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Jay Alix, McKinsey, and a Lack of Clarity

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JAY ALIX, MCKINSEY, AND A LACK OF CLARITY

ABSTRACT

Jay Alix v. McKinsey & Co. is the product of a gaping hole in the U.S. Bankruptcy Code: its extensive definition section does not adequately define various key words, including "professional persons" and "disinterested persons." McKinsey & Co., one of the world's largest and wealthiest consulting firms, stands accused of violating the disinterested standard set out in 11 U.S.C. § 327(a) and Federal Rules of Bankruptcy Procedure Rule 2014(a). McKinsey, however, maintains that it fully complied with the Bankruptcy Code requirements, and it may well be right; depending on the jurisdiction, and even on the individual judge, the disinterested and disclosure requirements to be employed under the Bankruptcy Code may vary.

Previous bankruptcy courts have not applied a clear, consistent standard regarding which entities are subject to the Bankruptcy Code requirements by virtue of being a professional person under 11 U.S.C. § 327(a), what constitutes a disinterested person under 11 U.S.C. § 327(a), or what exactly an entity must disclose under Bankruptcy Rules of Civil Procedure Rule 2014(a) prior to bankruptcy employment. However, the court has just such an opportunity in Jay Alix v. McKinsey & Co. Neglecting to use this opportunity to clarify the Bankruptcy Code could lead to further lawsuits between bankruptcy practitioners, as well as forum shopping by bankruptcy participants, all in an effort to hide potentially significant connections. This Comment proposes that the court should adopt firm standards for both definitional issues, as well as the disclosure requirement, to ensure a fair, transparent bankruptcy process that is in accordance with the original goals of the Code and the bankruptcy system as a whole.

INTRODUCTION

On May 9, 2018, bankruptcy turnaround expert Jay Alix filed suit against McKinsey & Co. in the Southern District of New York regarding the actions of McKinsey's restructuring group.[1] In this suit, Jay Alix—the founder and largest individual shareholder of AlixPartners, a major consulting firm and "turnaround veteran"—alleged that McKinsey & Co.—also a worldwide consulting firm that has recently grown its turnaround group—"conducted a criminal enterprise through a pattern of racketeering activity" by "knowingly and intentionally" submitting false and material declarations under oath in bankruptcy proceedings.[2] Alix claims that McKinsey submitted these false and material declarations in order to conceal "significant connections" to interested parties in bankruptcy proceedings and to avoid revealing conflicts of interest that would preclude it from being hired as a bankruptcy professional in those proceedings.[3] Because of these alleged false and misleading declarations, Alix brought suit alleging racketeering activity, including bankruptcy fraud in violation of 18 U.S.C. §§ 152(2), 152(3), and 152(6); mail fraud in violation of 18 U.S.C. § 1341; wire fraud in violation of 18 U.S.C. § 1343; obstruction of justice in violation of 18 U.S.C. § 1503(a); witness tampering in violation of 18 U.S.C. §§ 1512(b) and 1512(c); unlawful monetary transactions in violation of 18 U.S.C. §§ 1956 and 1957; and inducement to interstate or foreign travel in violation of 18 U.S.C. § 2314.[4] While this initial suit has since been dismissed, Alix appears to be continuing his charge, noting after the dismissal that the judge did not rule on the merits and that he would continue to litigate these allegations in other cases.[5]

This is not the first such case brought against McKinsey for similar activities. This kind of litigation has been an ongoing problem for McKinsey that gained broader nationwide attention following the publication of a recent Wall Street Journal article highlighting the firm's secretive nature and unwillingness to disclose information about clients.[6] The article highlights just how differently

1 Complaint and Jury Demand at 1, Alix v. McKinsey & Co., 404 F. Supp. 3d 827 (S.D.N.Y. 2018) (No. 1:18-cv-04141).

2 *Id.*

3 *Id.*

4 *Id.* at 2.

5 Tom Hals, *Judge Dismisses Turnaround Guru's Racketeering Case vs McKinsey*, REUTERS (Aug. 19, 2019), https://www.reuters.com/article/us-mckinsey-alixpartners-racketeering/judge-dismisses-turnaround-gurus-racketeering-case-vs-mckinsey-idUSKCN1V91S1.

6 Gretchen Morgenson & Tom Corrigan, *McKinsey Is Big in Bankruptcy — and Highly Secretive*, WALL ST. J. (Apr. 28, 2018), https://www.wsj.com/articles/mckinsey-is-big-in-bankruptcyand-highly-secretive-1524847720?mod=article_inline; *see, e.g.*, Mar-Bow Value Partners, LLC v. McKinsey Recovery &

McKinsey views the disclosure requirements as compared to traditional law firms and other groups involved in the bankruptcy process. For example, during the GenOn Energy bankruptcy, Kirkland & Ellis billed 105 hours for connections and conflict disclosures.[7] McKinsey, in contrast, billed five—although it claims this is because the firm does not bill for administrative staffers who check for connections.[8] Similarly, in the Edison Mission Energy bankruptcy, Akin Gump Strauss Hauer & Feld disclosed 368 connections, while McKinsey disclosed none.[9] McKinsey has responded to criticism of this lack of disclosure by stating that it cannot "disclose services performed for some interested parties because of its responsibility to maintain strict client confidentiality."[10] In response to this behavior—which continued in a similar vein in the Alpha Natural Resources' bankruptcy—and urging by Jay Alix, the U.S. Trustee in Virginia criticized McKinsey's disclosure statements as "vague and amorphous."[11] Further, according to the U.S. Trustee, McKinsey "gives the appearance of compliance without actually complying."[12] The findings from the Wall Street Journal's exposé are featured in multiple places in Alix's suit against McKinsey.[13]

This article, and the resulting suit against McKinsey, have brought attention to two definitional issues that not only resulted in the issue underlying this suit, but also plague law firms and other entities involved in the bankruptcy process. First, what does mean for an entity to be "disinterested," and second, who must go through the disinterested tests and procedures as set out in 11 U.S.C. § 327(a) and Federal Rules of Bankruptcy Procedure Rule 2014(a) ("Rule 2014"). This Comment explores who is considered to be a professional under the U.S. Bankruptcy Code, what is required to be disinterested according to the Code, and finally, the level of disclosures required under Rule 2014. First, this Comment delves into what it means for a party to be a professional person under the Code. Second, this Comment addresses how the Code defines disinterested and how this definition, which lacks specificity, has given rise to numerous lawsuits and a split among courts. Third, this Comment considers the various

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Transformation Servs. US, LLC, 578 B.R. 325 (E.D. Va. 2017).

7 Morgenson & Corrigan, *supra* note 6.

8 *Id.*

9 *Id.*

10 *Id.* (internal quotations omitted).

11 Tom Corrigan & Jacqueline Palank, *Bankruptcy Watchdogs Say McKinsey's Disclosures Are Inadequate*, WALL ST. J. (May 18, 2016), https://www.wsj.com/articles/bankruptcy-watchdogs-say-mckinsey-disclosures-are-inadequate-1463516707?mod=searchresults&page=1&pos=3&mod=article_inline (internal quotations omitted).

12 *Id.* (internal quotations omitted).

13 *See* Complaint and Jury Demand, *supra* note 1, at 4–5.

formulations for the amount of disclosures required under Rule 2014. Finally, this Comment suggests that the various courts involved in the ongoing bankruptcy and civil suits between Alix and McKinsey, particularly in *Alix v. McKinsey & Co.*, should adopt clear, easy-to-follow tests that provide a consistent standard to these questions across circuits. In establishing a consistent standard, the court should: 1) adopt the six-part test for a professional set out by the Bankruptcy Court for the District of Delaware in *In re American Tissue, Inc.*;[14] 2) adopt the strict definition of disinterested as set out by the Fourth Circuit in *In re Martin*;[15] 3) require an extensive level of disclosure similar to the amount set forth by the standard established by the Eleventh Circuit in *In re Jennings*;[16] and 4) rule for Jay Alix in his case against McKinsey & Co.

A. Background

The Bankruptcy Code sets out requirements for the employment of attorneys and professional persons during the bankruptcy process. First, under 11 U.S.C. § 1107(a), the power of a debtor in possession to employ attorneys and professionals is the same as that of a trustee.[17] Accordingly, the debtor-in-possession "may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons."[18] Additionally, if the trustee or debtor in possession, by virtue of § 1107(a), is authorized to run the business under 11 U.S.C. § 1108 and the debtor has "regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business."[19]

Professionals must satisfy two requirements: 1) they must not hold interests adverse to the estate; and 2) they must be disinterested.[20] Additionally, the Federal Rules of Bankruptcy Procedure state that, to be employed as a professional, an application must be filed that details 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.[21] This application must be accompanied

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14 *See infra* Section A1.
15 *See infra* Section A2.
16 *See infra* Section A3.
17 U.S. Trustee v. Price Waterhouse, 19 F.3d 138, 141 (3d Cir. 1994) (citing 11 U.S.C. § 1107(a)).
18 11 U.S.C. § 327(a) (2019).
19 § 327(b).
20 § 327(a).
21 Fed. R. Bankr. P. 2014(a) (2018).

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.[22] The Bankruptcy Code defines a "disinterested person" as one that: 1) "is not a creditor, an equity security holder, or an insider;" and 2) "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."[23] Despite this definition, questions remain over who exactly qualifies as a disinterested person, as well as to whom this standard applies, considering the lack of clarity in who is under the classification of "professional person." Additionally, there is disagreement between courts as to the proper amount of disclosures that are required under Rule 2014; must the professional seeking employment detail every possible connection, or only those that present the threat of an actual conflict of interest?

1. *Who is a Professional Person?*

The first issue that must be considered in the case of *Alix v. McKinsey & Co.* is what exactly the Bankruptcy Code means when it refers to a "professional person." 11 U.S.C. § 327(a) states that the trustee may employ "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."[24] Furthermore, Rule 2014(a) states that to be employed under § 327(a), "attorneys, accountants, appraisers, auctioneers, or other professionals" must file an application for employment that details "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."[25] These provisions are the full extent to which the Bankruptcy Code deals with a requirement that parties be disinterested. It is clear that attorneys, accountants, and appraisers must abide by the standards set out in § 327(a), but it is not clear what the Code means by the catch-all term "professional persons," as it is not specifically defined in the Code.[26] Courts have held a wide array of professionals to be "professional

22 *Id.*

23 11 U.S.C. § 101(14) (2019).

24 § 327(a).

25 Fed. R. Bankr. P. 2014(a) (2018).

26 Harner, Michelle M., *Final Report of the ABI Commission to Study the Reform of Chapter 11*, AM. BANKR. INST. (2014), https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1096&context=books.

persons," including a management firm, a consultant for oil and gas properties, a firm specializing in health care receivables and collection services, realtors, a media broker engaged in the sale of a radio station, a company operating a radio station, and a head hunter.[27] To better determine what Congress meant when it included the catch-all provision at the end of § 327(a) allowing the hiring of "other professional persons," it is helpful to look at both the history of the term "professional," as well as how other courts—both state and federal—have defined the term.

