

R. Douglas Noah, Jr., Esq.  
State Bar No. 15047500  
WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP  
5000 Renaissance Tower  
1201 Elm Street  
Dallas, Texas 75270  
Tel: (214) 698-8000  
Fax: (214) 698-1101

Mark G. Ledwin, Esq.  
WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP  
3 Gannett Drive  
White Plains, New York 10604  
Tel: (914) 323-7000  
Fax: (914) 323-7001

Co-Counsel for The Town of Lumberland, NY, The Town of Forestburgh, NY,  
The County of Sullivan, NY and The Eldred Central School District

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

_____ )	Chapter 11
In re: )	
)	Case No. 03-46590 (DML)
MIRANT CORPORATION, et al., )	Jointly Administered
)	
Debtors. )	<b>Hearing Date: 12/10/03</b>
_____ )	<b>Time: 10:30 a.m.</b>

**MOTION TO ABSTAIN AND/OR DISMISS  
DEBTORS' MOTION TO DETERMINE  
CERTAIN TAX LIABILITIES UNDER 11 U.S.C. § 505(a)**

This Motion is jointly made by (i) The Assessor of the Town of Forestburgh, NY, The Board of Assessment Review of the Town of Forestburgh, NY and The Town of Forestburgh, NY ("Forestburgh"), (ii) The Assessor of the Town of Lumberland, NY, The Board of Assessment Review of the Town of Lumberland, NY and The Town of Lumberland, NY ("Lumberland"), (iii) The Assessor of the Town of Bethel, NY, The Board of Assessment Review of the Town of Bethel, NY and The Town of Bethel, NY ("Bethel"), (iv) The County of Sullivan, NY ("Sullivan County") and (v) The Eldred Central School District ("Eldred CSD") (collectively, the "Sullivan County Taxing Authorities").

Pursuant to this Motion, the Sullivan County Taxing Authorities seek to have this Court enter an Order pursuant to 28 U.S.C. § 1334(c) and/or 11 U.S.C. §§ 505(a)(2) and 105(a), dismissing and/or abstaining from hearing the Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a) and 505(a) for the Determination of Tax Liability (the "Section 505 Motion") (Docket No. 1035).

Submitted herewith, and incorporated herein in full by reference, is the Motion to Remand and/or Abstain (the "Remand Motion"), together with all supporting Affidavits, Exhibits and Memorandum of Law, filed by the Sullivan County Taxing Authorities with the United States Bankruptcy Court for the Southern District of New York in connection with twelve (12) state court tax certiorari proceedings removed by Mirant to the Southern District of New York that are also the subject of Mirant's Section 505 Motion.

In support of this Motion, the Sullivan County Taxing Authorities respectfully represent to this Court as follows:

1. Starting in July of 2000, Mirant commenced actions under Article 7 of the New York Real Property Tax Law ("RPTL") with the New York Supreme Court, Sullivan County, against Forestburgh, Lumberland and Bethel seeking *de novo* review of the determinations made by the respective Boards of Assessment Review ("BAR") for the Towns of Forestburgh, Lumberland and Bethel rejecting Mirant's challenges to certain real property assessments. Similar actions were commenced by Mirant for years 2001, 2002 and 2003 (collectively, the "State Court Tax Proceedings"). All of the State Court Tax Proceedings have been effectively consolidated before the Honorable Burton Ledina, Acting Supreme Court Justice, Sullivan County, who has presided over the actions from their inception in July of 2000.

2. On or about July 14, 2003, Mirant and various of its affiliates filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division. Mirant's chapter 11 cases are being jointly administered.

3. Mirant commenced the 2003 State Court Tax Proceedings with the Sullivan County Supreme Court after the commencement of its bankruptcy cases by New York counsel specially retained to do so with the approval of this Court.

4. On or about October 6, 2003, Mirant filed Notices of Removal for each of the State Court Tax Proceedings with the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1452(a) and Fed. R. Bankr. P. 9027.

5. The Sullivan County Taxing Authorities have filed a Motion to Remand and/or Abstain with the New York Bankruptcy Court as to each of the removed State Court Tax Proceedings. [*See Appendix filed in support of this Motion*].

6. Mirant has also filed a Motion to Transfer Venue with the New York Bankruptcy Court seeking to transfer all of the removed State Court Tax proceedings to the Northern District of Texas.

7. The Motions to Remand and to Transfer Venue are scheduled for a hearing before the Honorable Adlai S. Hardin, Jr. of the New York Bankruptcy Court on December 4, 2003.

**A. This Court Should Defer To Judge Hardin Of The New York Bankruptcy Court On Any Issues Concerning Jurisdiction Or Abstention**

8. Mirant removed each of the State Court Tax Proceedings from New York state court to the Southern District of New York with the ultimate goal of having them transferred to the Northern District of Texas where Mirant's chapter 11 bankruptcy cases are pending. Mirant would like the New York Bankruptcy Court to bypass any consideration of issues concerning jurisdiction, remand and abstention, and instead immediately transfer all of the removed actions to Texas. But that is not the rule of the Southern District of New York, nor is it even the majority rule of the other federal districts who have confronted the issue. Rather, the controlling case law makes clear that Judge Hardin of the New York Bankruptcy Court must first decide whether or not *any* bankruptcy court should decide the removed State Court Tax Proceedings, before deciding *which* bankruptcy court, if any, should ultimately hear these proceedings. [See Appendix Ex. B, Memo of Law at 11-13].

9. The Sullivan County Taxing Authorities' Motion to Remand and/or Abstain, together with Mirant's Motion to Transfer Venue are set to be heard by Judge Hardin on December 4, 2003. In order to avoid having two Court's decide the same issue, this Court should defer any ruling on the instant Motion until Judge Hardin has ruled on the competing Motions to Remand and/or Abstain and to Transfer Venue.

10. It cannot be disputed that, notwithstanding Mirant's filing of the Section 505 Motion with this Court, the issues concerning Mirant's real property tax challenges were first commenced in New York state court, both before and after Mirant's filing of its chapter 11 petitions. The proper procedure to remove a state court action pending in a district other than the

district where the bankruptcy case is filed, is to remove the action to the bankruptcy court for the district where the state court action is pending, and then seek to transfer venue of the action to the district where the bankruptcy case is pending. *See Renaissance Cosmetics, Inc. v. Development Specialists Inc.*, 277 B.R. 5, 11 (S.D.N.Y. 2002) (and cases cited therein); *Haworth, Inc. v. Sunarhauserman Ltd.*, 131 B.R. 359 (Bankr. W.D. Mich. 1991); 10 *Collier on Bankruptcy* ¶9027.03, at 9027-7 (15<sup>th</sup> Ed. Rev. 2003).

11. Mirant followed this procedure here by removing the State Court Tax Proceedings to the Southern District of New York and then filing a motion to transfer venue to this Court. Thus, there was little need for Mirant's Section 505 Motion. Indeed, it appears that the sole purpose of Mirant's Section 505 Motion was to get something on file with this Court prior to the removal of the State Court Tax Proceedings so that Mirant could argue to the New York Bankruptcy Court that any jurisdictional and abstention issues should be decided by this Court. This is pure "boot-strapping." By creating a procedural issue where no should exist, Mirant essentially seeks to diminish the statutory rights of the Sullivan County Taxing Authorities to move to remand or abstain under 28 U.S.C. §§ 1452(b) and 1334(c), 11 U.S.C. § 505(a) and Federal Rule of Bankruptcy Procedure 9027(d). Moreover, the procedure chosen by Mirant to get the State Court Tax Proceedings before this Court is inherently ineffectual since it necessarily causes a duplication of effort and a risk of inconsistent results.

12. Accordingly, because any issues concerning jurisdiction and abstention must first be decided by Judge Hardin of the New York Bankruptcy Court, this Court should defer ruling on the instant Motion until such time as Judge Hardin has ruled on the New York motions.

**B. In the Event That This Court Decides To Hear  
The Instant Motion, This Court Should Either Dismiss  
Or Abstain From Hearing Mirant's Section 505 Motion**

13. As more fully set forth in the Memorandum of Law filed with the New York Bankruptcy Court, the Sullivan County Taxing Authorities respectfully submit that no bankruptcy court has jurisdiction to redetermine Mirant's tax liabilities under the plain dictates of Section 505(a)(2)(A) of the Bankruptcy Code. Each of the real property tax assessment challenges made by Mirant were originally heard and decided by the respective Boards of Assessment Review for the Towns of Forestburgh, Lumberland and Bethel. Because those determinations constitute adjudications by an appropriate administrative tribunal of competent jurisdiction under well-settled New York law, Section 505(a)(2)(A) prohibits the federal bankruptcy courts from interfering with those determinations. [See Appendix Ex. B, Memo of Law at 15-20].

14. Alternatively, even if the bankruptcy courts were found to have jurisdiction over the removed tax certiorari proceedings, multiple reasons exist to abstain from hearing the removed proceedings in favor of the New York state court. Amongst other things, the removed State Court Tax Proceedings involve a quintessentially local state law issue that is both complex and unsettled. The resolution of that issue by the New York state court can occur within a matter of months, and will have no material impact whatsoever on Mirant's multi-billion dollar reorganization cases that are still only in their nascent stages. Allowing these state law actions to proceed in bankruptcy court, however, will necessarily involve a duplication of effort and further create a risk for inconsistent results in an evolving area of New York Real Property Tax Law. [See Appendix Ex. B, Memo of Law at 21-31].

**WHEREFORE**, for all of the reasons set forth above and in the Sullivan County Taxing Authorities' Motion to Remand and/or Abstain filed with the New York Bankruptcy Court, as well as those set forth in the various motions filed by other similarly situated taxing authorities, the Sullivan County Taxing Authorities respectfully request that this Court defer ruling on any jurisdictional or abstention issues until Judge Hardin of the New York Bankruptcy Court has ruled on these same issues, or alternatively, decline to hear Mirant's Section 505 Motion due to a lack of jurisdiction or under principles of abstention.

