2138620, at *4, the court applied the doctrine to strike a claim objection because the court had "previously concluded [the objecting party] has no direct or indirect pecuniary interest" and "[n]othing ha[d] changed." In *Pavlock v. Golden Investment Acquisitions, LLC*, No. 1:15CV131, 2017 WL 386454, at *4 (N.D.W. Va. Jan. 27, 2017), the court held that a "Bankruptcy Court properly applied its prior decisions to conclude that Pavlock does not have standing as a party in interest." In *In re Southold Development Corp*., 136 B.R. 40, 42 (E.D.N.Y. 1992), the court denied standing because it had "already determined that [appellant] has no property interest in [the estate] . . . and therefore has no standing to object to the Confirmation Order." Having already concluded that Mar-Bow lacks a pecuniary interest, this Court can "quickly resolve" this appeal. *In re Abengoa*, 2018 WL 2138620, at *4.

Mar-Bow relegates its discussion of *Mar-Bow I* and *Mar-Bow II* to a footnote, arguing that those decisions do not control here because they addressed appellate rather than bankruptcy court standing. App.Br.5 n.1. But the test for party-in-

interest standing under Section 1109(b) and the "person aggrieved test" for bankruptcy appellate standing both require a pecuniary interest in the outcome. *In re Alpha Nat. Res. Inc.*, 544 B.R. at 856; *In re Urban Broad. Corp.*, 401 F.3d 236, 244 (4th Cir. 2005) ("a person aggrieved is a party directly and adversely affected pecuniarily" (quotation marks omitted)); *In re C.P. Hall Co.*, 750 F.3d at 663; *Cult Awareness Network, Inc. v. Martino*, No. 97 C 416, 1997 WL 327123, at *2 & n.4 (N.D. Ill. May 27, 1997) ("both concepts turn on whether the complaining party has a pecuniary interest"), *aff'd sub nom. In re Cult Awareness Network, Inc.*, 151 F.3d 605 (7th Cir. 1998). Furthermore, if Mar-Bow lacks appellate standing because it lacks a pecuniary interest, then this Court will dismiss the appeal without considering the correctness of the ruling below, as it did with Mar-Bow's prior appeals, so Mar-Bow's appeal is frivolous even if Mar-Bow's footnoted distinction were correct. To win this appeal, Mar-Bow must *both* have appellate standing *and* show that the court below erred in its holding that Mar-Bow lacked standing under both Section 1109(b) and the Constitution. Suffering dismissal for lack of appellate standing and suffering affirmance lead to the exact same place.

Mar-Bow's previously and finally adjudicated lack of any pecuniary interest in fees or other expenses disgorged by McKinsey RTS defeats both its appellate and its Section 1109 standing.

B. Mar-Bow Provides No Basis For This Court To Reverse Course And Find That Mar-Bow Now Has Appellate Standing Or Standing Under Section 1109.

Mar-Bow offers "no compelling reasons to re-examine this [Court's] prior ruling on standing." *Baron Fin. Corp.*, 509 F. Supp. 2d at 520. Nor does it show "that controlling legal authority has changed dramatically," "that significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light," or "that a blatant error in the prior decision will, if uncorrected, result in a serious injustice," as is necessary to escape the mandate rule. *Riese*, 356 F.3d at 584 n.9.

1. Standing Must Be Established At Every Stage, For Each Form Of Relief Sought.

Mar-Bow argues at length that standing is determined at "the commencement of litigation," and, once obtained, is never lost. App.Br.13-25. So, the argument goes, because Mar-Bow, as a creditor, had standing to be heard in the underlying bankruptcy proceedings *before* plan confirmation, it must have standing to challenge all decisions of the bankruptcy court in these proceedings, for all eternity, no matter the evolution of the proceedings or the relief sought by its motions.

But this Court and the Fourth Circuit have already held—in this case—that that is not the law. *In re Alpha Nat. Res., Inc.*, 736 F. App'x at 413. "[A] plaintiff must demonstrate standing separately *for each form of relief sought*." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (emphasis added). And the interest that gives the plaintiff standing "must continue to exist at every stage." *Rosenfeld v. Montgomery Cty. Pub. Sch.*, 25 F. App'x 123, 129-30 (4th Cir. 2001) (citing *Laidlaw*, 528 U.S. at 189); *see also* 7 COLLIER ON BANKRUPTCY ¶ 1109.01[3] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) ("'party in interest' in a 'case' may be precluded from participating *in a particular 'proceeding'* for lack of standing" (emphasis added)).

Mar-Bow plucks language from cases to argue that a party cannot lose standing that exists at the commencement of a lawsuit, *see* App.Br.20-21 (quoting *Deal v. Mercer Cty. Bd. of Educ.*, 911 F.3d 183, 191 (4th Cir. 2018), *Pashby v. Delia*, 709 F.3d 307, 316 (4th Cir. 2013), and *Republic Bank & Tr. Co. v. Kucan*, 245 F. App'x 308, 315 (4th Cir. 2007)), but in those cases the Fourth Circuit considered only whether the party had standing at the outset, not whether previous standing had been lost. (And none addressed the section 1109(b) requirement that a party have a pecuniary interest in the particular relief sought.) A party must have standing at the outset of the litigation, but numerous cases establish that standing must be maintained throughout a proceeding and can be lost. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 364 (2011) ("plaintiffs no longer employed by Wal-Mart lack standing to seek injunctive or declaratory relief against its employment practices"); *Karcher v. May*, 484 U.S. 72, 82 (1987) (legislators lost standing to appeal once they left office); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 592 (1967) ("Maud has voluntarily resigned and therefore no longer has standing in this suit.").[6]

To argue otherwise, Mar-Bow cites myriad cases that have nothing to do with standing and quotes generalities about the subject-matter jurisdiction of the federal courts. For example, in support of its assertion that "standing is fixed when litigation commences" (App.Br.13), Mar-Bow cites three cases that *do not mention standing* but instead address the "longstanding" and uncontroversial principle that the subject-matter "jurisdiction of the Court depends upon the state of things at the time . . . the action [is] brought." *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) (jurisdiction of Court of Federal Claims under 28 U.S.C. § 1500 is evaluated at time of filing); *see also Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 571-75 (2004) (citizenship for purposes of diversity jurisdiction under 28 U.S.C. § 1332 is determined at commencement of action); *In re Celotex Corp.*, 124 F.3d 619, 626 (4th Cir. 1997) ("related to" jurisdiction under 28 U.S.C. § 1334(b) is evaluated at time of removal).