The question of who qualifies as a professional stems from medieval times, originating with the guild system and the training of lawyers, doctors, and theologians at universities.[28] While there are not many specific definitions of a professional in federal laws, there are a couple statutory definitions from federal labor and tort laws. One of the few places that the federal government has provided greater definitional clarification on what constitutes a professional is § 152(12) of the Labor Management Relations Act, which defines a professional as:

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).[29]

However, this definition has seldom been applied by tort malpractice cases and is generally used in administrative cases by the Department of Labor.[30]

[27] Regina Stango Kelbon et al., *Conflicts, The Appointment of "Professionals," and Fiduciary Duties of Major Parties in Chapter 11*, 8 BANKR. DEV. J. 349, 376–77 (1991).

[28] *See generally* Michael J. Polelle, *Who's On First, and What's a Professional?*, 33 U.S.F. L. REV. 205, 212 (1999).

[29] 29 U.S.C. § 152(12) (2018).

[30] *See* Polelle, *supra* note 28, at 218 n.87.

State law may also provide some guidance on how to define a professional. Generally, states follow one of three tests for whether an individual/entity qualifies as a professional under malpractice law: 1) to limit the definition of professional to those occupations recognized as such by the common law; 2) to include as professions all occupations licensed by the state; or 3) to use some intermediate approach.[31]

a. State Treatment of Professional Persons

This first approach limits the definition of a professional to those recognized under early common law: doctors, lawyers, teachers, and clergy; however, legislatures may expand who is considered a professional.[32] The second approach is a broad definition, holding every occupation licensed by a governmental entity to be a professional.[33] Most states have not adopted either of these approaches, but have instead adopted various intermediate positions, including relying on the dictionary for a definition. The New York state courts, for example, state that a professional is:

> [D]istinguished by the requirements of extensive formal training and learning, admission to practice by a qualifying licensure, a code of ethics imposing standards qualitatively and extensively beyond those . . . tolerated in the marketplace, [and] a system for discipline of its members for violation of the code of ethics . . . .[34]

Florida, in contrast, has a bright-line rule: "a 'profession' is any vocation requiring at a minimum a four-year college degree before licensing is possible in Florida[;]" however, there is no requirement that the four-year degree be specifically related to the employment in question.[35] Effectively, this creates a two-part test: first, the profession must be one that requires a license under Florida law, and second, the license must require the completion of a four-year degree.[36]

Black's Law Dictionary defines a professional as "[a] person who belongs to a learned profession or whose occupation requires a high level of training and

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31 *Id.* at 218–19.

32 Polelle, *supra* note 28, at 219.

33 *Id.*

34 Hosp. Computer Sys., Inc. v. Staten Island Hosp., 788 F. Supp. 1351, 1361 (D.N.J. 1992) (citing *In re* Estate of Freeman (Lincoln Rochester Trust Co. v. Freeman), 311 N.E.2d 480, 483 (1974)).

35 Garden v. Frier, 602 So. 2d 1273, 1275 (Fla. 1992).

36 *See* Polelle, *supra* note 28, at 223 n.114.

proficiency."[37] The Fifth Edition of Black's Law Dictionary expanded on this definition and redefined a profession as:

> A vocation or occupation requiring special, usually advanced, education and skill. The labor and skill involved in a profession is predominantly mental or intellectual, rather than physical or manual. The term originally contemplated only theology, law and medicine, but as applications of science and learning are extended to other departments of affairs, other vocations also receive the name, which implies professed attainments in special knowledge as distinguished from mere skill.[38]

b. Bankruptcy Treatment of Professional Persons: Quantitative and Qualitative Tests

Generally, bankruptcy courts define professional in one of two ways.[39] The first is a so-called quantitative test that focuses on whether the entity plays a central role in the administration of the estate,[40] while the second is a qualitative test that focuses on whether the entity is given "discretion or autonomy . . . in some part of administration of the debtor's estate . . . ."[41] The quantitative test, first set out in the case *In re Seatrain Lines, Inc.*, stated that, for the purposes of § 327(a), "professional person" only applies to "persons in those occupations which play a central role in the administration of the debtor proceeding."[42] In this case, the question arose regarding whether a court order was necessary for the retention of maritime engineers by the debtor Seatrain.[43] The court declined to extend § 327(a)'s requirement to the maritime engineers, stating that court approval is only required for "professions intimately involved in the administration of the debtor's estate," in addition to those specifically listed in § 327(a).[44] The court conceded that while the maritime engineers play an important role in the operation of Seatrain's business, their retention would not affect the administration of Seatrain's reorganization, and thus were not subject

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37 *In re* Am. Tissue, Inc., 331 B.R. 169, 173 (Bankr. D. Del. 2005) (citing Black's Law Dictionary 1226 (7th ed. 1999)).

38 *In re* Metro. Hosp., 119 B.R. 910, 916 (Bankr. E.D. Pa. 1990) (citing Black's Law Dictionary 1089–90 (5th ed. 1979)).

39 Harner, *supra* note 26.

40 *In re Am. Tissue, Inc.*, 331 B.R. at 173; *see In re* Seatrain Lines, Inc., 13 B.R. 980, 981 (Bankr. S.D.N.Y 1981).

41 *In re Am. Tissue, Inc.*, 331 B.R. at 173 (setting out six factors to be considered in determining whether an entity is a professional); *see In re* Fretheim, 102 B.R. 298, 299 (Bankr. D. Conn. 1989).

42 *In re Seatrain Lines, Inc.*, 13 B.R. at 981.

43 *Id.*

44 *Id.* at 981 (specifically listed parties include attorneys, accountants, appraisers, and auctioneers).

to § 327(a).[45] The same court, applying the same test in a later case stated that an entity was not a professional if it did not play any part in negotiating a plan, adjusting the debtor/creditor relationship, disposing of or acquiring assets, or performing any other duties of a debtor under the Bankruptcy Code.[46]

Other courts, however, dismiss this quantitative test as "difficult to apply and subject to arbitrary and inconsistent results . . . ."[47] Instead, they use the qualitative test which states that, for § 327(a) to be applicable, first, "an employee's function must be related to the administration of the debtor's estate."[48] Then, it must be determined whether an employee has "discretion or autonomy in some part of the administration of the debtor's estate."[49] Under this analysis, approval must be sought for the employment of a person with a relatively small task but a large measure of discretion in performing it, but not sought for a person who is to perform an important but nondiscretionary task.[50] In the case *In re Fretheim*, there was disagreement regarding whether a land surveyor hired by the debtor required approval of the bankruptcy court.[51] The court concluded that "[a] surveyor performs an essentially mechanical, nondiscretionary task[,]" and therefore "court approval is not required under § 327(a)."[52] In addition to believing the qualitative test was easier to apply, the court adopted this test because it is "consistent with a primary purpose of § 327(a) to prevent conflicts of interest which erode the confidence of the parties in the administration of the estate," as well as "public confidence in the administration of justice in bankruptcy courts."[53]

Still more courts have combined the two, stating that the quantitative and qualitative analyses need not be mutually exclusive.[54] In this combined test, courts use the following six-factor analysis to determine whether an entity or person is a professional:

> (1) whether the employee controls, manages, administers, invests, purchases or sells assets that are significant to the debtor's reorganization, (2) whether the employee is involved in negotiating the

45 *Id.*
46 Committee of Asbestos-Related Litigants v. Johns-Manville Corp., 60 B.R. 612, 620–21 (Bankr. S.D.N.Y 1986).
47 *In re* Fretheim, 102 B.R. 298, 299 (Bankr. D. Conn. 1989).
48 *Id.*
49 *Id.*; *see also In re* Semenza, 121 B.R. 56, 57 (Bankr. D. Mont. 1990).
50 *In re Fretheim*, 102 B.R. at 299.
51 *Id.*
52 *Id.*
53 *Id.* (internal alterations omitted) (internal quotations omitted).
54 *In re* First Merchants Acceptance Corp., 1997 Bankr. LEXIS 2245, at *7–8 (Bankr. D. Del. 1997).

> terms of a Plan of Reorganization, (3) whether the employment is directly related to the type of work carried out by the debtor or to the routine maintenance of the debtor's business operations; (4) whether the employee is given discretion or autonomy to exercise his or her own professional judgment in some part of the administration of the debtor's estate, . . ., (5) the extent of the employee's involvement in the administration of the debtor's estate, . . . and (6) whether the employee's services involve some degree of special knowledge or skill, such that the employee can be considered a "professional" within the ordinary meaning of the term.[55]

This test requires an examination of the type of duties to be performed by the employee and whether any special skills or training is necessary to carry out these duties.[56] When applying the factors to the facts of a case, no one factor should be dispositive, but the factors should be weighed against each other and considered in toto.[57] Such courts believe this combined approach is best because, while the quantitative test focuses on the significance of the individual's role to the debtor proceeding and the qualitative test focuses on the amount of discretion the individual has in accomplishing that role, the bottom line of both tests involves an examination of the types of duties to be undertaken by the individual.[58] In the original application of this test, the debtor—in this case a chapter 7 debtor—entered into a plan in which a third party, known as UDC, would manage the purchase of new or used cars by customers with limited access to traditional sources of credit—known to the company as "receivables," which constituted the bulk of the debtor's estate.[59] The trustee in the case objected, contending that the debtor was employing a "professional" who also had status as a creditor, thus precluding its involvement.[60] Applying the six-factor test above, the court held that UDC was a professional within the meaning of § 327(a).[61] The court starts by noting it is unclear whether UDC's employment pertained to the ordinary course of business of the debtor, or whether it pertained to the administration of the debtor's estate.[62] The employment of UDC was to assist the debtor with the management of the receivables, which is the ordinary operation of the debtor.[63] However, because

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55 *In re* Am. Tissue, Inc., 331 B.R. 169, 173 (Bankr. D. Del. 2005) (citing *In re First Merchants Acceptance Corp*., 1997 Bankr. LEXIS 2245, at *8–10).

56 *In re Am. Tissue, Inc.*, 331 B.R. at 173–74.

57 *In re First Merchants Acceptance Corp.*, 1997 Bankr. LEXIS 2245, at *10.

58 *Id.* at *7–8.

59 *Id.* at *10–11.

60 *Id.* at *5.

61 *Id.* at *9–10.

62 *Id.* at *10.

