The following constitutes the order of the Court.

Signed May 24, 2005 **United States Bankruptcy Judge**

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-DML-11
	§	(Jointly Administered)
DEBTORS.	§	

MEMORANDUM OPINION

Before the court are the Motion of the Official Committee of Unsecured Creditors of Mirant Americas Generation, LLC (the "MAG Committee") Pursuant to Bankruptcy Rule 3013 Regarding Proposed Classification and Treatment of MAG Long-Term Noteholders' Claims Under the Debtors' First Amended Plan of Reorganization and the Motion of the Ad Hoc Committee of Bondholders of Mirant Americas Generation, LLC (the "Ad Hoc Committee") for Order Determining that Certain Creditors of Mirant Americas Generation, LLC are Impaired Under the Debtors' First Amended Joint Chapter 11 Plan of Reorganization and Thus Entitled to Vote on the Plan (collectively, the "Motions"). Wells Fargo Bank, National Association, as Successor Indenture Trustee

("Indenture Trustee," and, together with the MAG Committee and the Ad Hoc Committee, "Movants") filed a Memorandum of Wells Fargo Bank, National Association, as Indenture Trustee, Regarding the Impairment of the MAGI Long Term Notes Under the Debtors' First Amended Joint Chapter 11 Plan of Reorganization in support of the relief sought in the Motions. Debtors and the Official Committee of Unsecured Creditors of Mirant Corporation (the "Corp. Committee") objected to the Motions.

The court conducted a hearing on the Motions on April 28, 2005 during which the parties offered oral argument[1]. At the conclusion of the hearing, the court took this matter under advisement and instructed the parties to submit post-hearing briefs. Each of the parties has submitted a post-hearing brief, and the court has considered the same. This memorandum opinion comprises the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052 and 9014.

I. Jurisdiction

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

II. Background

Pursuant to an Indenture (the "Original Indenture") and Second Supplemental Indenture, Third Supplemental Indenture and Fifth Supplemental Indenture (each the

[1] The court's determination of these issues will be effective for purposes of any confirmation hearing on the Plan (as hereafter defined). Because the parties identified certain critical issues posed by the Plan the court, with the consent of the parties, determined to address some matters relating to confirmability of the Plan prior to confirmation and in connection with consideration of Debtors' disclosure statement. *See* FED. R. BANKR. P. 7042, incorporating FED. R. CIV. P. 42(b). The Motions present some of these issues.

"Supplemental Indenture" and, together with the Original Indenture, the "Indentures")[2], all dated as of May 1, 2001, Mirant Americas Generation, LLC ("MAG")[3] issued three series of long-dated unsecured notes (the "Senior Notes").[4] The holders of the Senior Notes comprise one of the largest classes of creditors in Debtors' reorganization cases, holding approximately $1.7 billion in claims against the MAG estate.

MAG, together with other members of the Mirant family, is in the business of, *inter alia*, generating electric power. Through various subsidiaries, MAG owns a number of power generation plants in North America. According to Mirant Americas Generating LLC's 10-K filed on April 30, 2003, MAG's assets had a value of approximately $7 billion at year-end 2002.[5]

On March 25, 2005, Debtors filed their First Amended Joint Chapter 11 Plan of Reorganization for Mirant Corporation and its Affiliated Debtors (the "Plan"). Pursuant to the Plan, Debtors propose to create a new holding company subsidiary of MAG ("New MAG Holdco"). New MAG Holdco will own MAG's operating subsidiaries, including Mirant Mid-Atlantic, LLC ("Mirma"), which itself owns a significant share of MAG's operating assets.[6] Mirant will contribute to MAG, under the Plan, certain of its

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2 The Supplemental Indentures applicable to the three series of Senior Notes (as defined below) are identical in all respects pertinent to the issues before the court.

3 Beginning the evening of July 14, 2003 and continuing into the following morning, Mirant Corporation ("Mirant") and 74 of its affiliates, including MAG, 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). Since then eight additional affiliates have filed chapter 11 petitions.

4 The Senior Notes include (i) the 8.3% Senior Notes due 2011, (ii) the 8.5% Senior Notes due 2021, and (iii) the 9.125% Senior Notes due 2031.

5 *See* Mirant Americas Generating LLC 10-K filed on April 30, 2003, available at www.mirant.com.