These cases all bear on the time for determining the Court's *power* to act but not "*who* may invoke the court's decisional and remedial powers." *Warth v. Seldin*,

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[6] The Supreme Court has rejected Mar-Bow's assertion (App.Br.20) that a loss of standing over time is *merely* a question of mootness, *see Laidlaw*, 528 U.S. at 190 ("the description of mootness as 'standing set in a time frame' is not comprehensive").

422 U.S. 490, 499 (1975) (emphasis added). "[W]hen standing is placed in issue in a case, the question is whether the *person* whose standing is challenged is a proper party to request an adjudication of a particular issue *and not whether the issue itself is justiciable*." *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968) (emphasis added). Although subject-matter jurisdiction generally is evaluated at the commencement of an action, *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (per curiam), a party seeking relief in federal court "must demonstrate standing for *each claim* he seeks to press and *for each form of relief* that is sought," *Davis v. FEC*, 554 U.S. 724, 734 (2008) (emphasis added) (quotation marks omitted).

The single standing case Mar-Bow cites—*In re Mirant Corp.*, 675 F.3d 530 (5th Cir. 2012)—does not help its cause. It does not address the pecuniary-interest requirement for bankruptcy standing. Rather, it reaffirms a point that *hurts* Mar-Bow's cause, namely that Article III standing is *not* fixed for eternity at the commencement of an action but turns on whether a litigant has an interest in the particular relief sought. In *Mirant*, the court evaluated whether a trustee maintains standing to assert an avoidance claim under 11 U.S.C. § 544(b) once the debtor's creditors have been paid in full. The court held that the trustee had standing so long as avoidance would "benefit the estate," but that the trustee's standing would not "persist" beyond that point. *Id.* at 533-34. In other words, the trustee had standing so long as the trustee was pursuing available redress for a cognizable injury—which Mar-Bow is not doing.

Mar-Bow asserts that, because the bankruptcy court had jurisdiction over the underlying bankruptcy proceedings, it has jurisdiction over Mar-Bow's Rule 60(d) Motion. App.Br.14-17. This argument, which attempts to capitalize on the fact that jurisdiction "is a word of many, too many, meanings,"[7] falters on the same ground as the last: The vast majority of cases Mar-Bow cites discuss the statutory subject-matter jurisdiction of federal courts to act on Rule 60 motions, not standing.[8] But the bankruptcy court's uncontested statutory jurisdiction to preside over Mar-Bow's Rule 60(d) Motion, including deciding *whether* Mar-Bow has standing, is wholly separate from whether Mar-Bow *has* standing.

Mar-Bow again cites only one case discussing standing—the unpublished decision in *In re New River Dry Dock, Inc.*, 497 F. App'x 882, 885-86 (11th Cir.

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[7] *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1848 (2019); *United States v. Cortez*, 930 F.3d 350, 359 (4th Cir. 2019); *United States v. Rivera Lopez*, 355 F. Supp. 3d 428, 438 (E.D. Va. 2018). Each cited case quotes some of the many other cases using the same phrase, but we have omitted internal quotation marks.

[8] *See Weldon v. United States*, 70 F.3d 1, 4 (2d Cir. 1995); *Bankers Mortg. Co. v. United States*, 423 F.2d 73, 78 (5th Cir. 1970); *Smith v. Widman Trucking & Excavating, Inc.*, 627 F.2d 792, 799 (7th Cir. 1980); *Root Refining Co. v. Universal Oil Prods. Co.*, 169 F.2d 514, 522 (3d Cir. 1948); *United States v. Beggerly*, 524 U.S. 38, 46 (1998); *Carey v. Hous. & Tex. Cent. Ry. Co.*, 161 U.S. 115, 130 (1896); *Ross v. Miller*, 252 F. 697, 699 (4th Cir. 1918); *Lamb v. Schmitt*, 285 U.S. 222, 227 (1932); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Springs v. Ally Fin., Inc.*, 657 F. App'x 148, 151 (4th Cir. 2016) (all addressing subject-matter jurisdiction, not standing).

2012)—but mischaracterizes its holding. Mar-Bow asserts that that case establishes that creditors have "§1109(b) standing to seek fee disgorgement from a court-approved professional" even after plan confirmation, App.Br.17, but the issue on appeal there was whether a plan administrator could assign to a creditor its right to request disgorgement of fees from a broker hired to sell the debtors' primary asset, 497 F. App'x at 885. There was no dispute that that creditor had standing under Section 1109(b) as a party in interest. *See Denison v. Marina Mile Shipyard, Inc.*, No. 10-62522-CIV, 2012 WL 75768, at *5 (S.D. Fla. Jan. 10, 2012) ("The Brokers have not argued that Marina Mile, a major creditor of the New River Dry Dock, was not a party in interest. Instead, the Brokers argue that the plan administrator had no right to delegate prosecution of claims to third parties." (quotation marks omitted)), *aff'd sub nom. In re New River Dry Dock, Inc.*, 497 F. App'x 882 (11th Cir. 2012).

Mar-Bow next argues based on out-of-circuit precedent that Article III standing and Section 1109(b) standing are "effectively coextensive" (App.Br.17-18) but the import of that point is not clear. The cases Mar-Bow cites establish that a determination that a party has standing under Section 1109(b)—*i.e.*, has a pecuniary interest in the outcome of the proceedings—may also establish Article III standing. *See In re Weinstein Co. Holdings, LLC*, 595 B.R. 455, 465 (Bankr. D. Del. 2018) ("Plaintiff has standing under the Bankruptcy Code to object to the Defendants' claims, [and thus] meets the requirements for Article III standing as well."); *In re*

Basson, 713 F. App'x 987, 988 n.2 (11th Cir. 2018) (same). They do not call into question the pecuniary-interest requirement that Mar-Bow cannot satisfy.

In re Gentry, 807 F.3d 1222 (10th Cir. 2015), and *In re Edgeworth*, 993 F.2d 51 (5th Cir. 1993), cited at App.Br.19, address the continued liability of guarantors and insurers following discharge of a borrower's debt in bankruptcy proceedings. They have nothing to do with whether Mar-Bow has a pecuniary interest.

Mar-Bow cites *In re Celotex*, 124 F.3d at 626, and *In re Enron Corp. Securities Derivative & Erisa Litigation*, 535 F.3d 325, 335 (5th Cir. 2008), to argue that the "Fourth Circuit and other courts have specifically held that confirmation of a plan does not divest the court of subject matter jurisdiction over litigation that began before plan confirmation." App.Br.21. That may be, but it is of no consequence here (which is of course one of the reasons the Fourth Circuit affirmed this Court's prior standing decisions). Those cases establish that plan confirmation does not automatically divest a bankruptcy court of subject-matter jurisdiction over actions previously removed to federal court under "related to" jurisdiction. *In re Celotex*, 124 F.3d at 626; *In re Enron*, 535 F.3d at 335. Neither case has anything to do with standing.

Mar-Bow next asserts that the "bankruptcy court's holding would mean anyone adversely affected by a judgment would lack standing to assert fraud on the court underpinning that judgment." App.Br.22. That is nonsense. Mar-Bow lacks standing because it is *not* adversely affected, in any redressable way, by the bankruptcy court's judgment.

Likewise, it is hardly a "perverse" result (App.Br.22) that Mar-Bow, a stranger that bought its way into ANR's bankruptcy case by buying debt whose value is now fixed, has been deprived of standing. A perverse result would be to allow a special-purpose vehicle created by the founder of a competitor with no financial interest in these (closed) bankruptcy proceedings to pursue an anticompetitive agenda despite a clear lack of standing.[9] Had there truly been fraud on the court—and there was not—the first-lienholders with an actual pecuniary interest in disgorgement of fees from McKinsey RTS could lodge such a claim, as could the U.S. Trustee. They have not done so.

Finally, Mar-Bow spends two pages trying to distinguish *Herring v. FDIC*, 82 F.3d 282 (9th Cir. 1995), as amended (1996). App.Br.23-25. In *Herring*, the Ninth Circuit held that "[a] party must have an interest in the litigation to raise a fraud on the court claim"; that "Rule 60(b) does not grant [parties] standing which they otherwise do not have"; and that parties who "could not recover funds even if their

[9] *Cf. In re Cambridge Analytica LLC*, 600 B.R. 750, 753 (Bankr. S.D.N.Y. 2019) ("The Court would set a very troubling precedent by allowing the Movant's Rule 2004 Motion to go forward. Such a result would incentivize parties to purchase nominal claims in bankruptcy cases solely to pursue their outside litigation agendas.").

fraud allegations were true . . . lack standing to challenge that fraud." 82 F.3d at 285. *Herring*'s reasoning is sound. As discussed in Section II below, "any party who invokes the court's authority must establish standing"—even a party that makes allegations of fraud on the court. *Ansley*, 861 F.3d at 517. The *Herring* court simply applied that fundamental rule.

2. Mar-Bow Lacked Both Statutory And Constitutional Standing To Be Heard On Its Rule 60(d) Motion.

Mar-Bow next argues that it had standing even if the bankruptcy court was right to assess its standing at the time of its Rule 60(d) Motion. App.Br.25-39. But Mar-Bow addresses only the test for Article III standing—ignoring the pecuniary-interest requirement, which this Court and the Fourth Circuit dispositively addressed in the prior appeals, and which is a prerequisite for both appellate and statutory standing. Because Mar-Bow lacks party-in-interest standing under Section 1109(b) and appellate standing, this Court need not address Mar-Bow's lack of constitutional standing.

Regardless, Mar-Bow lacks Article III standing too, as the court below correctly held. To establish Article III standing, a litigant must show (1) "a concrete and particularized 'injury in fact,'" that is (2) "fairly traceable to the challenged action"; and (3) "likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014). "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' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). The injury "must affect the plaintiff in a personal and individual way," *id.* at 1548—"in short, [the plaintiff must assert] something more than 'generalized grievances.'" *United States v. Richardson*, 418 U.S. 166, 180 (1974) (quoting *Flast*, 392 U.S. at 106).

Mar-Bow advances four theories of injury-in-fact. App.Br.25-30. Each one fails. First, Mar-Bow argues that its "claim against ANR . . . remained" even after confirmation of the Reorganization Plan and asserts that creditors have standing to litigate fraud on the court claims. App.Br.26. In neither case cited by Mar-Bow, however, was a creditor's lack of pecuniary interest at issue. *Marshall v. Gurley*, No. 4:17-cv-405, 2018 WL 4762858, at *4 (E.D. Tex. Sept. 30, 2018) (question was not whether creditors had an interest in the property at issue but whether they could seek relief as non-parties in lieu of the Chapter 7 trustee); *Denison*, 2012 WL 75768, at *5 ("The Brokers have not argued that Marina Mile, a major creditor of the New River Dry Dock, was not a party in interest.").

Mar-Bow claims to suffer a "continuing loss" as a creditor because the Reorganization Plan "diminished" the value of its property. App.Br.26. But Mar-Bow is no longer appealing and cannot appeal the plan confirmation order, which is final and no longer subject to review. Mar-Bow did appeal that order, but this Court dismissed its appeal as equitably moot years ago. An attempt to appeal plan confirmation now would be, if such a thing is possible, even more frivolous than Mar-Bow's standing appeal.

Further, Mar-Bow seeks to reopen the bankruptcy proceedings solely to challenge McKinsey RTS's Rule 2014 disclosures and seek disgorgement of fees and sanctions—relief that would not address any supposed loss related to the value of its claims. It is not enough for Mar-Bow to allege a loss, and then develop a theory for how it could receive an unrelated pecuniary gain through this Court's distribution of sanctions. Mar-Bow must show a pecuniary loss, trace it to the challenged conduct, *and* show that it would be remedied by the relief sought—something Mar-Bow cannot do. *See Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772-73 (2000) ("An interest unrelated to injury in fact is insufficient to give a plaintiff standing.").