63 *Id.* at *10–11.

the receivables were "so vital to the underlying estate," UDC's role in the administration of the estate would be "quite significant."[64] Because the receivables comprised the majority of the debtor's estate and UDC would have such authority in managing these assets, the court concluded that UDC's role was "akin to that of a professional, specialized collection agency."[65]

Still other courts have different definitions for professional persons. The Bankruptcy Court for the Eastern District of Delaware has established its own definition for what constitutes a professional.[66] This court holds that there are two prongs in a determination of whether a person is a professional under § 327(a).[67] To satisfy the first prong, one must be "a professional in a broad sense[,]" and to satisfy the second prong, one must be a professional "engaged to assist the trustee (or debtor in possession) in his or her duties . . . ."[68] The court settled on this approach because it felt that the test set out in *Matter of Seatrain Lines, Inc.* addresses the second prong of § 327(a) but not the first prong—the definition of professional.[69] This test states that:

> For the purposes of section 327(a), "professional person" is limited to persons in those occupations which play a central role in the administration of the debtor proceeding . . . . Court approval is required for the retention of [a professional person, who is] intimately involved in the administration of the debtor's estate.[70]

According to this court, the four examples provided by the statute—attorneys, accountants, appraisers, and auctioneers—make it apparent that the licensing of the skill is not a prerequisite to being classified as a professional under § 327(a) because appraisers and auctioneers need not be licensed.[71]

In one example of this two part analysis in action, the court had to consider whether a debt collection agency qualified as a professional under § 327(a).[72] The court noted that generally in debt collection there is an element of skill involved, but that this skill is relatively easily mastered without significant training or education.[73] However, in this case the services of the debt collection

64 *Id.* at *11.
65 *Id.* at *13 (internal quotations omitted).
66 *See In re* Metro. Hosp., 119 B.R. 910, 916 (Bankr. E.D. Pa. 1990).
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.* at 916–17.
73 *Id.* at 917.

agency were not only debt collection, but an extensive process that included interviewing patients, reviewing their treatment records, determining which patients might be Medicaid eligible, and submitting a timely application for eligibility for that individual.[74] Then—if eligibility were granted—the debt collector would submit the debtor's request for reimbursement and would be responsible for insuring that the state was required to pay under the Medicaid regulations.[75] These services required a "specialized knowledge of the Medicaid statute and regulations . . . the use of proper forms, strict compliance with the time deadlines involved, the skills of a social worker in interviewing patients, and perhaps even a knowledge of the administrative hearing process for contesting the denial of MA eligibility"—all tasks undertaken only after particularized training conducted or supervised by attorneys and experienced non-attorneys.[76] As a result, the court determined that the debt collector satisfied the first prong of the § 327(a) test. However, the court then had to consider the second prong—assisting the debtor in possession in the performance of duties that "were required . . . by virtue of its fiduciary status as debtor in possession."[77] The court here expanded the scope of § 327(a), stating that it applied to far more than just professionals assisting the trustee in the exercise of his duties that are administrative tasks, but to all those who assist the chapter 11 debtor in possession in operating its business "in a prudent, competent fashion . . . ."[78]

Courts have been widespread in their application of what constitutes a professional. Categories of individuals who have been considered professionals under the Bankruptcy Code include: brokers of real or personal property, leasing agents for aircraft, architects, management consultants, financial consultants or experts, investment banking firms, oil and gas consultants, oil and gas operators, credit adjustment companies, collection agencies, public relations firms, managers of commercial real estate, and engineering and industry management consulting firms.[79] Specifically regarding consulting agencies, court rulings are varied. In one case, the New York court held that computer consultants did not qualify as professionals because computer consultants are not professionals in the same sense as doctors, lawyers, accountants, engineers, architects, and others, who are held to a higher standard of care under the law.[80]

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74 *Id.* at 916.

75 *Id.* at 917.

76 *Id.* (internal citations omitted).

77 *Id.*

78 *Id.* at 918.

79 Rosemary Williams, *Approval of employment of professional persons under 11 U.S.C.A. §. 327(a) and Bankruptcy Rule 2014 nunc pro tunc*, 133 A.L.R. Fed. 465 (1997).

80 Hosp. Comput. Sys., Inc. v. Staten Island Hosp., 788 F. Supp. 1351, 1361 (D.N.J. 1992).

2. *Various Tests for Who Qualifies as a Disinterested Person*

Once it has been determined that an individual or entity is subject to § 327(a) by virtue of being a professional person, that individual must consider whether they are disinterested. Again, the U.S. Bankruptcy Code is not clear on what is the appropriate level of disinterestedness, although it does provide slightly more guidance when compared to the Code's treatment of professional persons. For ordinary lawyers, there is an additional consideration in the constraints imposed by the Rules of Professional Conduct, which are often looked to by courts for guidance in determining whether there exists a conflict of interest—however, this issue is not completely relevant here as we are considering professional persons and their disinterested requirement.[81]

Section 327(a) states that the trustee may employ 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."[82] The Code defines a disinterested person as a person that:

> [I]s not a creditor, an equity security holder, or an insider . . . and 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.[83]

Some courts interpret the disinterested standard strictly, disqualifying any professional who has actual or potential conflicts of interest with the debtor, while others only disqualify the professional if it holds interests that are materially adverse to the estate.[84]

Again, the phrase "interest materially adverse to the estate" is not defined in the Bankruptcy Code, but has been held to mean:

> Holding or representing an interest adverse to the estate as possessing, or serving as an attorney for a person possessing, either an economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the

[81] Robert J. Landry & James R. Higdon, *Ethical Considerations in Appointment and Compensation of an Attorney for a Chapter 11 Debtor-in-Possession*, 66 MISS. L.J. 355, 401 (1996).

[82] 11 U.S.C. § 327(a) (2019).

[83] 11 U.S.C. §101(14) (2019).

[84] Amer. Bankr. Inst., *ABI Commission to Study the Reform of Chapter 11*, 23 AM. BANKR. INST. L. REV. 4, 52 (2015).

> estate is a rival claimant . . . or . . . a predisposition under the circumstances that render such a bias against the estate.[85]

The strict interpretation of the disinterested person standard holds that the catch-all provision[86] in 11 U.S.C. §101(14) is broad enough to include any "interest or relationship that would even faintly color the independence and impartial attitude required by the [C]ode . . . ."[87] Courts using this interpretation have adopted a "'full panoply of events and elements' or 'totality of the circumstances' test to determine whether a particular conflict is materially adverse to the estate[,]" with an emphasis on providing the judge in the case with as much information as possible, facilitating a decision at his discretion.[88] In determining "whether the security interest coveted by counsel can be tolerated under the particular circumstances[,]" this test considers:

> the reasonableness of the arrangement and whether it was negotiated in good faith, whether the security demanded was commensurate with the predictable magnitude and value of the foreseeable services, whether it was a needed means of ensuring the engagement of competent counsel, and whether or not there are telltale signs of overreaching. The nature and extent of the conflict must be assayed, along with the likelihood that a potential conflict might turn into an actual one. An effort should be made to measure the influence the putative conflict may have in subsequent decision making. Perceptions are important; how the matter likely appears to creditors and to other parties in legitimate interest should be taken into account. There are other salient factors as well: whether the existence of the security interest threatens to hinder or to delay the effectuation of a plan, whether it is (or could be perceived as) an impediment to reorganization, and whether the fundamental fairness of the proceedings might be unduly jeopardized (either by the actuality of the arrangement or by the reasonable public perception of it).[89]

Additionally, the Court notes that this list of factors is by no means exhaustive, but that the most important fact is that the bankruptcy judge be given an immediate opportunity to make an intelligent appraisal of the potential conflict and to apply his "experience, common sense, and knowledge of the particular proceeding" to bear on the issue of disinterestedness.[90] This standard mandates

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[85] Landry & Higdon, *supra* note 81, at 364 (internal quotation omitted) (alterations omitted).

[86] §101(14) ("the term 'disinterested person' means a person that—does not have an interest materially adverse to the interest of the estate . . . for any . . . reason.").

[87] Dye v. Brown (*In re* AFI Holding, Inc.), 530 F.3d 832, 838 (9th Cir. 2008) (internal quotation omitted).

[88] *Id.*

[89] *In re* Martin, 817 F.2d 175, 182 (4th Cir. 1987).

[90] *Id.*

a per se disqualification if there exists actual conflicts of interest, and allows the district court discretion to dismiss parties with a potential conflict of interest.[91]

In contrast, other courts hold that the disinterested standard is less strict. In determining whether there is a conflict, the court need not ask whether a conflict exists, but "'*whether a potential conflict, or the perception of one* renders the lawyer's interest materially adverse to the estate or the creditors.'"[92] This same Court expanded upon the adverse interest definition stating that an adverse interest is the:

> possession or the assertion [of] mutually exclusive claims to the same economic interest, thus creating either an actual or potential dispute between rival claimants as to which . . . of them the disputed right or title to the interest in question attaches under valid and applicable law; or (2) [the possession of] a predisposition or interest under circumstances that render such a bias in favor of or against one of the entities.[93]

The court further stated that the test is not subjective but it contemplates "'an objective screening for even the appearance of impropriety,'" and the court noted that there can be a disqualifying conflict even absent proof of actual loss or injury.[94]

In spite of formulating this less strict test, the First Circuit has stated that the statutory requirements "serve [an] important policy of ensuring that all professionals appointed pursuant to [§] 327(a) tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities."[95] Further, "[§] 327(a) is designed to limit even appearances of impropriety to the extent reasonably practicable," therefore "doubt as to whether a particular set of facts gives rise to a disqualifying conflict of interest normally should be resolved in favor of disqualification."[96]

3. *Bankruptcy Rule 2014(a) Disclosure Requirements*

In addition to the requirements set out in § 327(a), professional parties seeking employment in a bankruptcy proceeding must meet the requirements

91 *See id*. at 182–83.
92 Beal Bank, S.S.B. v. Waters Edge Ltd. P'ship, 248 B.R. 668, 695 (D. Mass. 2000); *In re* Marvel Entertainment Group, 140 F.3d 463, 476 (3d Cir. 1998).
93 Rome v. Braunstein, 19 F.3d 54, 58 n.1 (1st Cir. 1994) (internal citations omitted) (alteration in original); *Beal Bank, S.S.B.*, 248 B.R. at 695.
94 *Beal Bank, S.S.B.*, 248 B.R. at 695 (internal citation omitted).
95 *Rome*, 19 F.3d at 58.
96 *Id.* at 60.

established in Rule 2014(a). This rule states that professionals seeking employment pursuant to § 327 must file an application that states, 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.[97] There is a simple goal of this disclosure requirement: "to ensure undivided loyalty to the estate and to preserve public confidence in the fairness of the bankruptcy system."[98] "The disclosure requirements of Rule 2014 are strictly applied and impose an independent duty upon the professional applicant[,]" therefore "failure to comply . . . is a sanctionable violation."[99] Even still, in applying this rule, courts are split on what constitutes a connection.

One court holds that "the professional must disclose all facts that bear on his disinterestedness, and cannot usurp the court's function by unilaterally choosing which connections impact on his disinterestedness and which do not."[100] Courts applying this holding believe that the disclosure requirements under Rule 2014(a) are broader than the rules governing disqualification under § 327(a), and that an applicant must disclose all connections regardless of whether they are sufficient to rise to the level of a disqualification under that section.

Other courts, however, have not been quite as strict in their application of Rule 2014(a), holding that professionals "need not disclose every past or remote connection with every party in interest," but must "disclose those presently or recently existing, whether they are business or personal in nature, which could reasonably have an effect on the attorney's judgment in the case."[101] The court further stated that the "'parties in interest' includes entities holding 'claims' against the debtor and those whose pecuniary interests might be directly and adversely affected by the proposed action."[102] In determining the sufficiency of disclosures, potential employees should balance "the plain language of the rule's mandate that applicants disclose 'all connections'" with a "common sense analysis of what connections are reasonably defined as pertinent to the ultimate question of disinterestedness" in order to lessen the burden of disclosures which may deter competent professions from representing parties in bankruptcy

[97] Fed. R. Bankr. P. 2014(a) (2018).

[98] *In re* Sundance Self Storage-El Dorado LP, 482 B.R. 613, 625 (Bankr. E.D. Cal. 2012).

[99] 9 Collier on Bankruptcy P 2014.05 (16th ed. 2020).

[100] Quarles & Brady LLP v. Maxfield (*In re* Jennings), 199 F. App'x 845, 848 (11th Cir. 2006) (internal citation omitted).

[101] Drew v. Latimer, Biaggi, Rachi & Godreau (*In re* El Comandante Mgmt. Co., LLC), 395 B.R. 807, 814 (D.P.R. 2008) (emphasis added).

[102] *Id.* at 817 (citing *In re* Savage Indus., 43 F.3d 714, 720 (1st Cir. 1994)).

cases.[103] Indeed, there is an argument that the only connections that must be disclosed under Rule 2014 are relations that a professional had with entities that are parties in interest in the instant case, by virtue of parallel involvement in other cases.[104] Some courts have even stated that the only connections requiring disclosure are fee sharing arrangements that might affect the court's decision to approve employment.[105]

4. *Penalties for Violation of 11 U.S.C. § 327*

Section 328(c) of the Bankruptcy Code provides the penalties imposed on professionals that violate the disinterested standard set out in § 327. This section states that:

> [T]he court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 . . . if, at any time during such professional person's employment . . . 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.[106]

In applying this section of the Code, the remedies available to courts include "disqualification and the denial or disgorgement of all fees."[107]

5. *Jay Alix v. McKinsey and the Application of the Established Tests*

The above requirements serve as the underlying issue in *Alix v. McKinsey & Co.*[108] Alix is the founder of AlixPartners, a major consulting firm that has a significant presence in the bankruptcy area, which Alix alleges McKinsey entered and stole business using its illegal policies.[109] Alix brought suit against McKinsey RTS—the restructuring arm of McKinsey's business; McKinsey & Co.—who owns and controls McKinsey RTS; and various McKinsey senior executives and partners, including Dominic Barton—managing partner of McKinsey & Co., Kevin Carmody—partner and senior executive of McKinsey RTS, Jon Garcia—senior partner and founding executive of McKinsey RTS,

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103 *In re* FiberMark, Inc., 2006 Bankr. LEXIS 4029, at *38 (Bankr. D. Vt.).

104 *Id.* at *29.

105 9 Collier on Bankruptcy, P2014.05 (16th ed. 2020); *see In re* Arlan's Dept. Stores, Inc. 615 F.2d 925, 932 (2d Cir. 1979).

106 11 U.S.C. § 328(c) (2019).

107 Rome v. Braunstein, 19 F.3d 54, 58 (1st Cir. 1994).

108 *See* Complaint and Jury Demand, *supra* note 1, at 5–6.

109 *See id.* at 1.

Seth Goldstrom, Alison Proshan—associate general counsel for McKinsey, and Robert Sternfels.[110]

The lawsuit is the latest in a string of confrontations and lawsuits between McKinsey and its employees, and Alix. According to McKinsey's motion to dismiss, Alix began confronting McKinsey leaders about its Rule 2014(a) disclosures, which he deemed to be non-compliant and illegal.[111] Over the course of several years, Alix confronted Dominic Barton—McKinsey's managing partner—eleven times, all initiated by Alix, including three in-person meetings.[112] Throughout these meetings, Alix attempted to convince Barton that McKinsey RTS was not compliant with Rule 2014(a)'s requirements, however McKinsey asserts that it was compliant, as affirmed by multiple bankruptcy courts—but that Alix's "uniquely personal interpretation" of Rule 2014(a) is incorrect.[113]

After these initial encounters, Alix upped his efforts. He formed an LLC—Mar-Bow Value Partners, LLC, whose sole function was to purchase a creditor claim for "pennies on the dollar" in the Alpha Natural Resources bankruptcy.[114] Through this company, Alix began complaining to the U.S. Trustee regarding McKinsey's disclosures in the course—disclosures which had already been considered and allowed by the bankruptcy judge in that case and in which the complaints were not joined by any other creditor involved in the case.[115] Following these complaints, the U.S. Trustee filed a motion to compel McKinsey to make additional disclosures beyond its normal practices, which consisted of merely describing the parties the firm had connections with, rather than specifically naming the companies.[116] McKinsey complied, and submitted a supplemental disclosure that satisfied the U.S. Trustee's standards—with the court even stating that it was "'completely satisfied that there is not any type of disinterested problem with McKinsey going forward' and that it was 'very satisfied with the information'" McKinsey submitted.[117]

Alix, however, was not satisfied. He filed a motion to clarify and even challenged the debtor's entire plan of reorganization, an action which left the

110 *See id.* at 98–100.
111 Motion to Dismiss the Complaint at 12, Jay Alix v. McKinsey, 404 F. Supp. 3d 827 (S.D.N.Y. July 30, 2018) (No. 18-cv-04141).
112 *Id*.
113 *Id.*
114 *Id.* at 13.
115 *Id.*
116 *Id.* at 12.
117 *Id.* at 14.

court "bewildered" and "confused[,]" resulting in the court rejecting both of Alix's challenges.[118] These rejections still did not deter Alix—he next moved to stay the implementation of the plan—an action which was again rejected by the court.[119] Finally, Alix continued to appeal the decision up to the district court in Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Services US, LLC.[120] Recently, more activity has taken place. In an incredibly rare move, the judge in the Alpha Natural Resources bankruptcy case reopened the case pursuant to 11 U.S.C. § 350(b), which provides that "[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause."[121] At the time of reopening the case, the judge made no conclusions about McKinsey's alleged misconduct, but that the continuation of hearings will allow the court to determine whether McKinsey's actions undermined the fundamental fairness of the bankruptcy proceedings.[122]

In the complaint, Alix states that McKinsey's racketeering activity was "calculated to harm AP," and that McKinsey knew it would be disqualified from employment under § 327 due to its extensive roster of clients and alumni connections.[123] In its complaint, Alix asserts that when considering whether a professional is disinterested, bankruptcy courts consider multiple factors, including:

> [1] whether the professional possesses or asserts for a client any economic interest that would tend to lessen the value of the bankruptcy estate or create either an actual or potential dispute in which the estate would be a rival claimant; [2] whether the professional possesses a predisposition under the circumstances to be biased against the estate; [3] whether the professional has some interest or relationship that would even faintly color the independence and impartial attitude required by the Code; [4] whether it is likely that the professional will be placed in a position permitting it to favor one interest over an impermissibly conflicting interest; [5] whether the professional is serving the debtors with undivided loyalty and providing untainted advice and assistance; and [6] the likelihood that a potential conflict

118 *Id.* (alterations omitted).
119 *Id.* at 12.
120 Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Servs. US, LLC, 578 B.R. 325 (E.D. Va. 2017).
121 11 U.S.C. § 350(b) (2019).
122 Morgenson & Corrigan, *supra* note 6.
123 Complaint and Jury Demand, *supra* note 1, at 2.

> might turn into an actual or the influence that a conflict might have on the professional's decision making.[124]

The complaint asserts that McKinsey's connections are extensive, citing McKinsey's website which states that McKinsey offers consulting services in everything from advanced electronics to paper and forest products industries.[125]

Indeed, it is logical that McKinsey will have numerous potential connections to almost any company, considering its status as the biggest of the "Big Three" consulting firms and the fact that over a quarter of its alumni have proceeded to found their own businesses upon leaving McKinsey, with nearly 400 of them leading $1 billion enterprises worldwide,[126] a feat that earns McKinsey the honor of having more alumni currently serving as Fortune 500 CEOs than any other company.[127] As a result of the connections, McKinsey cannot perform its duties—such as assisting the debtors in managing the chapter 11 bankruptcy process, including managing outside stakeholders—because, among the outside stakeholders McKinsey is charged with managing, are McKinsey's own clients.[128]

According to the complaint, in multiple cases McKinsey has failed to disclose a single connection, either throughout the case or, at a minimum, prior to confirmation of chapter 11 plans.[129] Allegedly, over a thirteen year period, McKinsey accepted eight restructuring cases in which they failed to comply with the disclosure requirements of § 327(a) and Rule 2014(a).[130] For example, in the Hayes bankruptcy case, McKinsey did not name a single connection to any interested parties, despite filing three separate affidavits.[131] Similarly, McKinsey filed two affidavits in the UAL bankruptcy case—the first of which named zero connections to any interested parties in the case, and the second of which—filed after McKinsey's employment had already been approved by the bankruptcy

[124] Complaint and Jury Demand, *supra* note 1, at 15–16.

[125] Complaint and Jury Demand, *supra* note 1, at 18.

[126] *McKinsey & Company*, VAULT (2020), https://www.vault.com/company-profiles/management-strategy/mckinsey-company.

[127] Complaint and Jury Demand, *supra* note 1, at 15.

[128] *Id.* at 90.

[129] *See id*. at 29.

[130] *See* Emiko Bd. v. AMF Bowling Worldwide, Inc. (*In re* AMF Bowling Worldwide, Inc.), 520 B.R. 185 (Bankr. E.D. Va. 2014); *In re* Edison Mission Energy, 502 B.R. 830 (Bankr. N.D. Ill. 2013); *In re* AMR Corp., 478 B.R. 599 (Bankr. S.D.N.Y. 2012); *In re* Harry & David Holdings, Inc., No. 11-BR-10884 (Bankr. D. Del. Mar. 28, 2011); *In re* Lyondell Chem. Co., 402 B.R. 596 (Bankr. S.D.N.Y. 2009); *In re* Mirant Corp., 354 B.R. 113 (Bankr. N.D. Tex. 2006); *In re* Hayes Lemmerz Int'l, Inc., 340 B.R. 461 (Bankr. D. Del. 2006); *In re* UAL Corp., 307 B.R. 80 (Bankr. N.D. Ill. 2004).

