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**ATTORNEYS FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF  
MIRANT AMERICAS GENERATION, LLC**

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

<b>In re</b>	§	<b>Chapter 11 Case</b>
	§	
	§	<b>Case No. 03-46591 (DML)</b>
<b>MIRANT CORPORATION, et al.,</b>	§	<b>Jointly Administered</b>
	§	
<b>Debtors.</b>	§	<b>Hearing Date and Time:</b>
	§	<b>October 29, 2003, 10:30 a.m.</b>

**APPLICATION OF THE OFFICIAL COMMITTEE OF UNSECURED  
CREDITORS OF MIRANT AMERICAS GENERATION, LLC FOR  
LEAVE TO ASSERT CLAIMS THAT ARE PROPERTY OF THE ESTATE**

**TO: THE HONORABLE D. MICHAEL LYNN,  
UNITED STATES BANKRUPTCY JUDGE**

The Official Committee of Unsecured Creditors (the “MAGI Committee”) of Mirant Americas Generation, LLC (“MAGI”), hereby files this Application, pursuant to sections 362(a), 1103(b) and 1109(b) of chapter 11, title 11, of the United States Code (the “Bankruptcy Code”), for entry of an order granting the MAGI Committee leave of Court to assert, on behalf of the estate of MAGI, claims against debtors Mirant Corporation (“Mirant”), Mirant Americas, Inc. (“Mirant Americas”) and certain of the current and former officers and directors of Mirant and Mirant Americas, as well as certain current and former members of the board of managers of MAGI.

## PRELIMINARY STATEMENT

1. By this Application, the MAGI Committee seeks leave of the Court to assert claims against Mirant, Mirant Americas, certain of their current and former officers and directors, as well as certain current and former managers of MAGI (collectively, the “Potential Defendants”), which the MAGI Committee has determined must be pursued on behalf of the MAGI estate. In the eighteen months prior to the commencement of these cases, nearly \$1 billion in cash was transferred by MAGI to Mirant and Mirant Americas, through a scheme of purported dividends that were in reality fraudulent transfers. MAGI has valuable estate claims arising from the intentional actions undertaken by these Potential Defendants, including claims for breach of fiduciary duty by the directors and managers who authorized and facilitated the systematic depletion of MAGI assets for the benefit of Mirant and Mirant Americas, and claims for the return of fraudulent conveyances. The MAGI Committee seeks leave to prosecute these claims in order to restore to the MAGI estate the assets that were depleted as a result of the Potential Defendants’ wrongful actions.

2. As demonstrated herein, MAGI’s meritorious claims against these Potential Defendants need to be pursued promptly. First, these important claims must be resolved prior to the plan process, since these claims represent significant assets of the MAGI estate. Second, the MAGI Committee is concerned that the passage of time will make it more difficult to analyze and trace the flow of funds among estates, and in particular, will impact its ability to have the Court impose a constructive trust on cash assets at Mirant and Mirant Americas Energy Marketing, LP (“MAEM”) because of the commingling of these funds during the pendency of these cases. The Court should grant leave to the MAGI Committee to assert these significant claims since any demand made on MAGI management to bring such action would be futile, given that the MAGI board of managers are also Mirant employees and are

hopelessly conflicted from vigorously and objectively prosecuting these claims. Accordingly, the MAGI Committee requests the entry of an order authorizing the Committee to prosecute, on behalf of the MAGI estate, all claims against these parties.<sup>1</sup>

### **JURISDICTION AND VENUE**

3. This Application is submitted pursuant to sections 362(a), 1103(b) and 1109(b) of the Bankruptcy Code. This Court has jurisdiction to consider this Application pursuant to 28 U.S.C. §§ 157 and 1334. Venue in this district is proper pursuant to 28 U.S.C. § 1409.

### **FACTUAL BACKGROUND**

#### **A. Mirant's Financial Distress Leads to the Transfer of Substantial Amounts of MAGI Cash**

4. Starting in late 2001 and through 2002, Mirant experienced a dramatic financial decline caused by a combination of factors, including an abundance of new power generation capacity with a resulting excess of supply positions throughout the United States, the bankruptcy of several significant energy sector companies, a reduction in energy trading and a restriction of capital available to energy companies. As a result, as disclosed in filings with the Securities and Exchange Commission (the "SEC"), Mirant had a net loss of \$2.4 billion for the