6 According to Mirma's 10-K filed on April 30, 2003, Mirma's assets had a value of over $3 billion at year-end 2002. *See* Mirma 10-K filed on April 30, 2003, available at www.mirant.com.

subsidiaries engaged in power generation in North America.[7] MAG and all of its subsidiaries will be substantively consolidated for purposes of voting on, confirmation of, and determination of claims against the consolidated MAG estate under the Plan.[8] The Plan further proposes that New MAG Holdco will be the obligor on a new senior secured credit facility of at least $750 million which will be secured by first priority liens on substantially all assets of New MAG Holdco. The Plan also provides for a release of Debtors and certain other third parties from some claims by creditors, including the holders of the Senior Notes.

Debtors and the Corp. Committee assert that the Plan reinstates the Senior Notes in conformity with the requirements of section 1124(2) of the United States Bankruptcy Code (the "Code")[9], thus leaving the holders of the Senior Notes unimpaired and, pursuant to Code section 1126(f), not entitled to vote on the Plan. Movants, on the other hand, argue that the proposed treatment of the Senior Notes in the Plan leaves the holders of the Senior Notes impaired in a number of ways, and so entitled to vote on the Plan.[10]

Mirma's assets were acquired through a series of transactions from Potomac Electric Power Company. *See* Mirant Corp. v. Potomac Elec. Power Co. (In re Mirant Corp.), 378 F.3d 511 (5th Cir. 2004); Memorandum Opinion and Order entered January 26, 2005 in case number 03-46590-DML-11 denying motions to dismiss Mirma's chapter 11 case).

7 Attached as Appendix "A" to this opinion are diagrams of MAG and its subsidiaries as presently structured and as they will be structured if the Plan is confirmed.

8 The court, in this memorandum opinion, assumes (1) the Plan is not further amended respecting issues before the court and (2) without so deciding, except with respect to issues here addressed, the Plan is otherwise confirmable.

9 11 U.S.C. §§ 101-1330. The Code was amended in 2005 by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "2005 Act"). The amendments have various effective dates. None of the amendments effective on passage is relevant to this matter.

10 Movants allege that the holders of the Senior Notes are impaired because the Plan fails to cure existing pre-petition defaults and creates new defaults under the Indentures and alters the legal, equitable and contractual rights of the holders of the Senior Notes in the following manner:

(1) The substantive consolidation proposed by the Plan substitutes a new obligor on the Senior Notes which, in violation of the Original Indenture, does not assume all obligations under the Original Indenture;

III. Discussion

The principal concern of Movants is that the Plan effects the subordination of the Senior Notes to other (presently parity or junior) indebtedness of MAG, which will be assumed by New MAG Holdco, as well as the proposed credit facility. This "structural subordination" of the Senior Notes is not prohibited by any provision of the Code nor is it specifically barred by the Indentures. Movants argue, however, that the structural subordination of the Senior Notes is accomplished through steps that violate provisions of the Indentures limiting mergers, sales and lien grants by MAG. Movants also assert other defaults under the Indentures which, they argue, must be cured pursuant to Code § 1124(2)(A) in order to leave them unimpaired.

Whether or not the Plan impairs the Senior Notes turns on Code § 1124(2) and three documents: the Plan, the Original Indenture, and the Supplemental Indenture. In considering Code § 1124(2), the Plan and the Indentures, the court must look first to the

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(2) The Plan causes a transfer of assets of MAG and its subsidiaries in violation of the Indentures;
(3) The New MAG Holdco credit facility proposed by the Plan violates provisions of the Indentures restricting the amount of borrowing permissible based on a senior debt service coverage ratio;
(4) The Plan structurally subordinates the holders of the Senior Notes to the liens created by the new credit facility in violation of the Indentures, which prohibits the granting of liens unless such new liens are equally and ratably secured with the Senior Notes;
(5) The Plan fails to provide for payment of interest, as well as interest on overdue interest, on the Senior Notes in accordance with the terms of the Original Indenture;
(6) The Plan fails to provide for payment of additional interest as required by certain Registration Rights Agreements pertaining to the Senior Notes on account of MAG's failure to maintain its status as a reporting company under the Securities Exchange Act of 1934;
(7) The Plan fails to cure MAG's failure to comply with provisions of the Original Indenture requiring it to provide certain financial information to the Indenture Trustee;
(8) The Plan fails to cure certain cross-defaults as required by the Original Indenture;
(9) The Plan fails to provide for payment of certain compensation and expenses of the Indenture Trustee as required by the Original Indenture;
(10) The Plan provides for an impermissible, non-consensual release of claims by the holders of the Senior Notes against Debtors and certain third parties; and
(11) The Plan releases intercompany claims of MAG against affiliated Debtors to the detriment of the holders of the Senior Notes.

language of each. Section 1124(2) must be applied as it reads. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (where language of a statute is plain, sole function of court is to enforce the statute in accordance with its terms); *Carrieri v. Jobs.com Inc.*, 393 F.3d 508, 518 (5th Cir. 2004) (same). Neither Movants nor Debtor and the Corp. Committee may expect of section 1124(2) more than its words plainly offer.[11]

The same is true of the Plan and the Indentures.[12] The Plan must be construed as a contract. *See U.S. Brass Corp. v. Travelers Ins. Group, Inc.* (*In re U.S. Brass Corp.*), 301 F.3d 296, 307 (5th Cir. 2002); *Official Creditors Comm. of Stratford of Tex., Inc. v. Stratford of Tex., Inc.* (*In re Stratford of Tex., Inc.*), 635 F.2d 365, 368 (5th Cir. 1981). The Indentures should be interpreted in accordance with principles of contract construction. *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 946 (5th Cir. 1981) (applying principles of contract construction under New York law to construe indenture governed by New York law); *U.S. Trust Co. of N.Y. v. Alpert*, 10 F. Supp. 2d 290, 299 (S.D.N.Y. 1997) (same). Applicable law – here the law of New York (Original Indenture § 112; Supplemental Indenture § 2.04) – will apply. Under New York law, the intent of the parties governs contract construction (*see, e.g., Johnson Controls, Inc. v. A.P.T. Critical Sys., Inc.*, 323 F. Supp. 2d 525, 539 (S.D.N.Y. 2004) ("It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the

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[11] In its post-hearing brief, the MAG Committee cites In re Barrington Oaks Gen. P'ship, 15 B.R. 952 (Bankr. D. Utah 1981) for the proposition that the court must not simply read Code section 1124 formalistically, but must also read section 1124 functionally and determine whether the Plan's proposed treatment of the Senior Notes is consistent with the fundamental fairness to creditors envisioned by the Code. However, *Barrington Oaks* was decided prior to *Lamie*, has not been followed and is not controlling precedent.

[12] In its post-hearing brief, the MAG Committee cites In re Associated Gas & Elec. Co., 61 F. Supp. 11 (S.D.N.Y. 1944), *aff'd* 149 F.2d 996 (2d Cir. 1945) for the proposition that the court must also look beyond the words of the Plan and determine whether the substance of the transactions proposed therein violates the Indentures. As with *Barrington Oaks*, *Associated Gas* has not been followed and is not controlling precedent.

unequivocal language employed.") (*quoting Breed v. Ins. Co. of N. Amer.*, 46 N.Y.2d 351, 355 (1978))), and that intent is best determined from the words of the contract. *Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, 557 N.E.2d 87, 93 (N.Y. 1990) ("[T]he words used in the instrument itself are the best evidence of the intention of the drafter of the document."); *Milonas v. Pub. Employment Relations Bd.*, 648 N.Y.S.2d 779, 784 (N.Y. App. Div. 1996) ("[T]he words of the agreement are the best indication of the intention of the parties.").

Debtors assert that the Plan leaves the Senior Notes unimpaired within the meaning of section 1124(2).[13] Facially, this is so. The treatment provided for the Senior Notes in the Plan tracks the language of section 1124(2).[14]

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[13] Section 1124 of the Code defines impairment negatively, specifying two ways in which a claim is unimpaired. The first, inapplicable here, is when the obligation of the debtor is not in default. The second permits a debtor to leave a claim (or class of claims) unimpaired through cure and reinstatement. Section 1124(2) states:

> Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan— . . .
>
> (2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment on such claim or interest after the occurrence of a default—
>
> (A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title;
>
> (B) reinstates the maturity of such claim or interest as such maturity existed before such default;
>
> (C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law; and
>
> (D) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

11 U.S.C. § 1124(2).

[14] Section 5.2(g) of the Plan states:

> Each holder of an Allowed MAG Long-term Note [a Senior Note] Claim against MAG shall be unimpaired under the Plan, and, pursuant to section 1124 of the Bankruptcy Code, (i) all of the legal, equitable and contractual rights to which such Claim entitles such holder against MAG in respect of such Claim shall be fully reinstated

Movants, however, assert the numerous purported defaults created by, or not cured under, the Plan and listed above. By reason of these defaults, they claim they are, in fact, impaired. Movants note that the law, unquestionably, is that no impairment is too small to escape the necessity of a vote by the class so affected. *See Solow v. PPI Enters. (U.S.), Inc.* (*In re PPI Enters. (U.S.), Inc.*), 324 F.3d 197, 202 (3d Cir. 2003) ("If the debtor's Chapter 11 reorganization plan does not leave the creditor's rights entirely 'unaltered,' the creditor's claim will be labeled as impaired . . . ."); *L & J Anaheim Assocs. v. Kawasaki Leasing Int'l, Inc.* (*In re L & J Anaheim Assocs.*), 995 F.2d 940, 943 (9th Cir. 1993) ("[T]he plain language of section 1124 says that a creditor's claim is 'impaired' unless its rights are left 'unaltered' by the Plan. There is no suggestion here that only alterations of a particular kind or degree can constitute impairment."); *Ronit Inc. v. Block Shim Dev. Co.-Irving* (*In re Block Shim Dev. Co.-Irving*), 118 B.R. 450, 454 (Bankr. N.D. Tex. 1990) ("Impairment under § 1124 has generally come to mean in its most basic form any alteration of the holder's legal, equitable, or contractual rights. . . ."); *In re Rhead*, 179 B.R. 169, 177 (Bankr. D. Ariz. 1994) ("[A]ny change of a creditor's rights, whether for the better or for the worse, constitutes impairment . . . .").

The court agrees that the Plan may not create or fail to cure defaults if it is to provide unimpaired treatment for the Senior Notes.[15] However, the court also must

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> and retained; (ii) all defaults, other than a default of a kind specified in section 365(b)(2) of the Bankruptcy Code, shall be cured; (iii) the maturity of such MAG Long-term Note Claim shall be reinstated; and (iv) all amounts owed in respect of such Allowed MAG Long-term Note Claim (including any amounts to which such holder is entitled pursuant to sections 1124(2)(C) and (D) of the Bankruptcy Code) shall be paid in full on the later of the Effective Date and the date such amount otherwise becomes due and payable under the MAG Indenture and the MAG Long-term Notes, as reinstated.

[15] As discussed below, however, in the case of a continuing default, if the creditor's rights respecting such a default are preserved such that, post-confirmation, the creditor may act on the continuing

distinguish between an effect of the *Plan* and an effect brought about by operation of the Code. If the "impairment" asserted is a consequence of the proper operation of the statute, it is not an impairment entitling the affected class to a vote. *See In re PPI Enters. (U.S.), Inc.*, 324 F.3d at 205 ("Solow is only entitled to his 'legal, equitable, and contractual rights,' as they now exist. Because the Bankruptcy Code, not the Plan, is the only source of limitation on those rights here, Solow's claim is not impaired . . . ."); *In re Monclova Care Ctr., Inc.*, 254 B.R. 167, 177 (Bankr. N.D. Ohio 2000) ("[I]mpairment as used by § 1124 simply refers to that part of a debtor's Plan which addresses the treatment of a debtor's claim . . . a distinction must be drawn between the concept of 'plan impairment' and 'statutory impairment,' with only the former constituting an impairment within the meaning of § 1124."); *In re Am. Solar King Corp.*, 90 B.R. 808, 819 (Bankr. W.D. Tex. 1988) ("Impairment results from what the *plan* does, not what the statute does.") (emphasis in original).

At a minimum, in order for the Plan to impair it must create or countenance a persisting default under either the Original Indenture or the Supplemental Indenture. Changes in the rights of the holders of the Senior Notes which do not so violate the Indentures could be undertaken outside of chapter 11. A change in rights which is not a default requires no cure and is not an impairment.

The Supplemental Indenture contains no discussion of what constitutes a default. Defaults are dealt with, however, in section 501 of the Original Indenture. Two events of default specified in Article 5 of the Original Indenture concern MAG's failure to pay

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default, failure to cure will still leave the creditor unimpaired since the creditor may exercise any legal, equitable or contractual rights it may have.

principal or interest on the Senior Notes (Original Indenture § 501(1) and (2))[16]. One event relates to MAG's default on other of its obligations (Original Indenture § 501(3)). Another event of default is rendering of a judgment of $50,000,000 or more against MAG (Original Indenture § 501(5)). Two events of default, described in sections 501(6) and (7), are of the kind excused by Code §§ 1124(2)(A) and 365(b)(2)(A) – (C)[17] and therefore need not be addressed.

The remaining[18] event of default states:

> "Event of Default," whenever used herein . . ., means . . . : . . .

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[16] A failure to pay other sums due under the Indentures is a breach of section 607 of the Original Indenture. The court would consider a breach of section 607 material.

[17] Section 365(b)(2)(D) aids Debtors as well. This provision excuses cure of a "default that is a breach of a provision relating to – … (D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease." The court has previously ruled in these cases that section 365(b)(2)(D) excuses performance by the debtor of "nonmonetary obligations" which do not involve a penalty. *See* In re Mirant Corp., No. 03-46590, 2004 Bankr. LEXIS 1377 (Bankr. N.D. Tex. Sept. 15, 2004); *see also* Newark Ins. Co. v. Bankvest Capital Corp., 360 F.3d 291 (1st Cir. 2004); *cf*. Worthington v. GMC (In re Claremont Acquisition Corp.), 113 F.3d 1029 (9th Cir. 1997). Movants point to a change made by the 2005 Act to section 365(b)(2)(D) that, according to Movants, referring to accompanying legislative history, clarifies that section 365(b)(2)(D) applies only to penalty provisions. The court, however, is not prepared to accept this reading of the section. First, adopting Movants' reading requires reading the section's relevant language as "breach of a provision relating to . . . any penalty . . . provision relating to a default arising from any failure to perform nonmonetary obligations . . . ." This reading is awkward and forced. The construction previously adopted by this court (and the *Bankvest* court) is much more sensible than Movants' ("breach of a provision relating to – (D) the satisfaction of any penalty or [breach of a] provision relating to a default [of any] nonmonetary obligation[ ]"). Further, even if the current Congress – one with an outlook concerning bankruptcy laws dramatically different from that which added section 365(b)(2)(D) in 1994 – has accurately stated the original intent of section 365(b)(2)(D), the court must follow the meaning of the words of the statute. *See* Union Bank v. Wolas, 502 U.S. 151, 157-58 (1991) ("We need not dispute the accuracy of respondent's description of the legislative history . . . . 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 its plain meaning."); Yates Dev., Inc. v. Old Kings Interchange, Inc. (In re Yates Dev., Inc.), 256 F.3d 1285, 1289 (11th Cir. 2001) ("Where the language of a statute is plain, we will not look at legislative history, even if that legislative history evinces a contrary intent. This rule applies in the context of the Bankruptcy Code.") (citations omitted); In re Carnahan, 77 B.R. 207, 210 (Bankr. N.D. Ind. 1987) ("[W]e will not stray from the plain words of the statute towards arguably contrary language in the legislative history.").

[18] Section 501(8) provides for further specification events of default in each Supplemental Indenture. As noted above, there is no such specification in the Supplemental Indenture.

> (4) the Company's *material* default in the performance or breach in any provision of the Indenture . . . .

(Original Indenture § 501(4); emphasis supplied). As "Indenture" is defined to include the Supplemental Indenture (Original Indenture § 101), a "material default in . . . performance or breach" of the Supplemental Indenture would constitute a default. It is in the context of these provisions of the Indentures that the court must decide, within the terms of section 1124(2), whether the Plan creates or leaves uncured (but unenforceable) a default.

Despite assurances on the record by Debtors' counsel and statements by the court, Movants continue to argue that MAG does not intend cure of all monetary defaults under the Senior Notes and so will remain in default under Original Indenture §§ 501(1) and 501(2). The court sees nothing in the Plan that would violate either provision. Rather, the Plan provides for cure of monetary defaults – something the court would insist upon. Let there be no question: Code § 1124(2)(A) requires payment of *all* amounts the court determines are due by the terms of the Indentures in order to effect cure. The court trusts its assurances on this occasion will eliminate any doubts Movants may have.

Movants allege that the proposed substantive consolidation of MAG and its subsidiaries under the Plan results in the substitution of a new obligor on the Senior Notes. This substitution, according to Movants, constitutes an alteration of the rights of the holders of the Senior Notes and violates sections 801 and 802 of the Original Indenture (and so is a default under section 501(4)) which require assumption of all obligations under the Original Indenture by any entity to which MAG's assets are transferred.

The substantive consolidation envisioned in the Plan, if approved by the court, is not the equivalent of a merger, however. It is only a temporary consolidation of estates of MAG and its subsidiaries for the limited purposes of voting on and confirmation of the Plan and determination of claims against the consolidated MAG estate under the Plan. MAG and its various subsidiaries are not to lose their separate corporate identities through the proposed consolidation.[19] Even if the court viewed the consolidation as a merger resulting in a default under the Indentures, such default would be cured upon the effective date of the Plan because under the Plan the consolidation will not affect the separate identities of the various Debtors upon their emergence from chapter 11.

The court also is not persuaded by Movants' argument that the restructuring of the MAG family of companies – the structural subordination of the Senior Notes – constitutes a default under section 801 of the Original Indenture. Section 801 generally prohibits MAG from consolidating or merging with, or selling, conveying, transferring or leasing its "properties and assets substantially as an entirety" to any entity. Movants focus primarily on the treatment of Mirma in alleging a default through transfer of assets in violation of section 801. Mirma is currently a direct subsidiary of MAG and, according to Movants, comprises the vast majority of MAG's operating assets. The Plan proposes that Mirma will become a direct subsidiary of New MAG Holdco. Movants interpret this as a transfer by MAG of its properties and assets substantially as an entirety to New MAG Holdco.

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[19] The court does not here express any opinion as to the propriety of the substantive consolidation proposed by the Plan. The concerns raised by Movants are but a few of many. Parties will have the opportunity to pursue, and the court will fully consider, any objections to the proposed consolidation at the confirmation hearing on the Plan.

Debtors counter that a transfer does not in fact occur because the insertion of New MAG Holdco between MAG and Mirma does not alter Mirma's status as a subsidiary of MAG post-confirmation. The court questions whether the treatment of Mirma (transfer of assets or not) could violate section 801 of the Original Indenture because New MAG Holdco, Mirma's new parent, will be wholly owned directly by MAG. Thus, the Plan does not eliminate MAG's interest in any of its current subsidiaries and their operating assets. Rather, the effect of the Plan is to insert a new holding company subsidiary between MAG and the bricks and mortar of its operating assets. Nothing about this structure will, in and of itself, prevent value from flowing to MAG from its operating assets. Moreover, nothing in the change of structure will specifically violate any provision of the Indentures (other than, perhaps, Supplemental Indenture § 110). The drafters of the Indentures could have specified prohibitions on transactions of the sort contemplated by the Plan. They chose, as the MAG Committee argues (post-hearing brief of MAG Committee, page 3), instead to rely on "relatively weak" investment-grade covenants. Such relative weakness, like the general failure of the drafters to address the type of restructuring contemplated by the Plan, is no reason for this court to force the square peg of the Plan's restructuring into the round hole of Original Indenture § 801.

In any event, the court does not have a sufficient factual basis at this time to determine whether or not a transfer of Mirma (assuming one occurs by operation of the Plan) is tantamount to a transfer of MAG's assets "substantially as an entirety," as that term is used in the Original Indenture.[20] As noted above, MAG's assets had a value of

[20] With regard to other MAG subsidiaries merging into New MAG Holdco, it is those other entities, not MAG, that engage in the activities which section 801 of the Original Indenture prohibits MAG from undertaking. The court concludes that a subsidiary of MAG merging into New MAG

approximately $7 billion at year end 2002, while Mirma's assets were valued at $3 billion. Thus, even if Mirma is "transferred" out of MAG, MAG retains substantial assets which exceed the total amount of the Senior Notes.

The court does believe a question exists as to whether the relocation of MAG's assets in New MAG Holdco runs afoul of section 110 of the Supplemental Indenture.[21] Section 110 prohibits certain dispositions of assets by MAG. If the corporate restructuring of the MAG family contemplated by the Plan qualifies as an "Asset Sale," as that term is defined in section 102 of the Supplemental Indenture[22], then the Plan creates a potential default in this regard if the sale otherwise falls within the limitation set by section 110. It is clear the transactions contemplated by the Plan include a "disposition of any assets." Thus, the Plan provides, within the plain meaning of the Supplemental Indenture, for an "Asset Sale" by MAG. The question remains whether the Asset Sale, as Debtors maintain, complies with section 110. The court will expect

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Holdco cannot constitute a default on the part of MAG under section 801 of the Original Indenture.

[21] The court does not read Supplemental Indenture § 110 as being subject to Original Indenture § 801 as do Movants. Rather, the court reads section 110 as permitting a sale that complies with sections 801 (and 802). Any sale that does not – even if it could alternatively have been addressed under the Original Indenture – must comply with section 110.

[22] Section 102 of the Supplemental Indenture states:

> "Asset Sale" means any sale, lease, sale-leaseback, transfer, conveyance or other disposition of any assets, including by way of the issue by the Company or any of the Company's Subsidiaries of equity interests in such Subsidiaries, except (i) in the ordinary course of business to the extent that such property is (A) worn out or is no longer useful or necessary in connection with the operation of our business inventory or (B) being transferred to a wholly-owned Subsidiary of the Company, and except (ii) for any new generating and any expansions or repowerings of existing generating assets, (A) in each case the construction of which is completed after the date of the issuance of the . . . Notes and all assets and property that are related, ancillary or incidental to such new, expanded or repowered generating assets, and (B) such assets are disposed of within 24 months following successful completion of construction of the new generating asset, expansion or repowering to which such assets relate.

Debtors to demonstrate at or prior to the confirmation hearing that section 110 of the Supplemental Indenture is not violated.[23]

Movants further allege that the incurrence of new debt by New MAG Holdco, to be secured by first priority liens on MAG's assets, violates section 109 of the Supplemental Indenture (and so is a default under Original Indenture § 501(4)) which prohibits the granting of liens without equally and ratably securing the Senior Notes with such new indebtedness[24]. However, section 109 of the Supplemental Indenture only applies to the granting of liens by MAG.[25] Because New MAG Holdco, not MAG, is the entity under the Plan which will incur the exit credit facility, section 109 should not prohibit the transaction. Furthermore, section 109 contains a number of exceptions to the general prohibition on granting of liens, two of which may be applicable to the transaction proposed by the Plan.[26]

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[23] The issue of compliance with section 110 is complicated by the transfer to the MAG family of entities presently owned by the Mirant family.

[24] Movants additionally argue that the incurrence of new debt through the exit credit facility will violate section 111 of the Supplemental Indenture. Section 111 prohibits the incurrence of additional debt if the such debt would cause MAG's Senior Debt Service Coverage Ratio, as that term is defined in the Supplemental Indenture, to exceed 2.5 to 1. The facts before the court are not sufficient to determine the effect on such ratio post-confirmation at any of the various levels of additional debt Movants assert may or will be incurred through the exit credit facility. In any case, a default as to the ratio will be post-confirmation or will be ongoing after confirmation. As holders of the Senior Notes retain, post-confirmation and post-effective date, their legal, equitable and contractual rights, they may pursue any default occurring or continuing thereafter.

[25] As noted by Debtors in their post-hearing brief, disclosure to the holders of the Senior Notes included notice that MAG's subsidiaries could incur debt.

[26] Section 109 states in pertinent part:

> The Company shall not issue, assume or guarantee any Indebtedness for borrowed money secured by any lien on any non-cash assets of the Company . . . without in any such case effectively securing the . . . Notes . . . equally and ratably with such Indebtedness . . . provided, however, that the foregoing restriction shall not apply to the following liens:
>
> . . .

Movants have also asserted that MAG's default under its other bonds and its bank indebtedness constitutes an incurable default under section 501(3) of the Original Indenture. Movants argue that, as those creditors are impaired under the Plan, cure of the cross-defaults cannot be accomplished. However, it would be inconsistent with the purposes of Chapter 11 to allow such cross-defaults to defeat non-impairment of the Senior Notes. If the Plan is confirmed, the debt in default will be replaced by the obligations undertaken in the Plan. Thus, even if a cross-default could be asserted, confirmation of the Plan resolves and eliminates it.[27]

The remaining "defaults" asserted by Movants arise, if at all, under section 501(4) of the Original Indenture. As such, as described above, they must be "material default[s]." The court finds and concludes that the reporting failures complained of by Movants[28] are not material.[29] It surely cannot be said that any failure by MAG to comply

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> (n) any lien arising by operation of law or by order of a court or tribunal or any lien arising by an agreement of similar effect, including, without limitation, judgment liens;
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> . . .
>
> (v) other liens to secure Indebtedness so long as the amount of outstanding Indebtedness secured by liens pursuant to this provision does not exceed 10% of the Company's Consolidated Net Assets at the time of incurrence; . . . .

[27] Arguably, enforcing the cross-defaults against MAG would be tantamount to enforcing an ipso facto clause, as MAG's default on other bond and bank debt was an inevitable result of MAG's chapter 11 filing.

[28] Movants assert that section 1005 of the Original Indenture requires MAG to provide to the Indenture Trustee (and to the holders of the Senior Notes, upon request) certain financial information on a quarterly basis. This information includes, but is not limited to, (1) unaudited consolidated balance sheets, (2) statements of income and cash flows, and (3) annual audited financial statements with officer certifications of compliance with the Original Indenture. Movants allege that, in addition to terminating its status as a reporting company with the SEC in August of 2003, MAG has refused to provide the Indenture Trustee and the holders of the Senior Notes with the information they are entitled to under the Original Indenture.

[29] *See* Lipsky v. Commonwealth United Corp., 551 F.2d 887, 895 (2d Cir. 1976) ("A 'material' breach has been defined as one which would justify the other party to suspend his own performance, or a breach which is so substantial as to defeat the purpose of the entire transaction.") (citations omitted); Cablevision Sys. Corp. v. Town of E. Hampton, 862 F. Supp.

with the reporting requirements of section 1005 of the Original Indenture has defeated the purpose of the transactions giving rise to the Senior Notes. Nor can it be said that Movants, representatives of the holders of the Senior Notes, have been less well informed since commencement of Debtors' cases than they would have been under MAG's normal reporting regime. Rather, they have been exhaustively informed concerning the financial condition and prospects of MAG and its affiliates. Furthermore, to the extent Movants complain of defaults constituting material breaches of non-monetary obligations of MAG, section 1124 of the Code neither requires cure of such defaults nor operates to eliminate the effect of continued reporting failures in the future. Any created or ongoing defaults of this nature will not impair the claims of the holders of the Senior Notes, but should such defaults continue post-confirmation, the holders may declare the same.

Turning next to Movants' contention that injunctive and exculpatory provisions in the Plan deprive the holders of the Senior Notes of rights, this issue will be addressed at confirmation. To the extent that any person who is not a debtor is relieved of obligations by the Plan, it is likely that the Plan is not confirmable under Code §§ 1129(a)(1) and 524(e). To the extent other obligations are released, the release will either not constitute a material default as to the Senior Notes or will result from operation of the Code or a court order.

The court may dispose similarly of Movants' complaints that the Plan will effect changes in corporate structures which Movants could prevent as fraudulent transfers. If the transactions contemplated by the Plan would render MAG insolvent or leave it with

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875, 885 (E.D.N.Y. 1994) ("It is well-settled that, to find . . . a material breach, the departure from the terms of the contract or defects of performance must have pervaded the whole of the contract or have been so essential as substantially to defeat the object that the parties intended to accomplish."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981).

inadequate capital, the Plan will not be feasible and so may not be confirmed. Thus, if the Plan is confirmable, Movants can have no fraudulent transfer claims of which they could be deprived.[30]

Indeed, the requirement of section 1129(a)(11) of the Code, that confirmation of the Plan will not be followed by need for liquidation or further reorganization, provides the holders of the Senior Notes with their best protection. At the confirmation hearing, Debtors must show that MAG will be able to keep its commitments under the Indentures. If MAG will default on the Senior Notes post-effective date, Debtors would no doubt be forced back into bankruptcy court. Debtors' post-confirmation future is dependent on MAG's performance because the bulk of Debtors' assets will be concentrated in subsidiaries of MAG.

The court notes that a debtor in chapter 11 is entitled to use its assets as is appropriate to rehabilitate. In the case at bar, the Debtors have determined that the restructuring contemplated by the Plan will facilitate obtaining exit financing that will allow Debtors to maximize their asset values for creditors. So long as they are able to do so while leaving the Senior Notes unimpaired (or satisfied under section 1129(b)), even in the absence of the consent of the holders of the Senior Notes, as required by section 1126 of the Code, it is an appropriate step for Debtors to take in aid of reorganization. The strictures applicable to such a strategy are found in the requirement of feasibility (section 1129(a)(11)) and, where impairment is at issue, the terms of the documents

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[30] The court notes that none of the conclusions reached in this matter shall in any way alter the Debtors' burden of demonstrating at a confirmation hearing that the Plan meets the requirements of section 1129(a)(11) of the Code and that Debtors will be capable of making all payments due the holders of the Senior Notes. In this respect, the court will be concerned as to the impact of the transactions contemplated by the Plan on MAG's Senior Debt Service Coverage Ratio, as that term is defined in the Supplemental Indenture.

governing the rights of the holders of the Senior Notes. The Debtors, acting as they have, are not proceeding inequitably or in bad faith so long as they remain within those strictures. There is nothing before the court to suggest the Plan does not meet this test.

IV. **Conclusion**

For the foregoing reasons, Movants' Motions must be and are hereby DENIED without prejudice to further proceedings, at or prior to a confirmation hearing, concerning possible default under Supplemental Indenture § 110.

Signed this the _____ day of May, 2005.

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DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE