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

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

Memorandum Order

On January 5, 2005, the court considered Debtors' Motion to (I) Disallow Certain Proofs of Claim Filed by Kinder Morgan Power Company Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure or, in the Alternative, for Partial Summary Judgment Pursuant to Rule 56 of the Federal Rules of Civil Procedure; and (II) Subordinate Certain Claims Pursuant to Bankruptcy Code Section 510(b) (the "Motion"). Besides providing written and oral argument, Debtors submitted certain documents supported by the affidavit of Jonathan Stack, and Paul Steineway provided an affidavit on behalf of Kinder Morgan Power Company ("KMP"). In this matter the court exercises its core jurisdiction pursuant to 28 U.S.C. §§ 1334(a) and 157(b)(2)(B).

The disputes before the court arise from the parties' joint ownership of a power plant located in Pulaski County, Arkansas (the "Plant"). The Plant was built in 2000 – 2002 by KMP pursuant to one of several agreements among various of Debtors and KMP. The cost of the Plant was covered (by agreement of the Parties) by $120,000,000 contributed by the parties (51% by Debtors and 49% by KMP) and a $180,000,000 loan originally made by Mirant Americas Generating, LLC ("MAG"). MAG thereafter assigned its rights and obligations under the loan to its parent, Mirant Americas, Inc. ("MAI"). The funding was funneled to the Plant through Wrightsville Development Funding, LLC ("Development"). Development (which is one of the

Debtors) is owned 50% by Mirant Wrightsville Investments, Inc. ("Investments"), a wholly owned direct subsidiary of MAI, 1% by Mirant Wrightsville Management, Inc. ("Management"), also a MAI subsidiary, and 49% by KMP.

The Plant itself is owned by Wrightsville Power Facility, LLC ("Power") which is owned 50% by Investments, 1% by Management and 49% by KMP. Power was established initially by KMP but at all times pertinent hereto was (and presently is) governed by the Limited Liability Company Agreement of Wrightsville Power Facility, LLC (the "Facility Agreement"). The Facility Agreement designates KMP as the preferred member of Power and Investments and Management as common members. Management is designated as the manager of the Plant.

The Plant began operations in 2002, but proved unprofitable. On July 14, 2003, MAG, MAI and 73 other Debtors filed chapter 11. On October 3, 2003, Development, Investment, Management and Power also commenced chapter 11 cases in this court. The Plant is no longer in operation.

KMP filed two sets of claims to which the Motion is addressed. First, KMP filed five claims on behalf of Power and four claims on behalf of Development as a 49% owner of those Debtors. KMP admitted, however, that those claims properly belong to those Debtors and therefore agreed the claims should be dismissed.[1]

KMP also filed six claims on its own behalf. One of these (Claim 7135 against Mirant America Energy Marketing, LLP; hereafter "MAEM") is not addressed in the Motion. Another, filed against Development, involved a cost overrun of $16,000,000 in building the Plant. At the January 5 hearing, KMP admitted the $16,000,000 claim was previously satisfied and should,

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[1] Debtors and KMP differed respecting the proper manner and permanency of the dismissal. By an oral ruling, the court disallowed the nine claims, but directed that KMP be given notice of any bar date for intercompany claims and ruled that the disallowance was without prejudice to any objection KMP might make to confirmation of a plan.

thus, be disallowed. KMP's remaining claims subject to the Motion are against Management ("Claim 7126"), Investments ("Claim 7132"), Power ("Claim 7142") and MAI ("Claim 7137"). At the January 5 hearing, KMP agreed that elements of Claim 7126, Claim 7132 and Claim 7142 were properly derivative and thus subject to disallowance. These elements related to allocation of costs of a pipeline agreement.

This leaves for the court's consideration (1) allegations of breach by each of Management, Investments, MAI and Power of fiduciary duties owed KMP; (2) allegations of aiding and abetting such breach of fiduciary duty on the part of MAI; (3) allegations of inequitable conduct by MAI and Management; (4) allegations of wrongful failure to enter into a tolling agreement for the Plant on the part of Management, Investments and Power; (5) allegations that Management, Investments and Power are guilty of mismanagement; and (6) allegations that Management and Investments potentially breached the limited liability company agreement establishing Development.

Debtors urge in the Motion a number of reasons for dismissal of or judgment on KMP's remaining claims, including absence of sufficient evidentiary support, entitlement to judgment based on the documents governing the relationship of the parties and the derivative nature of the claims. The court need not reach Debtors' other contentions.

In determining whether to disallow KMP's claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court must construe KMP's claims liberally in favor of KMP and must take all facts pleaded as true. *Campbell v. Wells Fargo Bank*, 781 F.2d 440, 442 (5th Cir. 1986). The court may not disallow KMP's claims under rule 12(b)(6) "unless it appears beyond doubt that the [claimant] can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). At the same time, a claimant must

plead specific facts, not mere conclusional allegations, to avoid dismissal for failure to state a claim. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000).

Alternatively, summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when viewed in the light most favorable to the nonmoving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (internal quotations omitted). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* at 248. In making its determination, the court must draw all justifiable inferences in favor of the nonmoving party. *Id.* at 255.

Once the moving party has initially shown "that there is an absence of evidence to support the nonmoving party's case," *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), the nonmovant must come forward, after adequate time for discovery[2], with significant probative evidence showing a triable issue of fact. FED. R. CIV. P. 56(e); *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 118 (5th Cir. 1990). Conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation are not adequate substitutes for specific facts showing that there is a genuine issue for trial. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428 (5th Cir. 1996) (en banc); *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993). To defeat a properly supported motion for summary judgment, the nonmovant must present more than a mere scintilla of evidence. *See Anderson*, 477 U.S. at 251.

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[2] KMP's claims have been on file for more than a year. On October 22, 2004, the court entered an order establishing a schedule for handling objections to certain claims, including those of KMP, that fixed December 31, 2004, as a cutoff for discovery. The court concludes, therefore, that KMP by January 5, 2005, should have been able to offer some factual support for its claims.

Rather, the nonmovant must present sufficient evidence upon which a jury could reasonably find in the nonmovant's favor. *Id.*

KMP specifies conduct of Debtors by which it claims to have been injured only in three areas. Two of these, assessment by MAEM of the entire cost of a pipeline agreement against Power and a failure to allocate properly the same cost, have already been acknowledged by KMP to cause harm (if any) to Power, not KMP. They are thus derivative and may not be pursued by KMP.

KMP relies heavily on the failure of Management and Power to enter into a tolling agreement for the Plant. Debtors' duty respecting entry into such a tolling agreement is set forth in section 7.6 of the Facility Agreement, which states:

> **Section 7.6 Tolling Agreement**. The Company will enter into a tolling agreement ("Tolling Agreement") for the Project acceptable to the Common Member, provided, however, that in the event that the Preferred Member objects in writing to a tolling agreement proposal acceptable to the Common Member, then the Members may seek proposals for tolling agreements from other creditworthy parties. Such other proposals shall be for comparable terms and conditions. If the total compensation to the Company from any such other proposal exceeds the proposal acceptable to the Common Member by 5% or more, then such other proposal will be accepted. If not, the proposal acceptable to the Common Member will be accepted. In the event the Company enters into a Tolling Agreement with an Affiliate of the Common Member, the Members intend that the terms of the Tolling Agreement will otherwise be not less beneficially to the Company than could be obtained in an arms-length transaction with a non-Affiliate third party. The Preferred Member herby acknowledges its consent and shall not object to an initial tolling agreement between the Company and an Affiliate of the Common Member for a term of not less than three years, with a capacity charge of not less than $65.52/kWyr and an energy charge of not less than $3.00/MWh and other terms and conditions that could be obtained in an arms-length transaction with a non-Affiliate third party. At any time that no tolling agreement is in effect, the Company shall use commercially reasonable efforts to sell its electric output (and ancillary services, if any) into the spot market.

KMP has offered no evidence that any Debtor breached this provision. During argument, KMP indicated it had sent a potential tolling agreement partner to Debtors, but Debtors failed to

respond. Other than that "evidence," nothing before the court suggests a suitable tolling agreement was even possible. Section 7.6 merely provides that Power "will enter into a tolling agreement . . . ." The provision is not mandatory, sets no time limits by which Power must enter into a tolling agreement and provides for no "default" tolling arrangement. Section 7.6 provides only that the tolling agreement must be acceptable to Management and Investments (the common members). The provision of section 7.6 that operates in default of a tolling agreement provides that, in the absence of a tolling agreement, Power "shall use commercially reasonable efforts to sell its electric output . . . into the spot market." KMP has not even asserted that this was not done.

The Plant was in operation for little more than a year. Given the provisions of the Facility Agreement, including vesting management of Power in Management (Facility Agreement, Section 4.1), it appears to the court that KMP has failed to state a claim on the basis of Debtors' failure to implement a tolling agreement. Even if the bare allegation that no tolling agreement was entered into were sufficient, the documents before the court demonstrate that, under the undisputed facts, Debtors complied with section 7.6. KMP has provided no evidence that Debtors did not perform within the parameters of section 7.6; Debtors are thus entitled to summary judgment respecting KMP's tolling agreement claims.

Moreover, the court concurs with Debtors that a failure to enter into a tolling agreement would be actionable, if at all, for the benefit of Power. As such, any allowable claim arising under section 7.6 would belong to Power. It thus would be a claim derivative of Power and may be asserted only by Power. *See Skolnick v. Atl. Gulf Cmtys. Corp.* (*In re Gen. Dev. Corp.*), 179 B.R. 335, 338 (S.D. Fla. 1995) ("Only the trustee . . . has standing to prosecute derivative claims."); *ANR Ltd. Inc. v. Chattin*, 89 B.R. 898, 901-02 (D. Utah 1988) ("Because claims for

damages from corporate mismanagement are derivative in nature, such claims are enforceable solely by the trustee and may not be asserted by any one creditor."); *In re Greenwood Supply Co.*, 295 B.R. 787, 795 (Bankr. D.S.C. 2002); *Hall v. Sunshine Mining Co. (In re Sunshine Precious Metals, Inc.)*, 157 B.R. 159, 164 (Bankr. D. Idaho 1993). For the foregoing reasons, the Motion is granted as to the tolling agreement portions of Claims 7126, 7132 and 7142.

Further, the conduct of MAI, Investments, Management and Power has not been such as could constitute a breach of any fiduciary duty that any of Management, MAI, Investments and Power owed to KMP. KMP has simply failed to offer any explanation of how it was injured (other than as an owner of Power and Development) by conduct of any of Debtors. Indeed, as Debtors assert, the Facility Agreement expressly states that Management owes "no fiduciary duty to [Power] or the Preferred Member [KMP]."[3]

KMP argues that Delaware law (Power, Management and Investments being Delaware limited liability companies) imposes on Power and Management a duty of good faith and fair dealing.[4] KMP argues that the court should consider its claims of breach of fiduciary duty to include claims for breach of Delaware's implied covenant of good faith and fair dealing. Delaware's implied covenant of good faith and fair dealing requires a party to a contract to act in accordance with the intent and goals of the contract parties. *Gloucester Holding Corp. v. U.S. Tape and Sticky Prods., LLC*, 832 A.2d 116, 128 (Del. Ch. 2003); *Kelly v. McKesson HBOC, Inc.*, No. 99C-09-265 WCC, 2002 Del. Super. LEXIS 39, *31 (Del. Super. Ct. Jan. 17, 2002). In order to demonstrate a breach of the implied covenant, KMP must produce evidence showing "arbitrary or unreasonable conduct which has the effect of preventing [KMP] from receiving the

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[3] The LLC agreement for Development contains an identical provision.

[4] *See* 6 Del. C. § 18-1101(c) (2004); True N. Composites, LLC v. Trinity Indus., Inc., 191 F. Supp. 2d 484, 517 (D. Del. 2002).

fruits of the contract." *Ace & Co., Inc. v. Balfour Beatty PLC*, 148 F. Supp. 2d 418, 426 (D. Del. 2001) (quoting *Cantor Fitzgerald, L.P. v. Cantor*, No. 16297, 2000 Del. Ch. LEXIS 43, *50 n.51 (Del. Ch. March 13, 2000)). KMP has presented no evidence indicating that Debtors did anything other than conduct their business within the four corners of the Facility Agreement.

As no claim filed by KMP for breach of fiduciary duty is allowable, KMP cannot recover for aiding and abetting a non-existent breach of fiduciary duty. Thus the Motion must be granted as to Claims 7126, 7132, 7137 and 7142 to the extent such claims assert breach of fiduciary duty or aiding and abetting a breach of fiduciary duty. Because the evidence before the court cannot possibly support a conclusion that Debtors acted arbitrarily or unreasonably, Debtors are also entitled to summary judgment on KMP's claims for breach of the implied covenant of good faith and fair dealing.

As to the remaining bases of KMP's claims (other than Claim 7135, which is not addressed in the Motion), the Motion must be granted. Remaining issues raised in KMP's claims include mismanagement and inequitable conduct. KMP has failed to offer any factual basis for either, and Debtors are thus entitled to summary judgment on those issues.

KMP argues that it has met the minimum requirements for its claims to be *prima facie* valid. *See* FED. R. BANKR. P. 3001(f). The court disagrees. A bankruptcy claim must contain sufficient information to put the representative of the estate (here Debtors) on notice as to what occurred that would create the estate's liability. *In re O'Malley*, 252 B.R. 451, 456 (Bankr. N.D. Ill. 1999) (a proof of claim must provide adequate notice of the existence, nature and amount of the claim); *In re Rimsat, Ltd.*, 223 B.R. 345, 347-48 (Bankr. N.D. Ind. 1998); *In re Grocerland Coop., Inc.*, 32 B.R. 427, 437 (Bankr. N.D. Ill. 1983) ("[I]n order for this court to approve a proof of claim, facts of sufficient particularity must be supplied to put the trustee on notice."). In

the case at bar, KMP has offered only broad, general accusations of mismanagement and inequitable conduct. Its claim having been challenged as inadequate, KMP can point to no concrete support for its allegations of misconduct (beyond the absence of a tolling agreement and allegations respecting pipeline charges). KMP's claims are thus facially inadequate.

Even if KMP is correct about the sufficiency of a claim that asserts wrongdoing without citing any evidence probative of wrongdoing, Debtors are entitled to summary judgment with respect to KMP's claims for mismanagement and inequitable conduct. Debtors, in the Motion and accompanying papers, including the Jonathan Stack affidavit, have provided uncontroverted evidence sufficient to overcome KMP's claims.

For the forgoing reasons Claim 7126, Claim 7132, Claim 7137 and Claim 7142 are disallowed. The other claims dealt with in the Motion have been withdrawn or abandoned by KMP.[5] Therefore, the Motion is GRANTED with respect to KMP's claims (other than Claim 7135) on the bases herein described.

It is so ORDERED.

Signed this the 12. day of January 2005.

DENNIS MICHAEL LYNN,
UNITED STATES BANKRUPTCY JUDGE

[5] The court notes that KMP's claims are charitably described as facially weak. It appears they were filed after inadequate inquiry into the underlying facts. The claims have now consumed many hours of court time and have cost the estates of Debtors considerable money. The court trusts KMP will be more cautious to avoid filing frivolous claims in the future.