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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)
Debtors.)	Jointly Administered
_____)	Hearing Date and Time: August 6, 2003
	1:30 p.m.

**DEBTORS' RESPONSE TO EMERGENCY MOTION OF THE OFFICIAL
COMMITTEE OF UNSECURED CREDITORS OF MIRANT AMERICAS
GENERATION, LLC FOR THE ENTRY OF ORDER APPROVING SPECIFIED
INFORMATION BLOCKING PROCEDURES AND PERMITTING TRADING OF THE
DEBTORS' SECURITIES, TRADING BANK DEBT PURCHASE OR SALE OF TRADE
DEBT AND ISSUING OF ANALYST REPORTS UPON ESTABLISHMENT OF A
SCREENING WALL EFFECTIVE JULY 25, 2003**

1. Mirant Corporation ("Mirant") and its affiliated debtors (collectively, the "Debtors"), as debtors-in-possession, submit this response to the Emergency Motion of the Official Committee of Unsecured Creditors of Mirant Americas Generation, LLC ("MAGI Committee") for the Entry of Order Approving Specified Information Blocking Procedures and Permitting Trading of the Debtors' Securities, Trading Bank Debt Purchase of Sale of Trade Debt and Issuing Analyst reports upon Establishment Of A Screening Wall Effective July 25,

2003 (“Motion”). In the Motion, the MAGI Committee seeks an order from this Court conclusively establishing and determining in advance the extent of the fiduciary duties of certain members of the MAGI Committee. Certain of the MAGI Committee members work for organizations that (1) conduct trades of Debtors’ securities, (2) trade in Debtors’ bank debt, (3) issue analysts reports, and (4) purchase and sell trade debt. The Motion requests that this Court establish a “safe harbor” for such MAGI Committee members (and their organizations) if such MAGI Committee members and their organizations comply with certain “Blocking Procedures” that establish the “safe harbor” sought in the Motion.

2. Debtors raise the following concerns with respect to the relief requested in the Motion:

- a. Whether a MAGI Committee member (and/or his/her organization) should conduct trades in regard to their own account or prepare analyst reports for dissemination to its clients or other entities.
- b. In light of recent case law (including an unreported order entered on September 21, 2001 in In re Amresco, Inc., Case No. 01-135327-SAF-11) whether a safe harbor that seeks to limit the fiduciary duties of a creditors’ committee in advance of their own conduct can, or should be, established.
- c. Whether the proposed Blocking Procedures are sufficient to create an effective screening wall.
- d. Whether there exists a sufficient factual predicate for the relief requested in the Motion.
- e. Whether notice of the Motion was sufficient.

Notwithstanding the foregoing, Debtors will cooperate with the MAGI Committee to enter into a Confidentiality Agreement, the form of which is attached hereto as Exhibit A, with the MAGI Committee prior to the hearing on the Motion. Debtors request that this Court allow the Debtors an opportunity to negotiate with the MAGI Committee in order to reach a consensual resolution of the issues raised in the Motion.

FACTUAL BACKGROUND

The Debtors' Business Operations

3. Mirant and its direct and indirect subsidiaries comprise one of the world's largest generators and marketers of electricity. Through its direct and indirect subsidiaries, Mirant produces, sells and delivers reliable energy products and services to utilities, municipal systems, aggregators, electric-cooperative utilities, producers, generators, marketers and large industrial customers in North America, the Philippines and the Caribbean. Mirant's core business centers on the production and sale of electricity and electrical capacity (essentially the ability to produce electricity on demand). Mirant currently owns or controls more than 21,800 megawatts of electric generating capacity around the world, of which more than 18,000 megawatts is located in the United States. In 2002, Mirant produced 73 million megawatt-hours of electricity, sold 312 million megawatt-hours of electricity and sold or marketed an aggregate average of 21 billion cubic feet per day of natural gas.

4. Mirant employs in excess of 7,000 employees worldwide, of which approximately 1,100 employees are based at Mirant's corporate headquarters in Atlanta and approximately 5,900 employees are based at operating facilities. In 2002, Mirant recorded a \$542 million loss in earnings before interest, taxes and depreciation ("EBITDA") on a consolidated basis. Its 2002 operating revenues were approximately \$6.4 billion.

ARGUMENT

5. The Motion requests that this Court enter an order which provides that certain MAGI Committee members will not violate their fiduciary duties by trading Debtors' securities, trading Debtors' bank debt, issuing analysts reports and purchasing and selling trade debt if (a) certain employees execute a Screening Wall Declaration describing "Blocking Procedures," and (b) such Blocking Procedures are "effectively implemented" and "adhered to," as such terms are used in the Motion. See Motion paragraph 5.

6. However, the proposed Blocking Procedures, described in Exhibit A to the Motion, are troubling and insufficient in several important ways. First, while the Blocking Procedures contained in paragraph 3 of Exhibit A appear to contain some reasonable protective measures, paragraph 4 of the Blocking Procedures removes many of the protections set forth in paragraph 3 through the use of various “carve-outs.” The Motion also seeks advance approval for MAGI Committee members (and their respective organizations) to create and disseminate analyst reports. The fiduciary duties of the MAGI Committee, the propriety of the relief requested, the shortcomings of the Blocking Procedures, and the Debtors’ suggested course of action, will be discussed more fully below.

A. The MAGI Committee Members Owe a Fiduciary Duty to the Holders of Unsecured Claims of MAGI.

7. MAGI Committee members owe a fiduciary duty to the other unsecured creditors they represent. Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262, 268-69 (1941) (finding committee members are fiduciaries); In the Matter of Advisory Committee of Major Funding Corp., 109 F.3d 219, 224 (5th Cir. 1997) (in essence, “the function of a creditors’ committee is to act as a watchdog on behalf of the larger body of creditors it represents”); In re Spiegel, 292 B.R. 748 (Bankr. S.D.N.Y. 2003) (Court denied request of unsecured creditors’ committee for judicial determination that trades made pursuant to certain “screening procedures” for which approval was sought was commensurate with the committee members’ fiduciary duties.)

8. The MAGI Committee acknowledges its fiduciary duty to creditors. See Motion paragraph 7. This duty extends to all MAGI unsecured creditors. See Berner v. Equitable Office Bldg. Corp., 175 F.2d 218, 220 (2d Cir. 1949) (stating each committee member “undertakes to act on behalf of any part of a class, he becomes a representative of the whole class, and may not deal for any part of it alone.”).

9. Creditor committee members face harsh penalties if they breach their fiduciary duties. American Mutual Life Ins. Co. v. City of Avon Park, 311 U.S. 138, 145-146

(1940) (citing Securities and Exch. Comm'n v. United States Realty and Improvement Co., 310 U.S. 434, 455 (1940)). These punishments may include disallowance or subordination of their claim, exposure to civil lawsuits, and other sanctions. American Mutual Life Ins. Co., 311 U.S. 138, 146 (1940) (discussing a bankruptcy court requiring “full, unequivocal disclosure; the limitation of the vote to the amount paid for the securities; the separate classification of claimants; the complete subordination of some claims”); In the Matter of Federated Department Stores, Inc., et al. (“Federated”), 1991 Bankr. LEXIS 288, at *2 (Bankr. S.D. Ohio, March 7, 1991) (claims subject to “possible disallowance, subordination, or other adverse treatment”). The foregoing are among some of the potential penalties from which the MAGI Committee seeks to shield certain of its members (and their respective organizations) in connection with certain trading activities by members of the MAGI Committee (or their respective organizations). See proposed order paragraph 3.

10. Trading debtor stock using non-public debtor information constitutes a breach of fiduciary duty. Federated, 1991 Bankr. LEXIS 288, at *2 (March 7, 1991) (discussing breach of fiduciary duty “by trading in securities of the Debtors”); see Citicorp Venture Capital, Ltd. v. Committee of Creditors Holding Unsecured Claims, 160 F.3d 982, 988-90 (3d Cir. 1998) (holding that creditors purchase of claims at a discount using inside information constituted breach of fiduciary duty). It also constitutes a violation of myriad Federal and State securities laws.

11. While it is beyond cavil that the MAGI Committee owes a fiduciary duty to the holders of unsecured claims against the MAGI estate, the Debtors’ interests in this matter should also be considered. MAGI is a vital part of the Debtors’ energy enterprise. The Debtors may issue securities as part of the distributions to their creditors in connection with an eventual plan of reorganization. The value of the Debtors’ shares is, therefore, not only important to the MAGI unsecured creditors, but to all creditors of these estates because if the value of such shares is diminished by improper trading, all creditors will be harmed.

B. Whether the Relief Sought by the MAGI Committee in the Motion May Be Granted?

12. Here, the MAGI Committee seeks this Court’s blanket approval of trading activities *in advance* of any trades. A factual predicate is necessary to determine the efficacy of the proposed Blocking Procedures, to determine the deleterious effects if such procedures are not properly implemented or adhered to, and to determine whether the proposed Blocking Procedures are even necessary in the first instance.

13. In that respect, the Motion is similar to the facts in In re Spiegel, 292 B.R. 748 (Bankr. S.D.N.Y. 2003). In Spiegel, members of the creditors’ committee included banks and securities traders. As in this case, the proposed committee counsel sought an order confirming that trading by committee members “will not violate their fiduciary duties as Committee Members by trading in the Debtors’ debt or securities” and that the committee members would “strictly adhere[] to the information blocking policies and procedures (collectively, the ‘Screening Wall’) . . . established by the Court.” Id. at 749.

14. Also like the MAGI Committee, the creditors’ committee in Spiegel did not submit a sufficient factual predicate for the relief requested. In this regard, the Spiegel Court noted: “This Court has nothing before it regarding the nature of any of the members’ businesses, their fiduciary duties, or the specific harm that would flow to them if this Court were not to grant the requested relief.” Id. at 750.

15. The Spiegel Court concluded that approval of general ‘Screening Wall’ procedures with no factual information was impermissible:

it appears that the Committee in this case seeks approval of a general scheme now, with affidavits from applicable members to follow, “as evidence of [the member’s] implementation of the procedures detailed [in the Application].” To this Court, this is not an acceptable procedure. This Court requires such information PRIOR to approval of any procedure.

Id. (citations omitted).

16. The Spiegel court further held that it would not be inclined to grant the motion even if the creditors' committee provided information regarding its members' businesses because of the appearance of impropriety of such a pre-approval:

Even with such a record, this Court would not be inclined to grant such relief as the Committee requests, as this Court intends to hold the Committee to full and strict compliance with its fiduciary obligations. See Woods v. City Nat'l Bank et al., 312 U.S. at 269, 61 S. Ct. 493 ("Only strict adherence to these equitable principles can keep the standard conduct for fiduciaries 'at a level higher than those trodden by the crowd' "); In re Ira Haupt & Co., 361 F.2d 164, 168 (2d Cir. 1966) ("...the conduct of bankruptcy proceedings not only should be right but must seem right."). For example, **if members of the Committee are allowed to trade in the securities of the Debtor, regardless of how the creditor internally divides its office, there is an appearance of impropriety**--to the extent such trading information is made public, the trades of a creditor-company which sits on an official committee of unsecured creditors could influence non-members in the marketplace who may not be aware that the creditor has a screening wall or other such device in place.

Id. at 751 (emphasis added). Any appearance of impropriety must be avoided in order to ensure the integrity of the bankruptcy system.¹ While the court in Spiegel did not immediately deny the motion, it set the motion for further hearing and the creditors committee voluntarily withdrew the motion. See Request for Judicial Notice ("RJN"), Exhibit A.

17. The Honorable Steven A. Felsenthal, sitting in this Court's Dallas Division also denied a similar request in connection with In re Amresco, Inc., Case No. 01-35327-SAF-11. Judge Felsenthal's order is attached to the RJN as Exhibit B.

¹ See also, In re Granite Partners, L.P., 219 B.R. 22, 38 (Bankr. S.D.N.Y. 1998) ("Bankruptcy is concerned as much with appearances as with reality"); In re Greenberg, 266 B.R. 45, 51 (Bankr. E.D.N.Y. 2001) (assignment of avoidance rights to creditor must avoid the "appearance of unfairness and a lack of neutrality" and sought to minimize any "the appearance of impropriety"); In re Transue & Williams, 1995 WL 646834, at *3 (Bankr. N.D. Ohio Sept. 19, 1995) (discussing bankruptcy policy of avoid adopting unusual credit terms between parties with recent relationships because that might "appear unfair" to other creditors); In re Zaidi, 293 B.R. 861, 864 (Bankr. E.D. Va. 2002) (stating that trustee appointment procedures changed to avoid appearance of impropriety in bankruptcy). They also accord with the axiom that "the conduct of bankruptcy proceedings not only should be right but must seem right." In re Ira Haupt & Co., 361 F.2d 164, 168 (2d Cir. 1966).

18. Also troubling is that the MAGI Committee in its Motion asserts that “the Securities Trading Committee Members also may have fiduciary duties to maximize returns to their respective clients through trading securities.” See Motion paragraph 7 (emphasis added). If the MAGI Committee members “may” have fiduciary duties to others, it is also the case that they “may” not and the Motion is unnecessary.

19. Notably, the MAGI Committee does not cite the Spiegel case in its Motion. Indeed, the MAGI Committee provides the order entered in Iridium as support when it is clear that the Judge that issued the Iridium order has changed his views. Spiegel 292 B.R. at 750. Put simply, the MAGI Committee string cites to various unreported orders in other cases without any analysis as to the committee make up of those other cases, the nature and business of the debtors in those cases (and the claims and securities), and why the same result should apply here.

20. The importance of the integrity of the bankruptcy system cannot be overstated, especially given in the current corporate climate. Although a screening wall may have been sufficient in 1991 in regards to the case most heavily relied upon by the MAGI Committee, In re Federated Dep’t Stores, Inc., times have changed significantly. One cannot pick up a newspaper these days without coming across an article regarding settlements between State Attorneys General and large investment banks requiring such institutions to completely *separate* their analysis business from their trading business. The Debtors question whether “screening walls” are sufficient to protect the integrity of the bankruptcy system and the securities at issue here. Indeed, Spiegel and Judge Felsenthal’s order in Amresco are further indications that bankruptcy courts are reconsidering the circumstances under which screening walls like the one requested in the Motion may be implemented or are ever appropriate.

C. Whether any MAGI Committee May Conduct Trades For their Own Account or Prepare Analyst Reports for Public Dissemination?

21. The Motion requests approval for certain, unnamed MAGI Committee members (and their respective organizations) to trade securities, bank debt or trade debt, of the

Debtors for their own account. The Debtors submit that holders of large amounts of Debtor securities bank debt, or trade debt should not be trading for their own beneficial interest.² The reasoning of Spiegel applies here in that such conduct creates the appearance of impropriety.

22. For the same reasons, this Court should not give advance blessing for certain, unnamed members of the MAGI Committee (or their respective organizations) to prepare and disseminate analyst reports regarding the Debtors that have not even been drafted yet. Again, this is not appropriate given the large positions of securities, bank debt and trade debt held by some of the MAGI Committee members (or their respective organizations).³

D. Other Parties in Interest Are Entitled to Notice of the Motion.

23. Based upon review of the proof of service of the Motion, it appears that the Motion was served upon (a) the United States Trustee; (b) the Debtors; (c) the “Limited Service List” which is comprised of the fifty largest creditors (on a consolidated basis); and (d) all parties that have requested notice. In a similar occurrence, the Spiegel Court noted the following:

Generally, this Court allows service on a committee of unsecured creditors, in lieu of service on the unsecured creditors themselves, because a creditors’ committee will represent the interests of all class members in reviewing proposed orders and applications. In this case, however, the relief sought is for the Committee members themselves – to be excused from their fiduciary duty – **and therefore the Application must be served on every member of the affected class.** This

² As discussed below, the Debtors do not object to MAGI Committee members trading the Debtors’ securities on behalf of their own clients (i.e., not on their own account), subject to execution of a confidentiality agreement acceptable to the Debtors in the form of Exhibit A attached hereto.

³ With regard to this conflict, the Motion states that “Securities Trading Committee Members should not be forced to choose between serving on the Committee and risking the loss of beneficial investment opportunities or foregoing service on the Committee and possibly compromising its responsibility by taking a less active role in the reorganization process.” See Motion paragraph 8. Professionals and creditors who decide to serve on a committee are faced with this dilemma all the time. Presumably, the committee member will choose the most advantageous course of conduct. And the “dilemma” is a red herring because if the committee member chooses to forego a position on the committee, the committee will still function and adequately represent all creditors, including the departing member.

court would be very interested in any comments the affected class members may have about the relief requested in the Application.

Spiegel 292 B.R. at 751 (emphasis added).

24. “Affected class members” with respect to the Motion include the holders of unsecured claims against the MAGI estate. The Securities and Exchange Commission is also affected by the relief sought in the Motion, and appears to have been served with the Motion. However, other parties entitled to notice, such as the various state securities regulatory agencies, have not received notice of the Motion. The Debtors have issued ten separate public bond issues that are publicly traded in all fifty states. Not only should all of the members of the MAGI unsecured creditors and the SEC receive service of the Motion and be afforded an opportunity to be heard but the state securities regulatory and enforcement agencies are likewise entitled to notice of the Motion.

E. Specific Concerns to the Blocking Procedures.

25. As noted, paragraph 3 of the Blocking Procedures (set forth in Exhibit A to the Motion) describes the procedures to be followed by MAGI Committee members (or their respective organizations) that trade in securities, bank debt and trade debt of the Debtors. The Debtors note the following concerns regarding to the proposed Blocking Procedures.⁴

i. The Definition of “Restricted Entity Committee Personnel” Must Be Clarified.

26. There is no meaningful definition of the term “Restricted Entity Committee Personnel” in the Blocking Procedures. The phrase, “personnel, representatives or agents” is too broad. See Motion, Exhibit A, paragraph 2. The Blocking Procedures should apply to the MAGI Committee member and those limited individuals necessary to assist the MAGI Committee member in discharging his/her fiduciary duties as a member of the MAGI Committee. Such necessary individuals should be specifically described.

⁴ Capitalized terms used in this section have the same meaning ascribed to them in Exhibit A to the Motion.

ii. Paragraph 3(ii) Should Be Modified.

27. Paragraph 3(ii) of the Blocking Procedures provides:

Subject to paragraph 4 hereof, Restricted Entity Committee Personnel will not directly or indirectly share any non-public information generated by, received from, or relating to Committee activities or Committee membership (“Information”) with any other employees, representatives or agents of Restricted Entity, including Restricted Entity’s investment advisory personnel or analysts issuing reports to the public or to such Committee member’s clients, *and Restricted Entity Committee Personnel shall use good faith efforts not to share any material Information concerning the Debtor’s chapter 11 cases with any Restricted Entity employee reasonably known to be engaged in trading activities with respect to the Debtors’ Securities or Bank Debt on behalf of Restricted Entity and/or its clients, except that a good faith communication of publicly available information shall not be presumed to be a breach of the obligations of Restricted Entity or any Restricted Entity Committee Personnel hereunder;*

(Emphasis added.)

28. While paragraph 3(ii) proscribes the sharing of non-public information generated by, received from or relating to Committee activities or Committee membership, the definition of “Information” should but does not include non-public information regarding the Debtors. Rather, the treatment of Debtor information is dealt with in the portion highlighted above and is governed by a “good faith efforts” standard and is unnecessarily confusing. The different standards are inappropriate as presumably much of the information received by a MAGI Committee member would very likely be sensitive information regarding the Debtors that should be protected by something more than mere “good faith.” The italicized portion should be deleted and non-public information regarding the Debtors should be protected in the same manner as MAGI Committee Information.

29. Another problem with paragraph 3(ii) is it limits the sharing of information to “any other employees, representatives or agents of Restricted Entity.” The Information should not be shared with any other Person (defined as “person, corporation, partnership, business association, governmental entity, or entity similar to any of the foregoing”) *including* the specific individuals set forth in paragraph 3(ii). If the Motion is approved as

currently drafted, a Restricted Entity could share Information with anyone that was not an employee, representative or agent of the Restricted Entity, which would include most people.⁵

iii. Court Approval of Future Investment Advisory Reports is not Appropriate.

30. The Motion seeks approval for certain unnamed MAGI Committee members (or their respective organizations) to issue analyst reports relating to the Debtors' securities. As noted above, this is inappropriate because it creates the appearance of impropriety. See Spiegel, 292 B.R. at 751.

iv. Section 3(iii) Should not be Limited to Employees.

31. The requirement in paragraph 3(iii) that files be inaccessible "to other employees of Restricted Entity" should be expanded so files are inaccessible to all other Persons, *including* the employees.

v. Portions of Section 3(iv) Should be Deleted.

32. Section 3(iv) provides:

Restricted Entity Committee Personnel will not receive any information regarding Restricted Entity's trades in the Debtors' Securities or Bank Debt in advance of the execution of such trades, except that Restricted Entity Committee Personnel may review such reports and systems showing Restricted Entity's purchases and sales and ownership of Debtors' Securities (provided that Restricted Entity Committee Personnel may review the usual and customary internal reports and systems showing Restricted Entity's purchases and sales on behalf of Restricted Entity or its clients and the amount and class of claims, interests or securities owned by Restricted Entity or its clients to the extent that such personnel would otherwise review such reports in the ordinary course and such reports are not specifically prepared with respect to the Debtors);

33. The portion above highlighted in italics should be deleted. There is no basis or justification for the inclusion of italicized portion and it is of dubious importance to the MAGI Committee members in performing his/her duties. The activities of the organizations who hold a seat on the MAGI Committee and its trading activities should be completely segregated to avoid the appearance of impropriety.

⁵ The Debtors presume this was a drafting oversight.

vi. Compliance Testing Should Occur More Regularly and More Often, and the Debtors are Entitled to Know if there is a Failure to Comply with the Blocking Procedures.

34. Paragraph 3(v) requires periodic compliance review. Such review should take place on a weekly basis in order that the Committee members may quickly report deviations from the Blocking Procedures.

35. The declaration of continued compliance required in Paragraph 3(vii) should be filed and served (including upon the Debtors) monthly, not every six months. Moreover, the Debtors (in addition to the United States Trustee and MAGI Committee's counsel) should be immediately apprised of any failure to comply with the Blocking Procedures.

vii. Paragraph 4(a) Must be Clarified.

36. While paragraph 3 of the Blocking Procedures establishes the screening wall, paragraph 4 minimizes the relief set forth in paragraph 3 by creating several "carve outs." For example, paragraph 4(a) provides that Information may be shared with:

senior management of Restricted Entity, who due to their duties and responsibilities, have a legitimate need to know such Information provided that such individuals (i) otherwise comply with the procedures herein; and (ii) use such Information only in connection with their managerial responsibilities.

37. The foregoing is too vague. Who are the senior managers, and what constitutes a "legitimate need to know?" There are no standards in place to measure non-compliance. Also, the senior managers should execute the Procedures Memoranda. Finally, is it not possible that the "managerial responsibilities" of the "senior managers" could include oversight and advising the trading unit?

viii. Paragraph 4(b) Must be More Limited.

38. Paragraph 4(b) should be limited to "regulators, auditors, designated legal and compliance personnel who provide legal advice to the Committee Personnel" *in their role as a MAGI Committee Member*. The Information cannot be disseminated for any other purpose.

ix. Paragraph 4(c) Should Be Deleted.

39. Paragraph 4(c) is overbroad and provides that Committee Personnel may share the Information with other Restricted Entity employees, representatives and agents who are

not involved in trading or investing advisory activities with respect to the Debtors' securities, bank debt, or trade debt. The Motion provides no justification why such individuals should obtain any non-public Information regarding the MAGI Committee or the Debtors and appears to be nothing more than a safety net in the event a party fails to comply with paragraph 3.

Paragraph 4(c) permits disclosure of confidential information about Debtors to employees trading in securities of other energy sector companies, creditors of the Debtors, or other entities with business related to Debtors. There appears to be no legitimate need for such individuals to have any of the Information and the carve out should be deleted. Indeed, at least the Information provided to the "senior managers" is on a "legitimate need to know" basis.

40. Where courts have granted pre-approval of trading activities that comport with general screening schemes, they have restricted access to non-public debtor information to persons that need to know that information for creditor committee purposes. For example, in the order described as "seminal" by the MAGI Committee, Federated, the Court ordered that "Fidelity committee personnel will share non-public Committee information with no other Fidelity employees (except the General Counsel for the purpose of rendering legal advice to committee personnel and who will not share such non-public committee information with other Fidelity employees)."

41. Legal scholarship addressing ethical walls erected in such instances also describes procedures restricting non-public debtor information to persons needing to know it for *committee* purposes. See, e.g., Harold S. Novikoff & Barbara Kohl Gerschwer, "Chapter 11 Business Reorganizations: SELECTED TOPICS IN CLAIMS TRADING", SG108 ALI-ABA 325, 336 (June 27, 2002) ("Typically" such orders require "Committee Personnel may not share non-public Committee information with other employees (except regulators, auditors and legal personnel for the purpose of rendering advice and who will not share such non-public Committee information with other employees)"); Robert C. Pozen & Judy K. Mencher, "Chinese Walls for Creditors Committees", 48 Bus. Law. 747, 758 (1993) (discussing Federated and stating "[t]he

second requirement is that committee personnel not share committee information with non-committee personnel. The communication barrier is an absolute necessity for an effective Chinese Wall.”)

F. Debtors Are Willing to Enter into Confidentiality Agreements with the MAGI Committee and the Mirant Committee.

42. Although the Debtors object to the Motion, the Debtors are fully cognizant of the important role the members of the MAGI Committee and the Mirant Committee play in this process. The United States Trustee has chosen those members and those members are willing to serve. The Debtors expect to work with both Committees toward a common goal of a consensual plan of reorganization.

43. In that regard, the Debtors have drafted a Confidentiality Agreement that resolves many of the issues raised by the Motion and this response. A copy of the Confidentially Agreement is attached hereto as Exhibit A. If the trading members of the MAGI Committee execute the Confidentiality Agreement, then the Debtors will have no objection to such members trading in the securities, bank debt or trade debt of their clients (so long as appropriate Blocking Procedures are established, implemented, and adhered to). The Debtors still object to the trading by a committee member of securities or bank debt for their own account, and to the issuance of analyst reports by MAGI Committee members.

CONCLUSION

44. Based upon the foregoing, the Debtors request this Court to deny the Motion and allow the parties to reach an agreement regarding the issues raised therein.

Dated: Fort Worth, Texas
August 5, 2003

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ATTORNEYS FOR THE DEBTORS AND
DEBTORS-IN-POSSESSION

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has authorized BSI as service agent to cause to serve a true and correct copy of the foregoing Application and Affidavit upon all parties on the Limited Service List via facsimile and electronic mail, where available and by overnight mail, on the 5th day of August, 2003 in accordance with the Federal Rules of Bankruptcy Procedure.

/s/ Robin Phelan

EXHIBIT A

Confidentiality Agreement

July 31, 2003

VIA FEDERAL EXPRESS

Bruce R. Zirinsky, Esq.
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Re: In re Mirant Corporation, et al.; Case No. 03-46590 (Jointly Administered)
Official Committee of Unsecured Creditors for Mirant Americas Generation, LLC

Dear Mr. Zirinsky and Ms. Williamson:

The purpose of this letter agreement (the "Agreement") is to set forth our understanding with regard to disclosures of confidential information by Mirant Corporation and its affiliated debtors (collectively, the "Debtors") by and through the Debtors, their counsel, their professionals or advisors to the Official Committee of Unsecured Creditors of Mirant Americas Generation, LLC, its members (each a "Member") and such committee and the Members (collectively, the "Committee"), and/or any of its Permitted Persons (as defined below) in connection with the above-referenced chapter 11 cases (the "Cases").

In connection with the Cases, the Debtors will be disclosing to the Committee certain information which they contend is confidential and/or proprietary (the "Subject Material"). In recognition of the Debtors' concern over the sensitivity of the Subject Material, the Committee hereby agrees to treat the Subject Material that is received by or is furnished to (whether orally or in writing) the Committee and/or any of its Permitted Persons in accordance with the provisions of this Agreement and to take or abstain from taking certain actions as herein set forth. The term "Subject Material" shall include all information, data, reports, computations, projections, forecasts, records, memoranda, summaries, oral conversations, notes, analyses, compilations, studies, interpretations or other documents or materials in whatever form maintained, whether documentary, computerized or otherwise, prepared by the Committee or any of its Permitted Persons which contain, reflect or are based upon, in whole or in part, any

information received by or furnished to the Committee or its Permitted Persons pursuant hereto or that reflect the Committee's review of, or interest in, all or any portion of the Debtors, including any possible transaction relating to the Debtors, including, without limitation, any proposed plan of reorganization. The term "Subject Material" shall not include information which (i) is or becomes generally available to, or known by, the public other than as a result of the unauthorized disclosure by the Committee or its Permitted Persons; or (ii) becomes available to the Committee on a non-confidential basis from a source other than the Debtors or any of their advisors, agents or affiliates, provided that the information from such source is not known after reasonable inquiry by the Committee to be bound by a confidentiality agreement with, or other obligation of secrecy to, whether by a contractual, legal or fiduciary obligation, the Debtors.

The Committee hereby agrees that the Committee will use, and will direct and cause its Permitted Persons to use (directly or indirectly) the Subject Material obtained herein solely for the purpose of carrying out the Committee's duties under the Bankruptcy Code. Without the consent of the Debtors or further order of the Bankruptcy Court, neither the Committee nor any of its Permitted Persons will in any way use, directly or indirectly, any of the Subject Material for the purpose of transacting business with any of the Debtors, competing with any of the Debtors, improving its competitive position with respect to any of the Debtors, soliciting or seeking business from any of the Debtors' business prospects, customers or former customers, soliciting or seeking to induce any employee or agent of any Debtor, or become employed or engaged in a business relationship with any Member, their affiliates, any Permitted Persons or their affiliates, or giving business to any of the Debtors' suppliers or providers, or for any other purpose not related to the Cases. Except as otherwise set forth in this Agreement, the Subject Material will be kept confidential by the Committee, each Member and any of its Permitted Persons. The Committee's authorized legal counsel and advisors retained pursuant to an order of the Bankruptcy Court and each person associated with any individual Member who is necessary to the Members' ability to carry out his or her fiduciary duties as a Committee Member (collectively, the "Permitted Persons") shall be informed of the confidential nature of the Subject Material and shall agree in writing, with a copy to the Debtors in advance of any Subject Material being provided or disclosed, to treat such information confidentially in the manner provided in, and subject to the terms of, this Agreement. The Committee hereby agrees, at its sole cost and expense, to take all necessary action to restrain its Permitted Persons from disclosing, using, or otherwise dealing with any of the Subject Material in a manner which is inconsistent with, or prohibited by, this Agreement, including disclosure to an Excluded Member (as defined below) and the Committee shall be fully responsible for any breach of this Agreement by any Permitted Persons. The Debtors may, in their discretion, designate certain sensitive information as "Excluded Information" that is not to be viewed by, nor its substance revealed to, a specified Member or such Member's Permitted Persons (collectively, the "Excluded Persons"). The Debtors shall clearly designate any Excluded Information in advance and specify the Members that shall not be permitted to have access thereto. Notwithstanding anything contained herein to the contrary without the prior consent of the Debtors, the Committee will not, under any circumstances, and that the Committee will direct any Permitted Persons not to, disclose Excluded Information to any Excluded Person.

Receipt of the Subject Material constitutes the Committee's acknowledgement that it is aware (and its Permitted Persons have been advised) that applicable securities laws impose restrictions on such Committee and its Permitted Persons from trading in securities of the Debtors and the Committee hereby agrees that it will not, and will not permit any of its Permitted Persons to, trade in securities of the Debtors in violation of applicable securities laws.

Notwithstanding anything contained in this Agreement or in any other document, agreement or understanding relating hereto, each party (and each employee, representative, or other agent of such party) is authorized to disclose to any and all persons, beginning immediately upon commencement of discussions regarding the transactions contemplated by this Agreement, and without limitation of any kind, the tax treatment and, tax structure of such transactions, and all materials of any kind (including opinions or other tax analyses) that are provided to such party (or any employee, representative, or other agent of such party) relating to such tax treatment and tax structure, except to the extent that such disclosure is subject to restrictions reasonably necessary to comply with securities laws. For purposes of this authorization, the "tax treatment" of a transaction means the purported or claimed U.S. federal income tax treatment of the transaction, and the "tax structure" of a transaction means any fact that may be relevant to understanding the purported or claimed U.S. federal income tax treatment of the transaction. None of the parties to the transactions contemplated by this Agreement provides U.S. tax advice, and each party should consult its own advisors regarding its participation in the transactions contemplated by this Agreement.

The Committee understands that no materials included in the Subject Material should be relied upon as an accurate representation or assurance of future results in connection with this Agreement. The Committee further acknowledges that the Debtors and their affiliates, representatives and advisors are not making any representation or warranty, either express or implied, as to the accuracy or completeness of any Subject Material. The Committee agrees, to the fullest extent permitted by law, that neither the Debtors nor any of their affiliates, representatives or advisors, in connection with this Agreement, shall have any liability to the Committee or any of its Permitted Persons, affiliates, representatives or advisors on any basis (including, without limitation, in contract, tort, under federal or state securities laws or otherwise) resulting from the review or use of the Subject Material by the Committee or any of its Permitted Persons.

In the event that the Committee or its Permitted Persons are required (by oral questions, interrogatories, requests for information or documents, subpoena or court order issued by a court of competent jurisdiction or by a federal, state or local governmental or regulatory body) to disclose any Subject Material supplied to the Committee or its Permitted Persons, such party will provide the Debtors with prompt written notice of such request or requirements so that the Debtors and/or their affiliates may seek an appropriate protective order and/or by mutual agreement waive compliance with the provisions of this Agreement. If in the absence of a protective order or the receipt of a waiver hereunder, the Committee or any of its Permitted Persons are nonetheless, in the opinion of its counsel, compelled to disclose any Subject Material to any tribunal or governmental authority or else stand liable for contempt or suffer other censure or penalty, the Committee or such Permitted Persons may disclose that portion of the Subject

Material which its counsel advises is legally required to be disclosed to such tribunal or governmental authority without liability hereunder.

On the closing or dismissal of the Cases (the "Termination Date"), or as soon thereafter as is practicable, the Committee and its Permitted Persons shall, in the Debtors' discretion, either (i) destroy the Subject Material in their possession or (ii) return the Subject Material to the Debtors' counsel. Neither the Committee, nor any Permitted Persons, will retain any copies, extracts or other reproductions in whole or in part of the Subject Material except as otherwise permitted herein. On the date a Member ceases to be a Member or any Permitted Person ceases to be a Permitted Person, such Member or Permitted Person, as the case may be, shall, in the Debtors' option, either (i) destroy the Subject Material in their possession or (ii) return the Subject Material to the Debtors' counsel. All documents, memoranda, notes and other writings whatsoever prepared by, or caused to be prepared by, the Committee or any Permitted Persons, based on the information in the Subject Material shall be destroyed on the Termination Date, or as soon thereafter as is practicable, and such destruction shall be certified in writing to the Debtors. On the date a Member ceases to be a Member or any Permitted Person ceases to be a Permitted Person, as the case may be, all documents, memoranda, notes and other writings whatsoever prepared by or caused to be prepared by the Committee, any Permitted Persons, based on the information on the Subject Material, in the possession of such Member or Permitted Person, shall be destroyed on such date, or as soon thereafter as is practicable, and such destruction shall be certified in writing to the Debtors. The delivery or destruction of Subject Material shall no relieve the Committee, or its Permitted Persons, of their confidential obligations under this Agreement.

The Debtors shall be entitled to equitable relief, including injunction and specific performance, in the event of any breach of the provisions of this Agreement, in addition to all other remedies available at law or in equity. It is further understood and agreed that no failure or delay by the Debtors in exercising any right, power or privilege hereunder will operate as a waiver thereof, nor will any single or partial exercise thereof preclude any other or future exercise thereof or the exercise of any right, power or privilege hereunder. This Agreement is for the benefit of the Debtors and their estates, successors and assigns and is not assignable by the Committee. This Agreement will be governed by and construed in accordance with the laws of the State of Texas without regard to the conflicts of law principles thereof. The obligations which are the subject of this Agreement will survive the execution hereof and the Termination Date. This Agreement supersedes any and all prior confidentiality agreements between the Committee and the Debtors and all Permitted Persons.

The Committee, the Members, and each Permitted Person who agrees to be bound by this Agreement hereby irrevocably and unconditionally consents to submit to the exclusive jurisdiction of the Bankruptcy Court for any actions, suits or proceedings arising out of or relating to this Agreement (and the Committee agrees not to commence any action, suit or proceeding relating thereto except in such court), and the Committee (on behalf of itself and all Permitted Persons) further agree that service of any process, summons, notice or documents by U.S. Registered Mail to its counsel's address set forth above (or any other address which the Committee provides to the Debtors in writing) shall be effective service of process for any

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action, suit or proceeding brought against the Committee or any of its Permitted Persons in connection with this Agreement. The Committee (on behalf of itself and all Permitted Persons) hereby irrevocably and unconditionally waives any objection to the lack of venue of any action, suit or proceedings arising out of this Agreement in the Bankruptcy Court and the Committee (on behalf of itself and all Permitted Persons) hereby further irrevocably and unconditionally waives and agrees not to plead or claim in such court that any such action, suit or proceeding brought in such court has been brought in an inconvenient forum.

Although the foregoing only addresses the exchange of information from the Debtors to the Committee, the Members and Permitted Persons from time to time, counsel and other advisors of the Debtors and the Committee may seek the mutual exchange Subject Materials prepared in connection with the prosecution or defense of any actual or anticipated contested matter, adversary proceeding, litigation or investigation (individually, a "Legal Dispute") related to the Debtors and their operations (collectively "Joint Defense and Prosecution Materials"). The treatment of such Joint Defense and Prosecution Materials, which shall be designated by the transmitting party as "Privileged and Confidential," or "Joint Defense Materials" or "Joint Prosecution Materials," shall in all respects be governed by and subject to the terms of this Agreement as well as the additional procedures set forth on Annex A hereto.

Yours truly,

Thomas E Lauria

THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF MIRANT AMERICAS
GENERATION, LLC

AGREED AND ACCEPTED THIS __ DAY OF
_____ BY:

LEHMAN BROTHERS, INC.

By: _____

Name: Frank Turner

Title:

AGREED AND ACCEPTED THIS __ DAY OF
_____ BY:

CALIFORNIA PUBLIC EMPLOYEES
RETIREMENT SYSTEM

By: _____

Name: Tom Baker

Title:

AGREED AND ACCEPTED THIS __ DAY OF
_____ BY:

JP MORGAN CHASE BANK

By: _____

Name: Stephanie Parker

Title: Vice President

AGREED AND ACCEPTED THIS __ DAY OF
_____ BY:

ELLIOTT ASSOCIATES, L.P.

By: _____
Name: Dan Gropper
Title:

AGREED AND ACCEPTED THIS __ DAY OF
_____ BY:

MACKAY SHIELDS FINANCIAL

By: _____
Name: Don Morgan
Title:

AGREED AND ACCEPTED THIS __ DAY OF
_____ BY:

THE ROYAL BANK OF SCOTLAND plc

By: _____
Name: Charles Greer
Title:

July 31, 2003
Page 8

AGREED AND ACCEPTED THIS __ DAY OF
_____ BY:

WELLS FARGO BANK MINNESOA,
NATIONAL ASSOCIATION

By: _____

Name: Thomas M. Korsman

Title:

ANNEX A

1. Legal counsel (“counsel”) for the Debtors and the Committee (individually, a “client”) may from time to time share information and work product with each other related to the prosecution of a Legal Dispute arising out of or related to the Cases.¹ Information that may be shared includes, but is not limited to, statements of clients, statements and information obtained from potential witnesses or third parties, expert advice and reports, documents, legal and factual research, ideas and opinions of counsel, information obtained from opposing counsel, and other work product of counsel. All such information provided, whether oral or written, is hereafter referred to as “Joint Defense and Prosecution Material.”

2. All Joint Defense and Prosecution Materials shall be transmitted from counsel to counsel for their respective parties and shall be clearly marked with one or more of the following legends: “Privileged and Confidential,” “Joint Prosecution Materials,” or “Joint Defense Materials.” Failure to follow any of the procedures of this paragraph shall not constitute a waiver of any applicable privilege or protection as against any third parties.

3. Joint Defense and Prosecution Material received by any counsel will not be disclosed, without permission of the originating counsel, to any person other than (i) a Member, (ii) other legal counsel for the client retained for the purpose of prosecuting or defending a Legal Dispute, (iii) a partner, associate, or employee of any such counsel who is assisting in the prosecution of the Legal Dispute, or (iv) an expert, investigator, or paralegal who is retained to assist in the prosecution or defense of the Legal Dispute, whose identity is made known to the party who furnished the Joint Defense and Prosecution Materials, and who has agreed in writing to be bound by the terms of the Agreement including this Annex. No Joint Defense and Prosecution Materials shall be disclosed to a Permitted Person without the written consent of originating counsel.

4. Notwithstanding any other provision of the Agreement, Joint Defense and Prosecution Materials received by any person will not be used for any purpose other than defense and/or prosecution of a Legal Dispute.

5. Should the interest of any client (or any Member thereof) materially diverge from the common interest of any other client with respect to any particular Legal Dispute, that client and its counsel (i) shall notify all other counsel of its divergent interest, (ii) shall not accept or request from any other client or Counsel additional Joint Defense and Prosecution Materials with respect to the particular Legal Dispute and (iii) shall return all Joint Defense and Prosecution Material related to the particular Legal Dispute in its possession, or the possession of its counsel, to the party that supplied the materials. Following such withdrawal, this Agreement shall no longer be operative as to subsequent communications between the

¹ Capitalized terms not defined in this Annex are defined in the Agreement.

withdrawing persons and the remaining parties in respect of the Legal Dispute, but shall continue to protect all communications and information covered by this Annex and disclosed to the withdrawing persons prior to the party's notification of withdrawal.

6. Each client (and each Member thereof) expressly understands and agrees that (i) it has retained its own counsel in connection with each Legal Dispute, (ii) it is not entering into an attorney/client relationship with any other client's counsel by virtue of the Agreement or this Annex and (iii) counsel's participation in the joint defense and prosecution arrangement memorialized in this Annex shall not be used in any way to seek disqualification of counsel.

7. By entering into the Agreement and consenting to the terms of this Annex, no party undertakes any responsibility or legal obligation to exchange Joint Defense and Prosecution Materials with respect to any particular Legal Dispute.

8. It is the express intent of the parties that, by exchanging Joint Defense and Prosecution Materials, no party will waive any attorney-client privilege, work product protection or any other relevant privilege or protection applicable to such materials.