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

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

MEMORANDUM ORDER CONSOLIDATING CERTAIN PROFESSIONAL FEE ORDERS

On July 14 and 15, 2003, Mirant Corporation[1] ("Mirant") and 74 of its subsidiaries[2] filed for relief under chapter 11 of title 11 of the United States Code.[3] Subsequently, nine other subsidiaries filed voluntary petitions for relief under chapter 11: Mirant EcoElectrica Investments I, Ltd. and Puerto Rico Power Investments, Ltd.[4] filed on August 18, 2003; Mirant Wrightsville Investments, Inc., Wrightsville Power Facility, L.L.C., Wrightsville Development Funding, L.L.C. and Mirant Wrightsville Management, Inc.[5] filed on October 3, 2003; and Mirant Americas Energy Capital, LP and Mirant Americas Energy Capital Assets, LLC[6] filed on November 17, 2003 (all such filers collectively the "Debtors"). Debtors' cases are being jointly

1 Case No. 03-46590.

2 Case Nos. 03-46588 and 03-46591 through 03-46663.

3 11 U.S.C. §§ 101 *et seq.* (the "Code").

4 Case Nos. 03-47927 and 03-47929, respectively.

5 Case Nos. 03-49548, 03-49553, 03-49555 and 03-49556, respectively.

6 Case No. 03-91079 and 03-91081, respectively.

administered and combine to form a "mega-case"[7] involving more than $8 billion in total debt,[8] over $19 billion in assets[9] and over 120 trade vendors.[10]

Debtors own and operate power generating plants throughout the United States and provide power on a wholesale basis in the United States and in other parts of the world. Debtors are also involved in purchase, sale and trading of various energy products. Debtors' business is not only complex by reason of its size and corporate structure, it is also subject to regulation by national, regional and local governmental agencies, including those concerned with energy, the environment and labor conditions. On a regular basis, Debtors are required to retain outside firms to assist them in dealing with regulators, taxing authorities, industry groups, employee organizations and others. Consequently, Debtors have employed numerous counsel and other professionals.[11]

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7 *See* Mabey v. Southwestern Elec. Power Co. (In re Cajun Elec. Power Coop.), 150 F.3d 503, 506 (5th Cir. 1998), cert. denied, 526 U.S. 1144 (1999) ("The Cajun case is a mega-case with more than $ 5 billion in debt and over seven hundred creditors."); F COLLIER ON BANKRUPTCY App. Pt. 43-39 15th ed. rev. 2000. *citing* Departments of Commerce, Justice, and State, *The Judiciary and Related Agencies Appropriations Act-Conference Report*, 139 Cong. Rec. S 14073 (daily ed. October, 1993) (referring to "mega-filings" as those worth more than $50 million and the most complex and difficult type of bankruptcy cases). With well over $10 billion in assets this case would be within the top tier of categories in most, if not all, schemes based upon value of assets. *See, for example*, George M. Huyler and Francis G. Conrad, *A Critique Of The Bankruptcy Court Time Study*, 67 Am. Bankr. L.J. 49, 54 (1993) (setting the highest tier as those cases with assets worth $10 billion and more).

8 Affidavit of John W. Ragan in Support of Certain First Day Motions, ¶ 45.

9 Ragan Affidavit at ¶ 15. The numbers given in the Ragan Affidavit have since been restated for accounting purposes.

10 Ragan Affidavit at ¶ 81. There are also thousands of holders of Debtors' publicly traded debt and dozens of institutional creditors. Mirant is publicly owned and, as of April 7, 2003, had 154,993 registered shareholders. List of Equity Security Holders Filed in Compliance with Federal Rules of Bankruptcy Procedure 1007(a)(3) (doc. #273).

11 Pursuant to an order entered August 1, 2003, Debtors are also, subject to certain limitations, authorized to retain professionals in the ordinary course of business (the "Ordinary Course Professionals"). The Ordinary Course Professionals must file an affidavit with the court in accordance with Fed. R. Bankr. P. 2014, but Debtors do not need to apply under Rule 2014 to employ them. Ordinary Course Professionals also may be compensated by Debtors in the ordinary course of their business subject to certain limits.

Furthermore, three official committees have been appointed.[12] In order to perform the duties assigned by section 1103(c) of the Code, each committee has hired at least two law firms and has retained other professionals, including financial advisors.

Simply put, the size and nature of Debtors' case is such that the mechanisms for compensation of professionals ordinarily utilized in chapter 11 could lead to numerous problems. First, under Code sections 330 and 331 and FED. R. BANKR. P. 2016(a) each professional is expected to file applications in order to receive interim and final compensation. These applications are required to provide a thorough review of the work done by the professional. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *In re First Colonial Corp. of Am.*, 544 F.2d 1291 (5th Cir. 1977), *cert. denied*, 431 U.S. 904, 97 S. Ct. 1696, 52 L. Ed. 2d 388 (1977); 3 COLLIER ON BANKRUPTCY ¶ 330.04 (15th ed. rev. 2003).