Dated: November 21, 2003

Respectfully,

/s/ R. Douglas Noah

R. Douglas Noah, Jr., Esq.  
State Bar No. 15047500  
WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP  
5000 Renaissance Tower  
1201 Elm Street  
Dallas, Texas 75270  
Tel: (214) 698-8000  
Fax: (214) 698-1101

-and-

Mark G. Ledwin, Esq.  
WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP  
3 Gannett Drive  
White Plains, NY 10604  
Tel: (914) 323-7000  
Fax: (914) 323-7001

Co-Counsel for The Town of Lumberland, NY,  
The Town of Forestburgh, NY,  
The County of Sullivan, NY and  
The Eldred Central School District

ADDITIONAL COUNSEL FOR MOVANTS:

Walter F. Garigliano, Esq.  
Garigliano Law Offices, LLP  
449 Broadway – P.O. Drawer 1069  
Monticello, NY 12701-1069  
(845) 796-1010

Counsel for The Assessor of the Town of Lumberland, The Board of Assessment Review of the Town of Lumberland and The Town of Lumberland, and

Counsel for The Assessor of the Town of Bethel, The Board of Assessment Review of the Town of Bethel and The Town of Bethel

Glen A. Plotsky, Esq.  
Bavoso & Plotsky  
19 East Main Street  
P.O. Box 3139  
Port Jervis, New York  
(845) 856-4444

Counsel for The Assessor of the Town of Forestburgh, The Board of Assessment Review of the Town of Forestburgh and The Town of Forestburgh

Thomas J. Cawley, Esq.  
Assistant County Attorney  
Sullivan County Department of Law  
County Government Center  
100 North Street, P.O. Box 5012  
Monticello, NY 12701  
(845) 794-3000, Ext. 3565

Counsel for The County of Sullivan

Henri Shawn, Esq.  
Shawn Law Offices  
North Street Professional Building  
30 North Street, P.O. Box 1320  
Monticello, NY 12701-1320  
(845) 791-7676

Counsel for The Eldred Central School District

Mark G. Ledwin, Esq. (ML-6873)  
**WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP**  
 3 Gannett Drive  
 White Plains, New York 10604  
 (914) 323-7000  
 Co-Counsel for Respondents

**Hearing Date: 12/04/03**  
**Time: 9:30 am**

**UNITED STATES BANKRUPTCY COURT  
 SOUTHERN DISTRICT OF NEW YORK**

-----		X
MIRANT NEW YORK, INC. f/k/a	:	Adv. Proc. Nos. 03-05023-ASH
SOUTHERN ENERGY NEW YORK-GEN LLC,	:	03-05028-ASH
	:	03-05041-ASH
Petitioners,	:	03-05044-ASH
-against-	:	
	:	
ASSESSOR OF THE TOWN OF FORESTBURGH, et al.,	:	
	:	
Respondents.	:	
-----		X
MIRANT NEW YORK, INC. f/k/a	:	Adv. Proc. Nos. 03-05027-ASH
SOUTHERN ENERGY NEW YORK-GEN LLC,	:	03-05030-ASH
	:	03-05034-ASH
Petitioners,	:	03-05043-ASH
-against-	:	
	:	
ASSESSOR OF THE TOWN OF LUMBERLAND, et al.,	:	
	:	
Respondents.	:	
-----		X
MIRANT NEW YORK, INC. f/k/a	:	Adv. Proc. Nos. 03-05031-ASH
SOUTHERN ENERGY NEW YORK-GEN LLC,	:	03-05032-ASH
	:	03-05033-ASH
Petitioners,	:	03-05040-ASH
-against-	:	
	:	
THE ASSESSOR OF THE TOWN OF BETHEL, et al.,	:	
	:	
Respondents,	:	
-----		X

**NOTICE OF JOINT MOTION TO REMAND AND/OR ABSTAIN**

**PLEASE TAKE NOTICE**, that upon the Affidavits of Walter F. Garigliano and Glen A. Plotsky, the Exhibits annexed thereto and the accompanying Memorandum of Law, Respondents (i) The Assessor of the Town of Forestburgh, The Board of Assessment Review of the Town of Forestburgh and The Town of Forestburgh (“Forestburgh”), (ii) The Assessor of the Town of Lumberland, The Board of Assessment Review of the Town of Lumberland and The Town of Lumberland (“Lumberland”), (iii) The Assessor of the Town of Bethel, The Board of Assessment Review of the Town of Bethel and The Town of Bethel (“Bethel”), (iv) The County of Sullivan (“Sullivan County”) and (v) The Eldred Central School District (“Eldred CSD”) (collectively, the “Sullivan County Taxing Authorities”), shall move before the Honorable Adlai S. Hardin, Jr., United States Bankruptcy Judge, at the United States Courthouse located at 300 Quarropas Street, White Plains, New York, on December 4, 2003, at 9:30 a.m., or as soon thereafter as counsel can be heard, for the entry of an Order remanding each of the above captioned removed actions to the New York Supreme Court in and for Sullivan County pursuant to 28 U.S.C. §§ 1452(b) and 1334(c)(1), 11 U.S.C. §§ 505(a)(2)(A) and 105(a), and/or Federal Rule of Bankruptcy Procedure 9027(d).

**PLEASE TAKE FURTHER NOTICE**, that answering papers to this Motion, if any, must be served upon each of the undersigned counsel for the Sullivan County Taxing Authorities, together with a courtesy copy thereof delivered to the chambers of Judge Hardin, so as to be received by each of the foregoing by no later that 4:00 p.m. on December 1, 2003.

Dated: White Plains, New York  
November 19, 2003

Respectfully,

**WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP**

By: /s/ Mark G. Ledwin  
Mark G. Ledwin, Esq. (ML-6873)  
3 Gannett Drive  
White Plains, New York 10604  
(914) 323-7000

Co-Counsel for Respondents/Movants

ADDITIONAL COUNSEL FOR MOVANTS LISTED ON NEXT PAGE

Glen A. Plotsky, Esq.  
Bavoso & Plotsky  
19 East Main Street  
P.O. Box 3139  
Port Jervis, New York  
(845) 856-4444

Counsel for The Assessor of the Town of Forestburgh, The Board of Assessment Review of the Town of Forestburgh and The Town of Forestburgh

Walter F. Garigliano, Esq.  
Garigliano Law Offices, LLP  
449 Broadway – P.O. Drawer 1069  
Monticello, NY 12701-1069  
(845) 796-1010

Counsel for The Assessor of the Town of Lumberland, The Board of Assessment Review of the Town of Lumberland and The Town of Lumberland, and

Counsel for The Assessor of the Town of Bethel, The Board of Assessment Review of the Town of Bethel and The Town of Bethel

Thomas J. Cawley, Esq.  
Assistant County Attorney  
Sullivan County Department of Law  
County Government Center  
100 North Street, P.O. Box 5012  
Monticello, NY 12701  
(845) 794-3000, Ext. 3565

Counsel for The County of Sullivan

Henri Shawn, Esq.  
Shawn Law Offices  
North Street Professional Building  
30 North Street, P.O. Box 1320  
Monticello, NY 12701-1320  
(845) 791-7676

Counsel for The Eldred Central School District

TO ALL PARTIES LISTED ON THE ANNEXED CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

MARK G. LEDWIN, an attorney duly admitted to practice before this Court, hereby certifies that on the 19<sup>th</sup> day of November, 2003, I cause true and correct copies of the foregoing Notice of Motion, together with copies of the Affidavits of Walter F. Garigliano and Glen A. Plotsky, the Exhibits annexed thereto and the supporting Memorandum of Law, to be served via UPS overnight delivery service upon each of the parties listed below:

J. Christopher Shore, Esq.  
M. Victoria Bayoneto, Esq.  
White & Case LLP  
1155 Avenue of the Americas  
New York, NY 10036

Marc D. Lansing, Esq.  
Hiscock & Barclay, LLP  
50 Beaver Street  
Albany, NY 12207

James J. Barriere, Esq.  
Couch White LLP  
540 Broadway  
Albany, NY 12201

Dated: White Plains, New York  
November 19, 2003

*/s/ Mark G. Ledwin*  
\_\_\_\_\_  
Mark G. Ledwin, Esq. (ML-6873)

Mark G. Ledwin, Esq. (ML-6873)  
**WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP**  
 3 Gannett Drive  
 White Plains, New York 10604  
 (914) 323-7000  
 Co-Counsel for Respondents

**UNITED STATES BANKRUPTCY COURT  
 SOUTHERN DISTRICT OF NEW YORK**

-----	X	
MIRANT NEW YORK, INC. f/k/a	:	Adv. Proc. Nos. 03-05023-ASH
SOUTHERN ENERGY NEW YORK-GEN LLC,	:	03-05028-ASH
	:	03-05041-ASH
Petitioners,	:	03-05044-ASH
-against-	:	
	:	
ASSESSOR OF THE TOWN OF FORESTBURGH, et al.,	:	
	:	
Respondents.	:	
-----	X	
MIRANT NEW YORK, INC. f/k/a	:	Adv. Proc. Nos. 03-05027-ASH
SOUTHERN ENERGY NEW YORK-GEN LLC,	:	03-05030-ASH
	:	03-05034-ASH
Petitioners,	:	03-05043-ASH
-against-	:	
	:	
ASSESSOR OF THE TOWN OF LUMBERLAND, et al.,	:	
	:	
Respondents.	:	
-----	X	
MIRANT NEW YORK, INC. f/k/a	:	Adv. Proc. Nos. 03-05031-ASH
SOUTHERN ENERGY NEW YORK-GEN LLC,	:	03-05032-ASH
	:	03-05033-ASH
Petitioners,	:	03-05040-ASH
-against-	:	
	:	
THE ASSESSOR OF THE TOWN OF BETHEL, et al.,	:	
	:	
Respondents,	:	
-----	X	

**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS'  
JOINT MOTION TO REMAND AND/OR ABSTAIN**

ADDITIONAL COUNSEL LISTED ON NEXT PAGE

**ADDITIONAL COUNSEL:**

Walter F. Garigliano, Esq.  
Garigliano Law Offices, LLP  
449 Broadway – P.O. Drawer 1069  
Monticello, NY 12701-1069  
(845) 796-1010

Counsel for The Assessor of the Town of Lumberland, The Board of Assessment Review of the Town of Lumberland and The Town of Lumberland, and

Counsel for The Assessor of the Town of Bethel, The Board of Assessment Review of the Town of Bethel and The Town of Bethel

Glen A. Plotsky, Esq.  
Bavoso & Plotsky  
19 East Main Street  
P.O. Box 3139  
Port Jervis, New York  
(845) 856-4444

Counsel for The Assessor of the Town of Forestburgh, The Board of Assessment Review of the Town of Forestburgh and The Town of Forestburgh

Thomas J. Cawley, Esq.  
Assistant County Attorney  
Sullivan County Department of Law  
County Government Center  
100 North Street, P.O. Box 5012  
Monticello, NY 12701  
(845) 794-3000, Ext. 3565

Counsel for The County of Sullivan

Henri Shawn, Esq.  
Shawn Law Offices  
North Street Professional Building  
30 North Street, P.O. Box 1320  
Monticello, NY 12701-1320  
(845) 791-7676

Counsel for The Eldred Central School District

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... ii

INTRODUCTION..... 1

PRELIMINARY STATEMENT ..... 1

STATEMENT OF FACTS AND PROCEDURAL HISTORY..... 3

    A. The Bankruptcy Removals..... 3

    B. The BAR Determinations ..... 4

    C. The State Court Tax Certiorari Proceedings ..... 6

    D. Mirant’s Chapter 11 Proceedings ..... 11

ARGUMENT ..... 11

    A. This Court Must Decide The Remand/Abstention Motion  
    Prior to Deciding Mirant’s Venue Transfer Motion ..... 12

    B. The 2003 State Court Tax Proceedings Must Be  
    Remanded Due To Their Untimely Removal ..... 17

    C. This Court Lacks Jurisdiction To Hear The Removed State Court  
    Tax Proceedings Under Bankruptcy Code § 505(a)(2)(A)..... 19

    D. Even If This Court Has Jurisdiction, It Should Exercise Its Discretion  
    To Abstain From Hearing And/Or Equitably Remand The Removed  
    State Court Tax Proceedings Pursuant To 11 U.S.C. § 505(a)(1), 28 U.S.C.  
    § 1334(c)(1) And/Or 28 U.S.C. § 1452(b)..... 26

        1. 11 U.S.C. § 505(a)(1) ..... 26

        2. 28 U.S.C. § 1334(c)(1) ..... 28

        3. 28 U.S.C. § 1452(b)..... 30

        4. No Matter Which Statutory Predicate Is Used, The Relevant Factors Weigh  
        Heavily In Favor Of Remanding The Removed State Court Tax Proceedings ..... 25

CONCLUSION ..... 38

**TABLE OF AUTHORITIES**

**Cases**

Allen County Bank & Trust Co. v. Valvomatic Int’l Corp., 51 B.R. 578, 581  
(N.D. Ind. 1985)..... 14

Beck v. Victor Equip. Co., Inc., 277 B.R. 179, 180 (S.D.N.Y. 2002) ..... 11

Brooklyn Union Gas Co. v. State Board of Equalization Assessments,  
65 N.Y.2d 472, 492 N.Y.S.2d 598 (1985) ..... 6, 11

Covanta Onondaga Ltd. v. Onondaga County Resource Recovery Agency,  
281 B.R. 809, 813 (N.D.N.Y. 2002)..... 11

Erie Boulevard Hydropower, L.P. v. Town of Ephratah, Slip. Op.,  
Index No. 87413 (N.Y. Sup. Ct., Fulton County) ..... 7, 11

In re AWB Assocs., G.P., 144 B.R. 270 (E.D. Pa. 1992) ..... 22

In re Baker, 74 F.3d 906, 909 (9th Cir. 1996) ..... 18, 19, 20

In re Cody, 338 F3d. 89, 95 (2d Cir. 2003) ..... 17, 18, 22, 24

In re D’Alessio, 181 B.R. 756, 759 (S.D.N.Y. 1995) ..... 22

In re Eagle Bend Dev., 61 B.R. 451, 458 (W.D. La. 1986) ..... 14

In re El Tropicano, Inc., 128 B.R. 153 (W.D. Tex. 1991) ..... 19

In re Fairchild Aircraft Corp., 124 B.R. 488 (W.D. Tex. 1991) ..... 22

In re Galvano, 116 B.R. 367, 372 (E.D.N.Y. 1990) ..... 22

In re Hunt, 95 B.R. 442, 445 (N.D. Tex. 1989) ..... 22

In re Lorax Corp., 295 B.R. 83 (Bankr. N.D. Tex. 2003) ..... 12, 13

In re Metromedia Fiber Network, Inc., 2003 WL 22204152, \*1  
(Bankr. S.D.N.Y. July 15, 2003) ..... 15, 21

In re New Haven Projects Ltd. Liability Co., 225 F.3d 283, 287 (2d Cir. 2000) ..... 21, 22

In re Northbrook Partners LLP, 245 B.R. 104 (D. Minn. 2000) ..... 18, 21

In re NTL, Inc., 295 B.R. 706, 715 (S.D.N.Y. 2003) ..... 22, 24

In re Onondaga, Plaza Maintenance Co., Inc., 206 B.R. 653 (N.D.N.Y. 1997) .....	18
In re Plus Gold, Inc., 1994 WL 92415 (Bankr. N.D. Ohio Feb. 4, 1994) .....	21
In re Railroad Street Partnership, 255 B.R. 644, 646 (N.D.N.Y. 2000) .....	16, 17, 18
In re Super Van, Inc., 161 B.R. 184 (W.D. Tex. 1993) .....	20
Lone Star Industries, Inc. v. Liberty Mut. Ins., 131 B.R. 269, 272-73 (D. Del. 1991) .....	11, 12
Matter of Teal, 16 F.3d 619 (5th Cir. 1994) .....	18
Matter of Trans State Outdoor Adver. Co., Inc., 140 F.3d 618, 622 (5th Cir. 1998) .....	19
Niagara Mohawk Power Corp. v. Town of Minetto, 221 A.D.2d 910, 634 N.Y.S.2d 292 (4th Dep't 1995) .....	6, 11
Renaissance Cosmetics, Inc. v. Development Specialists, Inc., 277 B.R. 5, 11 (S.D.N.Y. 2002) .....	11
Renaissance Cosmetics, Inc. v. Oleg Cassini, Inc. 2000 WL 890191, *2 (S.D.N.Y. 2000) ...	12, 13
State Bank of Lombard v. Chart House, Inc., 46 B.R. 468 .....	14
United Container LLC v. United Beverage Florida LLC, 281 B.R. 162, 166 (S.D. Fla. 2002) .....	11

**Statutes**

11 U.S.C. § 362(a)(1).....	7, 11
28 U.S.C. § 1334(c)(1).....	13, 21, 22, 23, 24
28 U.S.C. § 1452(a).....	3, 11, 12
28 U.S.C. § 1452(b).....	13, 21, 24
11 U.S.C. § 505(a)(1).....	2, 15, 21
11 U.S.C. § 505(a)(2)(A) .....	14, 15, 16, 17
RPTL § 506.....	4, 11
RPTL § 524.....	4, 5, 11
RPTL § 525.....	5, 11

**Rules**

Federal Rules of Bankruptcy Procedure 9027 ..... 3, 11

Federal Rules of Bankruptcy Procedure 9027(a)(3) ..... 3, 14

Federal Rule of Bankruptcy Procedure 9027(d) ..... 1, 11

## **INTRODUCTION**

This Memorandum of Law is jointly submitted on behalf of Respondents (i) The Assessor of the Town of Forestburgh, The Board of Assessment Review of the Town of Forestburgh and The Town of Forestburgh (“Forestburgh”), (ii) The Assessor of the Town of Lumberland, The Board of Assessment Review of the Town of Lumberland and The Town of Lumberland (“Lumberland”), (iii) The Assessor of the Town of Bethel, The Board of Assessment Review of the Town of Bethel and The Town of Bethel (“Bethel”), (iv) The County of Sullivan (“Sullivan County”) and (v) The Eldred Central School District (“Eldred CSD”) (collectively, the “Sullivan County Taxing Authorities”), in support of their Joint Motion to Remand and/or Abstain pursuant to 28 U.S.C. §§ 1452(b) and 1334(c), 11 U.S.C. §§ 505(a) and 105(a), and Federal Rule of Bankruptcy Procedure 9027(d). Submitted herewith are the Affidavit of Walter F. Garigliano (“Garigliano Aff.”), the Affidavit of Glen A. Plotsky (“Plotsky Aff.”) and certain Exhibits annexed thereto, to which the Court is respectfully referred herein.

## **PRELIMINARY STATEMENT**

Mirant removed the above captioned tax certiorari proceedings from the Sullivan County Supreme Court to this Court with the ultimate goal of having them transferred to the Northern District of Texas where Mirant’s chapter 11 bankruptcy cases are pending. Mirant would like this Court to bypass this Motion altogether and immediately transfer venue of these removed proceedings to its “home” bankruptcy court in Texas. But that is not the rule of this District, nor is it even the majority rule of the other federal districts who have confronted the issue. Rather, the controlling case law makes clear that this Court must first decide whether or not *any* bankruptcy court should decide these removed state court tax proceedings, before deciding *which* bankruptcy court, if any, should ultimately hear these proceedings.

For the reasons more fully set forth herein, the Sullivan County Taxing Authorities respectfully submit that no bankruptcy court has jurisdiction to hear these proceedings under the plain dictates of Section 505(a)(2)(A) of the Bankruptcy Code . Each of the real property tax assessment challenges made by Mirant in these actions were originally heard and decided by the respective Boards of Assessment Review for the Towns of Forestburgh, Lumberland and Bethel. Because those determinations constitute adjudications by an appropriate administrative tribunal of competent jurisdiction under well-settled New York law, Section 505(a)(2)(A) prohibits the federal bankruptcy courts from interfering with those determinations. Further, at least three of the state court tax certiorari proceedings must be remanded as matter of law due to their untimely removal by Mirant.

Alternatively, even if the bankruptcy courts were found to have jurisdiction over the removed tax certiorari proceedings, multiple reasons exist to justify a remand of these proceedings to the Sullivan County Supreme Court based upon the doctrines of abstention and equitable remand. Amongst other things, the removed state court tax certiorari proceedings involve a quintessentially local state law issue that is both complex and unsettled. The resolution of that issue by the Sullivan Country Supreme Court can occur within a matter of months, and will have virtually no impact whatsoever on Mirant's multi-billion dollar reorganization cases that are still only in their nascent stages. However, allowing these actions to proceed in bankruptcy court will necessarily involve a duplication of effort and further create a risk for inconsistent results.

Accordingly, for the reasons more fully discussed herein, the Sullivan County Taxing Authorities respectfully request that the Court remand all of the removed tax certiorari proceedings to the Sullivan County Supreme Court.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

### **A. The Bankruptcy Removals**

On or about July 14, 2003, Mirant and various of its affiliates filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division. Mirant's chapter 11 cases are all assigned to the Honorable D. Michael Lynn. On or about October 6, 2003, Mirant filed Notices of Removal with this Court pursuant to 28 U.S.C. § 1452(a) and Fed. R. Bankr. P. 9027, of each of the above captioned tax certiorari proceedings which were then pending in the New York Supreme Court in and for Sullivan County.<sup>1</sup> The removed actions concern Mirant's challenges under Article 7 of New York Real Property Tax Law ("RPTL") of the final administrative determinations made by the respective Boards of Assessment Review ("BAR") for the Towns of Forestburgh, Lumberland and Bethel for tax years 2000 through 2003, inclusive, with respect to certain real property located within Sullivan County and purportedly owned by Mirant.

The subject properties were apparently purchased by Mirant from Orange and Rockland Utilities, Inc. ("O&R") as part of a larger acquisition by Mirant from O&R that included various other properties in and about the Counties of Rockland, Orange and Sullivan in the State of New York. Specifically, the subject properties situated within Sullivan County consist of over 700 acres of land, including rivers, waterways, reservoirs, raw land, dam structures, pen stocks,

---

<sup>1</sup> Significantly, the 2003 tax certiorari proceedings were each commenced by Mirant on July 30, 2003 – *after* it had filed for bankruptcy relief on or about July 15, 2003. Those actions were not removed to this Court, however, until October 6, 2003 – some *68 days* after their commencement. As more fully discussed herein, the removal of the 2003 post-petition actions was untimely under Bankruptcy Rule 9027(a)(3) which requires the removal of post-petition actions within 30 days. The 2003 tax certiorari proceedings must therefore be remanded as a matter of law.

tunnels, raceways and hydroelectric facilities and are used to generate hydroelectric power. The subject properties are commonly known as the Swinging Bridge, Mongaup Falls and Rio Dam hydroelectric facilities. The subject property located within the Town of Bethel consists solely of a dam impounding the 1,000 acre Toronto reservoir. No hydroelectric generating stations are located within the Town of Bethel. For ease of reference, the subject properties located within the Towns of Forestburgh, Lumberland and Bethel are referred to herein as the “Sullivan County Properties.”<sup>2</sup>

## **B. The BAR Determinations**

On or about May 1, 2000, the Towns of Forestburgh, Lumberland and Bethel completed their respective preparation of the 2000 tentative assessment rolls for real property, and published notice of the tentative 2000 assessment rolls in accordance with RPTL § 506 . The Sullivan County Properties were valued and assessed based upon the “reconstruction cost new less depreciation” or “RCNLD” methodology, consistent with long standing New York law.

Soon after the publication of the 2000 tentative assessment rolls, Mirant (or its predecessor) filed Complaints on the administratively mandated forms (the “Complaints”) with the Forestburgh, Lumberland and Bethel BARs pursuant to RPTL § 524 contesting the 2000 assessments on the Sullivan County Properties based upon RCNLD and seeking a reduction of same. Mirant did the same for assessment years 2001, 2002 and 2003. *See Garigliano Aff., Ex. A.*

---

<sup>2</sup> Upon information and belief, O&R and/or Con Edison claim to have retained an interest in the subject properties and share some obligation to pay for a portion of the real property taxes on the subject properties.

Under RPTL § 525, a BAR is required to meet to hear assessment complaints in a public forum. At any such public hearings, the BAR is allowed under New York law to administer oaths, take testimony and hear proof in regard to a complaint and the assessment. The BAR is also allowed, in its discretion, to require the complainant to appear before the BAR and be examined concerning the complaint and to produce papers or other information concerning the complaint. After the completion of the review by the BAR, the BAR is then required to determine the final assessed valuation of the real property that is the subject of a complaint and to provide notice thereof to the petitioner.

Consistent with the procedures outlined above, Mirant's Complaints were brought before the Forestburgh, Lumberland and Bethel BARs in each of the subject years for the purpose of evaluating the merits of the Complaints in accordance with RPTL § 524. After duly considering those Complaints at a public hearing, each were denied since the BARs found that the use of RCNLD was an appropriate valuation method for the subject properties. The BARs then provided notices to Mirant and the Town Assessors of each of the determinations. Consistent with the BAR determinations, the Town Assessors then published the final tax assessment rolls on or about July 1 of each respective year. *See* Garigliano Aff., Exs. B and C.

### **C. The State Court Tax Certiorari Proceedings**

After the publication of the final assessment rolls, starting in 2000 Mirant commenced actions under Article 7 of the RPTL with the New York Supreme Court, Sullivan County, against Forestburgh, Lumberland and Bethel seeking a further review of the BAR determinations. Similar actions were commenced by Mirant for years 2001, 2002 and 2003. All of these actions have been effectively consolidated before the Honorable Burton Ledina, Acting Supreme Court Justice, Sullivan County, who has presided over these actions from their

inception in July of 2000. Copies of the RPTL Article 7 petitions filed by Mirant with the Sullivan County Supreme Court are annexed to its removal papers. The Index Numbers assigned to these actions by the Sullivan County Clerk are, respectively, 1506-00, 1693-01, 1665-02 and 1841-03 (Forestburgh), 1507-00, 1691-01, 1666-02 and 1839-03 (Lumberland), and 1505-00, 1692-01, 1667-02 and 1840-03 (Bethel) (collectively, the “State Court Tax Proceedings”).<sup>3</sup>

The State Court Tax Proceedings were initially filed on behalf of Mirant by the Tarrytown, New York law firm of Albert & Albert. Since their commencement, however, all proceedings, including multiple court conferences held over more than a three year period, have been handled by the Albany, New York law firm of Couch White LLP. The Couch White firm has since been retained as special counsel for Mirant and approved by the Texas bankruptcy court to continue on with that representation for purposes of the State Court Tax Proceedings. *See Garigliano Aff, Ex. D.*

The substantive issue to be resolved in the State Court Tax Proceedings is most certainly on the cutting edge of New York Real Property Tax Law. For years, New York has used RCNLD to value specialty properties such as the hydroelectric facilities and properties at issue here. *See, e.g., Niagara Mohawk Power Corp. v. Town of Minetto*, 221 A.D.2d 910, 634 N.Y.S.2d 292 (4th Dep’t 1995) (RCNLD is the appropriate valuation method for a hydroelectric facility); *Brooklyn Union Gas Co. v. State Board of Equalization Assessments*, 65 N.Y.2d 472, 492 N.Y.S.2d 598 (1985) (adopting RCNLD method). That is still good law in New York. Mirant points to a single trial court level decision in support of its argument that RCNLD is

---

<sup>3</sup> In December 2002, the County of Sullivan and the Eldred Central School District intervened as of right in the Lumberland and Bethel cases pursuant to a stipulation and order entered by Judge Ledina. Sullivan County and the Eldred Central School District both join in this Motion.

unfair and should no longer be applied to hydroelectric facilities. See *Erie Boulevard Hydropower, L.P. v. Town of Ephratah*, Slip. Op., Index No. 87413 (N.Y. Sup. Ct., Fulton County) (see Garigliano Aff., Ex. F). No appellate court in New York has ever adopted that position. Moreover, even the trial court in *Erie Boulevard*, after considering the arguments of the parties and the evidence submitted, determined that the best valuation method for the subject hydroelectric facility was the RCNLD method! *Id.* at 9.<sup>4</sup>

But for Mirant's bankruptcy filings in Fort Worth, Texas on or about July 14, 2003, and the removal of the State Court Tax proceedings to this Court on or about October 6, 2003, it was fully expected that those proceedings would have been tried by the Sullivan County Supreme Court by the end of 2003. Notably, in a letter dated August 29, 2003, Mirant's counsel requested that the appraisal submission date be extended from September 2, 2003 to January 10, 2004, with a court conference to be held on January 20, 2004. See Garigliano Aff. ¶¶ 12-16, Ex. E; Plotsky Aff. ¶¶ 13-17. In that same letter, Mirant's counsel advised Judge Ledina that he had been retained as special counsel in Mirant's chapter 11 cases so that he could continue to serve as counsel in the State Court Tax Proceedings. Mirant's counsel also advised Judge Ledina that the Sullivan County Properties were likely to be sold by Mirant in the near future. In a follow-up letter dated September 17, 2003, Mirant's counsel again advised Judge Ledina that the Sullivan County Properties were likely to be sold, and further confirmed that the State Court Tax Proceedings were not subject to the automatic stay of 11 U.S.C. § 362(a)(1) since they were actions commenced by Mirant, not against Mirant. *Id.*

---

<sup>4</sup> Indeed, Mirant's own reliance upon power deregulation as the basis for abandoning RCNDL is suspect given its admissions in its own bankruptcy filings that part of its problems are caused by the fact that "the contemplated deregulation of the electric markets has never fully developed ...." See Garigliano Aff., Ex. H at p. 30.

In reliance upon these representations, Judge Ledina granted Mirant's requested adjournment in a letter dated September 2, 2003, and set the matters for what would have amounted to a final pre-trial conference on January 20, 2004. *Id.* At that time it was fully expected that a trial date within the next few months would have been set. The trial itself for these matters is expected to last only a few days, and at most a week. It will consist primarily of expert valuation testimony. Significantly, Mirant has already completed its appraisal, at least as to the Lumberland properties, and the Towns of Forestburgh, Lumberland and Bethel have themselves gathered all of the necessary information needed to prepare such an appraisal. <sup>5</sup>

However, instead of going forward with the upcoming January 20, 2004 court conference or any intended sale of the Sullivan County Properties, Mirant instead removed the State Court Tax Proceedings to this Court with the hope of having venue further transferred to the Texas bankruptcy court. Mirant also publicly announced that it was refusing to pay any further taxes for the Sullivan County Properties, even though it has no basis in law to do so. *See Garigliano Aff., Ex. I.*

The total dollar amount of refunds sought by Mirant in the Sullivan County Tax Proceedings for all three of the Sullivan County Towns equals *less than \$7.5 million*. More specifically, based upon the allegations of Mirant's tax certiorari petitions filed with the Sullivan County Supreme Court, Mirant is seeking refunds from Forestburgh, Lumberland and Bethel in the following amounts:

---

<sup>5</sup> At a court conference held before Judge Ledina on March 11, 2003, the parties had essentially come to a resolution of the Bethel matters. The maximum refund potential for Bethel for all four years is less than \$1 million. Moreover, given that Bethel involves only a dam structure, gauging station and outlet works, it is hard to imagine how such real property could be valued on any basis other than RCNLD.

<b>Forestburgh</b>				
	Assessed Valuation	Claimed Valuation	Tax Paid	Refund Claimed
2000	3,975,486	524,900	710,397	616,601
2001	3,975,486	522,200	679,205	589,938
2002	3,975,486	521,400	696,777	605,392
2003	3,975,486	446,000	751,833	667,486
Total:				\$2,479,417

<b>Lumberland</b>				
	Assessed Valuation	Claimed Valuation	Tax Paid	Refund Claimed
2000	48,757,200	10,392,500	1,339,629	1,054,089
2001	48,757,200	10,392,500	1,207,010	949,740
2002	48,176,100	10,393,600	1,233,855	967,659
2003	48,176,100	10,393,600	1,254,986	984,230
Total:				\$3,955,799

<b>Bethel</b>				
	Assessed Valuation	Claimed Valuation	Tax Paid	Refund Claimed
2000	7,896,700	846,554	264,366	236,028
2001	7,896,700	796,358	282,830	254,316
2002	7,896,700	762,845	264,290	238,763
2003	7,896,700	762,845	273,788	247,345
Total:				\$976,452

Thus, the total potential value to Mirant of the Sullivan County Tax Proceedings for all three Towns, presuming it is 100% correct, is \$7,411,668. Although these may be small numbers as far as Mirant is concerned, they are very big numbers to the Towns of Forestburgh, Lumberland and Bethel. For example, Mirant's real properties constitute approximately 19.95% of the total tax base for Lumberland – a rural town with a total population of less than 2,000 people. If Mirant is ultimately successful against Lumberland, the requested refunds will *more than double* Lumberland's *total budget* for all of 2003. *See* Garigliano Aff., ¶ 27.

#### **D. Mirant's Chapter 11 Proceedings**

Mirant describes itself as “one of *the largest* generators and marketers of electricity.” *See* Garigliano Aff., Ex. D at p. 2-3; Ex. H, at pp.26-27. Mirant employs in excess of *7,000 employees worldwide*. In 2002, Mirant's operating revenues were approximately *\$6.4 billion*. *Id.* The most recent consolidated Monthly Operating Report filed by Mirant lists assets *in excess of \$17.6 billion*, including *almost \$1.4 billion in cash* or cash equivalents. Total liabilities exceed *\$11 billion*. *See* Garigliano Aff., Ex. G. Further, Mirant has already secured a *\$500 million* DIP financing facility.

Mirant recently filed a motion to extend its exclusive time to file and solicit a plan of reorganization for a *full year* -- to August 17, 2004 and October 15, 2004, respectively. Naturally, Mirant reserves the right to seek further extensions. Given the multiple complexities described by Mirant in its exclusivity motion, such further extensions appear to be virtually assured. In short, Mirant's extremely complex bankruptcy cases are still in their infancy and are unlikely to be completely resolved for several years. More importantly, it is plain that the State Court Tax proceedings are but a small part of Mirant's multi-billion dollar reorganization efforts.

## ARGUMENT

### **A. This Court Must Decide The Remand/Abstention Motion Prior to Deciding Mirant's Venue Transfer Motion**

As expected, Mirant filed a motion to transfer the venue of each of the removed State Court Tax Proceedings to the Northern District of Texas where its chapter 11 cases are pending. Where, as here, a bankruptcy court is faced with competing motions to remand and to transfer venue, the case law of this district makes clear that the court should first consider the remand motion before deciding the venue motion. See Renaissance Cosmetics, Inc. v. Development Specialists, Inc., 277 B.R. 5, 11 (S.D.N.Y. 2002) (“[C]ourts faced with cross-motions for remand and change of venue consider the remand motion first and if remand is denied, turn to the motion for change of venue.”); Renaissance Cosmetics, Inc. v. Oleg Cassini, Inc. 2000 WL 890191, \*2 (S.D.N.Y. 2000) (same); Beck v. Victor Equip. Co., Inc., 277 B.R. 179, 180 (S.D.N.Y. 2002) (same). See also Covanta Onondaga Ltd. v. Onondaga County Resource Recovery Agency, 281 B.R. 809, 813 (N.D.N.Y. 2002) (same); United Container LLC v. United Beverage Florida LLC, 281 B.R. 162, 166 (S.D. Fla. 2002) (explaining that the procedure of deciding the remand motion first and then the venue transfer motion is “in accord with the majority view that jurisdictional issues should be heard first”).

In Lone Star Industries, Inc. v. Liberty Mut. Ins., 131 B.R. 269, 272-73 (D. Del. 1991), the court was faced with a similar situation as in the present case, *i.e.* competing motions for remand and venue transfer. In its venue motion, the debtor requested that the District of Delaware “defer to the ‘home’ court of the Southern District of New York [where the debtor had filed its chapter 11 case] on the remand issue.” Id. at 273. The Lone Star court rejected this argument, noting instead that the debtor’s request assumed that venue should be transferred

without considering the remand motion, and that the request vitiated any need for the venue transfer statute since, according to the debtor's logic, all matters removed pursuant to 28 U.S.C. § 1452(a) would be automatically transferred to the "home" bankruptcy court. Id. The Lone Star court instead appropriately ruled that "as a logical and practical matter, the court should determine *whether any* bankruptcy court should hear a proceeding before it determines *which* bankruptcy court should hear it." Id. (emphasis in original). Id. Turning to the remand issue first, the court in Lone Star found, *inter alia*, that the removed action related solely to state law claims and thus warranted a remand. As a result, the court denied the venue transfer motion as moot.

The same logic employed by the foregoing courts should also be applied here. Before deciding whether to transfer venue, this Court must first determine as a threshold matter whether the removed State Court Tax Proceedings should even be in federal court. Indeed, if venue is transferred without this Court ever ruling on the remand motion, the Sullivan County Taxing Authorities run the risk of never having any court rule on its remand motion. Notably, the bankruptcy judge presiding over Mirant's chapter 11 cases has previously opined on this very issue.

In the matter of In re Lorax Corp., 295 B.R. 83 (Bankr. N.D. Tex. 2003), the debtors' bankruptcy case was filed in the Northern District of Texas. Thereafter, the trustee removed a civil proceeding from Texas state court to the Bankruptcy Court for the Western District of Texas, Austin Division. The plaintiff in the state court case opposed the removal and filed a motion to remand or abstain with the Western District of Texas. Instead of ruling on the remand motion, the bankruptcy court in the Western District of Texas transferred venue of the removed action to the debtor's "home" bankruptcy court in the Northern District of Texas. Id. at 87-88.

The plaintiff in the removed action then renewed its motion to remand or abstain with Bankruptcy Judge Lynn of the Northern District of Texas. In reviewing the procedural history, Judge Lynn noted that, because the Western District of Texas bankruptcy court chose to address the transfer motion before addressing the request for remand, the remand motion remained open “as a technical matter.” Id. at 93, n.28. But Judge Lynn quickly rejected this technicality, instead explaining that “[a]s this court understands the doctrine of remand, the doctrine requires a court to send a case back from when it came.” Id. Since the only court to remand the matter back to was the Western District of Texas bankruptcy court, and because there was no longer a pending state court case, Judge Lynn declined to hear the remand motion. Id.

To avoid the procedural “Catch-22” presented in Lorax, the Sullivan County Taxing Authorities respectfully submit that this Court must first rule on the motion to remand or abstain before transferring venue. As Judge Lynn’s decision in Lorax makes clear, in the event these removed actions are transferred to the Northern District of Texas without first deciding the remand motion, only one of two things will result: (1) the transferred actions will be sent back to this Court for a ruling on the remand motion; or (2) the remand motion will never be decided. As a matter of simple judicial economy, the former result makes absolutely no sense at all. And, the latter result would plainly eviscerate the clear Congressional intent underlying the remand and abstention provisions of 28 U.S.C. §§ 1452(b) and 1334(c) by eliminating any right of recourse by the Sullivan County Taxing Authorities to those provisions.

In sum, based upon the clear authorities from this District and a majority of others, as well as a matter of simple logic, this Court should first determine the remand and abstention motion before considering Mirant’s motion to transfer venue.

**B. The 2003 State Court Tax Proceedings Must Be Remanded Due To Their Untimely Removal**

Mirant's removal of the 2003 State Court Tax Proceedings was untimely under Bankruptcy Rule 9027(a)(3), and therefore those proceedings must be remanded to the Sullivan County Supreme Court as a matter of law. Bankruptcy Rule 9027(a)(3) provides that post-petition actions must be removed within thirty days after the receipt of the initial pleading. Mirant commenced each of the 2003 State Court Tax Proceedings against Forestburgh, Lumberland and Bethel on July 30, 2003, shortly after it filed for bankruptcy on July 15, 2003. Mirant, however, did not file notices of removal of those actions with this Court until October 6, 2003 – some 68 days *after* those post-petition actions were commenced. Mirant's removal of the 2003 State Court Tax Proceedings was thus untimely and the 2003 actions must be remanded as a matter of law.<sup>6</sup> See In re Eagle Bend Dev., 61 B.R. 451, 458 (W.D. La. 1986) (holding that removal of post-petition action must be “within 30 days after the service of the summons”); Allen County Bank & Trust Co. v. Valvomatic Int'l Corp., 51 B.R. 578, 581 (N.D. Ind. 1985) (strictly construing rule that defendant had 30 days after service of amended complaint to file removal petition and thus dismissing petition); State Bank of Lombard v. Chart House, Inc., 46 B.R. 468, strictly construing 30 day time limitation as “mandatory” and thus dismissing untimely removal petition).

---

<sup>6</sup> Apparently, on October 8, 2003, Bankruptcy Judge Lynn entered an order extending Mirant's time to remove pre-petition actions. However, neither the Order nor Mirant's motion contemplated the removal of post-petition actions. Furthermore, the motion was filed after Mirant's time to remove the 2003 actions had already expired.

**C. This Court Lacks Jurisdiction To Hear The Removed State Court Tax Proceedings Under Bankruptcy Code § 505(a)(2)(A)**

Prior to the commencement of Mirant’s bankruptcy cases, the removed State Court Tax Proceedings were each contested before and adjudicated by the respective BARs for the Towns of Forestburgh, Lumberland and Bethel. Because the BAR determinations constitute adjudications by an appropriate administrative tribunal of competent jurisdiction, this Court is precluded from hearing these removed actions as a matter of law under Section 505(a)(2)(A) of the Bankruptcy Code.

Section 505(a)(1) of the Bankruptcy Code generally empowers a bankruptcy court, under certain circumstances and as a matter of discretion, to determine the amount of any tax, fine or penalty owing by a debtor. A mandatory exception to this general grant of discretionary authority is found in Section 505(a)(2)(A) of the Code which states, in pertinent part, as follows:

(2) The court may *not* so determine –

(A) The amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality *was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case* under this title

....

11 U.S.C. § 505(a)(2)(A) (emphasis added).

In considering whether or not a bankruptcy court may decide tax matters relating to a debtor, this Court recently made clear in In re Metromedia Fiber Network, Inc., 2003 WL 22204152, \*1 (Bankr. S.D.N.Y. July 15, 2003), that “[t]he threshold question which must be addressed before any other issue is the jurisdiction of this Court [to hear a matter under § 505].” Therefore, the first determination to be made here is whether or not this Court has any jurisdiction over the removed State Court Tax Proceedings. As explained more fully below,

because the amount and legality of the subject taxes were adjudicated by the respective BARs before the commencement of Mirant's bankruptcy cases, and because the respective BARs are administrative tribunals of competent jurisdiction, this Court is without jurisdiction to hear the removed State Court Tax Proceedings as a matter of law.<sup>7</sup>

In the case of In re Railroad Street Partnership, 255 B.R. 644, 646 (N.D.N.Y. 2000), the bankruptcy court for the Northern District of New York held that Bankruptcy Code § 505(a)(2)(A) "prevents a bankruptcy court from determining the amount of tax liability when the issue has already been addressed pre-petition by any judicial or administrative tribunal of competent jurisdiction." In Railroad Street, the debtor had appeared before the Syracuse Board of Assessment Review contesting certain real property tax assessments. At the conclusion of the hearing, the BAR issued a decision. Thereafter, the debtor initiated proceedings in New York State Supreme Court to judicially review the BAR's determination. After filing for bankruptcy relief, the debtor filed a motion requesting that the bankruptcy court redetermine its tax liability for the subject parcels. 255 B.R. 644.

In support of its motion, the debtor in Railroad Street argued that the BAR's determination did not constitute a final adjudication and thus the bankruptcy court had the authority to redetermine its tax liability. Id. at 646. Judge Gerling of the Northern District of New York flatly rejected that contention. Id. at 647. In so holding, the court explained that "Code § 505 makes it clear that adjudication by an entity such as the Assessment Board was contemplated by Congress when it referenced an adjudication by either a judicial or

---

<sup>7</sup> This does not mean that Mirant is left without any further recourse. Mirant is still free to pursue its remedies in state court upon a remand of these removed actions. What Section 505(a)(2)(A) makes clear, however, is that the bankruptcy courts have no business interfering with that process.

administrative tribunal.” Id. at 647. Significantly, Judge Gerling further noted that “[t]here is *no language* in the statute to indicate that the adjudication must be ‘*final.*’” Id. (emphasis added).

Therefore, even though the BAR’s determination was subject to *de novo* review by the New York Supreme Court, Judge Gerling in Railroad Street found that an adjudication had still been made by a tribunal of competent jurisdiction within the purview of § 505(a)(2)(A) . Id. The mere fact that the BAR’s determination was not final made no difference in deciding whether an adjudication had been made. To the contrary, so long as a tax assessment is contested before and determined by a BAR, the bankruptcy courts are without power to redetermine the subject assessments.

More recently, in In re Cody, 338 F3d. 89, 95 (2d Cir. 2003), the Court of Appeals for the Second Circuit ultimately affirmed this Court and determined that the procedures of a town Board of Assessment Review are sufficient to constitute an adjudication under § 505(a)(2)(A) notwithstanding the right to seek *de novo* review from the New York state courts. Id. In reaching this conclusion, the Cody court found that the procedures established for BAR proceedings by the New York RPTL -- namely, that the BAR may administer oaths, take testimony, and require the parties to produce papers and note their objections – indicated that tax assessment challenges in New York are actually ‘adjudicated’ by a BAR. More importantly, the Cody court explained that “[i]t is irrelevant that decisions of the BAR are reviewed *de novo* in New York courts.” Cody, 338 F.3d at 96. Indeed, “the fact that the decisions of an administrative tribunal may be reviewed *de novo* hardly means that the decision did not constitute an adjudication.” Id. Thus, the Cody court ruled that the BAR’s determination

constituted an adjudication within the meaning of § 505(a)(2)(A), which, in turn, was sufficient to deprive this Court of jurisdiction to determine the debtor's tax liability. Id.<sup>8</sup>

In reaching its conclusion, the Second Circuit in Cody relied, in part, on In re Onondaga Plaza Maintenance Co., Inc., 206 B.R. 653 (N.D.N.Y. 1997). In Onondaga, the debtor had also contested a tax assessment before the Syracuse Assessment Board. Although the debtor failed to timely appeal the BAR's decision, the Onondaga court nonetheless concluded that the BAR's decision alone qualified for purposes of § 505(a)(2)(A). As explained by the Onondaga court, New York's assessment boards are quasi-judicial bodies who have the "responsibility of making findings of fact and applying the law before coming to a fair judgment in connection with a complaint filed contesting an assessment." Id. at 656. As such, the Onondaga court readily concluded that "it is clear that New York law does provide the property owner with a full and fair opportunity for a hearing by the Assessment Board." Id. Thus, because the tax assessment had been contested before the BAR, the Onondaga court refused to redetermine the debtor's tax liability. Accord, In re Northbrook Partners LLP, 245 B.R. 104 (D. Minn. 2000) (holding that "the issues must have been fresh as of the commencement of the bankruptcy cases").

Just as in Cody, Railroad Street and Onondaga, Mirant contested its real property tax assessments for years 2000 through 2003 before the respective BARs of the Towns of Forestburgh, Lumberland and Bethel. Mirant's complaints were duly considered by the BARs after a public hearing, and respectfully rejected. As such, Mirant is precluded from seeking a further determination of those assessments by the bankruptcy courts. Notwithstanding Mirant's

---

<sup>8</sup> It is worth noting that in the context of taxes owed to the IRS, the courts have consistently held that a tax proceeding is 'contested' and 'adjudicated' merely when the debtor files its petition and the IRS answers. See, e.g., In re Baker, 74 F.3d 906 (9th Cir. 1996); Matter of Teal, 16 F.3d 619 (5th Cir. 1994).

pending *de novo* challenges of those BAR determinations, it cannot be denied that each of the respective BARs have already considered and decided Mirant's challenges at the administrative level, nor can it be denied that the BARs are administrative tribunals of competent jurisdiction to decide those challenges under settled New York law. Accordingly, under a plain reading of § 505(a)(2)(A), no bankruptcy court is empowered to redetermine those issues.

Notably, such a rule comports with the legislative intent underlying Section 505 of the Bankruptcy Code. As explained by the court in In re El Tropicano, Inc., 128 B.R. 153 (W.D. Tex. 1991):

Congress appears to have used a broad expression in order to encompass the variety of mechanisms for tax adjudication which might be found throughout the nation. Some states might have only administrative tribunals, some only judicial forums, some both. Some states might give *de novo* review before a court, while others might give only appellate review. The generic language of the statute reflects an apparent congressional intent to defer to the tax adjudication mechanism of a given state, whatever it might be, so long as it results in an adjudication.

Had Congress intended to insulate only those adjudications qualifying as complete exhaustions of all levels of review available in a given state, it would seem to have been far easier to say that only matters which have been "*fully adjudicated*" are protected from further examination by the bankruptcy courts. No further reference to the *kinds of tribunals* before such adjudication had been accomplished would have been needed. The specific inclusion of "administrative" tribunals in Section 505(a)(2)(A) seems to be a congressional recognition that even adjudication at that level alone is an adjudication which Congress believes the federal courts have no business revisiting.

128 B.R. at 160 (emphasis in original; footnote omitted). Accord, Matter of Trans State Outdoor Adver. Co., Inc., 140 F.3d 618, 622 (5th Cir. 1998) (the purposes underlying § 505, *i.e.* protecting a debtor's estate from a loss due to the debtor's failure to contest a tax assessment, "would not be served by allowing Trans State to relitigate in a federal forum"); In re Baker, 74

F.3d 906, 909 (9th Cir. 1996) (“Section 505(a)(2)(A)’s legislative history makes it clear that ... [a] case not tried on the merits can nonetheless be ‘adjudicated’ within the meaning of the statute.”).<sup>9</sup>

In the instant case, the removed State Court Tax Proceedings were initially contested by Mirant before the respective BARs with the assistance of competent legal counsel. No defaults were taken. Rather, Mirant took full advantage of the procedures set forth in the New York Real Property Tax Law and then filed further petitions for review with the Sullivan County Supreme Court. Although Mirant’s tax challenges are subject to *de novo* review by the State Court, this does not change the fact that the matters were originally contested and *adjudicated* by the BARs prior to Mirant’s bankruptcy filings. For all of these reasons, under a plain application of § 505(a)(2)(A) to the uncontested facts presented here, no bankruptcy court is empowered to redetermine Mirant’s tax assessments and these removed proceedings must therefore be remanded as a matter of law.

---

<sup>9</sup> While the case of In re Super Van, Inc., 161 B.R. 184 (W.D. Tex. 1993), may appear to hold otherwise, that case is easily distinguished from the circumstances presented here. In Super Van, the debtor moved the bankruptcy court under § 505 for a determination of the amount or legality of taxes it owed to the IRS and the Texas Employment Commission. Prior to the filing of the debtor’s bankruptcy petition, the debtor contested the tax assessments before the Texas Employment Commission. The bankruptcy court ruled that the decision of the Texas Employment Commission “lacked the requisite finality to deprive” the court of jurisdiction under § 505(a)(2)(A) . However, the court stated that the “essential basis” for its decision was the fact that the “debtor had not been afforded the opportunity for *de novo* review of that decision by a state district court (because a state court action was pending *but was dropped by the TEC and the debtor when the debtor filed bankruptcy*), *nor had the debtor been represented by counsel at the time.*” Id. at 194 n.1 (emphasis added). Unlike Super Van, Mirant has been represented by competent counsel during every step of the BAR complaint process. Moreover, Mirant obviously has no intention whatsoever of ‘dropping’ the removed State Court Tax Proceedings whether or not they remain in bankruptcy court. Super Van is thus inapposite to the instant cases.

**D. Even If This Court Has Jurisdiction, It Should Exercise Its Discretion To Abstain From Hearing And/Or Equitably Remand The Removed State Court Tax Proceedings Pursuant To 11 U.S.C. § 505(a)(1), 28 U.S.C. § 1334(c)(1) And/Or 28 U.S.C. § 1452(b)**

---

Although the Sullivan County Taxing Authorities firmly contend that this Court is without jurisdiction as a matter of law to hear the removed State Court Tax Proceedings, even if this Court were to find that jurisdiction was proper, numerous reasons exist to nevertheless remand these actions back to state court based upon principles of abstention and equitable remand. Each of the statutory predicates available to this Court to order a remand are examined below, followed by an analysis of their application to the facts and circumstances presented here.

**1. 11 U.S.C. § 505(a)(1)**

Section 505(a)(1) of the Bankruptcy Code states that the bankruptcy courts “may determine” a debtor’s tax liability under certain circumstances. The federal courts within the Second Circuit and elsewhere have consistently recognized that “the plain language of Section 505(a)(1) grants a bankruptcy court ‘purely discretionary’ authority to redetermine a debtor’s tax liability.” In re Metromedia Fiber Network, Inc., 2003 WL 22204152 at \*26, n.23. See also In re New Haven Projects Ltd. Liability Co., 225 F.3d 283, 287 (2d Cir. 2000), cert. denied, 531 U.S. 1150 (2001); In re Plus Gold, Inc., 1994 WL 92415 (Bankr. N.D. Ohio Feb. 4, 1994); In re Northbrook Partners LLP, 245 B.R. 104 (D. Minn. 2000).

In New Haven, the debtor moved the bankruptcy court for a redetermination of certain tax liabilities. The debtor contended that a bankruptcy court could only abstain from redetermining a tax liability upon a showing that uniformity of assessment was of significant importance to the taxing authorities. 225 F.3d at 287. The Second Circuit disagreed, holding instead that the bankruptcy courts have broad discretionary authority to abstain from deciding

any tax question, and not merely those implicating an issue of uniformity of assessment. Id. at 288.<sup>10</sup>

As explained by the Second Circuit in New Haven, a number of factors are relevant when deciding whether or not to abstain from hearing a tax matter under § 505, including:

- 1) the complexity of the tax issue;
- 2) the need to administer the bankruptcy case in an expeditious fashion;
- 3) the burden on the bankruptcy court's docket;
- 4) the length of time necessary to conduct the hearing and to render a decision thereafter;
- 5) the asset and liability structure of the debtor; and
- 6) the potential prejudice to the debtor, the taxing authorities, and creditors.

225 F.3d at 289. See also In re D'Alessio, 181 B.R. 756, 759 (S.D.N.Y. 1995); In re Galvano, 116 B.R. 367, 372 (E.D.N.Y. 1990); In re Hunt, 95 B.R. 442, 445 (N.D. Tex. 1989).

## **2. 28 U.S.C. § 1334(c)(1)**

While 28 U.S.C. § 1334 provides for general federal jurisdiction over all civil proceedings arising under the Bankruptcy Code, or arising in or related to a bankruptcy case, the courts uniformly recognize that § 1334 “also gives the district court (and by referral, the bankruptcy court) broad power to abstain.” In re NTL, Inc., 295 B.R. 706, 715 (S.D.N.Y. 2003). In Cody, the Second Circuit stated that in deciding whether to hear a tax matter, “it is arguable

---

<sup>10</sup> In so holding, the Second Circuit in New Haven rejected contrary holdings such as in In re AWB Assocs., G.P., 144 B.R. 270 (E.D. Pa. 1992) and In re Fairchild Aircraft Corp., 124 B.R. 488 (W.D. Tex. 1991).

that a bankruptcy court can abstain pursuant to either § 505 or § 1334(c) in a matter over which it has jurisdiction under § 505.” 338 F.3d at 97, n.8.

Specifically, 28 U.S.C. § 1334(c)(1) states, in pertinent part:

Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. § 1334(c)(1).

In deciding whether to abstain as a matter of discretion under § 1334(c)(1) , the courts generally consider the following twelve factors:

- 1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention,
- 2) the extent to which state law issues predominate over bankruptcy issues,
- 3) the difficulty or unsettled nature of the applicable state law,
- 4) the presence of a related proceeding commenced in state court or other non-bankruptcy court,
- 5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334 ,
- 6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy cases,
- 7) the substance rather than form of an asserted “core” proceeding,
- 8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court,
- 9) the burden of the [court’s] docket,
- 10) the likelihood that the commencement of the proceeding in a bankruptcy court involves forum shopping by one of the parties,

- 11) the existence of a right to a jury trial, and
- 12) the presence in the proceedings of non-debtor parties.

NTL, 295 B.R. at 717-18, citing In re Cody, Inc., 282 B.R. 182, 190-91 (S.D.N.Y. 2002).

### 3. **28 U.S.C. § 1452(b)**

28 U.S.C. § 1452(b) provides this Court with the broad right to remand any removed action “*on any equitable ground.*” See NTL, 295 B.R. at 718. In deciding a motion to remand under § 1452(b), the courts consider essentially the same factors as those employed under a § 1334(c)(1) analysis, including:

- 1) the effect on the efficient administration of the bankruptcy estate;
- 2) the extent to which issues of state law predominate;
- 3) the difficulty or unsettled nature of the applicable state law;
- 4) comity;
- 5) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;
- 6) the existence of the right to a jury trial; and
- 7) prejudice to the involuntarily removed defendants.

NTL, 295 B.R. at 719, citing Drexel Burnham Lambert Group, Inc. v. Vigilant Ins.Co., 130 B.R. 405, 407 (S.D.N.Y. 1991))

Two additional factors which the courts often consider are: “‘the duplicative and uneconomical use of judicial resources’ and the ‘lessened possibility of inconsistent results.’” Id., citing Phoenix Elec. Contracting, Inc. v. Lovece, 1993 WL 512917, \*3 (S.D.N.Y. 1993)).

All of these factors, however, are “merely illustrative” and thus “the court may remand on any equitable ground.” NTL, 295 B.R. at 719.

**4. No Matter Which Statutory Predicate Is Used, The Relevant Factors Weigh Heavily In Favor Of Remanding The Removed State Court Tax Proceedings**

Whether this Court employs the discretionary abstention standard built into § 505(a), the permissive abstention factors of § 1334(c)(1), or the equitable remand standard of § 1452(b), all of the relevant factors weigh heavily in favor of remanding the removed State Court Tax Proceedings back to Sullivan County Supreme Court.

First, the issue to be decided in the State Court Tax Proceedings is a matter on the cutting edge of New York Real Property Tax Law. As noted above, the RCNLD method of valuation has been employed by the New York courts to hydroelectric facilities and other specialty properties for decades. Indeed, Mirant cites to a single trial court level decision for the proposition that RCNLD should be abandoned. However, since the New York Court of Appeals decision in Brooklyn Union Gas in 1985, no New York appellate court has ever endorsed a valuation methodology other than RCNLD for the types of real property at issue here. Even the basis proffered by Mirant for abandoning RCNLD – *i.e.*, power deregulation – is suspect given that Mirant admits that power deregulation has never been fully implemented. Thus, the substantive issue to be decided in the State Court Tax Proceedings is both complex and unsettled.

Second, the resolution of the substantive issue to be decided in the State Court Tax Proceedings will have a broad impact on numerous New York taxing authorities. There are literally hundreds of hydroelectric facilities located within the State of New York. The import of any decision abandoning the RCLND method for real property tax valuation purposes will thus have an impact on not only Forestburgh, Lumberland and Bethel, but on virtually hundreds of

New York towns, villages, cities, counties and school districts. That such a challenge may be decided by a Texas court with absolutely no ties to New York (be it the Texas bankruptcy court, the Texas district court or even the Fifth Circuit) is, in a word, astounding.

Third, the substantive issue to be decided in the State Court Tax Proceedings is wholly governed by the law of the State of New York. Indeed, not a single issue of federal bankruptcy law is presented by the State Court Tax Proceedings. Moreover, given the unsettled nature of that issue, it only makes sense as a matter of comity to allow the New York courts to decide that issue rather than the federal courts sitting in Texas.

As aptly noted by this Court in Metromedia: “Local property taxation is inherently and quintessentially local in the sense that a fair allocation of the cost of government amongst the universe of local taxpayers is and must be a product of local political, legislative, executive and administrative decision making.” 2003 WL 22204152 at \*24. Removing the State Court Tax Proceedings to bankruptcy court and then sending them to Texas hardly comports with the “quintessentially local” nature of the real property tax disputes to be decided here.

Fourth, because the 2003 State Court Tax Proceedings must be remanded to the Sullivan County Supreme Court as a matter of law due to their untimely removal, allowing the 2000 through 2002 State Court Tax Proceedings to be decided by the bankruptcy court creates an obvious and serious potential for inconsistent results, as well as an unnecessary duplication of effort.

Fifth, the State Court Tax Proceedings are essentially “non-core” in nature given that they involve wholly issues of state law that existed long before Mirant’s chapter 11 bankruptcy filings. Further, the vast majority of the parties are non-debtors.

Sixth, in addition to the subject property being situated in Sullivan County, New York, all of the relevant lawyers and witnesses are located within the State of New York, including Mirant's own attorneys – the Albany, New York firm of Couch White, which has already been approved as special counsel by the Texas bankruptcy court – as well as Mirant's appraisal experts – GAR Associates, Inc. located in Amherst, New York. It makes little economic sense to fly all of the New York witnesses, lawyers and experts to Texas for a bench trial before Judge Lynn, which in turn will require all of the parties to retain yet another set of local Texas counsel. Indeed, it would be cheaper for all parties concerned to simply fly Judge Lynn to New York to try the case here. Of course, this just proves how uneconomical Mirant's whole proposition is.

Seventh, the State Court Tax Proceedings can be timely adjudicated in Sullivan County Supreme Court within three to four months. *See* Garigliano Aff., ¶¶ 15, 19; Plotsky Aff., ¶ 16. But for Mirant's bankruptcy filing and the removal of the State Court Tax Proceedings, the parties were prepared to submit their appraisals and attend a final pre-trial conference before Judge Ledina on January 20, 2004. *Id.* There are no assurances that the Texas bankruptcy court will be able to complete the trial any faster. And, although either side may decide to appeal, it only makes sense to have the New York state appellate courts hear and determine any such appeals, rather than the Texas federal courts, given that Mirant is challenging a bed-rock principle of New York real property tax law that has been on the books for decades.

Eighth, Judge Ledina of the Sullivan County Supreme Court has presided over the State Court Tax Proceedings since their inception in July of 2000. Numerous court conferences have been held and Judge Ledina is intimately familiar with the facts and the issues to be decided. Sending the State Court Tax Proceedings to Texas will thus unnecessarily require a duplication of effort. Further, although there is no indication that the State Court Tax Proceedings present

any burden to Judge Ledina's docket, the mere fact that Mirant describes its chapter 11 cases as "one of the largest and most complex of all time" indicates that Judge Lynn already has plenty to do down in Texas and hardly needs the additional burden of having to decide the unique and unsettled issues of New York Real property Tax Law presented by the State Court Tax Proceedings.

Ninth, the resolution of the State Court Tax proceedings will not have any significant impact on the administration of Mirant's estate or its ability to reorganize. Mirant describes itself as "one of *the largest* generators and marketers of electricity." See Garigliano Aff., Ex. D at p. 2-3; Ex. H at pp.26-27. Mirant employs in excess of *7,000 employees worldwide*. In 2002, Mirant's operating revenues were approximately *\$6.4 billion*. *Id.* The most recent consolidated Monthly Operating Report filed by Mirant lists assets *in excess of \$17.6 billion*, including *almost \$1.4 billion in cash* or cash equivalents, and liabilities *exceeding \$11 billion*. See Garigliano Aff., Ex. G. Further, Mirant has already secured a *\$500 million* DIP financing facility. In contrast, the total dollar amount of refunds sought by Mirant in the Sullivan County Tax Proceedings for all three Towns equals *less than \$7.5 million*. Again, although these may be small numbers as far as Mirant is concerned, they are very big numbers to the Towns of Forestburgh, Lumberland and Bethel.

Moreover, in a recently filed motion dated October 17, 2003, Mirant seeks to extend its exclusive time to file and solicit a plan of reorganization for a *full year* -- to August 17, 2004 and October 15, 2004, respectively. Among other things, Mirant's exclusivity motion states:

- ◆ “Mirant’s chapter 11 case is one of the *largest and most complex of all time.*”
- ◆ “The Debtor’s assets, which include power plants and related infrastructures throughout the United States, the Caribbean and the Philippines, have a book value in 2002 of *over \$20 billion.*”
- ◆ “Total liabilities *exceed \$11 billion ...*”
- ◆ “The Debtors’ constituencies are diverse and, at this point, *hardly harmonious. Three official committees ...* have been appointed and are actively participating in the case.”
- ◆ “The process of review [of the Debtors’ intercompany arrangements], now only in its *nascent stages*, will ultimately affect the allocation of *billions of dollars* of value among the Debtors’ estates and is thus sure to be *arduous and time consuming.*”
- ◆ “[M]uch remains to be done before the Debtors will be able to propose a plan consistent with their fiduciary duties to maximize value.”
- ◆ “Considering the *early stages* of their chapter 11 cases, as well as the *size and complexity* of the issues to be resolved, neither the Debtors nor any other party in interest could *realistically* be in a position to formulate, promulgate and build consensus for a plan of reorganization before November 11, 2003.”

See Garigliano Aff., Ex. H at pp. 2, 4, 23, 26, 27, 28 (emphasis added for all).

Clearly, the State Court Tax Proceedings are but a small part of Mirant’s multi-billion dollar reorganization efforts. For example, although Mirant’s exclusivity motion makes much to do about “nearly *\$500 million* in affirmative claims for Optimization activities” which it deems “critical to [Mirant’s] successful reorganization” [Garigliano Aff., Ex. H at p. 15, 30], Mirant fails to make any mention of the State Court Tax Proceedings at issue here. In short, it is obvious that the State Court Tax Proceedings will have only a minimal impact on Mirant’s reorganization efforts. Moreover, as discussed above, the State Court Tax Proceedings are likely to be decided by Judge Ledina of the Sullivan County Supreme Court long before Mirant is ever in a position to propose – let alone confirm -- a plan of reorganization.

Tenth, declining to remand (which necessarily equates to a venue transfer) will greatly prejudice the Sullivan County Taxing Authorities with respect to the additional costs and expenses, as well as inconvenience, associated in having to travel to Texas and retain additional local Texas counsel. On the other hand, Mirant's reorganization expenses are likely to exceed a hundred million dollars. Litigating the tax issues in Sullivan County will not create any additional expense for Mirant, especially given that it has already retained its New York attorneys as special counsel to do just that with the approval of the Texas bankruptcy court.

Eleventh, given that the State Court Tax Proceedings were removed to bankruptcy court virtually on the eve of trial and after Mirant's New York counsel advised Judge Ledina that the subject properties were likely to be sold, smacks of "forum shopping." There is an obvious incentive to Mirant to move these proceedings to its "home" court in Texas and thereby gain some leverage over the Sullivan County Taxing Authorities to resolve the tax issues on more favorable terms in order to increase the purchase price for the subject properties.

Twelfth, the remaining factor of whether a jury trial is present is neutral given that a party does not have a right to jury trial in a tax certiorari proceeding commenced under Article 7 of the RPTL.

In sum, virtually every factor considered by the courts in deciding whether or not to remand or abstain weighs heavily in favor of abstention and remand here. Notably, it was Mirant who first chose to litigate its real property tax assessments in the Sullivan County Supreme Court. Now, after almost four years into the cases and virtually on the eve of trial, Mirant has removed the State Court Tax Proceedings to this Court and seeks to further transfer them to Texas bankruptcy court. On the equities alone, that request should be denied, and these matters

remanded to Mirant's initially chosen forum. Indeed, it is difficult, if not impossible, to fathom any credible reason why the State Court Tax Proceedings should be decided anywhere else but in the Sullivan County Supreme Court.

**CONCLUSION**

For all of the reasons set forth above, as well as those set forth in the various Memoranda of Law submitted by the other similarly situated taxing authorities in support of their respective motions to remand and/or abstain, the Sullivan County Taxing Authorities respectfully request that the Court enter an Order remanding all of the above-captioned removed tax certiorari proceedings to the New York Supreme Court in and for Sullivan County, together with such other and further relief as the Court deems just and equitable.

Dated: White Plains, New York  
November 19, 2003

Respectfully submitted,

**WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP**

By: /s/ Mark G. Ledwin  
Mark G. Ledwin, Esq. (ML-6873)  
3 Gannett Drive  
White Plains, New York 10604  
(914) 323-7000

Co-Counsel for Respondents

ADDITIONAL COUNSEL LISTED ON NEXT PAGE

**ADDITIONAL COUNSEL:**

Walter F. Garigliano, Esq.  
Garigliano Law Offices, LLP  
449 Broadway – P.O. Drawer 1069  
Monticello, NY 12701-1069  
(845) 796-1010

Counsel for The Assessor of the Town of Lumberland, The Board of Assessment Review of the Town of Lumberland and The Town of Lumberland, and

Counsel for The Assessor of the Town of Bethel, The Board of Assessment Review of the Town of Bethel and The Town of Bethel

Glen A. Plotsky, Esq.  
Bavoso & Plotsky  
19 East Main Street  
P.O. Box 3139  
Port Jervis, New York  
(845) 856-4444

Counsel for The Assessor of the Town of Forestburgh, The Board of Assessment Review of the Town of Forestburgh and The Town of Forestburgh

Thomas J. Cawley, Esq.  
Assistant County Attorney  
Sullivan County Department of Law  
County Government Center  
100 North Street, P.O. Box 5012  
Monticello, NY 12701  
(845) 794-3000, Ext. 3565

Counsel for The County of Sullivan

Henri Shawn, Esq.  
Shawn Law Offices  
North Street Professional Building  
30 North Street, P.O. Box 1320  
Monticello, NY 12701-1320  
(845) 791-7676

Counsel for The Eldred Central School District