Second, Mar-Bow claims that "creditors as well as the court have a legally protected interest in conflict-free fiduciary professionals." App.Br.26. The bankruptcy court correctly determined that this type of generalized grievance fails to support standing. App.144 (citing *Warth*, 422 U.S. at 499); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). Mar-Bow has no answer to "the basic principle that to invoke judicial power the claimant must have a 'personal stake in the outcome.'" *Richardson*, 418 U.S. at 179-80 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

Third, Mar-Bow claims that the bankruptcy court *could* impose monetary sanctions on McKinsey RTS and award them to Mar-Bow. App.Br.29. This Court already held that Mar-Bow has no pecuniary interest in such relief. *Mar-Bow II*, 2017 WL 4414155, at *18. And the bankruptcy court correctly held that such an injury is too conjectural to support Article III standing, as an award of monetary sanctions to Mar-Bow would not only "require [Mar-Bow] to prevail on its fraud on the court claim," but also to "obtain the disgorgement and monetary sanctions it seeks, and then convince this Court to sidestep the terms of the confirmed Plan to bestow the funds upon the unsecured creditors on a pro rata basis." App.143-44.

In other words, Mar-Bow's asserted interest in disgorgement of McKinsey RTS's fees depends "on a highly attenuated chain of possibilities" that cannot support a finding of standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013). Even if it could, the mere fact that money might somehow land in Mar-Bow's pocket would not establish standing. *See Vermont Agency*, 529 U.S. at 772 ("The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right.").[10]

[10] Mar-Bow asserts that "fraud on the court sanctions . . . need not be paid to the debtor or the bankruptcy estate" but cites inapposite cases that, at best, show the court has power to fashion appropriate sanctions during bankruptcy proceedings.

Mar-Bow argues that this analysis improperly considers Mar-Bow's likelihood of success on its claim. It argues that any gossamer possibility that the bankruptcy court *could* distribute the proceeds of sanctions to Mar-Bow satisfies the injury-in-fact requirement, regardless of the hurdles to recovery. App.Br.30-31. Although a court assessing standing must assume the plaintiff will prevail on its liability theory (here, that McKinsey RTS's disclosures were inadequate) the plaintiff bears the burden of establishing injury-in-fact. An asserted injury, like Mar-Bow's, that requires an attenuated chain of unlikely occurrences does not suffice. *Clapper v. Amnesty Int'l*, 568 U.S. at 410; *see* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1223 (1993) ("A lawyer looking at [Supreme Court] caselaw will learn that the injury must be distinct and palpable,

App.Br.37-38 & nn.5-6. None discusses Article III or Section 1109 standing, and none features a bankruptcy court sidestepping a confirmed plan's or the Bankruptcy Code's priority schemes to award monetary relief to a party that would not otherwise have standing and is junior in interest to others that have not been paid in full on their original claims. *E.g.*, *In re Lewis*, 113 F.3d 1040, 1046 (9th Cir. 1997) (declining to address creditor's challenge to disposition of disgorged funds as not ripe for appeal); *In re Charles St. African Methodist Episcopal Church of Bos.*, 499 B.R. 126, 133 (Bankr. D. Mass. 2013) (awarding fees to debtor for cost of prosecuting motion necessitated by bank's violation of debtors' right of exclusivity); *In re Schafler*, 263 B.R. 296, 300-01 (N.D. Cal. 2001) (bankruptcy court compensated Trustee's counsel for cost incurred defending motion); *In re Soll*, 181 B.R. 433, 450-51 (Bankr. D. Ariz. 1995) (awarding fees to creditor under 11 U.S.C. § 1105, which provides remedies to corporate debtors harmed by violation of automatic stay); *In re Brown*, 152 B.R. 563, 568 (Bankr. E.D. Ark. 1993) (sanctioning counsel for debtor that filed duplicative motions, in favor of creditors whose standing was not challenged).

concrete, certainly impending, real and immediate, and actual or imminent, not conjectural or hypothetical.") (footnotes and quotation marks omitted). Even if Mar-Bow could prevail on the merits of its challenges to McKinsey RTS's disclosures, Mar-Bow has "no legally protected interest in McKinsey RTS's disgorged fees and expenses, disgorged profits, or any other sanctions ordered by the Court." App.143.

The contrast between this case and *Cooksey v. Futrell*, 721 F.3d 226 (4th Cir. 2013) (cited at App.Br.30), highlights the flaw in Mar-Bow's analysis. There, the Fourth Circuit declined to consider the merits of a First Amendment claim as part of the standing analysis. *Id.* at 239. But the Fourth Circuit *did* evaluate whether the plaintiff suffered a justiciable injury-in-fact as a result of the challenged conduct. Only because the plaintiff had "sufficiently shown" injury-in-fact—"a non-speculative and objectively reasonable chilling effect of his speech" and a "credible threat of prosecution under the [challenged] Act"—did the Fourth Circuit find standing. *Id.* at 236-38. Here too, the bankruptcy court evaluated whether Mar-Bow had "sufficiently shown" an injury-in-fact (and concluded it had not).

Finally, Mar-Bow asserts that "even non-parties to underlying litigation have standing to litigate fraud on the court if their interests are 'sufficiently connected' . . . with the challenged order." App.Br.29. In the cases Mar-Bow cites, however, the non-parties' interests were "directly affected" by the judgment from which they sought relief, and relief from the judgment would redress their injuries.[11] Nothing in them does or could negate the "essential and unchanging part of the case-or-controversy requirement of Article III" that a litigant seeking relief must show injury-in-fact, traceability, and redressability. *Lujan*, 504 U.S. at 560; *see also Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017).