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<sup>1</sup> The automatic stay is not implicated by the filing of this Application or the filing in the Bankruptcy Court of a complaint against Mirant and Mirant Americas. *See, e.g., Prewitt v. N. Coast Vill., Ltd. (In re N. Coast Vill., Ltd.)*, 135 B.R. 641, 643 (9th Cir. BAP 1992) (finding the stay does not apply to proceedings commenced against the debtor in the bankruptcy court where debtor's bankruptcy is pending); *Nat'l City Bank of Minneapolis v. Lapides (In re Transcolor Corp.)*, 296 B.R. 343, 358 (Bankr. D. Md. 2003) ("the majority view is that the [Bankruptcy] Code implicitly permits the filing of suit in the bankruptcy court against a debtor without violating the automatic stay"); *Lighthouse Bluffs, Corp. v. Atreus Enters., Ltd. (In re Atreus Enters., Ltd.)*, 120 B.R. 341, 346 (Bankr. S.D.N.Y. 1990) ("Any action to recover property, to collect money, to enforce a lien, or to assert a prepetition claim against the debtor which would otherwise be enjoined by 11 U.S.C. § 362(a) if initiated in any other context, is not subject to the automatic stay if commenced in the bankruptcy court where the debtor's bankruptcy case is pending."). To the extent, however, that this Court determines the automatic stay does apply to these proceedings, the MAGI Committee requests that the Court grant to the MAGI Committee relief from the stay with respect to the prosecution of claims against Mirant and Mirant Americas.

fiscal year ending December 31, 2002.<sup>2</sup> *See* Petrick Aff., Exhibit B at p. F-3. During 2002, Mirant was under increasing financial pressure, as it had no credit with trading counterparties, and thus was being required to post cash collateral for its open commodity positions. By early 2003, Mirant had breached covenants in one or more of its bank facilities, which likely were going to result in a default thereunder, plus a default on a significant number of energy trading positions.

5. Mirant's financial condition became so dire that on April 29, 2003, KPMG, Mirant's auditors, warned in their opinion included in Mirant's Form 10-K filed with the SEC that "[t]he Company had a loss from continuing operations of \$2.4 billion for the year ended December 31, 2002 and sold significant assets to generate additional liquidity. Furthermore, the Company has \$1.8 billion in scheduled debt maturities during 2003 and does not project it will have sufficient liquidity to repay such debt maturities as they become due. Therefore, the Company anticipates that it will be required to refinance significant debt obligations during 2003 in order to maintain continuing operations. All of those conditions raise substantial doubt about the Company's ability to continue as a going concern." *See* Petrick Aff., Exhibit B at p. F-2.

6. In fact, for most of year 2002 and possibly starting in 2001, Mirant had not been a viable entity and had survived only by financial trickery and manipulation of its wholly-owned subsidiaries in order to maintain the fiction that it had the financial ability to pay its debts when due.

7. Simultaneously, MAGI's financial condition also was declining during year 2002. Based upon the information contained in MAGI's own filings with the SEC, MAGI's

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<sup>2</sup> Copies of all SEC filings referenced herein are attached as Exhibits to the Affidavit of Gregory M. Petrick, sworn to October 3, 2003 and submitted herewith (the "Petrick Aff.").

revenues declined over 50% in fiscal year 2002 compared to 2001, and its earnings before interest, taxes, depreciation and amortization also declined by almost 50% during the same time period. Further, MAGI's free cash flow declined by almost 85% from 2001 to 2002. *See* Petrick Aff., Exhibit A at pp. F-3, F-6. Clearly, action was required by the management of both Mirant and MAGI if the value of company assets and the interests of creditors were going to be preserved and protected.

8. The reaction of the Mirant directors and MAGI board of managers to this financial crisis, however, was just the opposite. Instead of making changes to the business plan or reducing overhead or operating expenses, Mirant and Mirant Americas, through their respective directors (the "Mirant Directors"), together with the managers of MAGI (collectively, the "MAGI Managers"), proceeded with a scheme to systematically deplete the cash of MAGI, for Mirant's sole benefit. Mirant was able to achieve this scheme because MAGI did not and does not now have independent management or directors, but instead is run by a board of managers, all of whom are Mirant directors or executives. Indeed, in its form 10-K for the period ending December 31, 2002 filed with the SEC, MAGI stated "Mirant controls us," and further stated that there can be no assurance that "Mirant would not exercise its power to control us in a manner that would benefit Mirant to the detriment of [MAGI creditors]." *See* Petrick Aff., Exhibit A at p. 50.

9. MAGI had, and continues to have, no independent oversight or management protecting its interests exclusively, nor does it have financial advisors or counsel that are independent from Mirant. All of MAGI's Managers have had conflicting roles in Mirant. For example, Marce S. Fuller is a MAGI Manager and also President, Chief Executive Officer and a director of Mirant. Harvey A. Wagner is a MAGI Manager and also executive vice president and Chief Financial Officer of Mirant. Similarly, during year 2002 and continuing

until August 2003, Richard A. Pershing was a MAGI Manager and also an executive of Mirant, Mirant Americas and Mirant Mid-Atlantic, LLC. These conflicts continue. Although Mr. Pershing no longer is a MAGI Manager and instead, has been replaced by Mr. Curtis A. Morgan in that role, effective August 25, 2003, Mr. Morgan became executive vice president for Mirant's North American operations. Essentially, MAGI and its assets are completely unprotected from Mirant and Mirant's conflicted executives, and there is no responsible person at the Debtors whose sole charge is to protect MAGI, and who is authorized to bring the proposed lawsuit on its behalf.

10. If MAGI did have an independent board of managers acting on its behalf, that board would be able to ensure that the duties owed to the company and its creditors were being observed. Specifically, such an independent board would protect MAGI's interests through the following:

- Ensuring that MAGI creditors and other parties-in-interest receive financial and business information on a MAGI-only basis, and not just Mirant information on a consolidated basis.
- Evaluating proposed debtor-in-possession financing involving MAGI assets to ensure that sufficient flexibility is maintained, such that MAGI could emerge from chapter 11 separately from Mirant.
- Supervising the conduct of trading by MAEM on behalf of MAGI to safeguard MAGI's interests by verifying that all intercompany transactions related to trading are on fair and arms-length terms.
- Investigating, evaluating and, if appropriate, prosecuting any causes of action belonging to the MAGI estate.

However, as is detailed below, it is abundantly clear that MAGI's former and present management was, and is, incapable of taking such actions because of the conflicts of interest with the Mirant estate.

11. Through Mirant's control and domination of MAGI management, during year 2002 and possibly continuing into 2003, Mirant and its wholly-owned subsidiary Mirant Americas forced MAGI to make "dividend" payments that ultimately were for the benefit of Mirant. At the direction of the Mirant Directors and with the assistance of MAGI Managers, MAGI issued purported dividends in the amount of \$134 million during the first quarter of 2002, \$453 million during the second quarter, and an additional \$209 million in the third quarter of 2002. *See* Petrick Aff., Exhibit C at p. 8, Exhibit D at p. 7 and Exhibit E at p. 7. Based upon publicly filed documents, there is no question that MAGI transferred nearly \$1 billion of its cash to the benefit of Mirant during year 2002 and, upon information and belief, into 2003. These same public filings fail to state what value MAGI ever received in exchange for these transfers.

12. These payments by MAGI are all the more egregious because they were made in 2002 and 2003, even though MAGI was in financial decline during that period. Based upon publicly disclosed information, it appears that MAGI's free cash flow dropped over 85% from 2001 compared to 2002, while the amount of dividends paid by MAGI increased over 350% in the same period. *See* Petrick Aff., Exhibit A at pp. F-3, F-6. MAGI's cash flow after debt service decreased from \$64 million in fiscal 2000 to negative \$133 million in fiscal year 2002. With its cash being diverted to prop up Mirant, MAGI's own cash balances declined from \$212 million at December 31, 2002, to only \$70 million as of April 25, 2003. *See* Petrick Aff., Exhibit D at p. 46. By the end of 2002, when Mirant had succeeded in orchestrating the depletion of the majority of MAGI's free cash, MAGI's very existence was at risk, as its auditors issued a qualified "going concern" opinion expressing "substantial doubt" as to the company's ability to continue operating. *See* Petrick Aff., Exhibit A at p. F-2.

**B. The Delaware Litigation and the Mirant Complaint**

13. As a result of the continuing pattern of neglect by the MAGI Managers evidenced by the massive transfers of cash to Mirant and other actions harmful to MAGI and its creditors, on June 10, 2003 an informal committee of certain holders of publicly traded notes issued by MAGI commenced litigation in the Delaware Chancery Court (the “Delaware Litigation”) against Mirant, Mirant Americas, the MAGI Managers and certain former and current officers and directors of Mirant. The plaintiffs in the Delaware Litigation sought, among other things, recovery of the approximately \$1 billion in MAGI cash that had been transferred during the previous year. The complaint in the Delaware Litigation asserted claims for breach of fiduciary duty, fraudulent transfer, conversion, aiding and abetting breach of fiduciary duty, as well as federal securities law and common law tort claims. After initial hearings with respect to possible preliminary injunctive relief on certain of the plaintiffs’ claims, the Delaware Litigation was scheduled for an accelerated trial date in late 2003.

14. On July 14, 2003 Defendants Mirant, Mirant Americas, as well as MAGI and several other Mirant affiliates (collectively, the “Debtors”), commenced their Chapter 11 cases in this Court. As a result, the Delaware Litigation has been stayed as to those Debtor entities that were named defendants therein.

15. On July 25, 2003, the MAGI Committee was appointed by the United States Trustee for the Northern District of Texas to represent the interests of all creditors of MAGI. The members of the MAGI Committee are California Public Employees Retirement System (“CalPERS”), Elliott Associates, L.P., JPMorgan Chase, Lehman Brothers Inc., MacKay Shields Financial, The Royal Bank of Scotland and Wells Fargo Bank, as Indenture Trustee. Upon their appointment, the members of the MAGI Committee immediately began to evaluate

the assets of the MAGI estate, including those claims asserted by the plaintiffs in the Delaware Litigation.