[131] Complaint and Jury Demand, *supra* note 1, at 22.

court—named eleven interested parties that were current McKinsey clients. This is notable considering that some of the parties named in the UAL case—JPMorgan Chase and Bank One Corporation and The Boeing Company—were also parties in the Hayes case, where McKinsey did not name the very same companies it later stated as interested parties to which it had connections.[132]

McKinsey, however, believes that this lack of disclosure is a feature of its business, rather than wrongdoing, telling bankruptcy courts that it cannot disclose connections due to "its responsibility to maintain strict client confidentiality."[133]

In his prayer for relief, Jay Alix requests, among other things, that McKinsey must disgorge all moneys received as a result of their illegal activities, per § 328(c).[134] Were the court to grant this request, the consequences would be enormous. According to Alix's complaint, McKinsey has received tens of millions in bankruptcy fees that it would not have otherwise earned if it had to disclose its connections or were disqualified due to these connections.[135] Through its "racketeering scheme," McKinsey has allegedly earned $101 million in the form of bankruptcy consulting fees.[136] Were the allegations in Alix's complaint proved, McKinsey would have to pay huge fines as required under convictions for bankruptcy fraud in violation of 18 U.S.C. §§ 152(2), 152(3), and 152(6); mail fraud in violation of 18 U.S.C. § 1341; wire fraud in violation of 18 U.S.C. § 1343; obstruction of justice in violation of 18 U.S.C. § 1503(a); witness tampering in violation of 18 U.S.C. §§ 1512(b) and 1512(c); unlawful monetary transactions in violation of 18 U.S.C. §§ 1956 and 1957; and inducement to interstate or foreign travel in violation of 18 U.S.C. § 2314, in addition to the fees McKinsey would owe due to disgorgement under 11 U.S.C. § 328(c).[137]

Alix states that damages to AlixPartners (AP) include, but are not limited to, fees from bankruptcy consulting engagements AP would have earned in the absence of McKinsey's unlawful conduct, other lost business opportunities (i.e., pre- and post-bankruptcy work AlixPartners would have received had it been able to form a relationship with debtor companies), and attorneys' fees and costs—including the attorneys' fees and costs associated with exposing and

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132 Complaint and Jury Demand, *supra* note 1, at 22–23.
133 Morgenson & Corrigan, *supra* note 6.
134 Complaint and Jury Demand, *supra* note 1, at 144.
135 Complaint and Jury Demand, *supra* note 1, at 2.
136 Complaint and Jury Demand, *supra* note 1, at 2.
137 *See* 18 U.S.C. §§ 152, 1341, 1343, 1503, 1512, 1956, 1957, 2314 (2018); 11 U.S.C. § 328 (2019).

litigating the criminal activities engaged in by McKinsey.[138] Additionally, were the allegations to be proved true, Alix would be entitled to recover treble damages, pursuant to 18 U.S.C. § 1964(c), which provides that "any person injured in his business or property by reason of a violation of § 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . ."[139]

Alix alleges that McKinsey formed McKinsey RTS— the restructuring portion of McKinsey's business—"for the purpose of facilitating, committing, perpetuating, and concealing the fraudulent and other criminal conduct alleged herein with the aim of unlawfully depriving AP of bankruptcy consulting engagements it otherwise would have obtained."[140] Additionally, Alix states that McKinsey RTS is distinct from McKinsey & Co.'s other entities not for any legitimate reasons, but because McKinsey hoped to "add a veneer of indirectness" and use McKinsey RTS as a pretext for withholding the numerous connections McKinsey has to debtors and bankruptcy proceeding participants, as well as to conduct the racketeering from a separate legal entity, walling off the illegal activities from the rest of McKinsey's business operations.[141] McKinsey, meanwhile, states that its alleged connections to various companies are not a legitimate issue because the companies are customers of McKinsey's main consulting organization or investments of McKinsey's investment arm, MIO Partners, Inc., which are separate entities from McKinsey RTS, which is "intentionally separate" and "follows policies designed to avoid conflicts of interest . . . ."[142]

In response to this lawsuit, McKinsey stated that the company's disclosure met all the legal requirements and described Alix's suit as "baseless and anti-competitive litigation . . . ."[143] Additionally, McKinsey filed a motion to dismiss, arguing that Alix's complaint is deficient in numerous respects.[144]

In spite of McKinsey's claims and several setbacks in court, Alix has continued his litigation against McKinsey, and has also attracted the interest of the United States trustee and the United States Attorney's Office in Manhattan.

138 Complaint and Jury Demand, *supra* note 1, at 124.

139 18 U.S.C. § 1964 (2018).

140 Complaint and Jury Demand, *supra* note 1, at 94.

141 Complaint and Jury Demand, *supra* note 1, at 94–95.

142 Morgenson & Corrigan, *supra* note 6.

143 Mary Williams Walsh, *McKinsey Hid Conflicts of Interest from Courts, Lawsuit Says*, N.Y. TIMES (May 9, 2018), https://www.nytimes.com/2018/05/09/business/jay-alix-mckinsey-lawsuit.html.

144 *See* Motion to Dismiss the Complaint, *supra* note 111, at 18.

The United States trustee stated that "McKinsey failed to satisfy its obligations under bankruptcy law and demonstrated a lack of candor with the court and USTP," and entered into a $15 million settlement agreement, which McKinsey states was not an admittance of wrongdoing but "provided additional clarity for the filing of future disclosures."[145] The United States Attorney's Office, meanwhile, was reportedly investigating whether McKinsey used its influence over bankruptcy clients to steer assets to itself and its clients over competing creditors.[146] Alix's litigation against McKinsey has continued, most recently in the Westmoreland Coal Co. bankruptcy, where Alix again objects to limited disclosures by McKinsey—a position that is supported by the United States Justice Department, who objected to McKinsey's work in the Westmoreland case.[147] This case will be especially important, as it is in one of the main bankruptcy venues in the country, Houston, Texas, and thus could serve to create a firm precedent for how courts should treat such disclosure requirements in the future. The judge in charge of the case appears to agree, promising a definitive ruling on disclosure requirements at the end of the trial, and stating that he does not "want to ever do this again."[148] While the litigation has been delayed due to the coronavirus pandemic, once it resumes the court has an opportunity to resolve this definitional issue once and for all.

B. Analysis

Considering the various standards set out in different courts, this Comment suggests a consistent standard should be applied to what constitutes a professional person and disinterested person under § 327(a), what the adequate level of disclosures is under Rule 2014(a), and recommends, in part, how the court should resolve the issues it is faced with in *Alix v. McKinsey & Co.* In establishing a consistent standard, the court should: 1) adopt the six-part test for determining a professional set out by the Bankruptcy Court for the District of Delaware in *In re American Tissue, Inc.*;[149] 2) adopt the strict definition of disinterested as set out by the Fourth Circuit in *In re Martin*;[150] 3) require an extensive level of disclosures similar to the amount set forth by the standard

[145] Morgenson & Corrigan, *supra* note 6 (internal quotations omitted).

[146] Walsh, *supra* note 143.

[147] Tom Corrigan, *McKinsey Foe Alleges 'Game of Hide and Seek' at Bankruptcy Trial*, WALL ST. J. (Feb. 5, 2020), https://www.wsj.com/articles/mckinsey-foe-alleges-game-of-hide-and-seek-at-bankruptcy-trial-11580934518.

[148] *Id.*

[149] *See supra* Section A1.

[150] *See supra* Section A2.

established in *In re Jennings* by the Eleventh Circuit;[151] and 4) rule for Jay Alix in his case against McKinsey & Co. While several of these tests include multi-factor balancing tests and reasonability standards that might seem unclear at first, the abundance of case law laying the framework for interpreting these tests will be sufficient to create a clear standard. Additionally, perhaps more important than selecting a clear standard with bright-line rules guiding application, is the adoption of consistent tests across all jurisdictions, in order to prevent forum shopping and confusion in the bankruptcy theater. In selecting these standards and tests, it is important to keep in mind the reasons § 327(a) and Bankruptcy Rule 2014(a) were adopted: "to ensure undivided loyalty to the estate and to preserve public confidence in the fairness of the bankruptcy system[,]"[152] as well as the two fundamental goals of bankruptcy: "a fresh start for the debtor and equal treatment of creditors."[153]

1. *A Broad Definition of Professional Persons Under § 327(a)*

In *In re Am. Tissue, Inc.*, the Bankruptcy Court for the District of Delaware established a six-factor test to consult when confronted with the issue of whether or not an individual or entity is a professional.[154] The six factors are:

> (1) whether the employee controls, manages, administers, invests, purchases or sells assets that are significant to the debtor's reorganization; (2) whether the employee is involved in negotiating the terms of a Plan of Reorganization; (3) whether the employment is directly related to the type of work carried out by the debtor or to the routine maintenance of the debtor's business operations; (4) whether the employee is given discretion or autonomy to exercise his or her own professional judgment in some part of the administration of the debtor's estate; (5) the extent of the employee's involvement in the administration of the debtor's estate; and (6) whether the employee's services involve some degree of special knowledge or skill, such that the employee can be considered a "professional" within the ordinary meaning of the term.[155]

No single factor is dispositive, but the factors should be weighed against each other and considered in total.[156] This test is, in part, inspired by the qualitative

[151] *See supra* Section A3.

[152] *In re* Sundance Self Storage-El Dorado LP, 482 B.R. 613, 625 (Bankr. E.D. Cal. 2012).

[153] *In re* Martin, 197 B.R. 120, 127 (Bankr. D. Colo. 1996).

[154] *See In re* Am. Tissue, Inc., 331 B.R. 169 (Bankr. D. Del. 2005).

[155] *Id.* at 173 (citing *In re* First Merchants Acceptance Corp., 1997. Bankr. LEXIS 2245, at *3 (D. Del. 1997)).

[156] *Id.* (citing *In re First Merchants Acceptance Corp.*, 1997. Bankr. LEXIS 2245, at *3).

and quantitative tests discussed previously,[157] but presents an expansive definition inclusive of the important elements of each test that encompasses a broad range of individuals under the term "professional."

Courts should adopt this rule because it provides for a broad definition of professional that is at the discretion of the judge—an experienced bankruptcy expert knowledgeable about the topic and familiar with the rationales behind the statutory provisions in bankruptcy. However, this may change as cases are appealed up the ladder.[158] A multi-factored balancing test is effective for three reasons: (1) it is simple; (2) it is descriptive; and (3) it is just.[159] Again, in adopting standards, the bankruptcy court must keep in mind its general goals—a fresh start for the debtor and equal treatment of creditors. The multi-factored balancing test more accurately satisfies these general goals—particularly the equal treatment of creditors provision.

Ensuring that the debtor is adequately represented by educated professionals who have been properly vetted by the bankruptcy court and who are required to go through the disclosures processes required by Rule 2014(a) and § 327(a) provides for a more effective, fair, and profitable bankruptcy experience for all parties, but most importantly, for creditors, by making for a robust, transparent bankruptcy process. Additionally, this combined approach is best because it offers the advantage of considering all aspects of the alleged professional's involvement in the bankruptcy proceeding. In contrast, the quantitative test from *In re Seatrain Lines, Inc.* merely focuses on the significance of the individual's role to the debtor proceeding,[160] while the qualitative test from *In re Fretheim* merely focuses on the amount of discretion the individual has in accomplishing that role.[161]

When adopting tests regarding specific provisions, the bankruptcy court must also consider the specific goals of those provisions, in this case "to ensure undivided loyalty to the estate and to preserve public confidence in the fairness

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157 *See supra* Section A(3)(b).

158 *See* Frank H. Easterbrook, *What's So Special about Judges?*, 61 U. COLO. L. REV. 772, 779–80 (1990). Although a balancing test is perhaps even more useful for judges relatively inexperienced with bankruptcy, such as those at the appellate levels, according to Judge Frank Easterbrook, "what happens when you turn a generalist loose in a complex world? An ignorant or unwise judge will be unaware of his limits and is apt to do something foolish. A sophisticated judge understands that he is not knowledgeable and so tries to limit the potential damage. How is this done? By and large, it is done by constructing 'five-part balancing tests.' Not only judges but also the leaders of the bar find this approach congenial. The American Law Institute's Restatements teem with multi-factor approaches." *Id.*

159 *See* Patrick McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 622 (1988).

160 *See In re* Seatrain Lines, Inc., 13 B.R. 980, 981 (Bankr. S.D.N.Y. 1981).

161 *See In re* Fretheim, 102 B.R. 298, 299 (Bankr. D. Conn. 1989).

of the bankruptcy system."[162] This multi-factor balancing test is most effective in accomplishing these goals. It considers all aspects of how the professional seeking employment will be assisting in the bankruptcy process. This allows the judge to make an effective determination of (1) whether the individual/entity should properly be considered a professional, and (2) whether it is appropriate for the debtor in possession or trustee to hire such a professional to assist in the bankruptcy process. The broad definition also promotes the goal of ensuring undivided loyalty to the estate because it encompasses more professionals, who will thus fall under the § 327(a) requirements—resulting in disclosures under Rule 2014(a) and the disqualification requirements from § 327(a) itself being applied to the professional, providing for a more complete, transparent bankruptcy process. While the application of balancing tests is not always entirely consistent, the presence of six clear factors to guide a group of experienced professionals such as the judges sitting on the bankruptcy court should be sufficient to guide preliminary decisions by entities involved in the bankruptcy process, such as AlixPartners and McKinsey, in the future. Additionally, this definition provides an extensive list of what bankruptcy judges should consider. While there is still some discretion available to judges, there are at least far more guidelines than some of the other formulations, such as whether the individual is "a professional in a broad sense."[163]

2. *Disinterested Standard Under § 327(a)*

Section 327(a) of the Code states that the trustee "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 . . . 11 U.S.C. § 101."[164] Regarding what qualifies as disinterested under § 327(a), the court should again use a strict standard, in this case the one previously adopted by the Fourth and Ninth Circuits,[165] which states that the catch-all provision in § 101(14)[166] is broad enough to include any "interest or relationship that would even faintly color the independence and impartial attitude required by the code."[167] This test requires the application of

162 *In re* Sundance Self Storage-El Dorado LP, 482 B.R. 613, 625 (Bankr. E.D. Cal. 2012).

163 *In re* Metro. Hosp., 119 B.R. 910, 916 (Bankr. E.D. Pa. 1990).

164 11 U.S.C. § 327(a) (2019).

165 *See* Dye v. Brown (*In re* AFI Holding, Inc.), 530 F.3d 832, 837–38 (9th Cir. 2008); *see also In re* Martin, 817 F.2d 175, 182 (4th Cir. 1987).

166 *See generally* 11 U.S.C. §101(14) (2019) ("the term 'disinterested person' means a person that—does not have an interest materially adverse to the interest of the estate . . . for any . . . reason").

167 *In re AFI Holding, Inc.*, 530 F.3d at 838.

a "totality of the circumstances" test to determine whether a particular conflict is materially adverse to the state.[168] Two aspects of this totality of the circumstances test are worth paying special note to. First, "[p]erceptions are important; how the matter likely appears to creditors and to other parties in legitimate interest should be taken into account."[169] Second, "whether the fundamental fairness of the proceedings might be unduly jeopardized (either by the actuality of the arrangement or by the reasonable public perception of it)."[170] The inclusion of these two factors in the test is important, because they mirror the second reason for the disclosure requirements under Rule 2014(a): "to preserve public confidence in the fairness of the bankruptcy system."[171]

This test is most effective because it more accurately captures the two goals for the required disclosures and disinterested standard.[172] Additionally, the less strict standard, which states that the court need not ask whether a conflict exists, but "whether a potential conflict, or the perception of one renders the lawyer's interest materially adverse to the estate or to creditors,"[173] is contradictory to the standards the courts applying it seek to uphold. In applying this test, the First Circuit has stated that the statutory requirements "serve an important policy of ensuring that all professionals appointed pursuant to [§] 327(a) tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities."[174] The court also stated that "[§] 327(a) is designed to limit even appearances of impropriety to the extent reasonable practicable. . . ."[175] Surely a stricter test would better serve the goal of limiting "even appearances of impropriety" by requiring the professional seeking

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[168] *See In re Martin*, 817 F.2d at 182 (In determining whether the security interest coveted by counsel can be tolerated under the particular circumstances, the test considers: "the reasonableness of the arrangement and whether it was negotiated in good faith, whether the security demanded was commensurate with the predictable magnitude and value of the foreseeable services, whether it was a needed means of ensuring the engagement of competent counsel, and whether or not there are telltale signs of overreaching. The nature and extent of the conflict must be assayed, along with the likelihood that a potential conflict might turn into an actual one. An effort should be made to measure the influence the putative conflict may have in subsequent decision making. Perceptions are important; how the matter likely appears to creditors and to other parties in legitimate interest should be taken into account. There are other salient factors as well: whether the existence of the security interest threatens to hinder or to delay the effectuation of a plan, whether it is (or could be perceived as) an impediment to reorganization, and whether the fundamental fairness of the proceedings might be unduly jeopardized (either by the actuality of the arrangement or by the reasonable public perception of it).").

[169] *Id.*

[170] *Id.*

[171] *In re* Sundance Self Storage-El Dorado LP, 482 B.R. 613, 625 (Bankr. E.D. Cal. 2012).

[172] *See id*. at 624–25 ("To ensure undivided loyalty to the estate and to preserve public confidence in the fairness of the bankruptcy system.").

[173] *In re Martin*, 817 F.2d at 182.

[174] Rome v. Braunstein, 19 F.3d 54, 58–60 (1st Cir. 1994) (emphasis added).

[175] *Id.* at 60.

employment to submit connections to the court, who then decides whether, in totality, there is a conflict of interest.[176]

3. *Extensive Disclosures Required Under Bankruptcy Rule 2014(a)*

Rule 2014(a) states that to be employed as a professional, an application that details "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" must be filed.[177] This 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."[178] When seeking employment, courts should require professionals to meet the Rule 2014(a) disclosure requirement set out by the Eleventh Circuit in *In re Jennings*, which sets forth a strict requirement that the professional seeking employment "must disclose all facts that bear on his disinterestedness, and cannot usurp the court's function by unilaterally choosing which connections impact on his disinterestedness and which do not."[179] This standard is quite broad, as courts applying this holding reason that the disclosure requirements set forth in Rule 2014(a) are broader than the rules governing disqualification, and that, to satisfy these rules, a professional seeking employment must disclose all connections, regardless of whether they believe they are sufficient to rise to the level necessitating disqualification under § 327(a).

This test is much more strict than other formulations, which state that professionals seeking employment "need not disclose every past or remote connection with every party in interest . . . [but] . . . must disclose those presently or recently existing, whether they are of business or personal in nature, which could reasonably have an effect on the attorney's judgment in the case."[180] This requirement to "disclose all facts that bear on his disinterestedness," rather than relying on a reasonableness standard will certainly be more costly and result in lengthier bankruptcy proceedings than adoption of a reasonableness standard, as

176 *Id.*

177 Fed. R. Bankr. P. 2014(a) (2018).

178 *Id.*

179 Quarles & Brady LLP v. Maxfield (*In re* Jennings), 199 F. App'x 845, 848 (11th Cir. 2006) (quoting *In re* Gulf Coast Orthopedic Ctr., 265 B.R. 318, 323 (Bankr. M.D. Fla. 2001).

180 Drew v. Latimer, Biaggi, Rachi & Godreau (*In re* El Comandante Mgmt. Co., LLC), 395 B.R. 807, 814 (D.P.R. 2008) (quoting *In re* El San Juan Hotel Corp., 239 B.R. 635, 647 (1st Cir. 1999)).

the judge must consider all possible connections, rather than only those that the professional deems relevant. However, there are two benefits to the adoption of this strict standard. First, a stricter standard is more in line with the goal of Rule 2014(a): "to ensure undivided loyalty to the estate and to preserve public confidence in the fairness of the bankruptcy system."[181] Certainly a system which provides the bankruptcy court with all the information available will better provide undivided loyalty to the estate, as well as to preserve confidence in the fairness of the system, than a test which gives discretion to professionals seeking employment as to whether they believe a connection might impact their decision-making during the bankruptcy process. Secondly, a reasonableness standard is harder to apply and will result in inconsistencies in what constitutes reasonable between jurisdictions—precisely the problem the courts are currently facing in the absence of a common, easily applicable standard.

4. *Alix v. McKinsey & Co. and the Application of Strict Standards*

Regarding Jay Alix's suit versus McKinsey, it must first be determined whether McKinsey is a professional under § 327(a), using the test discussed above.[182] If the answer to this question is yes, it raises the question of whether McKinsey qualifies as disinterested under § 327(a), again using the test discussed above.[183] And finally, there is the question of whether McKinsey's disclosures meet the requirements discussed above.[184] While Alix has faced difficulties in obtaining standing in his various proceedings against McKinsey, the underlying issues are still relevant and worthy of discussion.[185]

a. *McKinsey's Status as a Professional*

Using the definition from the test set out in *In re Am. Tissue, Inc.*, McKinsey is clearly a professional according to the Bankruptcy Code. Under this test, the court considers the following six factors:

> (1) whether the employee controls, manages, administers, invests, purchases or sells assets that are significant to the debtor's reorganization; (2) whether the employee is involved in negotiating

[181] *In re* Sundance Self Storage-El Dorado LP, 482 B.R. 613, 625 (Bankr. E.D. Cal. 2012) (emphasis added).

[182] *See supra* Section B1.

[183] *See supra* Section B2.

[184] *See supra* Section B3.

[185] *See* Tom Corrigan, *McKinsey Dodges Lawsuit Targeting Its Bankruptcy Disclosures*, WALL ST. J. (Aug. 19, 2019), https://www.wsj.com/articles/mckinsey-dodges-lawsuit-targeting-its-bankruptcy-disclosures-11566255695).

> the terms of a Plan of Reorganization; (3) whether the employment is directly related to the type of work carried out by the debtor or to the routine maintenance of the debtor's business operations; (4) whether the employee is given discretion or autonomy to exercise his or her own professional judgment in some part of the administration of the debtor's estate . . .; (5) the extent of the employee's involvement in the administration of the debtor's estate . . .; and (6) whether the employee's services involve some degree of special knowledge or skill, such that the employee can be considered a "professional" within the ordinary meaning of the term.[186]

While no single factor from this test is dispositive, and the circumstances should be considered in toto, McKinsey satisfies several of them.[187]

According to a report by the Wall Street Journal, McKinsey's role in the bankruptcy process went so far as to devise the reorganization plan for the companies it services,[188] while Alix's complaint states that McKinsey "secured" confirmation of the plan of reorganization.[189] Additionally, McKinsey's website advertises its services as including the creation of "a blueprint for successful long-term recovery of the business" and, in the case of judicially driven or formal restructurings, McKinsey offers "comprehensive support[.]"[190] Based on this information, it is clear that McKinsey, at a minimum, satisfies factor two as it is involved in formulating and negotiating the terms of a plan of reorganization. While no one factor is dispositive, satisfying factor two is strong evidence that McKinsey is a professional under the *In re Am. Tissue, Inc.* six-part test.

b. McKinsey's Violation of the Disinterested Standard from Section 327(a)

Because McKinsey qualifies as a professional, it is subject to the disinterested standard as set forth in § 327(a), which provides that anyone may be employed provided that they are:

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[186] *In re* Am. Tissue, Inc., 331 B.R. 169, 173 (Bankr. D. Del. 2005) (citing *In re* First Merchants Acceptance Corp., 1997 Bankr. LEXIS 2245, at *3 (D. Del. 1997)).

[187] *See generally* Alix v. McKinsey & Co., 404 F. Supp. 3d 827, 830 (S.D.N.Y. 2019) (granting motion to dismiss RICO claim because plaintiff did not satisfy RICO's proximate cause standard). As readily determinable by information at hand as of Jan. 12, 2019. More information will become available as the case against McKinsey proceeds.

[188] *See* Morgenson & Corrigan, *supra* note 6.

[189] Complaint and Jury Demand, *supra* note 1, at 19.

[190] *Corporate Restructuring and Turnarounds*, MCKINSEY & CO., https://www.mckinsey.com/business-functions/rts/how-we-help-clients/corporate-restructuring-and-turnarounds.

> [N]ot a creditor, an equity security holder, or an insider . . . [and] 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.[191]

The proper test is that set forth in *Dye v. Brown*, which has already been adopted by both the Fourth and Ninth Circuits,[192] and articulates that the catch-all provision in § 101(14)[193] is "broad enough to include . . . [any] interest or relationship that 'would even faintly color the independence and impartial attitude required by the code.'"[194] This test requires the application of a totality of the circumstances test to determine whether a particular conflict is materially adverse to the state.[195] One aspect of this totality of the circumstances test is worth paying special note to: "perceptions are important; how the matter likely appears to creditors and to other parties in legitimate interest should be taken into account."[196] Additionally, other salient factors include "whether the fundamental fairness of the proceedings might be unduly jeopardized (either by the actuality of the arrangement or by the reasonable public perception of it)."[197] While an individual factor by itself is not dispositive under this test, these factors are of particular importance considering the publicity that has been brought to Alix's case against McKinsey, as well as the various bankruptcies McKinsey has been involved in, as a result of the Wall Street Journal's various exposés against McKinsey.

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191 11 U.S.C. §101(14) (2019).

192 *See* Dye v. Brown (*In re* AFI Holding, Inc.), 530 F.3d 832, 838 (9th Cir. 2008); *In re* Martin, 817 F.2d 175, 182 (4th Cir. 1987).

193 *See* 11 U.S.C. § 101(14) ("The term 'disinterested person' means a person that—does not have an interest materially adverse to the interest of the estate . . . for any . . . reason.").

194 Dye v. Brown (*In re* AFI Holding, Inc.), 530 F.3d 832, 838 (9th Cir. 2008) (quoting *In re* AFI Holding, Inc., 355 B.R. 139, 149 (B.A.P. 9th Cir. 2006)).

195 *See In re* Martin, 817 F.2d 175, 182 (4th Cir. 1987) (The test considers: "the reasonableness of the arrangement and whether it was negotiated in good faith, whether the security demanded was commensurate with the predictable magnitude and value of the foreseeable services, whether it was a needed means of ensuring the engagement of competent counsel, and whether or not there are telltale signs of overreaching. The nature and extent of the conflict must be assayed, along with the likelihood that a potential conflict might turn into an actual one. An effort should be made to measure the influence the putative conflict may have in subsequent decision making. Perceptions are important; how the matter likely appears to creditors and to other parties in legitimate interest should be taken into account. There are other salient factors as well: whether the existence of the security interest threatens to hinder or to delay the effectuation of a plan, whether it is (or could be perceived as) an impediment to reorganization, and whether the fundamental fairness of the proceedings might be unduly jeopardized (either by the actuality of the arrangement or by the reasonable public perception of it).").

196 *Id.*

197 *Id.*

Here, it is likely that McKinsey would not be considered disinterested under the totality of the circumstances test. When determining "whether the security interest coveted by counsel can be tolerated under the particular circumstances," salient factors include:

> whether the existence of the security interest threatens to hinder or to delay the effectuation of a plan, whether it is (or could be perceived as) an impediment to reorganization, and whether the fundamental fairness of the proceedings might be unduly jeopardized (either by the actuality of the arrangement or by the reasonable public perception of it).[198]

While there has yet to be a complaint by one of the participants in a bankruptcy managed by McKinsey, the complaints by Alix, and others, have gained much notoriety, including being the subject of a multi-page exposé in the Wall Street Journal.[199] Indeed, the allegations featured in the Wall Street Journal exposé resulted in the bankruptcy judge in charge of the Alpha Natural Resources bankruptcy reopening the case to look into these allegations, which he called the "most serious" the judge had ever seen—that McKinsey had a major investment in a hedge fund run by Whitebox Advisors, LLC, an Alpha Natural Resources creditor who received the bankrupt company's most valuable asset.[200] This suit was later dismissed due to Alix not having standing to bring the case,[201] but the point remains: this notoriety is not acceptable, particularly under the totality of the circumstances test set forth in *Dye v. Brown*—it serves to undermine the fundamental fairness of the bankruptcy proceedings. Allowing misconduct of the sort Alix is alleging McKinsey engaged in will only serve to lessen public confidence in the effectiveness and fairness of the bankruptcy system and is contrary to the principles that form the basis of the bankruptcy system.

One factor in particular: "whether the fundamental fairness of the proceedings might by unduly jeopardized (either by the actuality of the arrangement or by the reasonable public perception of it)" is especially troubling when considering Alix's case against McKinsey.[202] While the full details of what actually transpired will be revealed in the trial, at a minimum the abundance of Wall Street Journal reports and attention that this case has received, the fact that

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198 *In re* Martin, 817 F.2d 175, 182 (4th Cir. 1987).

199 *See* Morgenson & Corrigan, *supra* note 6.

200 Tom Corrigan & Gretchen Morgenson, *Judge Reopens Bankruptcy Case, Citing Allegations McKinsey Hid Investments*, WALL ST. J. (Jan. 9, 2019), https://www.wsj.com/articles/judge-reopens-bankruptcy-case-citing-allegations-mckinsey-hid-investments-11547077920).

201 Tom Corrigan, *Judge Reins in Jay Alix's Bankruptcy Brawl with McKinsey*, WALL ST. J. (May 20, 2019), https://www.wsj.com/articles/judge-reins-in-jay-alixs-bankruptcy-brawl-with-mckinsey-11558380704.

202 *In re Martin*, 817 F.2d at 182.

the United States trustee has issued condemnations of McKinsey, as well as the fact that the judge in the Alpha Natural Resources case has reopened the case in light of further revelations of McKinsey's lack of disclosures, all point to the fact that the proceedings McKinsey has involved in are lacking fundamental fairness—if not in reality, then certainly in the "reasonable public perception of it."[203] Additionally, it is clear that in most, if not all of the bankruptcy cases listed in Alix's complaint, the bankruptcy judge was not given an immediate opportunity to make an intelligent appraisal of the potential conflict and to apply his "experience, common sense, and knowledge of the particular proceeding" to bear on the issue of disinterestedness—a requirement that courts applying this test consider to be the most important factor in the § 327(a) disclosure requirements.[204]

c. *McKinsey's Failure to Satisfy Bankruptcy Rule 2014(a) Disclosures*

Regarding the Rule 2014(a) disclosures, McKinsey responds that its disclosures were "robust and comprehensive[,]" stating that in Alix's complaint Alix did not append any of the allegedly deficient disclosures and quickly skipped past their actual content in the complaint.[205] Accordingly, across the thirteen bankruptcy cases implicated in the suit, McKinsey submitted thirty-nine declarations totaling more than 498 pages that disclosed McKinsey's connections to interested parties and set forth the process through which McKinsey identified these connections.[206]

However, the above recommended disclosure requirements[207] state that bankruptcy professionals must "disclose all facts that bear on his disinterestedness, and cannot usurp the court's function by unilaterally choosing which connections impact on his disinterestedness and which do not."[208] Under other, less strict formulations, McKinsey might be considered to have satisfied its disclosure requirements. However, because the proper disinterested standard is the strict test set forth by the Eleventh Circuit in *In re Jennings*, McKinsey has not satisfied its obligation under Rule 2014(a).

In reviewing past cases mentioned in Alix's brief, it is clear that McKinsey has not disclosed all facts that bear on its disinterestedness. In multiple cases,

203 *Id.*
204 *Id.*; *see* Complaint and Jury Demand, *supra* note 1.
205 Motion to Dismiss the Complaint, *supra* note 111, at 9.
206 Motion to Dismiss, *supra* note 111, at 9.
207 *See supra* Section A3.
208 Quarles & Brady LLP v. Maxfield (*In re* Jennings), 199 F. App'x 845, 848 (11th Cir. 2006).

McKinsey has not disclosed any connections at the beginning of the bankruptcy procedure, but only later after the process was already well underway, if at all.[209] Additionally, even after the late disclosures, McKinsey has failed to detail a complete list of connections, such as in the Alpha Natural Resources case, where Duke Energy, a client of McKinsey's, was also a major customer of Alpha Natural Resources.[210] In its response to Alix's previous assertions that McKinsey is not disinterested, McKinsey has stated that clients of the main McKinsey consulting services are separate from clients of McKinsey RTS, as well as that McKinsey's investment division, MIO, is a separate organization; however, these claims ring hollow since McKinsey RTS and MIO share various directors and board members.[211] In conclusion, McKinsey violated the disclosure requirements as required by the test promulgated in *In re Jennings*, as required by Rule 2014(a).

In addition to the questions posed in the bankruptcy context, above, the case against McKinsey also alleges various criminal actions.[212]

d. Criminal Allegations

There are various criminal allegations against McKinsey, for which it is helpful to have a brief overview of the allegations, as well as the elements necessary to prove them. These allegations include: bankruptcy fraud in violation of 18 U.S.C. §§ 152(2), 152(3), and 152(6); mail fraud in violation of 18 U.S.C. § 1341; wire fraud in violation of 18 U.S.C. § 1343; obstruction of justice in violation of 18 U.S.C. § 1503(a); witness tampering in violation of 18 U.S.C. §§ 1512(b) and 1512(c); unlawful monetary transactions in violation of 18 U.S.C. §§ 1956 and 1957; inducement to interstate or foreign travel in violation of 18 U.S.C. § 2314; and promissory estoppel.[213] These allegations clearly hinge on whether McKinsey satisfied the tests above, but the allegations also have their own requirements. While it is impossible to determine whether McKinsey satisfied each element of these various crimes until discovery reveals McKinsey's thought-processes in the bankruptcy process, it is worth noting

209 *See* Complaint and Jury Demand, *supra* note 1, at 21–32.

210 Complaint and Jury Demand, *supra* note 1, at 51. Full details of the connections McKinsey allegedly hid can be found in the Complaint and Jury demand.

211 Gretchen Morgenson & Tom Corrigan, *McKinsey Advised GenOn Energy about Bankruptcy Case while Having Interest in Outcome*, WALL ST. J. (Dec. 20, 2018), https://www.wsj.com/articles/mckinsey-advised-genon-energy-about-bankruptcy-case-while-having-interest-in-outcome-11545345478); Complaint and Jury Demand, *supra* note 1, at 32.

212 Discussed *infra* Section B(4)(d).

213 Complaint and Jury Demand, *supra* note 1, at 2.

some of the crimes alleged and the elements necessary to prove them, and analyzing the ones for which sufficient facts are apparent.

In his suit, Alix alleges McKinsey committed bankruptcy fraud in violation of 18 U.S.C. §§ 152(2), 152(3), and 152(6).[214] These provisions provide that a person who "(2) knowingly and fraudulently makes a false oath or account in or in relation to" any bankruptcy case; "(3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, or in relation to any" bankruptcy; "[or] (6) knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any" bankruptcy case "shall be fined under this title, imprisoned not more than 5 years, or both."[215]

This crime is fairly straightforward: if McKinsey is a professional under the Code and required to be disinterested and meet the requirements of Rule 2014(a), then it will be guilty provided that its inadequate disclosures and claims to be disinterested were knowingly dishonest. Clearly McKinsey knew that it had connections to interested parties in the bankruptcies it was involved—the only question remaining is whether it truly believed these connections did not fall under the disclosure requirements, or whether it knew that the connections were supposed to be disclosed, yet hid them anyway. If McKinsey knew these connections fell under the disclosure requirements, McKinsey clearly committed bankruptcy fraud. An individual violates 18 U.S.C. § 1956 if:

> knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, he conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful . . . knowing that the transaction is designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.[216]

Proving mail fraud in violation of 18 U.S.C. § 1341requires satisfying two elements: "(1) a scheme to defraud, and (2) the mailing of a letter, etc. for the purpose of executing the scheme."[217] Additionally, the scheme need not have "contemplate[d] the use of the mails as an essential element."[218]

[214] Complaint and Jury Demand, *supra* note 1, at 2.
[215] 18 U.S.C. § 152 (2018).
[216] United States v. Dennis, 237 F.3d 1295, 1302 (11th Cir. 2001) (citing 18 U.S.C. § 1956(a)(1)(B)(i)) (internal quotations omitted)).
[217] Pereira v. United States, 347 U.S. 1, 8 (1954).
[218] *Id.*

The crime of wire fraud in violation of 18 U.S.C. § 1343 requires proving two elements: "(1) a scheme to defraud and (2) the use of interstate communications in furtherance of the scheme."[219]

Wire fraud and mail fraud will be relatively easy to prove if Alix is able to prove that McKinsey knowingly and fraudulently lied about its disclosures in the bankruptcy cases on which it worked. If it truly did so knowingly, it will be clear that McKinsey was engaged in an ongoing scheme to defraud, as the fraud continued over multiple years and bankruptcies.

It has been formulated by at least one court that proving obstruction of justice in violation of 18 U.S.C. § 1503(a) requires: 1) a nexus between the individual's conduct and judicial proceedings; 2) the conduct must have relation in time, causation, or logic with judicial proceedings and must have natural and probable effect of interfering with due administration of justice; 3) the individual must have had specific intent to do some act or acts which tend to influence, obstruct, or impede due administration of justice; 4) the individual's motivation is irrelevant under § 1503(a); and 5) where the individual unquestionably intended to undertake the act, with full knowledge that it would impede due administration of justice, that is all law requires in order to show specific intent to influence, obstruct, or impede due administration of justice.[220]

To prove violations of inducement to interstate or foreign travel in violation of 18 U.S.C. § 2314, one must establish the following elements: "(1) unlawful or fraudulent intent in the (2) transportation in interstate commerce of (3) any falsely made securities with (4) knowledge that securities were falsely made."[221] Punishment can be imposed in the form of a fine or imprisonment of up to ten years, or both.[222] This analysis is closely tied to that of the bankruptcy fraud, as whether or not McKinsey truly had fraudulent intent is the main consideration of that charge, as well as the first element of this charge.[223]

In the case's sixth cause of action, Alix asserts promissory estoppel, stating that on October 16, 2014, McKinsey & Co., through its Managing Partner Dominic Barton, promised AlixPartners that it would dissolve McKinsey RTS "because of its unlawful activity, and cease providing bankruptcy consulting services [by] January 2015."[224] As a result of this promise, AlixPartners

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[219] United States v. Gordon, 780 F.2d 1165, 1171 (5th Cir. 1986).
[220] Alwan v. Ashcroft, 388 F.3d 507, 514 (5th Cir. 2004).
[221] United States v. Mitchell, 588 F.2d 481, 483 (5th Cir. 1979).
[222] 18 U.S.C. § 2314 (2018).
[223] *Mitchell*, 588 F.2d at 483.
[224] Complaint and Jury Demand, *supra* note 1, at 142.

refrained from commencing litigation against McKinsey for the illegal practices described above, but McKinsey breached its promise to AlixPartners by continuing to provide bankruptcy consulting services to debtors after January 2015.[225] The elements of promissory estoppel are: "(1) defendant made an unambiguous promise to plaintiff; (2) plaintiff relied on such promise; (3) plaintiff's reliance was expected and foreseeable by defendants; and (4) plaintiff relied on the promise to its detriment."[226]

This claim of promissory estoppel stems from an October 16, 2014 meeting, in which Alix and Dominic Barton, a global managing partner at McKinsey & Co., discussed McKinsey's alleged pay-to-play operation.[227] After an initial meeting in which Alix disclosed to Barton that he believed McKinsey's actions were illegal under the Code, Barton ask for some time to review the applicable law and McKinsey's action, after which Barton had determined the behavior was illegal and "expressed incredulity" that the directors of McKinsey RTS would engage in such conduct.[228] Barton then promised that, after his upcoming re-election as managing partner, he would remove the senior leadership of McKinsey RTS from their positions due to their illegal behavior, as well as remove McKinsey from the bankruptcy business altogether—in return, Alix would "remain patient and refrain from acting at that time on the issues he had raised."[229] The promised actions never occurred, however, resulting in the inclusion of this cause of action, because Alix did not bring litigation in reliance on the promise by Barton.

This cause of action is not likely to succeed—there is no true detrimental reliance. Alix claims that as a result of the promises by Barton, he did not bring legal action against McKinsey. While we only have Alix's side of the story, his record of events seems to make clear that Barton made an unambiguous promise to Alix to shut down the operations of McKinsey's restructuring group, thus the first element is satisfied. Additionally, there seems to be no doubt the Alix reasonably relied on the promise. The issue, however, lies in Alix's claim of injury as a result of this reliance. His injury, he claims, is that he did not bring litigation against McKinsey, and thus missed out on potential damages from litigation.[230] This argument holds no weight, however, as Alix is currently

225 *Id.*
226 Firestone Fin. Corp. v. Meyer, 796 F.3d 822, 827 (7th Cir. 2015) (*citing* Newton Tractor Sales, Inc. v. Kubota Tractor Corp., 906 N.E.2d 520, 523–24 (2009)).
227 Complaint and Jury Demand, *supra* note 1, at 36.
228 *Id.*
229 *Id.* at 36–38.
230 *See id.* at 142.

bringing litigation, and thus is eligible for damages that will remedy the past transgressions against him. A better argument would be that he was damaged by not obtaining several bankruptcy cases that occurred after the meeting in which Barton allegedly promised to exit the bankruptcy business and not seek any new cases. However, even this argument is baseless, as this injury is entirely speculative—there is no way to determine that, even in the absence of McKenzie, Alix would have been awarded the bankruptcy contract over some other consulting firm.

CONCLUSION

The recently filed case *Alix v. McKinsey & Co.* is an excellent tool to reveal several deficiencies in the bankruptcy system. While it is not entirely clear whether McKinsey & Co.'s restructuring group, McKinsey RTS, knew what the proper amount of disclosures required of them are and simply flouted these requirements in an attempt to maintain their brand reputation of client confidentiality, or whether they believed that a minimum level of disclosures was required to satisfy the disclosure requirements set forth in Rule 2014(a) and that they truly did qualify as disinterest under 11 U.S.C. § 327(a). Either way, the case has brought to the forefront of bankruptcy the reality that the definition of who qualifies as a professional under § 327(a), who qualifies as disinterested under § 327(a), and what are the full extent of the disclosure requirements under Rule 2014(a) is not clear. This lack of clarity has resulted in circuit splits and even splits within circuits regarding who is subject to the disinterested requirement under § 327(a), what this disinterested requirement entails, and how much information a professional seeking employment in a bankruptcy case must divulge to the bankruptcy court under Rule 2014(a).

The court in *Alix v. McKinsey & Co.* has an opportunity to resolve some of these definitional issues. This Comment suggests the following solutions. First, the court should adopt the six-part test for defining professional as set out by the Bankruptcy Court for the District of Delaware in *In re Am. Tissue, Inc.*, in which the court considers: (1) whether the employee controls, manages, administers, invests, purchases or sells assets that are significant to the debtor's reorganization; (2) whether the employee is involved in negotiating the terms of a Plan of Reorganization; (3) whether the employment is directly related to the type of work carried out by the debtor or to the routine maintenance of the debtor's business operations; (4) whether the employee is given discretion or autonomy to exercise his or her own professional judgment in some part of the administration of the debtor's estate; (5) the extent of the employee's involvement in the administration of the debtor's estate; and (6) whether the employee's services involve some degree of special knowledge or skill, such that the employee can be considered a "professional" within the ordinary meaning of the term.[231] Second, the court should adopt the strict definition of disinterested as set out by the Fourth Circuit in *In re Martin*, where the Court considers the totality of the circumstances in its determination of whether the professional is disinterested.[232] Third, the court should establish a broad disclosure rule similar to the rule set forth by the Eleventh Circuit in *In re Jennings*, where the Court required professionals to "disclose all facts that bear on his disinterestedness, and cannot usurp the court's function by unilaterally choosing which connections impact on his disinterestedness and which do not."[233]

While the allegations against McKinsey are serious and, if true, represent a threat to the fairness and effectiveness of the bankruptcy system, they also offer the opportunity to fix aspects of the bankruptcy system that have holes, allowing the court to ensure that such actions, are not repeated. The court has an opportunity to prevent further confusion and lack of cohesion between bankruptcy jurisdictions, and it may capitalize on this opportunity by adopting the tests and requirements set forth above.

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[231] *In re* Am. Tissue, Inc., 331 B.R. 169, 173 (Bankr. D. Del. 2005).

[232] *In re* Martin, 817 F.2d 175, 182 (4th Cir. 1987).

[233] Quarles & Brady LLP v. Maxfield (*In re* Jennings), 199 F. App'x 845, 848 (11th Cir. 2006) (citing *In re* Keller Fin. Servs. of Fla., Inc., 243 B.R. 806, 812 (Bankr. M.D. Fla. 1999)).

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