II. WITHOUT STANDING, MAR-BOW CANNOT MAINTAIN ITS MOTION ALLEGING FRAUD ON THE COURT OR ITS APPEAL OF THE BANKRUPTCY COURT'S JUDGMENT

Mar-Bow asks this Court to carve out an unprecedented exception from the "essential and unchanging . . . requirement" that litigants possess standing, *Lujan*, 504 U.S. at 560, arguing that "standing is unnecessary to address fraud on the court," App.Br.39. A court's "action is *mandated*," Mar-Bow says, whenever *anyone* insists that fraud occurred. App.Br.39-40 (emphasis added).

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[11] *See Grace v. Bank Leumi Tr. Co. of N.Y.*, 443 F.3d 180, 188 (2d Cir. 2006) (non-party had standing to bring Rule 60 motion where plaintiff and judgment-proof defendant reached settlement and attempted to use it as predicate for fraudulent conveyance action against non-party); *Eyak Native Vill. v. Exxon Corp.*, 25 F.3d 773, 777 (9th Cir. 1994) (non-party environmental organizations would have standing to challenge consent decree between States and Exxon on grounds that State did not adequately represent public's interest when it negotiated decree); *Binker v. Pennsylvania*, 977 F.2d 738, 745 (3d Cir. 1992) (non-party had standing to appeal where it participated in settlement and "had a stake in its proceeds discernable from the record"); *Southerland v. Irons*, 628 F.2d 978, 980 (6th Cir. 1980) (per curiam) (allowing state agency that paid $30,000 to cover medical care for plaintiff's husband to raise claim of fraud because plaintiff's attorney misrepresented he would pay state agency's lien); *Kupferman v. Consol. Research & Mfg. Corp.*, 459 F.2d 1072, 1074 n.1 (2d Cir. 1972) (former director of defunct company had standing to seek relief from judgment where he was "real party in interest").

But decades of case law could hardly make clearer that "*any* party who invokes the court's authority must establish standing." *Ansley*, 861 F.3d at 517 (emphasis added); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011). The federal judiciary has jurisdiction "over *only* 'cases and controversies,' and the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (emphasis added). "'Concerned bystanders' may not marshal the judiciary as a 'vehicle for the vindication of value interests'—the exercise of judicial power is restricted to litigants who seek to rectify a personal and discrete harm." *Ansley*, 861 F.3d at 517 (alteration marks omitted) (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013)). "A mere interest in an event—no matter how passionate or sincere the interest and no matter how charged with public import the event—will not substitute for an actual injury." *United States v. AVX Corp.*, 962 F.2d 108, 114 (1st Cir. 1992).

Accordingly, "a plaintiff must demonstrate standing separately for each form of relief sought." *Laidlaw*, 528 U.S. at 185. "For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right." *Town of Chester*, 137 S. Ct. at 1651.

Motions for relief from judgment under Rule 60 fall within that rule. *See, e.g.*, *Horne v. Flores*, 557 U.S. 433, 445 (2009). "A nonparty who seeks to attack a fraudulently obtained judgment through an independent action is required to show that his legal interests are affected." *Houck ex rel. United States v. Folding Carton Admin. Comm.*, 881 F.2d 494, 505 (7th Cir. 1989). In other words, a non-party may raise such a challenge only if its "rights were directly compromised by the final judgment" that was allegedly procured through fraud. *Kem Mfg. Corp. v. Wilder*, 817 F.2d 1517, 1521 (11th Cir. 1987); *see also In re Lawrence*, 293 F.3d 615, 627 n.11 (2d Cir. 2002) ("[S]everal circuit courts have permitted a non-party to bring a Rule 60(b) motion or a direct appeal *when its interests are strongly affected* . . . ." (emphasis added)); *Eyak Native Vill. v. Exxon Corp.*, 25 F.3d 773, 777 (9th Cir. 1994) ("[A] nonparty may seek relief from a judgment procured by fraud *if the nonparty's interests are directly affected*." (emphasis added)).[12]

Courts applying these principles have rejected fraud-on-the-court motions brought by parties who lack standing. For example, in *Gache v. Hill Realty Associates*, a plaintiff brought motions under Rules 60(b)(3) and 60(d)(3) to vacate a bankruptcy court's order that he claimed resulted from fraud on the court. No. 13-

[12] Before the 2007 amendments to the Federal Rules of Civil Procedure, a party seeking to set aside a judgment for fraud on the court would move under Rule 60(b). *See* Fed. R. Civ. P. 60(b) (2006) ("This rule does not limit the power of a court to entertain an independent action . . . to set aside a judgment for fraud upon the court."). This portion of Rule 60 was shifted to subsection (d)(3) in 2007. *See* Fed. R. Civ. P. 60(d)(3) (2007). Thus, *Houck*, *Kem Manufacturing*, *Eyak Native Village*, and other pre-2007 cases involve motions under Rule 60(b) that are procedurally identical to Mar-Bow's present motion under Rule 60(d)(3).

CV-1650, 2014 WL 5048336, at *4, *7 n.11 (S.D.N.Y. Sept. 22, 2014). The district court denied the motion due to his lack of standing, reasoning that the plaintiff could not bring the motion if he had no pecuniary interest in the proceeds of a successful claim. *Id.* at *7. Likewise, in *In re Motors Liquidation Co.*, the bankruptcy court denied the Rule 60(b)(3) and Rule 60(d) motions of a litigant who had sold her claim against the debtor before filing her motions. 533 B.R. 46, 49 (Bankr. S.D.N.Y. 2015), *aff'd*, No. 15-CV-9971 (JMF), 2016 WL 3461359 (S.D.N.Y. June 21, 2016), *aff'd*, 689 F. App'x 95 (2d Cir. 2017). As the court explained, "[a]n unequivocal and complete assignment extinguishes all rights against the obligor and leaves the assignor without standing to sue." *Id.* at 52 (alteration marks omitted).

The Seventh Circuit reached the same conclusion in *Parvati Corp. v. City of Oak Forest*, 630 F.3d 512 (7th Cir. 2010). There, a litigant alleged fraud on the court and moved under Rules 60(b)(3) and 60(d)(3) to vacate an order that had denied a license to a business located on its property. *See Parvati Corp. v. City of Oak Forest*, No. 06 C 1772, 2008 WL 11411343, at *1-2 (N.D. Ill. Dec. 16, 2008). Although the district court found that the litigant had standing and reached the merits of its claim, the court of appeals (in an opinion joined by Justice O'Connor, sitting by designation) held that the case should be dismissed for lack of jurisdiction because the litigant "no longer own[ed] the property" and thus "lack[ed] standing to reopen the judgment on that claim." 630 F.3d at 518.

To try to escape these basic principles, Mar-Bow misapplies cases observing that courts may act *sua sponte* to vacate prior judgments upon discovering fraud on the court. *See* App.Br.39-43. Not only is Mar-Bow unable to evade standing requirements by invoking the bankruptcy court's inherent authority, but also Judge Huennekens expressly declined to invoke it himself. *See* App.147 ("To the extent that the Court may have the ability to appoint an examiner *sua sponte*, pursuant to the authority granted to it under section 105(a) of the Bankruptcy Code, the Court elects not to do so at this time."). Mar-Bow cites no case suggesting that a litigant without standing can *compel* a court to investigate assertions of fraud on the court. For example, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* held that, on discovering that one of its judgments was procured through fraud, a court of appeals had the power to vacate that judgment and issue new instructions to the district court. 322 U.S. 238, 247-50 (1944). Not a word of the opinion suggests that a court must consider the motion of a litigant that lacks standing.

Likewise, *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575 (1946), and the related *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514 (3d Cir. 1948), did not review any litigant's standing. Instead, the Supreme Court held that a federal court *may* "investigate whether a judgment was obtained by fraud." 328 U.S. at 580. In aid of that process, the court was free to enlist the services of amici who did not have a stake in the outcome. *Id.* at 581. But the opinion never implied that, whenever an amicus asserts fraud on the court, the court must investigate. Similarly, in subsequent lower-court proceedings, the Third Circuit simply recognized "the inherent power of a court to inquire into the integrity of its own judgments," such that a judgment's "freedom from fraud may always be the subject of further judicial inquiry." *Root Ref.*, 169 F.2d at 521-22. The court's acknowledgment of its own power nowhere discussed the standing required of a litigant.

In any event, as the Seventh Circuit explained in *Houck ex rel. United States v. Folding Carton Administration Committee*, the movants in *Hazel-Atlas* and *Root Refining* actually *had* standing. The movant in *Hazel-Atlas* sought to vacate a judgment that had been entered against itself. 322 U.S. at 239; *see also Houck*, 881 F.2d at 505 (distinguishing *Hazel-Atlas* because the movant "was party to prior litigation in which the judgment was entered"). The court in *Root Refining* held that the intervenor was among "those who may be affected by the outcome of [the court's] investigation." 169 F.2d at 525; *see also Houck*, 881 F.2d at 505 (distinguishing *Root Refining* because the motion sought to set aside the "judgment for fraud . . . as to those affected by [the] outcome").

Mar-Bow cites a number of other cases, most of which rely on *Hazel-Atlas*, *Universal Oil Products*, and *Root Refining*, that repeat the same undisputed and irrelevant conclusion: A court is empowered to investigate potential fraud on the court. None holds that a court is *required* to investigate allegations of fraud raised by persons who *lack standing*. In fact, most of these cases offer virtually no discussion of standing. *See In re Intermagnetics Am., Inc.*, 926 F.2d 912 (9th Cir. 1991); *Alexander v. Robertson*, 882 F.2d 421 (9th Cir. 1989); *Okros v. Angelo Iafrate Constr. Co.*, 298 F. App'x 419 (6th Cir. 2008); *Chi. Title & Tr. Co. v. Fox Theatres Corp.*, 182 F. Supp. 18 (S.D.N.Y. 1960); *In re M.T.G., Inc.*, 366 B.R. 730 (Bankr. E.D. Mich. 2007), *aff'd*, 400 B.R. 558 (E.D. Mich. 2009).

Other cases cited by Mar-Bow hold that a party does not need standing to *suggest* that a court investigate potential fraud. *See Kupferman v. Consol. Research & Mfg. Corp.*, 459 F.2d 1072, 1074 n.1 (2d Cir. 1972); *United States v. Int'l Tel. & Tel. Corp.*, 349 F. Supp. 22, 27-28 (D. Conn. 1972) (holding that the movants alleging fraud on the court did not have standing, but nonetheless choosing to investigate "without the intervention of the movants as parties"), *aff'd sub nom. Nader v. United States*, 410 U.S. 919 (1973). These cases nowhere imply that the movants who lack standing can force the court to weigh the issue after declining to address it *sua sponte*.

Mar-Bow's reliance on *Southerland v. Irons*, 628 F.2d 978 (6th Cir. 1980), is equally misplaced. In that case, the district court held that the Rule 60(b) movant *did* have standing, as the movant possessed a lien that an attorney had falsely promised to pay off while securing the court's approval of a settlement agreement.

Id. at 979. Upon concluding that the attorney had committed fraud on the court, the court reallocated the settlement proceeds to the movant's benefit. *Id.* On appeal, the attorney argued that, as a non-party, the movant did not have standing. *See id.* at 980. The court of appeals recognized that Rule 60 "does not limit the court's power to set aside a judgment induced by fraud" and that "a claim of fraud on the court may be raised by a non-party." *Id.* Of course, the district court had already elected to exercise its power to investigate and had set aside the judgment. The court of appeals did not hold that the district court would have been *required* to entertain any Rule 60(b) motion brought by any party who lacked standing. Nor was there any occasion to hold as much, as the movant had standing insofar as it held a "legal interest[]" that was "affected by the judgment sought to be set aside." *Houck*, 881 F.2d at 505 (distinguishing *Southerland*).

Similarly, *Zucker v. Occidental Petroleum Corp.* concerned only a court's "inherent authority" to award attorneys' fees, irrespective of any objector's standing. 192 F.3d 1323, 1328-29 (9th Cir. 1999). It did not hold that a litigant without standing could invoke the power of the federal judiciary to obtain a particular fee award. *See id.* at 1328 ("No one needed standing, or needed to object, for the district court to reconsider the amount of attorneys' fees and decide upon an amount.").

Finally, Mar-Bow relies on several cases concerning a court's power to oversee professionals who serve the debtor in bankruptcy. Those cases have nothing to do with standing. *See Dickinson Indus. Site v. Cowan*, 309 U.S. 382, 389 (1940) (bankruptcy courts have discretion to allow or disallow fee claims); *In re Interwest Bus. Equip., Inc.*, 23 F.3d 311, 317 (10th Cir. 1994) (bankruptcy courts have independent "power to ensure professionals are disinterested and do not represent interests adverse to the estate regardless of objection by party in interest"); *Rome v. Braunstein*, 19 F.3d 54 (1st Cir. 1994) (a bankruptcy court had discretion under 11 U.S.C § 328(c) to deny the fee application of a court-appointed counsel who had failed to disclose facts material to his disinterestedness under § 327).

This is not an issue of first impression in the federal courts. Mar-Bow has made these same arguments—and lost—repeatedly. "Mar-Bow's standing argument confuses the Court's inherent authority—what the Court can do—with its own standing—what Mar-Bow can do." *In re SunEdison, Inc.*, No. 16-10992 (SMB), 2019 WL 2572250, at *8 (Bankr. S.D.N.Y. June 21, 2019); *see also In re SRC Liquidation LLC*, No. 15-10541 (BLS), 2019 WL 4386373, at *4-6 (Bankr. D. Del. Sept. 12, 2019).

Mar-Bow insinuates that the bankruptcy court has ignored fraud on the court by declining to address the "merits" of Mar-Bow's claims. But there has been no finding of fraud on the court or evidence that fraud occurred. Mar-Bow rests entirely on its own assertions—those of a non-party without standing. As the Eleventh Circuit has explained, no case "suggest[s] that a district court must provide standing to every *nonparty* who makes a Rule 60(b) motion that *asserts* that there has been fraud on the court." *Kem Mfg.*, 817 F.2d at 1521 (second emphasis added). Faced with such assertions, the bankruptcy court was "correct to deny the . . . motion without an evidentiary hearing." *Id*.

The bankruptcy court of course was entitled to listen to Mar-Bow's suggestion and investigate further, if it so chose. *Kupferman*, 459 F.2d at 1074 n.1. Once the bankruptcy court declined to do so, *see* App.147, however, nothing else was required. The very concept of *sua sponte* action pertains to what a court may itself elect to do, not what a litigant is entitled to insist that a court do.

True to form, Mar-Bow meanders from the dispositive question—its lack of standing—to make false, defamatory, and transparently anticompetitive attacks against McKinsey RTS. Mar-Bow lacks standing and, certainly at this point, it knows it. But Mar-Bow's objective is not to win in this Court—its objective is to use the Court as a vehicle to damage McKinsey RTS publicly. McKinsey RTS has responded to Mar-Bow's outrageous misstatements at length in the court below and elsewhere and will not waste the Court's time by rehashing fact-intensive disputes that are irrelevant to Mar-Bow's lack of standing.

Nonetheless, the Court should be deeply skeptical of Mar-Bow's aspersion that the bankruptcy court has neglected some purported duty on its part by refusing to reopen these bankruptcy proceedings. *See* App.Br.42-49. The bankruptcy court did not "allow[] . . . facts about McKinsey partners' and employees'" connections "to remain shadowy with apparently deliberate obscurity on the part of McKinsey." *Id.* at 44. Rather, after having presided over the entire bankruptcy case, and after extensive further proceedings in which the U.S. Trustee, the Debtors, a Mediator, and Mar-Bow participated, the court exercised its discretion not to undertake still more expansive and costly investigations of Mar-Bow's false assertions in a long-closed case at the behest of a non-party without standing. Mar-Bow has no power to "mandate" otherwise.

III. THE ADEQUACY OF MCKINSEY RTS'S CERTIFICATION CONCERNING SETTLEMENT PROCEEDS IS NOT PROPERLY BEFORE THIS COURT BECAUSE NO ONE WITH STANDING CHALLENGES IT, BUT JUDGE HUENNEKENS DID NOT MISCONSTRUE OR MISAPPLY HIS OWN ORDER IN ANY EVENT

Mar-Bow's lack of appellate, statutory, and Article III standing precludes its challenge to the court's approval of McKinsey RTS's certification regarding the settlement payment. *See Town of Chester*, 137 S. Ct. at 1651 ("For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right."). Mar-Bow does not even attempt to explain how the court's order causes an injury to Mar-Bow that would be redressed by vacating the order.

Even if Mar-Bow had standing, its challenge would easily fail. As Mar-Bow concedes, the bankruptcy court "is generally 'in the best position to interpret its own orders.'" App.Br.52 (quoting *Tomlin*, 105 F.3d at 941). Both the court's decision itself and the court's explanation in its order approving the certification are entitled to "substantial deference." *Tomlin*, 105 F.3d at 941; *Warnick v. Arrowsmith*, No. 3:16-CV-876, 2017 WL 2999025, at *3 (E.D. Va. July 14, 2017) ("[A] bankruptcy court's interpretation of its own order, including an opinion accompanying the order, receives 'substantial deference.'"), *appeal dismissed*, No. 17-1946, 2018 WL 894079 (4th Cir. Jan. 18, 2018); *see also Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 n.4 (2009) ("Numerous Courts of Appeals have held that a bankruptcy court's interpretation of its own confirmation order is entitled to substantial deference."). There is no credible argument that the court's approval of the certification was erroneous.

Mar-Bow's characterization of the record—specifically, the bankruptcy court's instructions to McKinsey RTS and McKinsey RTS's satisfaction of those instructions—is wrong. At no point did the court specifically demand a certification that no investment through a third-party manager would indirectly benefit McKinsey employees through their pension plans. And at no point did McKinsey RTS state that it could not comply with the instructions that the court *did* give. At the April 23, 2019, hearing, the court initially asked McKinsey RTS for "a certification from *McKinsey* that they are not going to receive any benefit, directly or indirectly, in any way whatsoever." App.115 (emphasis added). The court did not define "McKinsey" during oral argument, but the Settlement Agreement that was the subject of the hearing defined "McKinsey" as "McKinsey & Company, Inc., McKinsey Holdings, Inc., McKinsey & Company, Inc. United States, and McKinsey Recovery & Transformation Services U.S., LLC." Appellee.App.38 n.1. It did not include MIO Partners, Inc. (which manages retirement and after-tax funds for roughly 30,000 current and former McKinsey employees) or individual McKinsey employees.

At the May 29 status conference, the court clarified that it wished to see a "certification that there is no direct or indirect benefit that *McKinsey* would receive as a result of the distribution of these funds," including "indirect distributions . . . because it affects the stock price even marginally." App.520 (emphasis added). McKinsey RTS stated at the hearing that no "McKinsey" entity would receive money from settlement payments to the reorganized debtors or would directly own stock in Contura, the parent of the reorganized debtors. App.523. But, beyond "McKinsey," McKinsey RTS explained that some third-party funds to which *MIO* delegates investment discretion might invest McKinsey *employees'* pension-plan funds in Contura, unbeknownst to MIO. App.524. The court did not demand any specific certification with respect to MIO or McKinsey employees. Rather, the court instructed McKinsey RTS to "give to me what you're proposing" and "we'll see where we go from there." App.526. McKinsey RTS asked whether the proposed certification should "cover, not just the McKinsey entities, but also employees." App.526. The court replied, "yes."

McKinsey RTS then submitted a certification confirming that "McKinsey" would not receive any settlement proceeds and that "no McKinsey entity has a direct holding in Contura stock." App.574. The certification added that no McKinsey employee directly held Contura stock. *Id.* McKinsey RTS then provided a detailed explanation of why it could not be certain that third-party-managed pension plans would be unaffected by the settlement. App.575-84. The primary reasons were simply "the inherently speculative nature of the inquiry and informational deficiencies inherent to the fund-of-funds investment strategy of MIO." App.575. These responses were consistent with the court's instructions, including the instruction to "propose" a certification that addressed the pension plans of McKinsey employees—interests that the court's original request had never mentioned. As the court itself emphasized in approving the certification, the Settlement Agreement defined "McKinsey" exclusive of MIO and McKinsey employees. App.1242. The court was also satisfied with the further explanation that, although "MIO invests with certain fund managers that may have a fund of funds that include Contura stock," MIO "cannot determine with specificity whether any such funds are available to and/or utilized by employees." *Id.* It was plainly reasonable for the court to find that this certification assuaged any initial concern.

The cases Mar-Bow cites are completely inapposite. *United States v. Rylander* holds that, where a defendant to a civil contempt proceeding asserts that compliance with an order is impossible, the defendant has a burden of production. 460 U.S. 752, 757 (1983). There was no contempt proceeding here, nor did McKinsey RTS or the court ever say that McKinsey RTS could not comply with the court's order. Mar-Bow also cites three Supreme Court cases for the proposition that litigants must comply with injunctions. *Celotex Corp. v. Edwards*, 514 U.S. 300, 306 (1995); *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 386 (1980); *Oriel v. Russell*, 278 U.S. 358, 364 (1929). McKinsey RTS dutifully obeyed the bankruptcy court, as that court itself found.

In re Novon International, Inc. held that one bankruptcy court's interpretation of its own order was "not supported by the record." No. 96-BK-15463B, 2000 WL 432848, at *1 (W.D.N.Y. Mar. 31, 2000). That also has no bearing on the present case, where there was ample support in the record for Judge Huennekens's interpretation of his order. Even if the court's original request *had* contemplated independent, third-party-managed pension plans for McKinsey employees (which it did not), the court's later instruction to "propose" a practicable certification would properly be construed as changing that original demand. A bankruptcy court generally is free to modify its own orders "before rights have vested on the faith of its action." *Pfister v. N. Ill. Fin. Corp.*, 317 U.S. 144, 149 (1942); *see also Poliquin* *v. Garden Way, Inc.*, 989 F.2d 527, 535 (1st Cir. 1993). If the court considered McKinsey RTS's comments at the May 29 hearing and modified the order to make it more flexible (which it did not have to do because there was no failure of compliance to begin with), it would have been well within its power to do so.

Finally, as a last-ditch tactic, Mar-Bow, again, asserts misstatements of fact that have never been adopted as true by the bankruptcy court. In fact, many of Mar-Bow's misstatements are contrary to the very certification that the bankruptcy court accepted.[13] McKinsey RTS has responded to Mar-Bow's accusations in detail in the court below and in other courts, but will not address them further here because they are irrelevant to Mar-Bow's lack of standing below, lack of appellate standing, and

[13] For example, Mar-Bow falsely claims that "MIO is a captive affiliate and not a 'blind trust'" and falsely implies that MIO had investments that necessarily resulted in a "peppercorn" of interest in Contura. App.Br.50-51. As McKinsey RTS explained in the certification approved by the bankruptcy court:

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

App.575; *see also* App.579 ("[T]here are several information barriers that prevent McKinsey and its employees from having visibility into the nature and allocation of such investments of MIO and its third-party managers.").

lack of basis to challenge the bankruptcy court's determination of compliance with its own orders.

CONCLUSION

Mar-Bow's appeal should be dismissed in its entirety for lack of appellate standing. In the alternative, this Court should affirm the bankruptcy court's determination that Mar-Bow lacks standing. If the Court reaches any issues that Mar-Bow lacks standing to raise, it should affirm the rulings of the bankruptcy court.

DATED: January 8, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8015(h) of the Federal Rules of Bankruptcy Procedure, I hereby certify as follows:

1. This brief complies with the type-volume limitation set forth in Bankruptcy Rule 8015(a)(7)(B)(i) because this brief contains 12,964 words, excluding the parts of the brief exempted from the type-volume calculation pursuant to Bankruptcy Rule 8015(g).

2. This brief complies with the typeface and type-style requirements of Bankruptcy Rules 8015(a)(5) and 8015(a)(6) because this brief is formatted in Microsoft Word 2010 using a proportionally spaced typeface in 14-point Times New Roman font.

Dated: January 8, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2020, I caused a copy of the foregoing to be served by first class mail to the parties listed below.

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