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

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

Memorandum Opinion and Order

Before the court is the Motion to Dismiss Chapter 11 Case of Mirant Mid-Atlantic LLC Pursuant to 11 U.S.C. § 1112(b) filed by U.S. Bank National Association as Lease Indenture Trustee (the "Trustee" and the "Trustee's Motion") and the Mirma Landlords' (the "Landlords," and collectively with the Trustee, the "Movants") Motion Pursuant to 11 U.S.C. § 1112(b) to Dismiss Mirant Mid-Atlantic, LLC Bankruptcy Case, and Supporting Brief (the "Landlords' Motion," and together with the Trustee's Motion, the "Motions"). Charles County, Maryland ("Charles County") and several trade creditors ("Trade Creditors") filed joinders to the Motions.

The Debtors objected to the Motions, which question whether the chapter 11 filed by Mirant Mid-Atlantic, LLC ("MirMA") was filed in good faith. The Official Committee of Equity Security Holders, the Official Committee of Unsecured Creditors of Mirant Corporation, and the Official Committee of Unsecured Creditors of Mirant Americas Generation, LLC ("MAG") also objected to the Motions. The court tried the Motions over two days, January 5 and 6, 2005.

At trial, the court received certain evidence by stipulation and heard testimony from John William Holden ("Holden"), CFO of MirMA; Lisa Johnson ("Johnson"), president of MirMA; and Neal Cody ("Cody"), an expert for the Landlords. The court also received into evidence a number of documents, which are described as necessary below. The parties also offered portions of the depositions of Michael J. D'Angelico ("D'Angelico") taken November 17, 2004, Maurice Moore ("Moore") taken November 18, 2004, Lance B. Markowitz ("Markowitz") taken November 18, 2004, and James J. Jordan ("Jordan") taken November 18, 2004. D'Angelico was deposed as a representative of the Trustee, while Moore, Markowitz and Jordan were designated under FED. R. BANKR. P. 7030 and F. R. CIV. P. 30(b)(6) by the Landlords.[1] As the Motions are contested matters, the court has also considered portions of the prior record in these cases.

These matters are subject to the court's core jurisdiction. 28 U.S.C. §§ 1334(a) and 157(b)(2)(A), (O). This memorandum opinion comprises the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052 and 9014.

I. **Background**

MirMA was formed in 2000 (under the name of Southern Energy Mid Atlantic[2]) as part of a sale by Potomac Electric Power Company ("Pepco") to Mirant Corporation ("Mirant," formerly known as Southern Energy, Inc.) pursuant to the Asset Purchase and Sale Agreement (the "APSA") of its power generation assets.[3] Among the assets

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1 D'Angelico is employed by the Trustee. Jordan, an employee of Verizon Capital Corp., testified for Landlords owned by it; Moore, an employee of Bank One, N.A., represented its affiliated Landlords; and Markowitz testified as an employee of Union Bank of California, representing its affiliated Landlords.

2 MirMA, together with its parent, MAG, MAG's parent, Mirant America's Inc. ("MAI") and MAI's parent Mirant (as hereafter defined) were spun off by The Southern Company ("TSC") in late 2000 and early 2001. At that time the spun-off entities changed their names. The court will use the various Debtors' current names hereafter rather than, when applicable, the corporate names in use before TSC's divestiture.

3 Pepco was required by deregulation legislation to divest itself of its power producing assets.

acquired by Mirant were power plants located in Maryland and known as the Dickerson and Morgantown Plants.

In order to finance part of the total price under the APSA of $2,650,000,000.00,[4] Mirant caused MirMA to enter into a complex series of transactions by which MirMA purported to sell and lease the assets and realty at the Dickerson and Morgantown Plants to the Landlords.[5] Each Landlord thus acquired an undivided, pro rata interest in the Morgantown Plant or the Dickerson Plant. The Landlords provided approximately $300,000,000.00 of the purchase price directly and borrowed from investors through the Trustee[6] approximately $1,200,000,000.00. The Landlords leased back the Dickerson and Morgantown Plants to MirMA. The key agreements utilized in these transactions included (for each of the leases) a Facility Lease Agreement (the "Facility Agreements")[7], a Participation Agreement[8] and a Pass Through Trust Agreement (the "Pass Through Agreements").

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4 The purchase price additionally included obligations assumed that raised the cost to Mirant above $3 billion.

5 The Landlords are 11 special purpose entities owned indirectly by Verizon Capital Corp., Bank One, N.A. and Union Bank of California.

6 State Street Bank and Trust of Connecticut, N.A. ("State Street") initially served as Trustee. After acquiring State Street, U.S. Bank National Association became Trustee. The notes held by the investors were actually issued by MirMA (*see* Pass Through Agreements, p. 1). However, payments on the notes were made from the rental paid to the Landlords.

7 Each Facility Agreement is between one of the Landlords and MirMA. By the Facility Agreements each MirMA Landlord "leased" to MirMA its undivided interest in the Dickerson or Morgantown Plant.

8 Each Participation Agreement was between one of the Landlords, MirMA, Wilmington Trust Company serving as "owner manager", an investor and the Trustee. The Participation Agreements establish the relationship among the Landlords, the investors lending the bulk of the funds used in the transaction and MirMA. The Trustee acts in these chapter 11 cases for the interests of the investors.

Pursuant to the APSA, in addition to the Dickerson and Morgantown Plants, Pepco sold power facilities known as the Chalk Point Station and the Potomac River Station. Ownership of the latter was placed in Mirant Potomac River, LLC ("Mirant Potomac"), a subsidiary of Mirant, and ownership of the former was divided between Mirant Chalk Point, LLC ("Mirant CP"), a subsidiary of MirMA, and Mirant Peaker, LLC ("Mirant Peaker"), a subsidiary of Mirant.[9] The acquisitions by Mirant Potomac and Mirant Peaker were funded in part by loans from MirMA. By virtue of a Capital Contribution Agreement (the "Contribution Agreement") between Mirant and MirMA,[10] Mirant (as part of the transactions with the Landlords and the Trustee) undertook to contribute to MirMA's capital the cash flow produced by Mirant Potomac and Mirant Peaker. Contribution Agreement § 3.03. Mirant also undertook to provide to MirMA certain financial information. *Id.* A failure of Mirant to perform as contemplated by the Contribution Agreement is an event of default under the Facility Agreements. Facility Agreement § 17(l).

Besides its relationships with Mirant, Mirant Potomac and Mirant Peaker under the Contribution Agreement, MirMA is furnished employees and other services by Mirant Services, LLC ("Services") and purchases fuel and markets power through Mirant Americas Energy Marketing, LP ("MAEM"). Services and MAEM are owned by Mirant (directly or indirectly).

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9 The Chalk Point Station is the subject of other litigation. *See* Memorandum Opinion entered on June 28, 2004 in the adversary proceeding styled Mirant Peaker, LLC, Mirant Chalk Point, LLC and Mirant Corporation v. Southern Maryland Electric Cooperative, Inc. and Potomac Electric Power Company, Adversary No. 04-4073, available at http://www.txnb.uscourts.gov.

10 The Trustee and Landlords are specifically designated third party beneficiaries of the Contribution Agreement. Contribution Agreement § 4.12.

In addition to the transactions discussed above, in connection with acquisition by Mirant of the Pepco assets, Mirant entered into an assignment and assumption agreement by which Mirant assigned to, *inter alia*, MirMA, Mirant Potomac, Mirant Peaker and Mirant CP, certain rights under the APSA, and those entities each purportedly assumed Mirant's obligations under the APSA. Pepco was a party to this agreement and currently takes the position that MirMA, *inter alia*, is a purchaser under the APSA.

Following closing of the APSA, the Facility Agreements and the related agreements, MirMA operated its assets and made payments as required by the Facility Agreements. Mirant and its affiliates performed as required by the Contribution Agreement, and all parties implemented the APSA. As part of the consideration for acquisition of Pepco's power generating facilities, MAEM was required to, and did, pay the out-of-market (i.e., net loss) portion of certain long-term provider agreements (see n. 4, above; the part of the APSA providing for these payments is known as the Back-to-Back Agreement – the "BTB").

As reflected in the APSA, Pepco retained numerous post-closing obligations. *See* APSA Section 8.1(c), which conditions consummation of the purchase and sale of Pepco's assets upon "execution and delivery of certain ancillary agreements." These are defined (APSA Schedule 1.1) to include, *inter alia*, Interconnection Agreements (APSA, Exhibits to Schedule E). By the Interconnection Agreements, Pepco is obligated to permit each of the sold power generation facilities "to continue to be interconnected to [Pepco's] Transmission System . . . ." Interconnection Agreement § 3.1. In the absence of the Interconnection Agreements, MirMA could not transmit its power to the marketplace. By other of the agreements ancillary to the APSA, Pepco also granted to

Mirant (and MirMA) certain easements and provided local assistance. Like the Interconnection Agreements, these are necessary to the operation of the Dickerson and Morgantown Plants as well as the Chalk Point and Potomac River Stations.

Although the assets purchased from Pepco remained profitable, Mirant and its affiliates encountered other problems. By 2003, Mirant was struggling to restructure bank loans and bond debt of Mirant and MAG. When those efforts failed, beginning the evening of July 14, 2003 and continuing into the following morning, Mirant and 74 of its affiliates[11], including MirMA, Mirant CP, Mirant Peaker and Mirant Potomac, filed chapter 11 petitions in this court. The cases of all 75 Debtors were consolidated for administrative purposes by order entered on July 17, 2003. *See* FED. R. BANKR. P. 1015(b).

Commencement of Debtors' chapter 11 cases constituted events of default under, *inter alia*, the Facility Agreement (Facility Agreement § 17(g)), the Pass Through Agreement (Pass Through Agreement § 6.1) and the Interconnection Agreements (Interconnection Agreement § 7.1(g)). As a result of its filing, Mirant is also in breach of provisions of the Contribution Agreement – that also being a default under the Facility Agreement (Facility Agreement § 17(k)). These defaults are not now enforceable, however, because of the automatic stay of section 362(a). The filing by MirMA also left Charles County with a prepetition ad valorem tax claim of $14,188,811.59 and the Trade Creditors with prepetition unsecured claims against MirMA totaling approximately $98,000.00.

Following commencement of these chapter 11 cases, from the beginning the Landlords and Trustee have been active participants in the reorganization process. Each

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11 Since then additional affiliates not affected by these proceedings have filed chapter 11 petitions.

has taken positions on issues varying from the proper scope of the role of the Examiner to debtor-in-possession financing. The court or the Examiner has mediated several information sharing disputes between Debtors on the one hand and the Trustee and Landlords on the other. Certain important events in these cases have specifically involved the Landlords and the Trustee in litigation with Debtors. The parties clashed twice over whether Debtors[12] should be given additional time pursuant to section 365(d)(4) of the Bankruptcy Code[13] (the "Code") within which to assume leases of real property.[14] On the occasion of Debtors' second motion to extend time for assumption, Debtors advised the court on March 3, 2004 that they might seek to recharacterize the transactions with the Landlords and the Trustee as a disguised mortgage. The court then directed, as a condition to the grant of additional time pursuant to section 365(d)(4), that Debtors commence any suit to cause such recharacterization by September 1, 2004. *See* Order Extending the Period to Assume or Reject MirMA Leases Pursuant to 11 U.S.C. § 365(d)(4) entered on July 30, 2004.

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12 Although the case before the court is that of MirMA, actions in these chapter 11 cases are typically taken by "Debtors" due to administrative consolidation. Use by the court of the term "Debtors" is not intended to suggest substantive identity of MirMA and other Debtors.

13 11 U.S.C. §§ 101-1330.

14 Section 365(d)(4) states:

> Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

11 U.S.C. § 365(d)(4). The parties dispute whether the Facility Agreements relate to real or personal property. *See* In re Mirant Corp., No. 03-46590, 2004 Bankr. LEXIS 1377, *11 n.11 (Bankr. N.D. Tex. Sept. 15, 2004).

In August of 2004 the parties met and Debtors sought concessions with respect to the Facility Agreements and the Pass Through Agreements. At that time Debtors indicated that, even if they were unsuccessful in recharacterizing their transactions with the Landlords and the Trustee, they might reject the "leases" as leases of real property and use Code § 502(b)(6) to limit damage claims against MirMA (and other "lessee" Debtors if any).

Subsequently, on August 31, 2004, Debtors Mirant Mid-Atlantic Services, LLC, (apparently named mistakenly for MirMA; MirMA has since joined the Adversary), Mirant, Mirant MD Ash Management, LLC, Mirant Peaker, Mirant Potomac and Mirant CP filed their Complaint for Declaratory Judgments Relating to Mirma Agreements and for Related Relief commencing suit (the "Adversary") seeking declaratory relief against the Landlords, the Trustee and others that (1) the transactions embodied in the Facility Agreements and related documents should be recharacterized as debtor-creditor rather than lessee-lessor relationships; (2) certain provisions in those documents contingent upon such a recharacterization are not enforceable; (3) if recharacterization is denied, all or some of the agreements among the parties are leases of realty; (4) rejection of such leases would result in claims capped by Code § 502(b)(6); (5) certain cross default provisions would be unenforceable following rejections; and (6) a certain "467" type of account evidences a collectible debt due MirMA.[15] Thereafter, the Trustee and Landlords filed the Motions on October 25, 2004.

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[15] The court's paraphrase of the relief sought in the Adversary is approximate through brevity. Immediately following the hearing on the Motions, the court heard motions to dismiss parts of the Adversary. The Court granted those motions in part, and Debtors have indicated they will replead their case to conform to the court's ruling.

In the meantime, Debtors have been litigating with Pepco in an effort to eliminate the losses suffered through payments under the BTB. Debtors initially sought to reject the BTB in this court. The District Court, on Pepco's motion, withdrew the reference respecting the rejection motion. Following a ruling by the District Court that the BTB could not be rejected under Code § 365, Debtors appealed, and the Court of Appeals, on August 4, 2004, reversed the District Court as to the applicability of section 365 to the BTB. *See Mirant Corp. v. Potomac Elec. Power Co.* (*In re Mirant Corp.*), 378 F.3d 511, 524 (5th Cir. 2004). The Court of Appeals also remanded the rejection motion to the District Court, which retained jurisdiction over it.

On December 9, 2004, the District Court held that the BTB is part of the APSA, and cannot be dealt with under Code § 365 independently of the APSA. Also on December 9, Debtors, apparently coincidentally, ceased payments to Pepco under the BTB. The court is advised Debtors have noticed an appeal from the District Court's December 9 decision. Debtors have also suggested they may seek to reject the entire APSA or to recharacterize the transactions with Pepco such that the BTB would be treated as part of a deferred purchase price of the Pepco assets.

Pepco retaliated by moving for relief from the stay so that Pepco might cease performing its obligations under the APSA, including provision of interconnection services to the Dickerson and Morgantown Plants, and the Chalk Point and Potomac River Stations. Pepco has also sought to force payment by Debtors of the amounts due under the BTB.[16]

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[16] The court has since rejected Pepco's stay motion and has granted Pepco some relief as to payments pursuant to the BTB.

During the time preceding the commencement of its chapter 11 and since, MirMA has been solvent. Its assets clearly exceed in value its debts. Subject to the potential consequences of contractual defaults discussed below, MirMA has no difficulties meeting its obligations as they mature.

II. **Issues**

The court is faced with four questions. First, should the court apply a different standard for good faith filing by a corporate family? Second, was the MirMA case commenced in good faith? Third, could MirMA's case be dismissed at this time without risk to MirMA and other parties in interest? And, fourth, did the Trustee and the Landlords delay so long in filing the Motions that laches should apply to bar the Motions?

III. **Discussion**

Movants seek dismissal of MirMA's bankruptcy case pursuant to section 1112(b) of the Code[17] based on MirMA's alleged lack of good faith in filing its petition for relief.

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17 Section 1112(b) provides:

> (b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee or bankruptcy administrator, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including—
>
> (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
> (2) inability to effectuate a plan;
> (3) unreasonable delay by the debtor that is prejudicial to creditors;
> (4) failure to propose a plan under section 1121 of this title within any time fixed by the court;
> (5) denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan or a modification of a plan;
> (6) revocation of an order of confirmation under section 1144 of this title, and denial of confirmation of another plan or a modified plan under section 1129 of this title;
> (7) inability to effectuate a substantial consummation of a confirmed plan;
> (8) material default by the debtor with respect to a confirmed plan;

Section 1112(b) allows for dismissal of a bankruptcy case for cause, and a non-exclusive list of examples of cause for dismissal are provided by the statute. Lack of good faith is not one of the enumerated examples in section 1112(b), but many courts have held that lack of good faith is appropriate cause for dismissal under that section. *See Little Creek Dev. Co. v. Commonweatlh Mortgage Corp. (In re Little Creek Dev. Co.),* 779 F.2d 1068, 1072 (5th Cir. 1986) ("Findings of lack of good faith in proceedings based on . . . 1112(b) have been predicated on certain recurring but non-exclusive patterns . . . ."); *In re SGL Carbon Corp.,* 200 F.3d 154, 162 (3d Cir. 1999) ("[W]e conclude a Chapter 11 petition is subject to dismissal for 'cause' under 11 U.S.C. § 1112(b) unless it is filed in good faith."); *Marsch v. Marsch (In re Marsch)* 36 F.3d 825, 828 (9th Cir. 1994) ("Although section 1112(b) does not explicitly require that cases be filed in 'good faith,' courts have overwhelmingly held that a lack of good faith in filing a Chapter 11 petition establishes cause for dismissal."); *Furness v. Lilienfield*, 35 B.R. 1006, 1011 (D. Md. 1983) ("Courts have found that if a Chapter 11 petition is not filed in good faith, grounds exist to . . . dismiss the petition."); *In re Liberate Techs.*, 314 B.R. 206, 211 (Bankr. N.D. Cal. 2004) ("The good faith requirement operates through section 1112(b), which authorizes dismissal of a chapter 11 petition for 'cause.' Lack of good faith is a species of cause for dismissal."); *In re Walden Ridge Dev., LLC*, 292 B.R. 58, 61-62 (Bankr. D.N.J. 2003) ("A debtor's lack of good faith constitutes cause for dismissal of a Chapter 11 petition.").

> (9) termination of a plan by reason of the occurrence of a condition specified in the plan; or
> (10) nonpayment of any fees or charges required under chapter 123 of title 28.

11 U.S.C. § 1112(b).

A. **A Corporate Family Filing is in Good Faith**

The court believes it appropriate to provide a standard different from that applied to good faith dismissal in a single debtor case to that of a key operating affiliate placed in chapter 11 in conjunction with necessary filings by its family of affiliates. Several parties have cited to the court the case of *Heisley v. U. I. P. Engineered Prods. Corp.* (*In re U. I. P. Engineered Prods. Corp.*), 831 F.2d 54 (4th Cir. 1987), in which the Court of Appeals for the Fourth Circuit addressed the propriety of chapter 11 filings by solvent subsidiaries of a parent corporation which had filed its own chapter 11 case shortly before the subsidiaries filed.[18] While the parties did not place great emphasis on *U. I. P.*, the court finds the reasoning of the Court of Appeals persuasive and particularly relevant to the case at bar:

> On appeal, appellants contend that the district court erred as a matter of law in affirming the bankruptcy court's denial of their motions to dismiss the bankruptcy petitions of Harry Davies and UIPE. Specifically, appellants argue that the timing of the debtors' bankruptcy filings, coupled with their admission of solvency, is conclusive evidence of abuse of the bankruptcy process. We disagree.
>
> Whether Harry Davies and UIPE *independently* demonstrated good faith in filing for bankruptcy is simply not relevant to this dispute. The ultimate question in this appeal is whether these wholly-owned subsidiaries should have been included in their parent company's bankruptcy estate [sic], when the parent company had filed in good faith for Chapter 11 reorganization. Under the circumstances, it was clearly sound business practice for Eastmet to seek Chapter 11 protection for its wholly-owned subsidiaries when those subsidiaries were crucial to its own reorganization plan.

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18 *Cf.* Grubbs v. Pettit, 282 F.2d 557 (2d Cir. 1960) decided under the Bankruptcy Act of 1898 (the "Former Bankruptcy Act").

Id. at 56 (emphasis in original). Such a "family" filing is common when the debtors are parts of a common business enterprise, as is true of Debtors' cases. The court also notes that, sometimes with tragic consequences, corporate structures are not devised to facilitate the corporate family's eventual need for chapter 11 reorganization. Indeed – and MirMA and its operating affiliates are an outstanding example – the needs of financing structuring or efforts to shift or eliminate tax liability are more likely to determine corporate structure than even is operating efficiency.

MirMA is one of the largest pieces of Debtors' enterprise. Had MirMA not filed for relief, the court expects it would have been pushed in by creditors concerned about leaving so large a part of Debtors' business and assets beyond court supervision. Certainly MirMA would have been subject to repercussions from the filings of its affiliates. Where, as here, the need for rehabilitation of the corporate family enterprise is obvious, it is clearly a valid use of chapter 11 to address that need.[19]

It seems to the court that managers of a corporate family assigned the task of selecting which entities should file for relief are prudent to err in favor of filing when in doubt. A failure to file for an entity that is a principal member of the family could prove disastrous if relief in fact was necessary. For these reasons, the court holds that MirMA, as a key and integrated member of the Mirant corporate family, was placed in chapter 11 in good faith. Even if the court assumes for purposes of argument that the good faith test applied in stand-alone chapter 11 cases should be applied to MirMA, however, the same conclusion is reached.

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19 The court suspects the opportunity for mischief (whether on the part of Debtors, their creditors or others) to the detriment of the reorganization process would be increased if MirMA were not in chapter 11.

B. **MirMA Filed Chapter 11 in Good Faith**

Precedents suggest that bad faith dismissal is to be determined based on the totality of the circumstances. *See, e.g., SGL Carbon,* 200 F.3d at 165. This, in turn, requires the court's "evaluation of the debtor's financial condition, motives and the local financial realities." *Little Creek*, 779 F.2d at 1072; *see also Cedar Shore Resort, Inc. v. Mueller (In re Cedar Shore Resort, Inc.),* 235 F.3d 375, 379 (8th Cir. 2000). Numerous courts set out factors or patterns to be considered in the good faith analysis. *See e.g. Trident Assocs. Ltd. P'ship v. Metropolitan Life Ins. Co. (In re Trident)*, 52 F.3d 127, 131 (6th Cir. 1995); *Little Creek*, 779 F.2d at 1073 ("The debtor has one asset . . . . The secured creditor's liens encumber this [asset]. There are generally no employees . . . , little or no cash flow, and no available sources of income . . . .").

It is obvious that the facts in MirMA's case are antithetical to those of *Little Creek*, and the court doubts the suitability of assessing MirMA's good faith by the factors there enumerated. More useful to the court are cases that have adopted a "valid bankruptcy purpose" test to determine good faith. *See Cedar Shore*, 235 F. 3d at 380 (Debtor "did not file bankruptcy to effectuate a valid reorganization . . . ."); *Marsch*, 36 F.3d at 829 (filing to avoid posting affordable appeal bond where no risk of disruption of business not a valid reason for filing); *In re Newsome*, 92 B.R. 941 (Bankr. M.D. Fla. 1988). The court in *NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (In re Integrated Telecom Express)* 384 F.3d 108, 119 (3rd Cir. 2004) identifies as proper purposes for commencing a chapter 11 case "preserving going concerns and . . . maximizing property available to satisfy creditors," quoting *Bank of Am. Nat'l Trust & Sav. Assn. v. 203 N. LaSalle St P'ship,* 526 U.S. 434, 453 (1999). This view of valid purposes is accepted generally in testing for good faith. *See SGL Carbon*, 200 F.3d at 165-66 ("When financially troubled petitioners seek a chance to remain in business, the exercise of those [bankruptcy] powers is justified."); *In re RBGSC Inv. Corp.*, 253 B.R. 352, 367 (E.D. Pa. 2000) ("[T]he Airport site, which was a going concern, was an important – perhaps, at the time, the most important – asset for RBGSC. The Chapter 11 petition served to prevent Marketplace/Redwood from terminating the lease, and thus protected RBGSC's interest in the Airport site."); *In re Original IFPC S'holders, Inc.*, 317 B.R. 738, 750 (Bankr. N.D. Ill. 2004) (stating that in determining whether to dismiss a case pursuant to section 1112(b), "[t]he inquiry often centers around the debtor's *bona fide* need for a breathing spell to reorganize, and this need must be related to the dual purposes of 'preserving going concerns' and 'maximizing property available to satisfy creditors.'") (citations omitted); *Liberate Techs.*, 314 B.R. at 211-12; *Walden Ridge*, 292 B.R. at 64 ("The preservation of value is a permissible motive for filing Chapter 11 . . . . Thus, the filing was an appropriate exercise of business judgment and protected the equity of the Debtor in the Purchase Contract for the benefit of other creditors, as well as the Debtor.").

The court assumes without deciding that it is the burden of MirMA to show it had a valid purpose in filing for chapter 11 relief.[20] Even assuming *U. I. P.* is incorrect, MirMA has met that burden.

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[20] The court is not satisfied that the allocation to the debtor of showing good faith is appropriate. The Fifth Circuit's remand for want of a sufficient record in Little Creek, 779 F.2d at 1073 (failure to "provide sufficient evidence to show lack of good faith" warrants remand) suggests Movants, not MirMA, have the burden. *See, also*, the recent well-reasoned decision in Liberate Techs., 314 B.R. at 211, declining to hold that the burden is on debtor, and Walden Ridge, 292 B.R. at 62 ("The movant has the initial burden to present a prima facie case alleging bad faith; once achieved, the burden shifts to the debtor to prove that the petition was filed in good faith."). There is, however, ample authority for the proposition that the debtor, once good faith is raised, bears the burden of proof. *See* Integrated Telecom, 384 F.3d at 118 ("Chapter 11 bankruptcy petitions are

Holden testified that the Board of Mangers of MirMA[21] determined to file because of potential contractual defaults. Holden also testified to concern about MirMA operating outside of chapter 11. Both of these concerns were justifiable. Commencement of a chapter 11 case by Mirant Peaker, Mirant Potomac, Mirant CP[22] and, for that matter, Mirant, triggered defaults not only under the Facility Agreements and the Pass Through Agreements but presumably under other contracts to which MirMA is a party.[23] Holden was not specific about which contracts other than the Facility Agreements and the Pass Through Agreements might be in default; assuming, however, that no thought was given to the APSA, it is inferable that the Board of Managers considered at least the arrangements with Pepco and SMECO involving the Chalk Point Facility.

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subject to dismissal under 11 U.S.C. § 1112(b) unless filed in good faith, and the burden is on the bankruptcy petitioner to establish that its petition has been filed in good faith."); SGL Carbon, 200 F.3d at 162 n.10 (Once at issue, the burden falls upon the bankruptcy petitioner to establish that the petition has been filed in 'good faith.'"); RBGSC, 253 B.R. at 366 ("[O]nce the issue of good faith is raised, the petitioner has the burden of establishing that the filing was in good faith."); In re Fox, 232 B.R. 229, 233 (Bankr. D. Kan. 1999) ("[W]hen lack of good faith is raised as a basis for dismissal for cause, the debtor bears the burden of proving that the filing was made in good faith."); *see also* Newsome, 92 B.R. at 943-44 ("[I]n the context of a Motion to Dismiss a Chapter 13 case, the courts consistently held that once the debtor's good faith has been challenged, the debtor has a burden of proving that the petition for relief was filed in good faith."). While these decisions may hark back to cases under the Former Bankruptcy Act, (*e.g.* Tucker v. Texas Am. Syndicate, 170 F.2d 939 (5th Cir. 1948), cited in, *inter alia*, the Landlords' Motion at p. 6) under which relief was not automatic (cf., Code § 301) and, in fact, a chapter X debtor, as in *Tucker*, had to prove good faith affirmatively as a condition to relief, the court will allocate the burden to MirMA.

21 The Board of Mangers, equivalent to a board of directors, was the proper body to decide on MirMA's behalf to file. Movants note Johnson did not participate in the decision. This, however, does not matter as long as the Board of Managers acted within its authority.

22 Movants argued that chapter 11 was not necessary for these entities either. That issue is not before the court; only MirMA's filing is at issue.

23 MirMA's schedules on file with the court include six pages of contracts, at least 26 of which contracts apparently do not involve the Trustee, the Landlords or Pepco. See MirMA's Schedule G.

Although Movants assured the court that defaults in MirMA's agreements with them would not have been declared had MirMA not filed, looking, as it must, at the position of the decision makers at the outset of the case,[24] it was reasonable for the Board of Managers to conclude that the prospect of default and other repercussions from affiliate filings should not be risked; rather MirMA should seek court protection. As MirMA points out, hundreds of billions of dollars of claims were originally asserted against it in its chapter 11 case. Though most of those claims were easily expunged, there might have been greater difficulty dealing with them out of bankruptcy. In sum, in mid-July of 2003, MirMA faced defaults in various contracts, complications in its interaction with chapter 11 debtor affiliates and other potential consequences from the filings of those affiliates. MirMA's Board of Managers determined it was more prudent to place MirMA in chapter 11 than face these risks out of court. Their purpose was valid: to protect MirMA's ability to continue as a going concern as part of the corporate family enterprise. Perhaps MirMA could have taken alternative precautions, could have protected itself through negotiated agreements with its contract parties. That is not the issue. *See* 6 COLLIER ON BANKRUPTCY ¶ 6.07[2] (14th ed. 1977), citing *Marine Harbor Props., Inc. v. Mfrs. Trust Co.*, 317 U.S. 78 (1942).[25] The question is whether MirMA's Board of Managers could properly conclude that chapter 11 was an appropriate way to address possible tough times ahead.

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24 Furness, 35 B.R. at 1013. Hindsight should not be used to impute bad faith from a failure of fears to materialize.

25 While the good faith analysis under the Former Bankruptcy Act was different, in that a debtor was required to demonstrate good faith in filing a Chapter X petition before such petition could be approved, the standard for determining good faith under the Former Bankruptcy Act was just as rigorous, if not more so, than the standard employed under the Code for determining whether dismissal of a chapter 11 case for lack of good faith in filing is appropriate.

Just as important, MirMA's filing was not tactical or intended for a nefarious purpose. In analyzing the purpose of a debtor's chapter 11 petition in the context of a motion to dismiss for bad faith filing, the courts regularly consider whether the bankruptcy was intended to obtain tactical advantage in litigation or negotiations. *See Cedar Shore*, 235 F.3d at 380 (affirming bankruptcy court decision dismissing debtor's case for bad faith filing where bankruptcy court determined that debtor filed case to prevent a lawsuit from proceeding in state court); *SGL Carbon*, 200 F.3d at 167 (remanding case to District Court to dismiss debtor's case for bad faith filing where debtor's purpose in filing was to gain a tactical litigation advantage in an antitrust lawsuit and place pressure on the plaintiffs in such suit to accept debtor's settlement proposal); *Marsch*, 36 F.3d at 828 ("One limitation some courts have implied under section 1112(b) involves Chapter 11 cases filed to stay a state court judgment against the debtor pending appeal. In those cases, courts have expressed concern that the petition is merely a 'litigating tactic' . . . ."); *Liberate*, 314 B.R. at 214 (dismissing debtor's case for bad faith filing where debtor, "suffering the frustration with lawsuits that many businesses share, seeks chapter 11 protection not because its existence is genuinely threatened by that litigation, but because bankruptcy offered enticing advantages in dealing with that litigation"); *In re Silberkraus*, 253 B.R. 890, 905 (Bankr. C.D. Cal. 2000) ("[I]t constitutes bad faith to file bankruptcy to impede, delay, forum shop, or obtain a tactical advantage regarding litigation ongoing in nonbankruptcy forum . . . ."). Such use of chapter 11 is inappropriate, as is a filing intended to effect a nefarious purpose. *See Cedar Shore*, 235 F.3d at 379 ("[G]ood faith implies an honest intent and genuine desire on the part of the petitioner to use the statutory process to effect a plan of reorganization and not merely as a device to serve some sinister or unworthy purpose.") (quoting *In re Metro. Realty Corp.*, 433 F.2d 676, 678 (5th Cir. 1971)); *Furness*, 35 B.R. at 1012.

Movants urge the court to conclude that MirMA had such an improper purpose. They contend MirMA filed for chapter 11 with recharacterization of its relationships with the Landlords and the Trustee in mind. This position, however, is not supported by the evidence or common sense.

Holden testified without contradiction that the possibility of recharacterization was not considered at the time the decision was made to file chapter 11 for MirMA. In fact, Holden testified that MirMA first began exploring the possibility of recharacterization in early 2004, six months after the filing of MirMA's case. To the court's recollection, recharacterization was first raised before it in connection with the second motion to extend under section 365(d)(4).

Moreover, filing provided no special benefit to MirMA in the recharacterization dispute. Recharacterization could have been sought and obtained in another court[26] without the need for chapter 11. *See Reaves Brokerage Co., Inc. v. Sunbelt Fruit & Vegetable Co., Inc.*, 336 F.3d 410, 417 (5th Cir. 2003) (affirming District Court decision recharacterizing a purported factoring agreement as a secured lending agreement); *Addison v. Burnett*, 49 Cal. Rptr. 2d 132, 139 (Cal. Ct. App. 1996) (declining to recharacterize a purported lease as a secured sale); *Tennant Co. v. Martin's Landscaping, Inc.*, 515 A.2d 665, 666-67 (Conn. Super. Ct. 1986) (determining that agreement entitled "equipment lease" was not a true lease, but an agreement creating a security interest). The documents memorializing the agreements among the parties recognize the possibility

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26 For that matter, even had MirMA not filed, this court would have had a jurisdictional basis under 28 U.S.C. § 1334(b) for hearing the Adversary as "related to" the cases of MirMA's affiliates.

of recharacterization independently of the possibility of bankruptcy. *See* § 3.1 of the Conditional Indemnity Agreement entered into between MirMA and each of Landlords. Given the evidence and MirMA's ability to seek recharacterization without filing bankruptcy, the court finds that MirMA's chapter 11 case was not motivated by a plan to restructure the parties' relationships.

The Landlords and the Trustee also suggest MirMA filed in order to take advantage of Code § 502(b)(6)[27] and cap rejection damages if MirMA rejects all or some "leases" with the Landlords. As initially pled, in the Adversary MirMA sought declaratory judgment concerning applicability of section 502(b)(6). There is no evidence, though, that section 502(b)(6) was considered in deciding whether MirMA should be placed in chapter 11 (the § 502(b)(6) option first came up last August), and, in any case, the court has ordered dismissed those portions of the Adversary seeking declaratory relief under section 502(b)(6). Finally, it is questionable whether a debtor's intent to utilize section 502(b)(6) should weigh in a consideration of good faith in filing.

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27 Section 502(b)(6) provides:

> (b) . . . [If] objection to a claim is made, the court . . . shall allow such claim . . . except to the extent that –
>
> > (6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds –
> >
> > > (A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of ---
> > >
> > > > (i) the date of the filing of the petition; and
> > > > (ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus
> > >
> > > (B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

11 U.S.C. § 502(b)(6).

Liberate, 314 B.R. at 216 ("Debtor's proposed use of section 502(b)(6) does not establish either good faith or bad faith."); *In re Chameleon Sys., Inc.*, 306 B.R. 666, 669 (Banrk. N.D. Cal. 2004) ("Because rejection and the capping of a landlord's claim is not per se bad faith, that purpose may not form the basis for a bad faith finding under § 1112(b).").

Before leaving the issue of good faith in filing, the court must address the concerns of Charles County and the Trade Creditors. In support of the Motions, Charles County and the Trade Creditors argue that pendency of MirMA's chapter 11 unfairly delays payment of their claims.[28]

First, Charles County's claim for property taxes clearly is fully secured. It bears interest at 12% per annum – well above market rates. The claims of the Trade Creditors, though unsecured, may require payment of interest as well. A number of courts have required payment of interest on unsecured claims under a plan before allowing any return to equity. *Groundhog, Inc. v. San Joaquin Estates, Inc. (In re San Joaquin Estates, Inc.)*, 64 B.R. 534, 536 (B.A.P. 9th Cir. 1986) (holding that bankruptcy court abused its discretion in not awarding post-petition interest on creditors' claims where debtor was very solvent); *In re Gaines*, 178 B.R. 101, 103 (Bankr. W.D. Va. 1995) ("[U]nsecured creditors are entitled to receive post-petition interest on their claims when the estate is solvent and a surplus remains after payment of the principal balances of all claims."); *In re David Green Prop. Mgmt.*, 164 B.R. 92, 99 (Bankr. W.D. Mo. 1994) (exercising discretion to allow payment of post-petition interest on unsecured claims because liquidating chapter 11 plan would result in surplus after full payment of all claims).

[28] The Landlords have been timely paid rent due under the Facility Agreement prior to and since the chapter 11 filing.

If Charles County or the Trade Creditors are seriously harmed by continued delay in payment, they may have other remedies. If the claims are certain to be paid in full and MirMA has cash on hand to make payment, upon any showing of hardship, relief from stay to pursue collection might even be granted.[29] In any case, accrual of interest protects these creditors against delay in payment.

The court thus holds that MirMA's chapter 11 filing was in good faith even considered independently of the corporate family's need for relief.

C. MirMA Should not Emerge from Chapter 11 at this Time

Turning to the third question before the court, it is unclear that an answer is necessary in the context of the Motions. Once the court has determined that MirMA filed in good faith, there is no need to consider whether its bankruptcy should now be terminated. Only if MirMA failed to meet the good faith test would it truly be necessary for the court to address whether, because its affairs were so inextricably intertwined with those of other Debtors or because of other reasons, it would be appropriate for MirMA to remain in this court's custody.

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[29] The court is aware that payment of claims – especially unsecured claims – prior to confirmation of a plan is contrary to precedent. *See* Chiasson v. J. Louis Matherne and Assocs. (In re Oxford Mgmt., Inc.), 4 F.3d 1329 (5th Cir. 1993); In re Kmart Corp., 359 F.3d 866 (7th Cir. 2004); In re Coserv, L.L.C., 273 B.R. 487 (Bankr. N.D. Tex. 2002). However, these cases turn on the rule that similarly situated creditors should be treated the same. *See* In re Combustion Eng'g, Inc., 391 F.3d 190, 239 (3d Cir. 2004) ("The Bankruptcy Code furthers the policy of 'equality of distribution among creditors' by requiring that a plan of reorganization provide similar treatment to similarly situated claims."); Pension Benefit Guar. Corp. v. Belfance (In re CSC Indus., Inc.), 232 F.3d 505, 508 (6th Cir. 2000) ("[A] fundamental objective of the Bankruptcy Code is to treat similarly situated creditors equally."); Liona Corp., Inc. v. PCH Assocs. (In re PCH Assocs.), 949 F.2d 585, 598 (2d Cir. 1991) ("In holding that the PCH/Liona agreements did not constitute a 'true lease,' we sought to implement what is perhaps the predominant policy objective of a bankruptcy proceeding – equal treatment of similarly situated creditors."). In MirMA's case, this principle could be observed and all unsecured creditors (but not necessarily all contract parties) could be satisfied. Indeed, payment in full of the Trade Creditors probably would not run afoul of the absolute priority rule. *See* U.S. v. Aweco, Inc. (In re Aweco, Inc.), 725 F.2d 293, 298 (5th Cir. 1984).

Movants, however, suggest MirMA must need, in good faith, to continue its chapter 11 case to avoid dismissal. Assuming Movants are correct, the court would still not dismiss the case. First, MirMA is in technical default under its agreements with the Landlords and the Trustee (and perhaps under other contracts). While the Landlords and the Trustee indicated at the January 5 hearing that they would waive those defaults, the court is reluctant to rely on MirMA's ability to resolve such problems once the protection of the automatic stay is lost. Even if the court were willing to accept the assurances of the Landlords and the Trustee,[30] MirMA is a party to numerous other contracts which may be in default and are better dealt with through emergence by confirmation of a plan.

Second, MirMA has been an active participant in these chapter 11 cases. It is a borrower under Debtors' post-petition line of credit. It has utilized and relied upon court-invoked mechanisms for dealing with contracts, claims and hiring, and paying professionals. On the other hand, the court cannot find that disruption of MirMA's business relationships would occur if MirMA today emerged from bankruptcy. Although Cody's testimony was that it would take at least 45 days to replace MAEM, Services and other affiliates that have relationships with MirMA that are essential to its business, each of those relationships is profitable or at least not burdensome to the MirMA affiliate. Even if an affiliate of MirMA elected to terminate its relationship with MirMA, it is in Debtors' interests that MirMA's business be healthy and not disrupted. The affiliates could be expected to assist MirMA in effecting a smooth transition to new contract

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30 The court does not doubt counsel's assurances, but fears that, following dismissal of MirMA's case, the Landlords and the Trustee might be tempted to use their ability to enforce contractual rights as leverage in the recharacterization dispute.

parties. Thus, the court finds MirMA's affiliates would avoid – and, as fiduciaries, would be largely obligated to avoid – action that would reduce MirMA's value.

The story is quite different when one considers, third, Pepco's ongoing relations with MirMA. Debtors and Pepco have been engaged in a lengthy battle, principally related to the BTB. Doubtless Pepco would find it tactically useful were MirMA to lose the protections of chapter 11. Pepco claims MirMA is a party to the APSA. Pepco claims the APSA is in default. Were MirMA not a debtor before this court, Pepco could pursue remedies against MirMA in other tribunals. MirMA depends on its agreements with Pepco to get its power to the marketplace. Easements, local assistance and other concessions by Pepco under the APSA and related agreements benefit MirMA. While the court doubts that Pepco, as it has sometimes intimated, would take advantage of freedom from this court to cause Washington, D.C. to go "dark," there is little doubt that Pepco would use MirMA's emergence from bankruptcy to good advantage. Any mischief authored by Pepco could adversely affect efforts to restructure Debtors' enterprise.

For the forgoing reasons, the court holds that there is too much risk for MirMA to emerge from chapter 11 through dismissal at this time.[31]

D. The Landlords' Motion and the Trustee's Motion Are Barred by Laches

In addition to the foregoing reasons, the relief sought by Movants must be denied because they have waited too long in requesting it. Although section 1112(b) places no time limitations on the filing of a motion to dismiss, a bankruptcy court may exercise its

[31] The court recognizes that, as suggested by Movants, under Code §§ 105 and 349, dismissal might be subject to protections for MirMA. The court questions whether custom-fashioned relief would be a sensible replacement for chapter 11.

discretion to deny a motion to dismiss as untimely based on the doctrine of laches. *In re Shea & Gould*, 214 B.R. 739, 749 (Bankr. S.D.N.Y. 1997); *In re I.D. Craig Serv. Corp.*, 118 B.R. 335, 338 (Bankr. W.D. Pa. 1990) (where board of directors of debtor waited over one year to seek dismissal of case based on debtor's president's lack of authority to file for relief, court held that laches required denial of the motion). For laches to apply, the following factors must be shown: (1) delay in assertion of a claim; (2) the delay is inexcusable; and (3) undue prejudice results from the delay. *Geyen v. Marsh*, 775 F.2d 1303, 1310 (5th Cir. 1985); *Mut. Life Ins. Co. of N.Y. v. Bohart (In re Bohart)*, 743 F.2d 313, 325 (5th Cir. 1984). Each factor exists in this case.

Movants filed the Motions over 15 months after MirMA filed its bankruptcy case. Thus, delay is unquestionably present. The court concludes this delay is also inexcusable.[32] The Motions are based largely on the allegation that MirMA was highly solvent and financially healthy on the date of its bankruptcy filing and has continued to be so since that date. Nothing concerning the financial condition of MirMA could be said to have come as a surprise to Movants at any stage of MirMA's bankruptcy proceedings. MirMA's financial condition was reflected in its schedules filed shortly after the commencement of its case, and its monthly operating reports have updated its status ever since. These documents were available to Movants (as well as considerable confidential information) and, in fact, Movants point to them as evidence supporting dismissal of MirMA's case. What Movants have failed to demonstrate, however, is any legitimate

[32] The court does not view "inexcusable" delay as delay resulting from improper conduct. Rather, the court concludes that the inexcusability factor requires only that the court determine that there is no reasonable explanation for the delay, regardless of whether improper motives or conduct are at play. *See* Envtl. Def. Fund, Inc. v. Alexander, 614 F.2d 474, 479 (5th Cir. 1980) (affirming District Court application of doctrine of laches to bar claim and finding no excuse for plaintiffs' delay, although not finding that plaintiffs' actions were improper).

reason for waiting well over a year to move for dismissal of MirMA's case based on the company's solvency, something they could have done right after the petition date. Rather, the deposition testimony of Markowitz, Jordan and Moore makes it clear Movants were "puzzled" or "troubled" by what appeared to them to be an unnecessary filing. *See* Deposition of Markowitz, p. 17:3-19; Deposition of Jordan, p.24:15-25:15; Deposition of Moore, p. 25:12-26:23.

Movants allege that the delay in filing the Motions is excusable because it was not until the filing of the Adversary that Movants' suspicions were confirmed that MirMA filed its bankruptcy for the improper purpose of recharacterizing the parties' relationships or rejecting the leases and capping Movants' damage claims under section 502(b)(6). The court finds this argument unpersuasive. As noted before, Movants were aware, at the very latest, in early March, 2004 that Debtors might seek to recharacterize the parties' relationships. The parties' Conditional Indemnity Agreements also expressly envision the possibility that a court, and not just one sitting in bankruptcy, might recharacterize the parties' relationships. Therefore, Movants must have known at the time of MirMA's bankruptcy filing that Debtors' request for recharacterization was a possibility and, by March of 2004, a not unlikely event.

Debtors and their creditors have been prejudiced by Movants' delay in bringing the Motions. Debtors have operated for over 18 months under the assumption that MirMA, a key element of Debtors' corporate enterprise, is properly in bankruptcy. Based on that assumption, Debtors have expended considerable time and effort, at significant cost, in formulating a plan of reorganization of which MirMA is undoubtedly a key component. Were this court now to dismiss MirMA's bankruptcy case, a meaningful portion of Debtors' plan architecture could be unraveled, and Debtors would be sent back to the drawing board which would, in turn, result in further cost to Debtors' estates. Debtors have also dedicated substantial resources in the course of these proceedings to litigation and negotiation with Movants on matters unrelated to those presently before the court.[33] Therefore, the court concludes that the three factors justifying application of the doctrine of laches are present in this case, and Movants' Motions should be denied on that basis.

IV. **Conclusion**

For the foregoing reasons, the Trustee's and Landlords' Motions must be and are hereby DENIED.

It is so ORDERED.

Signed this the 26 day of January, 2005.

DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE

33 While Movants' prior involvement in Debtors' bankruptcy cases is not necessarily relevant to the determination of whether Movants' delay in bringing the Motions is inexcusable, the court believes it supports the conclusion that laches requires denial of the Motions. Movants have appeared before the court on a number of occasions and have actively participated in matters including: (1) the proper scope of the Examiner's role in Debtors' cases; (2) whether (on two separate occasions) Debtors should be granted additional time to assume or reject leases under section 365(d)(4); and (3) Debtors' debtor-in-possession financing. The Landlords have also sought affirmative relief by asking this court to compel Debtors to provide certain operating information to Landlords and to compel Debtors to pay "alternative rent" to Landlords after MirMA discontinued its status as a reporting company (which relief was granted). This active participation, which continued for 15 months, reflected an apparent approval by Movants of MirMA as a Debtor. The court concludes that because Movants have provided no legitimate excuse for waiting so late in the game to bring the Motions, Debtors and their creditors have been prejudiced in that Debtors have expended substantial resources in their prior dealings with Movants in this case.