16. Initially, the MAGI Committee attempted to obtain from the Debtors information on intercompany transfers of assets and any investigation thereof that Mirant may have conducted. Attached to the Petrick Affidavit as Exhibit F is a copy of a letter sent to the Debtors' counsel seeking such information. The MAGI Committee did not receive any substantive response to this and subsequent inquiries, nor did the MAGI Committee receive any indication that the Debtors were investigating or pursuing MAGI's claims. Indeed, most recently, at a meeting with the Debtors on September 18, 2003, in response to questions from the MAGI Committee, Mirant executives stated that the Debtors would require significant additional time prior to being able to provide any information to the MAGI Committee regarding the \$1 billion transferred from MAGI to Mirant. Moreover, on September 23, 2003, the Debtors filed the *Motion For an Order (I) Pursuant to Bankruptcy Code Section 105(a) Staying Certain Litigation and (II) Authorizing Insurance Companies to Make Advanced Payments in Accordance with the Debtors' D&O and Fiduciary Insurance Policies*, which included seeking a stay of the Delaware Litigation with respect to those individual, non-Debtor defendants named therein. The Debtors sought such relief without providing any explanation to the MAGI Committee, in the Motion or otherwise, as to how the Debtors would resolve MAGI's significant claims against Mirant, or how such claims could ever be resolved given that the present MAGI and Mirant management is the same one that authorized the substantial transfers of cash from MAGI.

17. The claims that the MAGI Committee now seeks to pursue are based upon injuries to the company and its creditors as a whole, and are assets of the MAGI estate. Due to

the Debtors' conflicts of interest, the MAGI Committee is the only party that can pursue these claims on behalf of the MAGI estate.

#### The Claims against Mirant and Mirant Americas

18. Based upon the facts discussed herein, the MAGI Committee believes that MAGI has significant claims against Mirant and Mirant Americas including, but not limited to, the following:

(i) Breach of Fiduciary Duty. Mirant and Mirant Americas breached their fiduciary duties to MAGI and its creditors by authorizing the systematic transfer of MAGI's cash to the benefit of Mirant during the time MAGI was suffering financial distress. Mirant and Mirant Americas participated in and allowed these transfers to occur even though MAGI received less than equivalent value for the assets transferred and even though the transfers worsened MAGI's financial condition. As a consequence of this breach, the MAGI estate has claims for damages against Mirant and Mirant Americas of at least \$1 billion.

(ii) Fraudulent Transfer. Mirant and Mirant Americas caused the transfer of at least \$1 billion of MAGI's assets, for which MAGI did not receive reasonably equivalent value. These transfers were made with the actual intent to hinder, delay and defraud MAGI's creditors, left MAGI with insufficient capital with which to conduct its business and/or prevented MAGI from being able to satisfy its debts as they came due. As a result, Mirant and Mirant Americas are liable for damages to the MAGI estate in an amount of not less than \$1 billion.

(iii) Conversion. Starting in at least January 2002, Mirant and Mirant Americas directed MAGI to pay approximately \$1 billion in purported distributions to Mirant Americas, for the benefit of Mirant. Mirant presently exercises unlawful dominion and control over these funds, which rightfully belong to the MAGI estate. As a result, Mirant and Mirant Americas have caused damages in an amount of not less than \$1 billion.

(iv) Restitution. The receipt of \$1 billion in dividends by Mirant and Mirant Americas through their tortious acts constitutes an unjustified retention of a benefit by Mirant and Mirant Americas. Mirant and Mirant Americas have been and continue to be unjustly enriched based upon their acts of conversion and the knowing receipt of fraudulent conveyances, all to the detriment of MAGI and its creditors. Based upon this unjust enrichment, the MAGI estate is entitled to restitution from each of Mirant and Mirant Americas in excess of \$1 billion.

(v) Constructive Trust. The transfer of \$1 billion in funds belonging to MAGI was the result of tortious acts and breaches of fiduciary duty by Mirant, the Mirant Directors and the MAGI Managers. These transferred funds rightfully belong to the MAGI estate. Mirant, however, presently exercises dominion and control over these funds, resulting in an unjust enrichment of Mirant at the expense of MAGI and its creditors. Upon information and belief, Mirant utilizes such funds to support its speculative energy trading business, including providing

collateral to contract counterparties, all for the sole benefit of Mirant. These funds rightfully belong to, and are property of, the estate of MAGI. Therefore, under principles of equity, a constructive trust should be imposed on these funds so that they may be returned to the estate of MAGI.

#### The Claims against the MAGI Managers

19. The MAGI Committee believes that the MAGI estate has significant claims against the MAGI Managers including, but not limited to, the following:

(i) Breach of Fiduciary Duty. The MAGI Managers had a fiduciary duty to MAGI and its constituents, including MAGI's creditors. This fiduciary duty included the obligation to exercise independent judgment on behalf of the company and to take steps to preserve and protect MAGI assets by ensuring that the company received reasonably equivalent value for all transfers of assets. In violation of this duty, the MAGI Managers authorized and permitted the transfer of MAGI's cash to the benefit of Mirant while MAGI was suffering financial distress. As a direct and proximate result of this breach, MAGI has been damaged. Therefore, the MAGI Managers are liable to MAGI for damages in an amount not less than \$1 billion.

(ii) Aiding and Abetting Conversion. Mirant and Mirant Americas' actions in directing MAGI to pay Mirant Americas at least \$1 billion in purported distributions constituted the conversion of assets rightfully belonging to MAGI. The MAGI Managers knowingly participated in that conversion, and provided substantial assistance to Mirant and Mirant Americas in achieving this conversion. As a consequence of this aiding and abetting, the MAGI Managers have caused damage to the MAGI estate in an amount not less than \$1 billion.

#### The Claims against the Mirant Directors

20. Finally, the MAGI Committee believes that the MAGI estate has significant claims against the Mirant Directors including, but not limited to, the following:

(i) Aiding and Abetting Breach of Fiduciary Duty. The Mirant Directors knowingly participated and substantially assisted in the breaches of fiduciary duty by the MAGI Managers in allowing the transfer of approximately \$1 billion of MAGI assets to Mirant and Mirant Americas in exchange for less than reasonably equivalent value. Based upon common control and overlapping executives and directors between MAGI and Mirant, the Mirant Directors participated in and substantially assisted in this transfer of assets. As a consequence of this aiding and abetting, the estate has claims against the Mirant Directors in an amount not less than \$1 billion.

(ii) Aiding and Abetting Fraudulent Transfer. Based on common control and overlapping executives between MAGI and Mirant, the Mirant Directors were aware that MAGI was suffering financial distress during year 2002 and also were aware that MAGI's financial condition would be further weakened by the transfer of substantial amounts of cash from MAGI

to Mirant. Nevertheless, the Mirant Directors knowingly participated and substantially assisted in the transfer of approximately \$1 billion of assets of MAGI to Mirant without any consideration to MAGI. As a consequence of this aiding and abetting by the Mirant Directors, the MAGI estate has damages against the Mirant Directors in an amount not less than \$1 billion.

(iii) Aiding and Abetting Conversion. Based on common control and overlapping executives between MAGI and Mirant, the Mirant Directors were aware that MAGI was suffering financial distress during year 2002 and also were aware that MAGI's financial condition would be further weakened by the transfer of substantial amounts of cash from MAGI to Mirant. Nevertheless, the Mirant Directors knowingly participated in the conversion of MAGI cash by Mirant and Mirant Americas through the payment of purported dividends, and the Mirant Directors provided substantial assistance to Mirant and Mirant Americas in achieving this conversion. As a consequence of this aiding and abetting, the MAGI estate has damages against the Mirant Directors in an amount not less than \$1 billion.

### **REASONS FOR GRANTING THE APPLICATION**

#### **A. The Causes of Action Asserted by the MAGI Committee are Property of the MAGI Estate**

21. The claims that the MAGI Committee seeks permission to prosecute could result, if successful, in the recovery of \$1 billion, and clearly are valuable assets of the MAGI estate. It is axiomatic that upon the filing of a petition for reorganization under chapter 11 of the Bankruptcy Code, an estate is created, which is comprised of all of the debtor's property, including "all legal or equitable interests of the debtor in property as of the commencement of the case." *See* 11 U.S.C. § 541(a)(1). The scope of property of the estate is very broad, and includes causes of action belonging to the debtor at the time the case is commenced. *See Louisiana World Exposition v. Fed. Ins. Co.*, 858 F.2d 233, 245 (5th Cir. 1988) (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205-206 (1983)) (explaining that property of the estate "includes causes of action belonging to the debtor at the time the case is commenced").

22. Where a cause of action belongs to the corporation, seeks redress for injuries sustained by the corporation, and is general and common to the debtor and creditors as a whole, it is clear that the action constitutes property of the estate. *See, e.g., S.I. Acquisition, Inc. v. Eastway Delivery Serv., Inc. (In re S.I. Acquisition, Inc.)*, 817 F.2d 1142, 1151-52 (5th Cir.

1987) (finding right to recover damages suffered by corporation and creditors as a whole belongs to estate); *Louisiana World Exposition*, 858 F.2d at 245-46 (holding action that could have been asserted by debtor corporation, or by its shareholders, prior to bankruptcy constitutes property of the estate); *In re E.F. Hutton Southwest Props. II, Ltd.*, 103 B.R. 808, 812 (Bankr. N.D. Tex. 1989) (finding injury that is “general and common to the corporation and creditors” belongs to the debtor’s estate).

23. Courts previously have held that property of a debtor’s estate includes actions for breach of fiduciary duties owed to the corporation and its creditors, and actions to recover fraudulently transferred payments or assets. *See* 5 COLLIER ON BANKRUPTCY ¶ 541.08[6] (Lawrence P. King ed., 15th ed. rev. 2003) (“The estate created pursuant to section 541 succeeds to any right of action the debtor corporation may have to recover damages for misconduct, mismanagement, or neglect of duty by a corporate officer or director.”); *see also Louisiana World Exposition*, 858 F.2d at 246 (action for damages on behalf of corporate debtor against corporate principals for gross negligence, mismanagement or breach of fiduciary belongs to the estate); *In re The Babcock & Wilcox Co.*, Nos. Civ. A. 01-1467, 00-10992, 00-10993, 00-10994, 00-10995, 01-1155, 2001 WL 725318, at \*3 (E.D. La. Jun. 26, 2001) (fraudulent conveyance claim “belongs to the debtor-in-possession”); *S.I. Acquisition, Inc.*, 817 F.2d at 1151-52 (finding that right of action to recover damages sustained by corporation because of misconduct by debtor’s parent and principals is property of the estate). *See also Pepper v. Litton*, 308 U.S. 295, 307 (1939) (because state law imposes a fiduciary duty on directors and controlling shareholders for benefit of all creditors and stockholders in bankruptcy, trustee may enforce an action against directors and controlling shareholders for the “community of interest”). Accordingly, the causes of action against the MAGI Managers for breaching their duties to MAGI, as well as the claims against Mirant, Mirant Americas and their respective officers and directors for fraudulent

transfers and aiding and abetting wrongful conduct, belong to the estate of MAGI and its creditors as a whole.

24. As these claims are assets of the MAGI estate, MAGI has the obligation to diligently and vigorously investigate and pursue such claims. A trustee or debtor-in-possession has the duty and obligation to manage and collect property of the estate, and “has the duty to maximize the value of the estate.” *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 352 (1985) (enumerating duties of trustee and/or debtor-in-possession). That duty has been found to specifically include pursuing causes of action or claims that have significant value to the debtor’s estate. *See Louisiana World Exposition*, 858 F.2d at 246 (holding that because corporate debtor’s cause of action was property of the estate, “the debtor-in-possession was duty bound to assert it if doing so would maximize the value of the estate”); *E.F. Hutton Southwest Props. II, Ltd.*, 103 B.R. at 812 (noting that “the trustee must act under his statutory duty to collect property of the estate and either pursue or abandon such actions” in order to “benefit the debtor’s creditors upon distribution”). Thus, MAGI and the MAGI Managers are duty bound to assert the claims against Mirant and Mirant Americas in order to maximize the value of the estate for the benefit of all MAGI creditors. However, as demonstrated below, due to inherent and intractable conflicts of interest among the MAGI Managers and the other Debtors, MAGI cannot and will not pursue such claims. Because MAGI is incapable of asserting these claims, the MAGI Committee should be authorized to pursue the recovery of these assets, which rightfully belong to the MAGI estate.

**B. The MAGI Committee Is the Only Party Capable of Pursuing these Valuable Claims on Behalf of the MAGI Estate**

25. In this Circuit, it is well settled that a creditors’ committee has standing to file suit on behalf of a debtor-in-possession or a trustee, and numerous other courts have agreed

with this principle. *See Louisiana World Exposition*, 858 F.2d at 246-47 (authorizing creditors' committee to bring claims on behalf of debtor corporation against its officers and directors for gross negligence, mismanagement and breach of fiduciary duty); *Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F.2d 1351, 1363 (5th Cir. 1986) (holding that Bankruptcy Code section 1109(b) provides a basis for a creditors' committee to have standing to bring suit); *E.F. Hutton Southwest Props. II, Ltd.*, 103 B.R. at 813-14 (allowing committee appointed to represent interests of debtors' limited partners to prosecute claims belonging to estate); *The Babcock & Wilcox Co.*, 2001 WL 725318 at \*3-\*4 (authorizing creditors' committee to prosecute fraudulent conveyance claims on behalf of the estate). *See also Official Comm. of Unsecured Creditors of Cybergenics Corp v. Chinery*, 330 F.3d 548, 580 (3d Cir. 2003) (holding that courts may authorize creditors' committees to sue to avoid fraudulent transfers for the benefit of the estate); *In re First Capital Holdings Corp.*, 146 B.R. 7, 13 (Bankr. C.D. Cal. 1992) (authorizing committee to bring claims against officers, directors, and controlling shareholder of debtor for gross negligence and breach of fiduciary duty). "Where the debtor-in-possession is unable or unwilling to fulfill its obligation [of pursuing claims that maximize estate value]--due, for instance, to a conflict of interest--the Committee may assert the cause of action on behalf and in the name of [the debtor]." *Louisiana World Exposition*, 858 F.2d at 252. Here, it is abundantly clear that the Debtors' hopeless conflicts of interest prevent them from pursuing these claims.

26. A creditor will have standing to bring suit on behalf of the debtor-in-possession when: (i) the claim in question is colorable; (ii) the debtor unjustifiably refuses to pursue the claim; and (iii) the creditor obtains leave of the court prior to instituting suit on the claim. *See Louisiana World Exposition*, 858 F.2d at 247 (noting that these criteria are relevant considerations in determining creditor standing, and not a "formulistic checklist"). The MAGI Committee easily satisfies the factors enunciated in *Louisiana World Exposition* because, as

demonstrated below, the claims that the MAGI Committee seeks to pursue clearly are colorable and meritorious.

**1. The MAGI Estate's Claims are Colorable**

27. There can be no doubt that the MAGI Committee seeks to pursue colorable claims on behalf of the MAGI estate. First, as described previously herein, the claims to be brought by the MAGI Committee are founded upon substantial assertions of fact, based upon disclosures in publicly filed documents of the Debtors, and are not based solely upon conclusory allegations. *See The Babcock & Wilcox Co.*, 2001 WL 725318, at \*3 (creditors' committee fraudulent conveyance claim held colorable). *See also E.F. Hutton Southwest Props. II, Ltd.*, 103 B.R. at 812 (holding creditors' committee claims against general partner for the debtor met standards for committee standing); *First Capital Holdings Corp.*, 146 B.R. at 13 (finding that complaint containing allegations of specific acts of wrongdoing by members of debtor's board and controlling shareholder met standards for committee standing). Specifically, the MAGI Committee has provided in this Application explicit detail regarding the domination and control of MAGI by Mirant and Mirant Americas, the systematic campaign to deplete all available cash from MAGI in complete contravention of Mirant and Mirant Americas' duties as dominant equity holder and sole managing member, respectively, and the fraudulent transfer of assets and cash of MAGI to Mirant and Mirant Americas. *See infra*, at ¶¶ 4 to 12. The MAGI Committee need not prove its claims at the pleading stage; it need only state claims recognized under applicable law. Clearly, the MAGI Committee has done so and, therefore, its claims are colorable.

**2. Demand Upon the Debtors to Pursue the MAGI Estate's Claims Is Futile Due to Inherent Conflicts of Interest**

28. While a creditors' committee is generally required to make a demand on the debtor to bring causes of action on behalf of the estate, courts have held that a creditors' committee may be excused from making a demand upon a debtor where such a demand would be futile. For example, in *First Capital Holdings Corp.*, the official creditors' committee argued that making a demand on the debtor to bring causes of action on behalf of the estate was futile because there was simply "no reasonable possibility that the debtors' officers and directors [would] initiate or zealously prosecute a suit against themselves and the debtors' principal shareholder." 146 B.R. at 10. The *First Capital Holdings* Court agreed with the committee that the demand upon the chapter 11 corporate debtor's board of directors to pursue claims should be excused as futile, such that the creditors' committee would be allowed to prosecute claims against the officers, directors and controlling shareholder of the debtor. *Id.* at 13 (noting that committee's complaint alleged specific acts of wrongdoing by the members and domination of the board of directors by principal shareholder).

29. Just as in *First Capital Holdings*, there is no reasonable possibility that the MAGI Managers will initiate or zealously prosecute a suit against themselves and their controlling member, Mirant Americas, as well as their ultimate parent company Mirant. There is simply no incentive on the part of MAGI representatives to avoid transfers made to its controlling member and parent company, particularly when those transfers total such a significant amount – almost \$1 billion. As the bankruptcy court acknowledged in *E.F. Hutton Southwest Properties II, Ltd.*, a case in which the creditors' committee sought to bring claims against the debtor's general partner on behalf of the debtor limited partnership, it is "quite difficult, if not impossible for counsel for the Debtor in Possession to sue the general partner or

affiliate.” 103 B.R. at 810 n.1. The *E.F. Hutton* court further explained that the likelihood of a debtor pursuing claims against an affiliate is even more remote where there is common legal counsel, as the “insider person’s control skews counsel’s independent judgment and allegiance, eliminating counsel’s duty to serve a single master.” *Id.* This authority is directly applicable to MAGI, an entity dominated by Mirant and Mirant management. The MAGI Committee should not be required to make a demand on the same MAGI Managers and Mirant directors and officers who are the very defendants named in the complaint.

30. Indeed, the Debtors’ refusal to provide the MAGI Committee with any substantive information on these intercompany claims indicates strongly that the Debtors have no interest or intent in pursuing the claims belonging to the MAGI estate and therefore, their actions should be construed as an unjustified refusal to prosecute the claims. A debtor’s refusal to prosecute an action will be found unjustified where it leaves the interests of creditors unprotected. *See The Babcock & Wilcox Co.*, 2001 WL 725318, at \*4 (holding debtors’ refusal to bring suit was unjustified where causes of action based upon fraudulent conveyance could be worth over \$622 million or more to the estate because in such situation the “interests of creditors were left unprotected”) (quoting *Louisiana World Exposition*, 858 F.2d at 252 n.20). As the Fifth Circuit Court of Appeals stated in *Louisiana World Exposition*:

A creditor’s interests in a Chapter 11 context are *not* protected where the debtor-in-possession fails to fulfill its obligation to collect property of the estate. If a valid--and potentially profitable--cause of action exists under state law which the debtor-in-possession may assert on behalf of the corporation, *all* creditors are harmed when the debtor-in-possession refuses to pursue it. The value of the estate is not maximized and the ultimate recovery of all creditors is diminished.

858 F.2d at 249 (emphasis in original). Without the prosecution of the MAGI estate's claims, the value of MAGI is not being maximized, and the ultimate recovery for all MAGI creditors is thereby diminished.

31. Any further delay in taking steps to pursue the MAGI estate claims may have a detrimental effect on MAGI's ability to recover those assets for the MAGI estate. The Debtors have failed to provide any cogent explanation as to how MAGI's officers and directors can ensure that MAGI's interests, as distinct from Mirant's interests, are protected in the procurement of fuel and dispatch of power from MAGI generating assets. The MAGI Committee has not received sufficient information regarding how these transactions are financed or accounted for. The MAGI Committee believes, however, that Mirant is financing the trading done through its wholly-owned subsidiary MAEM with the cash diverted illegally from MAGI, which subsequently was posted as direct collateral, or as collateral securing letters of credit to counterparties. As MAEM's trading positions are unwound, the MAGI estate is entitled to the imposition of a constructive trust on these cash assets. Similarly, the MAGI estate is entitled to assert such a trust claim with respect to cash at Mirant that was obtained from MAGI through the fraudulent dividend scheme. Without leave to prosecute the MAGI estate's claims, these assets may become commingled with other cash of the Debtors, making the imposition of such trust claims potentially more difficult. For example, the Debtors are pursuing a secured DIP financing facility of at least \$500 million that will create superpriority liens on the assets of Mirant and Mirant Americas (among other Debtors), even though no action has apparently been taken by them to evaluate the intercompany claims amongst the various Debtors. The implementation of these liens on Mirant assets will only render MAGI's intercompany claims that much more difficult to collect and satisfy. MAGI's claims against Mirant and Mirant Americas must be

resolved in a timely fashion, before the Debtors proceed with any other actions to dispose of or encumber assets.

32. Equally important, the prosecution of the MAGI claims to final resolution is appropriate at this juncture. This is not an adversary proceeding that can properly be deferred to the tail end of these chapter 11 cases. Rather, given the magnitude of the claims, and the range of impacts upon each Debtor estate, these claims must be resolved prior to commencing the chapter 11 plan process. These claims are substantial MAGI estate assets, which ultimately may be critical to the shape of the plan or plans of reorganization acceptable to MAGI creditors. Resolving these claims sooner, rather than later, will facilitate the prompt overall resolution of these cases.

**3. The MAGI Committee has Properly Requested Leave from this Court to Bring Suit**

33. Finally, the MAGI Committee fulfills the last factor articulated in *Louisiana World Exposition* because the Committee is seeking this Court's explicit authority to pursue claims on behalf of the MAGI estate. *See Louisiana World Exposition*, 858 F.2d at 247 (the committee must "first receive leave to sue from the bankruptcy court" before initiating suit). As all of the requirements for standing have been satisfied, the MAGI Committee therefore, requests that it be granted the authority to prosecute, on behalf of MAGI, all claims based upon the facts described herein.

**CONCLUSION**

WHEREFORE, the MAGI Committee respectfully requests that this Court enter an order (i) granting this Application for leave to file and assert on behalf of the MAGI estate all claims against Mirant, Mirant Americas, the MAGI Managers and the Mirant Directors based upon the facts described herein, (ii) as applicable, granting the MAGI Committee leave from the automatic stay to allow the prosecution of such claims, and (iii) granting the MAGI Committee such other and further relief as is just and proper.

Dated: October 3, 2003

Respectfully submitted,

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**ATTORNEYS FOR THE OFFICIAL  
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## CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2003, a true and correct copy of the foregoing *Application of the Official Committee of Unsecured Creditors of Mirant Americas Generation, LLC for Leave to Assert Claims that are Property of the Estate* was sent via electronic mail to the parties listed below and was sent via U.S. First Class Mail to the parties listed on the Official Shortened Service List.

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