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

ENTERED
MARSHALL, CLERK
THE DATE OF ENTRY IS

In re:	§	
	§	
Mirant Corporation, et al.,	§	
	§	Case No. 03-46590
	§	Jointly Administered
Debtors.	§	Chapter 11

Memorandum Order Regarding Reconsideration of Expanded Role of Examiner

On July 30, 2004, this court entered its Memorandum Order Expanding Role of Examiner (the "7/30 Order"), in which the court added to the responsibilities given by the Examiner Order[1] to the Examiner appointed in these cases. By motion filed August 9, 2004 (the "MAG Motion") the MAG Committee asked the court to clarify and reconsider the 7/30 Order. The same day the Mirant Committee filed a motion seeking partial reconsideration of the 7/30 Order (with the MAG Motion, the "Motions"). On August 10, 2004 the Equity Committee filed an objection to the Motions (the "Equity Objection"). On August 11, 2004, the court, upon notice to the parties, heard argument on the Motions and the Objection. At that time the UST orally advised the court of his concerns with the 7/30 Order.

Although the MAG Motion enumerated some of the MAG Committee's problems with the 7/30 Order, it leaves open the possibility of further complaints with it (MAG Motion ¶ 29: "This motion is not an exhaustive statement of the issues with respect to the [7/30 Order] that the MAG[] Committee believes may warrant reconsideration"). It is the court's considered view that questions about the role of the Examiner must be promptly disposed of. Time spent on these questions delays administration of these cases, distracts from plan formulation and is expensive for the estates. Thus the court directed that the MAG Committee file a complete

[1] Terms defined in 7/30 Order shall have the same meaning in this memorandum order.

statement of its position by August 16, 2004. The court required that responses – in opposition to or in support of the MAG Motion – be filed by August 20.

The MAG Committee timely filed a brief in support of the MAG Motion. Timely responses were filed by Deutsche Bank Securities, Inc. ("Deutsche"), the Mirant Committee, U.S. Bank as trustee ("USB") and Elliott Associates, L.P. (Elliott). The UST also submitted a comment and the Examiner filed a statement respecting the Motion (the "Examiner's Statement"). Debtors, possibly enjoying their unaccustomed role as spectators, filed no response and have taken no position on the 7/30 Order, the Motions or the Objection.

I. Issues

The court understands the issues it must address to be: (1) Whether the 7/30 Order gives to the Examiner functions which, individually or collectively, exceed the scope of a legally permissible assignment for an examiner; and (2) Whether the Examiner should be so empowered in this case.

The MAG Committee and Elliott have raised other issues which do not run to the merits of the 7/30 Order.[2] In response to the concerns expressed by the MAG Committee and Elliott, the court does not at this time believe that any Fiduciary or Protected Person in these cases has acted or plans to act improperly or contrary to any duty to any constituent, any estate or the court. The court trusts this will dispose of any questions the parties may have. Should any entity desire further clarification, the matter should be brought up in a more appropriate context.

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[2] In the 7/30 Order, the court ordered that the Examiner, when appropriate, invoke FED. R. BANKR. P. 9011 and 18 U.S.C. § 3057. The court included this provision not in the expectation that the Examiner would need to use these provisions but rather to give him the same abilities and responsibilities regarding improper conduct as other Fiduciaries.

II. Discussion

The court would also dispel any question about what caused it to enter the 7/30 Order. The court's decision-making process is not a proper area of inquiry by litigants. In the case at bar, however, the court wishes it to be clear that the 7/30 Order, which evolved over a period of three weeks, was a product of the court's intent to facilitate the effective and efficient reorganization of Debtors and to serve the public interest. While the court expanded the Examiner's role to compensate for limitations it voluntarily placed on itself, particularly since reading the Examiner's Statement, the court is convinced (and has in fact been so since July 15, 2003, when the court first raised the possibility of an examiner for Debtors[3]) that the *best* way to administer these cases is through the involvement of an empowered examiner.

A. Examiner Powers in General

The court has undertaken a thorough review of the law in the area of assignments for examiners. The positions taken by the MAG Committee are largely untenable. The authorities cited in the MAG Motion and in the committee's supporting brief are not persuasive, often not on point and sometimes more consistent with the court's views of the law than supportive of that adopted in the MAG Motion.[4]

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[3] Opposition from some of the parties delayed the appointment of an examiner, a possibility the court repeatedly raised between the commencement of these cases and the appointment of the Examiner. When the Examiner was finally appointed, the court limited his discretion in an effort to comply with the desires of the parties.

[4] The MAG Committee cites, e.g., United States v. Schilling (*In re* Big Rivers Elec. Corp.), 355 F.3d 415 (6th Cir. 2004) (finding that examiner violated his duties of disinterest, disclosure and loyalty in association with charging a "success fee," but *not finding error* in broad range of tasks assigned to examiner by bankruptcy court, which included, *inter alia*, resolving disputes with creditors and developing a consensual plan of reorganization); Kovalesky v. Carpenter, No. 95 Civ. 3700, 1997 WL 630144, at *15-16 (S.D.N.Y. Oct. 9, 1997) (stating that the court has the power to *sua sponte* appoint an examiner); *In re* Int'l Distribution Ctrs., Inc., 74 B.R. 221, 224 (S.D.N.Y. 1987) (stating that a "bankruptcy court obviously must be afforded flexibility to fashion the examiner's powers as specific circumstances may require") ; *In re* Gliatech, Inc., 305 B.R. 832, 835 (Bankr. N.D. Ohio 2004) (noting bankruptcy court's broad discretion to direct examiner's investigation and that in using such discretion "courts have appointed examiners to perform other functions").

The plain meaning of the applicable provisions of the Code demonstrates Congress intended to give ample discretion to the court to empower the Examiner as it has done in the case at bar.[5] Section 1106(a)(3), describing the scope of an examiner's permissible inquiry, provides that an examiner shall –

> (3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan . . .

The final, catch-all clause of this provision contemplates an investigation of sufficient breadth to reach virtually any matter the court may need to hear in connection with the case or in connection with formulation of a plan. The court concludes that an examiner (or trustee) is authorized by section 1106(a)(3), subject to limit set (as in the instant case) by the court, to extend his or her investigation to the limits of the court's jurisdiction.

Section 1106(b), by which the court is authorized to give added powers to an examiner, is similarly broad:

> An examiner appointed under section 1104(d) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform.

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[5] The Code should be construed in accordance with its plain meaning. *See* Barnhart v. Sigmond Coal Co., 534 U.S. 438, 450 (2002) (in all statutory construction cases inquiry begins with the language of the statute itself and ceases if the language is unambiguous and the statutory scheme is coherent and consistent); Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) (analysis in any statutory construction case begins and ends with the language of the statute when the statutory language provides a clear answer); Toibb v. Radloff, 501 U.S. 157, 162 (1991) (where resolution of a question of law turns on a statute, courts must look first to the statutory language). If the meaning of the language is plain, the court must adopt that meaning unless to do so would lead to an absurd result. *See* Lamie v. United States Trustee, 124 S. Ct. 1023, 1030 (2004) (when the language of a statute is plain and does not lead to an absurd result, the sole function of the court is to enforce the statute according to its terms); Union Bank v. Wolas, 502 U.S. 151, 158 (1991) (the fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to the statute's plain meaning); United States v. Ron Pair Enter., Inc., 489 U.S. 235, 241 (1989) (where a statute's language is plain, the sole function of the courts is to enforce the statute according to its terms).

Nothing in the language of this provision suggests Congress intended to prevent a court from granting to an examiner a specific power or an aggregation of powers.

Moreover, case law, treatises and law review articles overwhelmingly support the court's view that the Examiner may undertake each of the tasks assigned to him.[6] As to the aggregation of tasks specified in the 7/30 Order, there is ample precedent for granting an Examiner so broad a role.[7] The arguments to the contrary offered by the MAG Committee are

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6 *See In re* Pittsburgh Rys. Co., 159 F.2d 630, 631 (3rd Cir. 1946) (Trustee directed to investigate whether claims of one of debtor's largest creditors should be limited or subordinated); Williamson v. Roppollo, 114 B.R. 127, 129 (W.D. La. 1990) (bankruptcy court may empower examiner to initiate suits to recover preferences and fraudulent transfers); Franklin-Lee Homes, Inc. v. First Union Nat'l Bank of North Carolina (*In re* Franklin-Lee Homes, Inc.), 102 B.R. 477, 481 (E.D.N.C. 1989) (bankruptcy court correctly concluded examiner's duties could be expanded to include authority to initiate adversary proceedings); *In re* First American Health Care of Georgia, Inc., 208 B.R. 992, 995 (Bankr. S.D. Ga. 1996) (appointing examiner authorized to, *inter alia*, hold conferences with US Trustee, creditors' committee and any individual creditors regarding any matter); *In re* Apex Oil Co., 111 B.R. 235, 240 (Bankr. E.D. Mo. 1990) (examiner investigated potential injury claims against debtor's estate and formulated a claims resolution procedure adopted by the court which minimized potential prejudice to the debtor's efforts to formulate a plan of reorganization) rev'd on other grounds, 132 B.R. 613 (E.D. Mo. 1991), aff'd in part, rev'd in part, 960 F.2d 728 (8th Cir. 1992); *In re* Pub. Serv. Co. of New Hampshire, 99 B.R. 177, 182 (Bankr. D.N.H. 1989) (examiner authorized to mediate negotiation of a consensual plan of reorganization); *In re* UNR Indus., 72 B.R. 789, 795-96 (Bankr. N.D. Ill. 1987) (ordering appointment of examiner whose powers included authority to mediate differences between parties arising in the formulation of a consensual plan or reorganization); *In re* John Peterson Motors, Inc., 47 B.R. 551, 553 (Bankr. D. Minn. 1985) (bankruptcy court may appoint an examiner with any or all of the powers of a trustee); *In re* Carnegie Int'l Corp., 51 B.R. 252, 255 (Bankr. S.D. Ind. 1984) (examiner may not only conduct investigations, buy may initiate lawsuits on behalf of debtor); *In re* Liberal Market, Inc., 11 B.R. 742, 745 (Bankr. S.D. Ohio 1981) (appointing examiner authorized to investigate any matter related to the case or formulation of a plan of reorganization); 7 COLLIER ON BANKRUPTCY ¶ 1106.05 (15th ed. rev. 1996) ("Nevertheless, there are useful roles to be played by an examiner in addition to the investigatory function . . . ."); Ralph R. Mabey et al., *Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and the Other Forms of ADR*, 46 S.C. L. Rev. 1259 n.29 (1995) (noting court which appointed examiner authorized to, *inter alia*, identify issues to be resolved in order to facilitate a plan of reorganization); Regina S. Kelbon et al., *Conflicts, the Appointment of "Professionals," and Fiduciary Duties of Major Parties in Chapter 11*, 8 Bank. Dev. J. 349 (1991).

7 *See* NBD Park Ridge Bank v. SRJ Enters. (*In re* SRJ Enters.), 151 B.R. 189, 196 (Bankr. N.D. Ill. 1993) (characterizing bankruptcy court authority to appoint duties to examiner as broad); Pub. Serv. Co. of New Hampshire, 99 B.R. at 182 (examiner not limited by Bankruptcy Code to investigatory functions, but may be authorized to perform a range of duties); UNR Indus., 72 B.R. at 795 (legislative history to § 1106(b) indicates Congressional intent that bankruptcy court have power to appoint examiner with broad range of duties); Evan D. Flaschen, et al., *Foreign Representatives in U.S. Chapter 11 Cases: Filling the Void in the Law of Multinational Insolvencies*, 17 Conn. J. Int'l L. 3, n.31 (2001); *Conflicts, the Appointment of "Professionals," and Fiduciary Duties of Major Parties in Chapter 11*, 8 Bank. Dev. J. at 403.

supported largely by snippets of language that are taken out of context or are, at best, *dicta*. The court does not believe there is a need for it to elaborate further. The legal justification for the 7/30 Order has been thoroughly dealt with in the Equity Objection, the Examiner's Statement and the 7/30 Order itself.

As to the "cause"[8] for expanding the Examiner's role, while the court quite purposely made no findings of fact in the 7/30 Order,[9] the concerns expressed by the court are obviously valid. The responses of Deutsche and USB[10] and the Examiner's Statement demonstrate that the potential problems foreseen by the court[11] are very real. The court continues to believe

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8 Sections 1106(b) and 1107(a) of the Code do not appear to require cause, notice or hearing for the court to limit the authority of a debtor in possession or to assign a task to an examiner. This court, however, believes it would be an abuse of discretion to do either without good reason. The court is convinced good reason here exists. As to notice, while the court entered the 7/30 Order *sua sponte*, it advised the parties of its intentions during the hearings in Debrors' cases on July 14 and 28.

The statement in the MAG Motion that the court only told parties the Examiner's role would be expanded to convene status conferences is inaccurate. On July 14, the court stated that it was "going to look to the examiner to monitor the conduct of the attorneys in this case, the other professionals in this case and the fiduciaries." *See* Transcript at 230.

On July 28, the court noted that one of the additional duties would be for the examiner to "identify and take appropriate reporting actions under certain circumstances with respect to issues which may be impeding, or may need to be resolved for the reorganization process to move forward in terms of negotiations or otherwise" and that there was " more than that." *See* Transcript at 12.

9 The court explicitly labeled its reasons for the 7/30 Order as "concerns" instead of findings. While these concerns are partly premised on facts (e.g., there are, after all, 83 debtors; MAG and Mirant both have subsidiaries which have creditors who are not represented directly on a committee; and Citibank does chair the Mirant Committee and was an investment banker for MAG) or on affidavits (e.g., Debtors' unitary management), the court's concern is, at root, caused by "the dynamics of the cases, Debtors' corporate structure, the nature of Debtors' business, the variables in [Debtors' cases] and in the market place, the orphan creditor constituencies . . . and the variety of agendas . . . ." 7/30 Order p. 8.

10 The MAG Committee's insistence that there are no orphan constituencies is belied by the responses of Deutsche and USB. Indeed, an ad hoc committee of bondholders of MAG filed a notice of appearance in these cases on August 8, 2004. Though the court has not been apprised why MAG's bondholders do not consider themselves adequately represented by the MAG Committee, the very existence of the ad hoc committee gives credence to the court's fear that the efforts of the Fiduciaries, however well-intentioned, will not satisfy all stakeholders in these cases that their interests were protected in the reorganization process. As a neutral watch-dog, the Examiner offers to all constituencies the comfort of ensured transparency and a fair reorganization process.

11 The Examiner's statement corrects statements by the two creditors' committees and the UST regarding the 7/30 Order. Anything more than the most cursory reading of the 7/30 Order can leave no doubt that

expansion of the role of the Examiner is the best way to ensure these problems do not hinder or skew Debtors' reorganization effort or lead to public concern about the fairness of these Chapter 11 cases.

B. The Scope of the Examiner's Role

The MAG Committee and, to a lesser extent, the Mirant Committee have raised a number of objections to the 7/30 Order that run to the breadth of the powers given the Examiner. Most of these objections result from a mistaken view of the 7/30 Order. The court has no intention of limiting the authority of any of the Fiduciaries or any other party in interest. So long as these parties perform their functions consistently with the Code, other applicable law and professional codes of conduct, the Examiner will serve as no more than a monitor and investigator. Other "powers" given the Examiner – e.g., to commence litigation – require notice, hearing and court approval prior to exercise.

Both the MAG Committee and the Mirant Committee moreover argue that the assignments to the Examiner are so many and so pervasive that he may become conflicted or ineffective. The court recognizes there might ultimately prove to be some merit to this argument, and the court addresses the problem in modifications to the 7/30 Order described below. By explicitly commanding that the Examiner maintain his neutrality and by requiring notice and hearing before the Examiner may proceed in certain areas, the parties are assured that the Examiner cannot become the sort of "loose cannon" they seem to fear. If the assignment to the Examiner proves still to be debilitatingly extensive, the Examiner or any other party in interest may seek appropriate relief from the court.

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the court's concern was not about *present* conditions, but rather was directed to potential *future* problems in these cases. The filings of the MAG Committee are misleading in their characterizations of (and quotations from) the 7/30 Order.

C. Modifications to the 7/30 Order

The court believes the 7/30 Order would operate satisfactorily in its present form. It is clear from the Examiner's Statement that the Examiner understands what the court intended and how to perform his duties. Nevertheless, the court has determined that several modifications to the 7/30 Order are appropriate to address specific concerns described by the Mirant Committee, the MAG Committee and the UST. Accordingly, the 7/30 Order will be modified as follows (references are to decretal paragraphs of the 7/30 Order, beginning at p. 9; footnotes are explanatory only, not decretal):

1. Paragraph 1 shall be modified to read:

   The Examiner may hold a monthly status conference regarding these chapter 11 cases in order to monitor the progress and conduct of these cases.[12] Such status conferences shall be on notice to entities entitled to notice pursuant to FED. R. BANKR. P. 2002(i), and any party in interest in these cases may attend any such conference through counsel. No party shall be required to attend any such conference. The Examiner shall make a recording of each such status conference which will not be filed of record but may be provided to any entity (other than, absent further order, the court).

2. Paragraph 2 shall be modified to read:

   The Examiner shall identify any issue of fact or law in these cases resolution of which may be necessary or useful to advancement of the reorganization of these Debtors. The Examiner may take such steps as are consistent with his duty to remain neutral as among Debtors' estates in order to resolve any such issue

[12] The court, as suggested by some parties, may convene status conferences in the future. *See* Code § 105(d). At this juncture, however, the plan-formulation issues faced by the parties are best addressed through discussion and negotiation outside the court's presence.

(other than an issue involving compensation of a professional). In the event any such issue cannot be resolved through negotiation by the parties involved or by mediation, the Examiner shall consult with Debtors, the Mirant Committee, the MAG Committee and the Equity Committee (collectively, the "Fiduciaries") and any other party having an interest in the issue over how and when such issue should be resolved through litigation. In the event no party commences litigation to resolve such an issue, on notice to parties entitled to notice under FED. R. BANKR. P. 2002(i), the Examiner may seek court authority to commence such litigation unless to do so would compromise his neutrality as to any of Debtors' estates. In the latter event, he may report to the court concerning the nature of the issue in the next Examiner's report (but shall not thereby compromise his neutrality or breach any privilege assertable by any Fiduciary). Examples of issues of the type described in this paragraph include substantive consolidation of all or some of Debtors, resolution of intercompany claims and the valuation for purposes of a plan of reorganization of one or more of Debtors.

3. Paragraph 3 shall be modified to read:

Upon the court's request, subject to objection by any party, the Examiner shall advise the court of his views concerning any contested matter.[13] The Examiner shall advise the court, in connection with hearing by the court of any contested matter, if any Fiduciary that is a party to such contested matter has not made a good faith effort to resolve such contested matter without the need for litigation.

[13] The court anticipates that it will request the Examiner's opinion principally regarding procedural matters such as the Protection Order or the Continued Trading Order.

4. Paragraph 5 shall be modified to read:

The Examiner may investigate any aspect of Debtors' operations to ensure fair dealing among Debtors and may investigate any basis that may exist for pursuing litigation in or in connection with these cases which litigation would be likely to affect materially the assets or liabilities of any of Debtors. The Examiner may request by motion that the court limit or delay investigation of any issue by a Fiduciary in order to permit the Examiner to conduct such investigation of such issue as he deems appropriate.[14]

5. Paragraph 6 shall be modified to read:

The Examiner shall monitor negotiations among the parties regarding a plan or plans of reorganization for one or more of Debtors. The Examiner shall not participate in the negotiations, provided, however, that, upon the request of one or more Fiduciaries, the Examiner may participate in such negotiations, but only as a mediator. The Examiner, in his reports, shall advise the court concerning (a) progress in negotiations, (b) if any Fiduciary is not negotiating in good faith and (c) what procedures the court might implement to advance and facilitate the negotiating process.

6. Paragraph 7 shall be modified to read:

The Examiner shall investigate any conduct by a Protected Person (as that term is used in the Protection Order) or Fiduciary which may, in the Examiner's judgment, constitute a breach of any duty to a Fiduciary's constituency, the estate of any Debtor or the court. In performing his duties under this paragraph,

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[14] It has been held that a court may prevent other parties from interfering with a trustee's (or examiner's) investigation. *See In re* Preston Mining Co., Inc., 203 F.Supp. 103, 107 (E.D. Pa. 1962) (court has power to enjoin a party from interfering with a trustee's investigation of such party's affairs).

the Examiner shall always keep in mind the specific duties owed by each of the Fiduciaries (i.e., to which constituents and which estates). The Examiner may, if necessary in aid of this paragraph, employ investigators with the approval of the UST upon application to this court under seal and after such hearing as the court or UST may require. Such seal, absent cause shown, shall dissolve automatically 180 days after its imposition. Regarding any Protected Person the Examiner may, if appropriate, invoke or act under FED. R. BANKR. P. 9011 or 18 U.S.C. § 3057. The Examiner shall report to the court and the UST if he concludes that any Protected Person has violated Rule 9011 or should be referred to the United States Attorney under title 18 of the United States Code.

7. Paragraph 8 shall be modified to read:

The Examiner shall nominate a representative to coordinate with the Fee Committee, but such representative shall have no vote on such committee. The Examiner may object to or comment on retention or continued retention of a professional by a Fiduciary.

III. Conclusion

Except as described above, the court concludes the Motions should be denied. The Examiner is directed to perform the duties set forth in the Examiner Order and the 7/30 Order, as herein modified.

It is so ORDERED.

Signed this the 1 day of September 2004.

Hon. Dennis Michael Lynn
United States Bankruptcy Court