Applications for compensation are subject to court hearing. The court ultimately must independently review compensation of professionals.[13] *See In re Temple Retirement Community, Inc.*, 97 B.R. 333, 336 (Bankr. W.D. Tex. 1989); *In re Pettibone*, 74 B.R. 293, 308 (Bankr. N.D. Ill. 1987); *In re Liberal Market, Inc.*, 24 B.R. 653, 657 (Bankr. S.D. Ohio 1982). A professional is entitled to compensation for time spent preparing an application for compensation and participating in the hearing on the application. *See Smith v. Edwards & Hale, Ltd. (In re Smith)*, 305 F.3d 1078, 1087 (9th Cir. 2002) *citing In re Nucorp Energy, Inc.*, 764 F.2d 655, 660-61 (9th Cir. 1985); *see generally* 3 COLLIER ON BANKRUPTCY ¶ 330.04[5] (15th ed. rev. 2003).

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[12] An official unsecured creditors' committee and an official committee of equity securities holders have been appointed for Mirant and an official unsecured creditors' committee has been appointed for Mirant Americas Generation, LLC (Case No. 03-46592).

[13] The procedures here adopted by the court will preserve court review in that objections to interim compensation must be disposed of before payment and final applications for compensation will all be reviewed and heard by the court.

Moreover, other parties, including those represented by counsel who will be paid by the estate,[14] may object to an application for compensation.

The court is acutely aware of the adverse consequences that might result in this case from using the ordinary procedures for compensating professionals. The cost of the chapter 11 process could be significantly increased. Court – and professional – time required for addressing compensation issues could be excessive. Litigated disputes over fees could complicate progress toward Debtors' reorganization.

Bankruptcy courts have broad authority and considerable discretion with regard to awarding attorney and other professional fees. *See, e.g.*, Bankruptcy Court, Northern District of Texas General Order 2000-6 (a complex chapter 11 case requires certain special procedures because of large size of case, large number of parties in interest in case, or claims against debtor or equity interests in debtor are publicly traded); Bankruptcy Court, Northern District of Texas Standing Order 2000-7 (order incorporating Guidelines for Compensation and Expense Reimbursement of Professionals); L.B.R. 2016.1 (bankruptcy court controls mechanics of compensation of professionals). Furthermore, section 105(a) of the Code provides that a bankruptcy court may issue any order necessary or appropriate to carry out the provisions of the Code.

Due to the complexity of these cases, the large number of professionals involved and the consequent importance of an efficient mechanism for dealing with compensation, the court has entered various orders regarding professional fees. On motion of the Debtors and consistent with local practice under General Order 2000-06, the court entered its *Administrative Order Establishing Procedures For Interim Compensation and Reimbursement of Chapter 11*

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[14] Even a party not ordinarily entitled to reimbursement for professional services may request payment of fees incurred in objecting to a fee application. 11 U.S.C. § 503(b)(3)(D) and (4).

Professionals and Committee Members (the "Fee Procedures Order"; attached hereto as exhibit "1") on August 1, 2003; on its own motion, the court entered its *Memorandum Order Regarding Compensation of Professionals* (the "Compensation of Professionals Order"; attached hereto as exhibit "2"), on August 27, 2003; and on November 6, 2003, its *Order Regarding Compensation of Fee Expert and Fee Review Committee Chairperson Nancy B. Rapoport* (attached hereto as exhibit "3") and its *Order Regarding Fee Review Committee Procedures and Standards* ("Procedures and Standards Order"; attached hereto as exhibit "4").[15]

In its Compensation of Professionals Order, the court ordered established a committee to review fees in these cases (the "Fee Committee") and appointed Dean Nancy B. Rapoport ("Rapoport") of the University of Houston School of Law as the court's expert on compensation matters (FED. R. EV. 706, applicable in bankruptcy cases pursuant to FED. R. BANKR. P. 9017) and as chairperson of the Fee Committee. The Fee Committee met on October 18, 2003 and recommended to the court a fee structure for Rapoport and operating procedures whereby the Fee Committee would review professional fees in these cases. In its Procedures and Standards Order, the court found the fee procedures recommended by the Fee Committee to be in the best interest of the Debtors and their estates and creditors and, subject to notice to the parties and a status conference to consider any objections to the procedures, the court adopted the Fee Committee's procedures.

On November 25, 2003, the court held the status conference to address concerns parties raised regarding the Procedures and Standards Order, specifically, and the Professional Fee

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15 Exhibits 1 through 4 shall be referred to collectively hereinafter as the "Professional Fee Orders."

Orders, generally.[16] At the status conference, parties concerns were primarily focused on two areas: time requirements for filing statements and certification as to most favored client status.[17]

In part based on the proceedings then had, the court concludes it is appropriate to amend the Professional Fee Orders in certain respects and provide additional guidance to the Fee Committee and the Professionals[18] in these cases.

ACCORDINGLY IT IS HEREBY

ORDERED that the following shall supercede the second decretal paragraph of the Fee Procedures Order:[19]

> **ORDERED** that except as may be provided in *any* separate order authorizing the retention of *a specific professional*, all Professionals shall seek compensation and reimbursement in accordance with the following procedures:
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> (a) On or before the 25th day of each month following the month for which compensation is sought, *but in no event, absent Fee Committee approval, later than the date on which the Quarterly Compensation Summary is due, which is the 15th day of the second month following the end of the quarter,* each Professional (and Committee member, as defined below) *shall* serve a detailed statement of services rendered and expenses incurred during the prior month upon (i) the Debtors; (ii) the Debtors' counsel *(as designated to the Fee Committee)*; (iii) the United States Trustee for the Northern District of Texas; (iv) counsel for any statutory committee appointed in these cases *(as designated to the Fee Committee)* (the "Committ*ees" or a "Committee*" and, *(i) though (iv)* collectively, the "Application Recipients"); *(v) each member of*

16 The court also ruled at the status conference that professional fees for the first quarter-year of the case could be paid prior to year-end as if approved for full payment, but that parties would reserve for the next quarterly review objections to those fees. To the extent an objection to any such fees in eventually sustained, the professional's total compensation will be adjusted accordingly.

17 Although there were other questions raised, the Court does not consider it necessary to resolve them by court order.

18 There are two categories of professionals required to submit interim and final fee applications: (1) separately retained chapter 11 professionals, and (2) those Ordinary Course Professionals whose fees and expenses exceed $50,000 for a given month (collectively, the "Professionals," or each, a "Professional").

19 Italics shall be used hereinafter to indicate a change or addition to a previously entered order.

the Fee Committee, and (vi) Rapoport, who shall be provided two copies. Application Recipients shall have ten (10) days after the date of receipt *thereof* to review and raise objections, if any, to each statement. At the expiration of the ten (10) day objection period, Debtors shall promptly pay eighty percent (80%) of the fees and one hundred (100%) of the out-of-pocket expenses identified in each monthly statement, except such fees or expenses as to which an objection may be served by *the Fee Committee or* one of the Application Recipients as provided in sub-paragraph (b) below.

(b) In the event that one of the Application Recipients has an objection to the compensation or reimbursement sought in a particular monthly statement, such party shall, within ten (10) days after the receipt of the statement, serve upon (i) the Professional to whose statement an objection is made, (ii) the other Application Recipients, *(iii) each member of the Fee Committee, with (iv) two copies to Rapoport,* a written "Objection To Fee Statement," with a statement setting forth the precise nature of the objection and the amount at issue. Thereafter, the objecting party and the Professional to whose statement an objection has been submitted shall attempt, *with such assistance as the Fee Committee may on its own or at the request of the parties offer,* to reach an agreement *regarding the objection. If the objection is not resolved, payment of the portion objected to shall be made as recommended by the Fee Committee, and both the objecting party and the Professional shall retain their respective rights to seek an adjudication of the objection by the court upon court consideration of the next application by that professional heard by the court; to the extent the objecting party maintains its objection, such objection, if filed with the court and served as required, shall be considered as provided in subparagraph (c)(ii) below.*

(c) *Following the Fee Committee's review of a Professional's Quarterly Compensation Summary, to which Application Recipients shall have fifteen (15) days within which to file an objection, such Professional's requested compensation shall be paid in the following manner: (i) if no member of the Fee Committee raises an objection to the Quarterly Compensation Summary and no objection has been made by any of the Application Recipients, Debtors shall immediately pay any unpaid fees and the out-of-pocket expenses identified in the Quarterly Compensation Summary; (ii) if a member of the Fee Committee does raise an objection to the Quarterly Compensation Summary and such objection is not otherwise resolved, or if a timely objection has been made by a Application Recipient, fees and expenses not subject to objection shall be paid immediately and* *fees and expenses subject to objection shall be paid to the extent directed by the court after notice and a hearing; (iii) any fees or expenses paid in accordance with the foregoing procedures shall be subject to re-review only upon a sufficient showing as to why a prior objection was not made or, when appropriate, how the court erred in ruling on a prior objection to such fees or expenses.*

(d) The pendency of an objection or a Court order stating that payment of compensation or reimbursement of expenses was improper as to a particular monthly statement shall not disqualify a Professional from the further payment of monthly compensation or reimbursement of expenses as set forth above, except as otherwise directed by an Order of this Court.

(e) Neither the payment of, nor the failure to pay, in whole or in part, monthly compensation and reimbursement as provided herein shall bind any party-in-interest or the Court with respect to the interim or final allowance of applications for compensation and reimbursement of Professionals.

And it is further

ORDERED that the following shall supercede the 6th decretal paragraph, found at the bottom of page 3, of the Fee Procedures Order:

> **ORDERED** that, the Debtors shall serve notice of any hearing to consider fee applications to (i) the United States Trustee for the Northern District of Texas; (ii) counsel for the Committees appointed in these cases; (iii) Debtors' counsel; (iv) *the Fee Committee; and (v)* all parties requesting notice pursuant to Federal Rule of Bankruptcy Procedure 2002.

And it is further

ORDERED that the following shall supercede the 6th decretal paragraph, found at the bottom of page 2, of the Compensation of Professionals Order:

> **ORDERED** that, *the Fee Committee is designated a party in interest pursuant to 11 U.S.C. § 1109 respecting all matters involving compensation of professionals.*

And it is further

ORDERED that the following shall supercede the 7th decretal paragraph, found at the top of page 3, of the Compensation of Professionals Order:

> **ORDERED** that, in modification of the procedures described in the Fee Procedures Order, *on or before the 15th day of the second month following the end of the quarter,* each professional subject to the Fee Procedures Order seeking compensation in these cases shall submit to each member of the Fee Committee a *Quarterly* Compensation Summary containing certification of the relationship between rates regularly charged in these cases and rates charged to *any of* such professional's (or such professional's firm's) clients *in a bankruptcy case (other than a bankruptcy case where the economics of the case require otherwise) and other clients, generally, for comparable services* and a summary of time expended, costs incurred and tasks accomplished or addressed during the period for which compensation is sought*; provided however any format of Quarterly Compensation Summary satisfactory to the Fee Committee shall satisfy the requirements of this order.*

And it is further

ORDERED that the 8th decretal paragraph, found at the bottom of page 3, of the Compensation of Professionals Order is hereby deleted; and it is further

ORDERED that the following shall supercede the 11th decretal paragraph, found as the 3rd paragraph on page 4, of the Compensation of Professionals Order:

> **ORDERED** that, upon completion of duties related to these cases, each professional seeking compensation shall *file with the court and* provide to each member of the Fee Committee a final *fee application as contemplated by 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016, including a* Compensation Summary (each a "Final Compensation Summary"), which shall include a summary of time expended, costs incurred and tasks accomplished as a result of such professional's efforts during these cases (with appropriate time records to be made available at the Fee Committee's request).

And it is further

ORDERED that the following shall supercede the 12th decretal paragraph, found as the 4th paragraph on page 4, of the Compensation of Professionals Order:

> **ORDERED** that, after review of each Final Compensation Summary, *and prior to hearing final fee applications,* the Fee Committee shall submit to the court a recommendation regarding final approval of such professional's compensation and, when warranted, the propriety of a fee enhancement.

And it is further

ORDERED that the following shall supercede the 1st decretal paragraph of the Procedures and Standards Order:

> **ORDERED** that the proposed procedures and standards *stated under the heading "OPERATIONS"* be, and they hereby are, provisionally, and, subject to this order, finally approved.

And it is further

ORDERED that the following shall supercede paragraph numbers 7, 8, 9 and 10 under the heading "OPERATIONS" of exhibit "A" to the Procedures and Standards Order:

> 7. At least five days before each monthly meeting, the FRC will distribute *to its members* the spreadsheet with any issues flagged.
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> 8. If the FRC has concerns about any rate, expense, or staffing issue, the FRC will first designate a member to raise the concern with the appropriate professional. If the FRC is not able to resolve the concern with the professional, the FRC will *so report to the court and the fees or expenses at issue will be treated as if objected to.*
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> 9. The FRC shall file quarterly Advisory Reports with the Court, raising any issues it deems relevant. *To the extent any Advisory Report recommends compensation other than as requested by the professional, unless the professional waives payment of such compensation until hearing on its final fee application, the Court will consider the quarterly compensation at a hearing after notice to the professional and the FRC.*
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> 10. The FRC *need* not opine on any other party in interest's objection to a fee or expense, *but the chair, as the court's expert shall, and any member to the FRC may, so opine.*

And it is further

ORDERED that any item provided to the court as a report by the Fee Committee shall be served on all persons entitled to receive objections to fees.

Signed this 20th day of January 2004.

DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE