

Daniel C. Stewart, SBT #19206500
John E. Mitchell, SBT #00797095
VINSON & ELKINS L.L.P.
3700 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201-2975
Tel: 214-220-7700
Fax: 214-220-7716

**ATTORNEYS FOR THE TOWNS OF HAVERSTRAW,
NEW YORK, STONY POINT, NEW YORK, AND THE
HAVERSTRAW-STONY POINT CENTRAL SCHOOL DISTRICT**

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

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

**MOTION FOR LEAVE TO APPEAL INTERLOCUTORY ORDER
REGARDING MOTIONS TO DISMISS AND/OR ABSTAIN FROM
HEARING DEBTORS' MOTION PURSUANT TO 11 U.S.C. §§ 105(A)
AND 505(A) FOR THE DETERMINATION OF TAX LIABILITY**

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**MOTION FOR LEAVE TO APPEAL INTERLOCUTORY ORDER
REGARDING MOTIONS TO DISMISS AND/OR ABSTAIN FROM
HEARING DEBTORS' MOTION PURSUANT TO 11 U.S.C. §§ 105(A)
AND 505(A) FOR THE DETERMINATION OF TAX LIABILITY**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

THE TOWNS OF HAVERSTRAW, NEW YORK ("Haverstraw"), **STONY POINT, NEW YORK** ("Stony Point"), and **THE HAVERSTRAW-STONY POINT CENTRAL SCHOOL DISTRICT** (the "School District") (collectively, the "Appellants") file this Motion for Leave to Appeal (the "Motion") Interlocutory Order Regarding Motions to Dismiss and/or Abstain from Hearing Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a) and 505(a) for the Determination of Tax Liability (the "Order"), entered by the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division (the "Bankruptcy Court") on January 9, 2004, and pursuant to FED. R. BANKR. P. 8003(a) respectfully state:

PRELIMINARY STATEMENT

1. ***Five (5) days ago***, the United States Supreme Court mandated how Federal Courts must interpret and apply the provisions of the Bankruptcy Code. In doing so, the Supreme Court stated:

The starting point in discerning congressional intent is the existing statutory text . . . and not the predecessor statutes. It is well established that ***"when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms."***

Lamie v. United States Trustee, 540 U.S. ____, 2004 WL 110846 (January 26, 2004) (Kennedy, J.) (emphasis added).¹

¹ Because the decision was rendered only five (5) days ago, a copy of the decision is attached hereto as Exhibit "A" for the Court's reference.

The statute at issue in this appeal is Bankruptcy Code § 505(a)(2), which states, in relevant part:

“The court may not so determine...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). Notwithstanding the express provisions of Bankruptcy Code § 505(a)(2), the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division, (the “Fort Worth Bankruptcy Court”) held that it did indeed have jurisdiction to **redetermine over \$200 million in taxes** previously assessed, contested, and properly adjudicated before the applicable New York State tax tribunals of competent jurisdiction. In doing so, the Fort Worth Bankruptcy Court added the non-existent requirement that the “adjudication” must have been final (not on appeal or subject to *de novo* review). The Fort Worth Bankruptcy Court further erred in holding that a proceeding before an administrative tribunal cannot be abbreviated in nature. Neither requirement is in the plain text of the statute, and the Fort Worth Bankruptcy Court erred accordingly.

2. Now faced with the prospect of incurring the expense of a trial for which the Fort Worth Bankruptcy Court has no jurisdiction, in addition to the expense of preparing for and trial of the numerous proceedings in the Supreme Court for the State of New York, a court which **does** have jurisdiction over these matters, the Appellants seek immediate review of the Bankruptcy Court’s Interlocutory Order.

**STATEMENT OF THE FACTS NECESSARY TO AN UNDERSTANDING OF THE
QUESTIONS TO BE PRESENTED BY THE APPEAL**

The Chapter 11 Cases

3. On July 14, 2003 (the "Petition Date"), Mirant Corporation and certain of its affiliates (the "Debtors") filed for relief pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the Fort Worth Bankruptcy Court. The Debtors' Chapter 11 Cases are being jointly administered under Case No. 03-46590-DML-11 (the "Cases"). Haverstraw and Stony Point are towns located in the State of New York, and with the School District, are respondents to the 505 Motion (as defined below).²

4. The original petitioner, Orange & Rockland Utilities, Inc. (the "Original Petitioner") owned a 1212 megawatt natural gas fired plant (the "Bowline Plant") in the Town of Haverstraw. Upon information and belief, Mirant Bowline, L.L.C. (hereinafter referred to as "Mirant Bowline") is the current owner of the Bowline Plant and is alleged to be the successor in interest to the Original Petitioner.

5. Pursuant to Article 5 of the N.Y. Real Prop. Tax Law (McKinney 2000) ("RPTL"), on or about May 1, 1995, the Assessor for the Town of Haverstraw (the "Haverstraw Assessor") completed a general Assessment Roll for the tax year 1995 of all real property in the Town of Haverstraw not otherwise exempt by law from taxation. The assessment roll included assessed values for each parcel constituting the Bowline Plant. Similar assessments were made by the Haverstraw Assessor for tax years 1996-2003 (collectively, the "Haverstraw Assessments").

² Certain of the Appellants may also hold claims for ad valorem taxes owed for the fiscal years 2003, 2004 and forward.

The Lovett Plant Tax Assessments

6. Upon belief, the Original Petitioner also owned a 432 megawatt, coal-fired plant in the Town of Stony Point, Rockland County (the "Lovett Plant"). Upon further information and belief, Mirant Lovett, LLC (hereinafter referred to as "Mirant Lovett" and collectively with Mirant Bowline and all other Debtor in Possession affiliates, "Mirant") is the current owner of the Lovett Plant and is alleged to be the successor in interest to the Original Petitioner.

7. Pursuant to Article 5 of the RPTL, the Assessor for the Town of Stony Point completed tax assessments for the tax years 2000, 2001, 2002 and 2003, similar to the Haverstraw Assessments (the "Stony Point Assessments" and collectively with the Haverstraw Assessments, the "Assessments").

The Board of Assessment Review Proceedings and Adjudication of the Taxes

8. Pursuant to RPTL § 524, *and prior to the commencement of the Debtors' Cases*, Mirant appeared, duly protested and otherwise complained of the Assessments and filed with the applicable Board of Assessment Review (the "BAR")³ a statement of protest, thereby challenging the Assessments and commencing the BAR review of the Assessments (the "Administrative Proceedings"). RPTL § 524. In adjudicating before the BARs, Mirant filed statements under oath, specifying the

³ Under RPTL § 525, a BAR is required to meet to hear assessment complaints in a public forum. At any such proceedings, the BAR is allowed under New York law to administer oaths, take testimony and hear proof in regard to a complaint and assessment. Additionally, if the taxpayer chooses to do so, the taxpayer is authorized to submit any documentary evidence to the BAR. RPTL § 525. The BAR also is 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 required to determine the final assessed valuation of the real property and provide notice to the taxpayer. Federal courts within the State of New York have consistently held that a proceeding before the BAR satisfies the requirement for an "adjudication" under Bankruptcy Code § 505(a)(2). See, e.g., *Cody, Inc. v. County of Orange (In re Cody, Inc.)*, 338 F.3d 89, 95 (2d Cir. 2003).

respects in which the Assessments should be corrected, reviewed, or reduced. After considering Mirant's protests, the applicable BARs rendered determinations affirming the Assessments. ***These determinations were also rendered prior to the commencement of the Debtors' Cases.*** Then, pursuant to the RPTL, the Assessments were finalized, became open for public inspection, and the Administrative Proceedings became final. Following the BARs' determinations, Mirant filed petitions for certiorari review with the Supreme Court of the State of New York, County of Rockland (the "State Court"), thereby commencing the next level of review of the Assessments pursuant to Article 7 of the RPTL (the "State Court Proceedings").

9. Various of Mirant's other affiliates operating in New York pursued similar challenges of their tax assessments before the applicable BAR, and upon adjudication by the applicable BAR, commenced mirror review proceedings pursuant to Article 7 of the RPTL in Rockland County, Orange County and Sullivan County, New York. ***All in all, and prior to the commencement of the Debtors' Cases, forty-one (41) separate tax assessments were contested before and adjudicated by an administrative tribunal of competent jurisdiction in New York, the applicable BAR.*** Some of these assessments were adjudicated as long ago as 1995 (collectively with the State Court Proceedings, the "Tax Certiorari Proceedings"). In fact, the Debtors have already paid all but the fiscal year 2003 school taxes. Accordingly, the Debtors are seeking to ***disgorge over \$200 million*** from towns and school districts throughout the State of New York.

The Collateral Attack on the BAR Decisions

10. After filing for bankruptcy relief, the Debtors abandoned any effort to pursue the Tax Certiorari Proceedings, instead commencing an aggressive effort to have the Fort Worth Bankruptcy Court **redetermine** the previously adjudicated (and paid) Assessments. First, on September 30, 2003, the Debtors filed their Motion Pursuant to Bankruptcy Code §§ 105(a) and 505(a) for the Determination of Tax Liability (the “505 Motion”), in which the Debtors sought review by the Fort Worth Bankruptcy Court of not merely the property values already set by the BAR, but also of the methodology long used by the New York State Courts in a review of assessments of electric power generation plants in the hope that the Fort Worth Bankruptcy Court would establish a different methodology for valuation of the plants at issue in these proceedings.

The Removal of the Tax Certiorari Proceedings

11. Soon thereafter, on October 14, 2003, Mirant filed Notices of Removal, thereby removing the Tax Certiorari Proceedings (hereinafter, the “Removed Proceedings”) to the United States District Court for the Southern District of New York (the “New York District Court”). On October 20, 2003, the New York District Court referred the Removed Proceedings to the United States Bankruptcy Court for the Southern District of New York (the “New York Bankruptcy Court”).

12. The Debtors also sought transfer of venue of the Removed Proceedings to the Fort Worth Bankruptcy Court, whereas Appellants, and numerous other tax authorities that are parties to the Tax Certiorari Proceedings, sought immediate remand of the proceedings back to the New York Supreme Court.

Remand by the Southern District of New York Bankruptcy Court

13. On December 4, 2003, the New York Bankruptcy Court **remanded** the Removed Proceedings to the applicable divisions of the New York Supreme Court. In doing so, the New York Bankruptcy Court held that:

*“We are talking about matters of great moment not only to these taxpayers but to all other like taxpayers in the State of New York in an era of deregulation...**issues of New York law of such gravity to the body politic in New York should be decided by New York courts.**”⁴*

14. Accordingly, all forty-one (41) of the Tax Certiorari Proceedings were remanded back to the New York Supreme Court for review of the assessments.

The Bankruptcy Court Retains Jurisdiction of the 505 Motion

15. Notwithstanding the remand of the Removed Proceedings, the 505 Motion remained pending before the Fort Worth Bankruptcy Court. Accordingly, in response to the 505 Motion, on November 21, 2003, Appellants (and nearly every other affected tax authority in New York) filed various motions to dismiss the 505 Motion, namely, on the grounds that Bankruptcy Code § 505(a)(2) expressly denies the Fort Worth Bankruptcy Court subject matter jurisdiction to redetermine the Debtors’ tax liability (the “Dismissal Motions”). In these responsive pleadings, Appellants (and the other tax authorities) argued that the Fort Worth Bankruptcy Court lacked subject matter jurisdiction under Bankruptcy Code § 505 to redetermine the assessments. Alternatively, Appellants and others argued that the Fort Worth Bankruptcy Court should have abstained from determining the 505 Motion, either under mandatory or permissive abstention doctrines.

⁴ The Honorable Adlai S. Hardin, United States Bankruptcy Judge for the Southern District of New York, December 4, 2003, remanding the Tax Certiorari Proceedings.

16. On December 10, 2003, the Fort Worth Bankruptcy Court heard arguments on the 505 Motion and the Dismissal Motions. The Fort Worth Bankruptcy Court held, among other things, that it **does** have subject matter jurisdiction redetermine the assessments, notwithstanding the express provisions of Bankruptcy Code § 505(a)(2).

17. However, notwithstanding its finding of subject matter jurisdiction, the Fort Worth Bankruptcy Court decided it would **temporarily** refrain from hearing the 505 Motion. In doing so, the Fort Worth Bankruptcy Court crafted an unprecedented ruling whereby the Debtors and Appellants (as well as every other affected tax authority in New York) must endeavor to be in trial in the New York Supreme Court not later than August 1, 2003. If the parties fail to achieve such a result, then the Fort Worth Bankruptcy Court will set the 505 Motion for trial in Fort Worth, Texas in September, 2004.

The Bankruptcy Court Holds It Has Jurisdiction to Enjoin the Supreme Courts for the State of New York

18. Notwithstanding the remand of the Tax Certiorari Proceedings by the New York Bankruptcy Court, the Fort Worth Bankruptcy Court held that, by having jurisdiction over the 505 Motion, it likewise would have the ability to, and if necessary would, **enjoin** the New York Supreme Courts from proceeding to trial of the Tax Certiorari Proceedings:

THE COURT: The New York Supreme Court cases go forward, right?

MR. PHELAN: Yep.

* * *

THE COURT: But I could stay them, couldn't I?

MR. PHELAN: You could. You could stay them. Could stay them. Another half-way measure – that’s more than half-way. It’s probably about an 88 percent –

THE COURT: I would say from the point of view of the judge in New York it would be 103 percent measure, but that –

* * *

THE COURT: Any other case following August 1st I will entertain appropriate pleadings from the debtor seeking a stay under 105 of any further proceedings in the New York Courts.

Transcript of Hearing, December 10, 2003, pp. 79, 80, 100.

19. Accordingly, in disregard of the clear requirement of Bankruptcy Code § 505(a)(2), the Bankruptcy Court is now requiring the Appellants (and every other tax authority) to prepare for two trials in two separate jurisdictions over 1600 miles apart, thereby multiplying the time, cost and expense that each party must bear. Furthermore, notwithstanding an order of the New York Bankruptcy Court that the Tax Certiorari Proceedings should proceed in the New York Supreme Courts, the Fort Worth Bankruptcy Court intends to enjoin these proceedings if they are not progressing to the Court’s satisfaction. Accordingly, Appellants are compelled to seek relief by way of this requested interlocutory appeal.

RELIEF REQUESTED

20. Section 158(a)(3) of the Judiciary Code states, in relevant part:
- (a) The district courts of the United States shall have jurisdiction to hear appeals
 - (3) with leave of the court, from other interlocutory orders and decrees;

of bankruptcy judges entered in cases and proceedings referred to bankruptcy judges under section 157 of this title.

28 U.S.C. § 158(a)(3).

21. Furthermore, Fed. R. Bankr. P. 8001(b) states, in relevant part:

An appeal from an interlocutory judgment, order or decree of a bankruptcy judge as permitted by 28 U.S.C. § 158(a)(3) shall be taken by filing a notice of appeal, as prescribed in subdivision (a) of this rule, accompanied by a motion for leave to appeal prepared in accordance with Rule 8003 and with proof of service in accordance with Rule 8008.

FED. R. BANKR. P. 8001(b).

22. By this Motion, Appellants seek leave to appeal the Bankruptcy Court's interlocutory Order.

**STATEMENT OF QUESTIONS TO BE RAISED BY THE
APPEAL AND OF THE RELIEF SOUGHT**

23. On appeal are the following questions:

- a. Did the Fort Worth Bankruptcy Court err in holding that it had subject matter jurisdiction over the 505 Motion pursuant to Bankruptcy Code § 505(a) and 28 U.S.C. §§ 1334 and 157?
- b. Did the Fort Worth Bankruptcy Court err in determining that, specifically, Bankruptcy Code § 505(a)(2) does not deprive it of subject matter jurisdiction over the 505 Motion?
- c. Did the Fort Worth Bankruptcy Court err in not simply applying the plain meaning of the statute, instead adding language to the statute requiring the adjudication to be "final" and not otherwise on appeal or subject to *de novo* review?
- d. Did the Fort Worth Bankruptcy Court err in not simply applying the plain meaning of the statute, and instead add language to the statute requiring the adjudication to be a full, non-abbreviated trial in the opinion of the Fort Worth Bankruptcy Court?
- e. Did the Fort Worth Bankruptcy Court err in holding that Bankruptcy Code § 505(a)(2) functions as an affirmative defense, and not as a limitation on the Bankruptcy Court's subject matter jurisdiction?

- f. Did the Fort Worth Bankruptcy Court err in determining that it was not required to mandatorily abstain from determining the 505 Motion?
 - g. Did the Fort Worth Bankruptcy Court err in failing to permissively abstain from determining the 505 Motion?
24. Appellants would seek the following relief on appeal:
- a. that the United States District Court determine that the Fort Worth Bankruptcy Court erred on the aforelisted grounds and that, as such, the Fort Worth Bankruptcy Court is reversed and is prohibited, due to lack of subject matter jurisdiction and the requirements of abstention, from determining the 505 Motion;
 - b. that the Fort Worth Bankruptcy Court be reversed and, upon remand, instructed to dismiss the 505 Motion for lack of subject matter jurisdiction; and
 - c. that Appellants receive any and all other relief to which they are legally and equitably entitled.

STATEMENT OF THE REASONS WHY AN APPEAL SHOULD BE GRANTED⁵

The Appeal Should Be Granted Because the Bankruptcy Court's Order is in Error Regarding Multiple Controlling Questions of Law

25. The Fort Worth Bankruptcy Court erred in deciding multiple controlling questions of law. First, the Order is without basis under the Bankruptcy Code and is based upon an erroneous interpretation of Bankruptcy Code § 505(a)(2). The Fort Worth Bankruptcy Court erred in determining that the Assessments have not already been "contested before and adjudicated by" an administrative tribunal of competent jurisdiction. Additionally, the Fort Worth Bankruptcy Court erred in determining that

⁵ 28 U.S.C. § 158(a) does not indicate the standard a district court should use in determining whether to grant leave to appeal. However, the Fifth Circuit has recognized that most courts use the standard delineated in 28 U.S.C. § 1292(b): (i) a controlling issue of law must be involved, (ii) the question must be one where there is substantial ground for difference of opinion, and (iii) an immediate appeal must materially advance the ultimate termination of the litigation. See *In re Ichinose*, 946 F.2d 1169, 1177 (5th Cir. 1991).

Bankruptcy Code § 505(a)(2) is not a statute limiting subject matter jurisdiction, but instead is in the nature of an affirmative defense.

26. Further, the Fort Worth Bankruptcy Court erred in determining that neither mandatory abstention nor permissive abstention was warranted. Even if the Fort Worth Bankruptcy Court in fact has subject matter jurisdiction under Bankruptcy Code § 505, it should have abstained from hearing the 505 Motion.

27. These are controlling questions of law because if the Fort Worth Bankruptcy Court erred in its determinations on any of these issues, the Fort Worth Bankruptcy Court's determination of the 505 Motion is improper and without authority. These errors are not harmless but rather go directly to the seminal issue of whether the Fort Worth Bankruptcy Court may adjudicate the 505 Motion.

There are Substantial Grounds for Difference of Opinion as to the Conclusions of Law and the Relief Ordered Thereon

28. Leave to appeal should be granted because there are substantial grounds for a difference of opinion as to whether the Fort Worth Bankruptcy Court erred in making its conclusions of law. The statute at issue is Bankruptcy Code § 505:

§ 505. Determination of tax liability

(a) (1) Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

(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; or . . .

29. First, the Fort Worth Bankruptcy Court erred in its application of Bankruptcy Code § 505(a)(2), because the text of the statute is clear and unambiguous on its face. As the United States Supreme Court has recently ruled, in interpreting the Bankruptcy Code (as well as other federal statutes) “when a statute’s language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.” *Lamie*, 540 U.S. _____, 2004 WL 110846 (January 26, 2004).

30. This is consistent with what the Fifth Circuit has stressed, on several occasions, that Federal Courts must “presume that a legislature says in a statute what it means and means in a statute what it says.” See, e.g., *Texas Food Indus. v. United States*, 81 F.3d 578, 582-83 (5th Cir. 1996). By ignoring the express, unambiguous provisions of the Bankruptcy Code, the Fort Worth Bankruptcy Court erred as a matter of law.

31. There is no issue whether the 505 Motion seeks to determine the amount of a tax; ***it does***. There is no issue that the Debtors contested the amount of such tax before an administrative tribunal; ***they did***. There is no issue that the BARs decided the Debtors’ contest of the taxes; ***thereby rendering an “adjudication”***. There is no dispute that the BAR is an administrative tribunal of competent jurisdiction; ***it is***.⁶ There is no issue that each of the foregoing events occurred prepetition; ***they did***. “When the statute’s language is plain, the sole function of the courts . . . is to enforce it according to

⁶ See RPTL § 524. See also *Cody*, 338 F.3d at 95.

its terms.” *Lamie*, 540 U.S. at *6. By not doing so, the Fort Worth Bankruptcy Court erred.

32. In concluding that the Assessments have not been contested before and adjudicated by an administrative tribunal of competent jurisdiction for purposes of Bankruptcy Code § 505(a)(2), the Fort Worth Bankruptcy Court also rejected the Fifth Circuit’s articulated, stated purpose of Bankruptcy Code § 505,⁷ and the Second Circuit’s recent, exhaustive analysis of whether New York State BAR proceedings qualify as an “adjudication” for purposes of Bankruptcy Code § 505(a)(2).⁸

33. Furthermore, the Fort Worth Bankruptcy Court’s ruling, at its essence, raises concerns over the 11th Amendment to the United States Constitution, as well as the practical reality that the Fort Worth Bankruptcy Court will be sitting in appellate review of the New York Bankruptcy Court. By finding that it can (and will) enjoin the New York Supreme Courts, the Fort Worth Bankruptcy Court will be directly violating the 11th Amendment of the Constitution of the United States. If the Fort Worth Bankruptcy Court is allowed to enjoin the Tax Certiorari Proceedings that have already been remanded by the New York Bankruptcy Court, the Fort Worth Bankruptcy Court will, in

⁷ In dismissing a similar proceeding for lack of subject matter jurisdiction, the Fifth Circuit held that the “purpose behind section 505 of the bankruptcy code is to protect the estate from the potential loss incurred because of a debtor's failure, due either to financial inability or mere indifference, to contest potentially incorrect assessments...the purposes underlying section 505 would not be served by allowing [a debtor] to relitigate in a federal forum.” *In re Trans State Outdoor Advertising Co.*, 140 F.3d 618 (5th Cir. 1998).

⁸ In *Cody*, the Second Circuit Court of Appeals specifically held that “[t]he fact that the determination of the Assessment Board is subject to further review by the State Court does not alter the fact that the Debtor had a fair and full opportunity to present its case to the Assessment Board and that an adjudication was made by a tribunal of competent jurisdiction.” 338 F.3d at 95.

essence, be sitting in appellate review of Judge Hardin, and rendering the provisions of 28 U.S.C. §§ 1452 & 1334 **a complete nullity**. This result cannot stand.⁹

34. Second, in concluding that Bankruptcy Code § 505 is not a subject matter jurisdiction statute, the Fort Worth Bankruptcy Court ruled contrary to the vast majority of case law on the issue. Not only the Fifth Circuit, but most every other court has recognized the language of Bankruptcy Code § 505(a)(2) as a limitation of subject matter jurisdiction. *Trans State*, 140 F.3d at 620 (“...the key to resolving the jurisdictional issue...”). See also, e.g., *Mantz v. Cal. State Bd. of Educ. (In re Mantz)*, 343 F.3d 1207, 1210-13 (10th Cir. 2003); *Cody, Inc. v. County of Orange (In re Cody, Inc.)*, 338 F.3d 89 (2d Cir. 2003); *I.R.S. v. Luongo (In re Luongo)*, 259 F.3d 323, 329-30 (5th Cir. 2001); *City of Perth Amboy v. Custom Distrib. Servs., Inc. (In re Custom Distrib. Servs., Inc.)*, 224 F.3d 235, 239-40 (3d Cir. 2000); *I.R.S. v. Teal (In re Teal)*, 16 F.3d 619, 622 (5th Cir. 1994); *City Vending of Muskogee, Inc. v. Okla. Tax Comm’n*, 898 F.2d 122, 125 (10th Cir. 1990).

An Immediate Appeal Would Materially Advance the Ultimate Termination of the Litigation

35. An appeal would materially advance the ultimate termination of the litigation because, if the Appellants are successful on their appeal of the Order, the 505 Motion would necessarily be dismissed for a lack of subject matter jurisdiction and thereby ending the litigation. For this proposition, there can be no dispute.

36. Further, the litigation related to the Assessments would be properly resolved in the New York Supreme Courts, without the constant threat of an injunction

⁹ 28 U.S.C. §§ 1334 & 1452 govern removal and remand of proceedings related to bankruptcy cases, and were relied upon by Judge Hardin in his decision.

hanging over the heads of both the courts and the litigants. Resolution in the New York Supreme Courts is necessary not only due to the express language of Bankruptcy Code § 505(a)(2), but also due to the fact that complex, novel issues of state law clearly predominate over bankruptcy issues. The Debtors are seeking to change the well-established law in New York as to the method for valuing specialized utility property, which could have profound effects both on the way in which power generation facilities in New York are valued and on the public institutions that rely upon such revenues. As stated by the United States Bankruptcy Court for the Southern District of New York, when remanding the **very** Tax Certiorari Proceedings which the Fort Worth Bankruptcy Court now seeks to adjudicate, and, if necessary, enjoin, these issues are of:

“Great moment not only to these taxpayers but to all other like taxpayers in the State of New York in an era of deregulation...”¹⁰

37. Further, immediate appeal will prevent the unnecessary and wasteful incurrence of significant costs to both the Debtors and the Appellants in having to prepare for both a federal bankruptcy court trial on the Assessments while also preparing for the state court trial over 1600 miles away in New York. In light of the Fort Worth Bankruptcy Court’s Order, the Appellants are now faced with the prospect of having to prepare for trial in New York, only to have the Fort Worth Bankruptcy Court order a trial on the very same issues in Fort Worth, for matters which the Fort Worth Bankruptcy Court does not have subject matter jurisdiction to adjudicate. Not only will the Appellants have to litigate in both Texas and New York on these issues, on appeal, the Appellants are confident that they will succeed in having the 505 Motion (and any

¹⁰ The Honorable Adlai S. Hardin, United States Bankruptcy Judge for the Southern District of New York, December 4, 2003, remanding the Tax Certiorari Proceedings.

judgment related thereto) dismissed for lack of subject matter jurisdiction, thereby rendering any trial in Fort Worth futile and simply a waste of the taxpayers' money.

CONCLUSION

38. In sum, interlocutory appeals are available to prevent grave injustice in substantial and serious matters, and the Appellants file this Motion because they have no other means available to obtain relief from the Fort Worth Bankruptcy Court's erroneous and insupportable ruling. Because good cause for granting immediate leave to appeal the Fort Worth Bankruptcy Court's Order exists, the Appellants request the Court grant this Motion.

COPY OF THE ORDER

39. A copy of the Order to be appealed from is attached to the Motion as **Exhibit "B"**.¹¹

PRAYER

WHEREFORE, the Appellants pray that the Motion be **GRANTED** and leave given for the interlocutory appeal from the Order.

¹¹ Pursuant to FED. R. BANKR. P. 8001(b), this Motion is being filed contemporaneously with a Notice of Appeal. Pursuant to FED. R. BANKR. P. 8002(a), this Motion is being filed within ten (10) days of the filing of the Notice of Appeal filed on January 20, 2004 by the Town of Ramapo, New York.

Robin Eric Phelan
Haynes and Boone
901 Main St., Suite 3100
Dallas, TX 75202-3789
214-651-5612
Attorneys for the Debtors

Erin Marie Schmidt
Office of the United States Trustee
1100 Commerce St Room 976
Dallas, TX 75242
214-767-8967
Attorneys for the United States Trustee

Thomas E. Lauria
Christopher Shore
Craig Averch
White and Case, LLP
Wachovia Financial Ctr.
200 Biscayne Blvd.
Miami, FL 33131
305-371-2700
Attorneys for the Debtors

Jason S. