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PROPOSED ATTORNEYS FOR THE DEBTORS AND DEBTORS-IN-POSSESSION

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

_____)	
In re)	Chapter 11 Case
_____)	
MIRANT CORPORATION, <u>et al.</u> ,)	Case No. 03-46590(DML)11
_____)	Jointly Administered
Debtors.)	
_____)	Hearing Date and Time: To Be Set

**MOTION OF THE DEBTORS PURSUANT TO 11 U.S.C. §§ 105(a), 507(a)
AND 541 FOR AUTHORITY TO PAY PREPETITION TRUST FUND
TAXES IN THE ORDINARY COURSE OF BUSINESS**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

Mirant Corporation (“Mirant”) and its affiliated debtors (collectively, the “Debtors”), as debtors-in-possession, file this motion for entry of an order pursuant to 11 U.S.C. §§ 105(a), 507(a) and 541 authorizing the Debtors to pay their prepetition trust fund taxes in the ordinary course of business (the “Motion”), and respectfully represent as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

PROCEDURAL BACKGROUND

2. The Cases. On July 14, 2003 (the "Petition Date"), each of the Debtors filed a voluntary petition in this court for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330, as amended (the "Bankruptcy Code"). The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

3. Joint Administration Request is Pending. Concurrently with the filing of the Motion, the Debtors have moved the court to jointly administer the bankruptcy estates of the Debtors.

4. The Creditors' Committee. No creditors' committee has yet been appointed in these cases by the United States Trustee. Further, no trustee or examiner has been requested or appointed in any of the Debtors' chapter 11 cases.

RELIEF REQUESTED

5. By this Motion, pursuant to sections 105(a), 507(a) and 541 of the Bankruptcy Code, the Debtors seek the entry of an order authorizing, but not directing, the Debtors to pay prepetition sales, use, employee related withholding and other trust fund type taxes (however denominated) (the "Trust Fund Taxes") owed to the appropriate federal, state and local taxing or related authorities (each a "Taxing Authority," and collectively, the "Taxing Authorities") in the ordinary course of business, on an unaccelerated basis, as such payments become due and payable and to the extent adequate funds are available to make such payments. The Debtors seek authority to pay the Trust Fund Taxes to avoid the serious disruption to their reorganization efforts that would result from the nonpayment of such amounts.

6. In the ordinary course of their businesses, the Debtors collect sales, use and other trust fund type taxes from their employees, customers, independent contractors and

other third parties, and subsequently remit such taxes to the appropriate Taxing Authorities. For example, in certain cases the Debtors collect sales taxes from their customers for remittance to the appropriate state or local Taxing Authorities in connection with the sale of products and services to their customers. In addition, the Debtors withhold certain taxes (including FICA and Medicare taxes) from their employees' paychecks, which amounts are remitted periodically to the appropriate federal, local and state Taxing Authorities. The process by which the Debtors remit the Trust Fund Taxes varies, depending on the nature of the tax at issue and the Taxing Authority to which the relevant tax is to be paid.

7. Furthermore, there is often a lag-time between the time when the Debtors incur an obligation to pay Trust Fund Taxes and the date when payment of such Trust Fund Taxes are due. Various governmental units may therefore have claims against the Debtors for Trust Fund Taxes that have accrued, but are unpaid and not yet due, as of the Petition Date. The relevant Taxing Authority may also make retrospective adjustments to determine any payment deficiency or surplus for a particular period resulting in a demand for further payment from or refund to the taxpayer. The Debtors estimate that approximately \$440,000 accrued but unpaid Trust Fund Taxes in the aggregate may be owing as of the Petition Date.

APPLICABLE AUTHORITY

8. Section 541(d) of the Bankruptcy Code provides, in relevant part, as follows:

Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. § 541(d).

9. The Trust Fund Taxes do not constitute property of the Debtors' estate, as such funds are taxes held in trust for payment to the Taxing Authorities. See, e.g., In re Al Copeland Enterprises, Inc., 991 F.2d 233, 237 (5th Cir. 1993); Begier v. Internal Revenue Serv., 496 U.S. 53 (1990); In re Shank, 792 F.2d 829, 832 (9th Cir. 1986) (sales taxes required by state law to be collected by sellers from their customers are "trust fund" taxes); DeChiaro v. New York State Tax Comm'n, 760 F.2d 432, 433-34 (2d Cir. 1985) (same); In re American Int'l Airways, Inc., 70 B.R. 102, 103 (Bankr. E.D. Pa. 1987) (excise and withholding taxes); Shipley Co., Inc. v. Darr (In re Tap, Inc.), 52 B.R. 271, 272 (Bankr. D. Mass. 1985) (withholding taxes). Accordingly, the Debtors should be permitted to pay the Trust Fund Taxes when due as the Debtors possess bare legal title but no equitable interest in the funds held to pay such taxes.

10. Even if Trust Fund Tax amounts were deemed to be property of the Debtors' estate (to an extent greater than as described in section 541(d) of the Bankruptcy Code), then claims for payment of Trust Fund Taxes, and some of the Governmental Fees, would be afforded priority status under section 507(a)(8) of the Bankruptcy Code and, therefore, would have to be paid in full, pursuant to section 1129(a)(9)(C) of the Bankruptcy Code, under any plan of reorganization in these cases.

11. Moreover, many state statutes, including those of certain of the states in which the Debtors operate, hold officers and directors of collecting entities personally liable for sales, use and employee withholding and related taxes, however denominated, owed by those entities.¹ To the extent that any Trust Fund Taxes remain unpaid by the Debtors as of the Petition Date, the Debtors' officers and directors may be subject to actions to collect such

¹ See, e.g., Ga. Code Ann. § 48-2-52(a) (2001); LA. Rev. Stat. Ann § 2845.1 (West 2001).

amounts directly from the officers and directors during the pendency of these chapter 11 cases. Any such action (and the attendant potential liability) would distract the Debtors and their officers and directors in their attempt to maximize the value of the estates, to the detriment of all parties in interest in these chapter 11 cases.

12. This Court has previously exercised its equitable powers under section 105 of the Bankruptcy Code to authorize debtors to pay prepetition tax obligations. See, e.g., In re Kevco, Inc., Case No. 01-40783 (Bankr. N.D. Tex. Feb. 12, 2001). The Debtors submit that the present circumstances warrant similar relief in these chapter 11 cases.

13. Finally, some, if not all, of the agencies collecting taxes and fees may audit the Debtors if such taxes and fees are not paid forthwith. Such audits needlessly will divert the Debtors' attention away from the reorganization process and diminish its estate. The timely payment of Trust Fund Taxes is necessary for the Debtors to avoid distractions that could arise if these Trust Fund Taxes were not paid. Accordingly, the Debtors seek authority to continue to pay such Trust Fund Taxes in full in the ordinary course of business. For all of the foregoing reasons, the Debtors believe that granting the relief requested herein is appropriate and in the best interest of the Debtors and their estates.

14. Nothing in this Motion should be construed as impairing the Debtors' right to contest the amount of any sales and use taxes that may be due to the Taxing Authorities.

NOTICE

15. Notice of this Motion has been provided to the Office of the United States Trustee for the Northern District of Texas; the holders of the fifty largest unsecured claims against the Debtors on a consolidated basis; and certain governmental entities, counsel and parties-in-interest; all as set forth in more detail on the Certificate of Service attached hereto. The Debtors submit that no other or further notice need be provided.

CONCLUSION

WHEREFORE, the Debtors respectfully request entry of an order pursuant to 11 U.S.C. §§ 105(a), 507(a) and 541 authorizing the Debtors to pay their prepetition trust fund taxes in the ordinary course of business and granting such other and further relief as is just and proper.

Dated: Fort Worth, Texas
July 15, 2003

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AND DEBTORS-IN-POSSESSION**

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

In re

MIRANT CORPORATION, et al.,

Debtors.

)
) Chapter 11 Case

)
) Case No. 03-46590(DML)11
) Jointly Administered

**ORDER PURSUANT TO 11 U.S.C. §§ 105(a), 507(a) AND 541
AUTHORIZING DEBTORS TO PAY PREPETITION TRUST
FUND TAXES IN THE ORDINARY COURSE OF BUSINESS**

Upon the Motion, dated July 15, 2003 (the "Motion"), of Mirant Corporation and its affiliated debtors, (collectively, the "Debtors"), as debtors-in-possession, for an order pursuant to sections 105(a), 507(a) and 541 of title 11 of the United States Code (the "Bankruptcy Code") authorizing the Debtors to pay prepetition trust fund taxes in the ordinary course; and it appearing that the Court has jurisdiction over this matter; and it appearing that due notice of the Motion has been provided as set forth in the Motion, and that no other or further notice need be provided; and it further appearing that the relief requested in the Motion is in the best interests of

the Debtors and their estates and creditors; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor, it is

ORDERED that, the Motion is granted to the extent set forth herein; and it is further

ORDERED that, the Debtors are authorized, solely to the extent adequate funds are available, to pay all Trust Fund Taxes (as defined in the Motion), including, but not limited to prepetition sales, use and employee-related withholding and related tax obligations and other governmental assessments due and owing to all federal, state and local taxing authorities (the "Taxing Authorities"), consistent with the practices and policies in effect as of the commencement of postpetition checks or wire transfer requests; and it is further

ORDERED that, the Debtors' banks are authorized to process, honor, and pay, to the extent of funds on deposit, any and all prepetition wire transfer requests or checks issued by the Debtors in respect of any prepetition Trust Fund Taxes prior to or after the commencement of these chapter 11 cases to the Taxing Authorities; and it is further;

ORDERED that, the Debtors are authorized (consistent with this order) to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests in respect of prepetition Trust Fund Taxes dishonored or rejected as of the commencement of these chapter 11 cases; and it is further

ORDERED that, nothing in this order or the Motion shall be construed as prejudicing any rights the Debtors may have to contest the amount or basis of any Trust Fund Tax allegedly due any Taxing Authority.

End of Order

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she provided true and correct copies of the foregoing to Bankruptcy Services, LLC and directed them to effect service upon all persons on the attached Service Lists via facsimile and email transmission, where indicated, or via overnight courier, on the 15th day of July, 2003.

s/ Judith Elkin

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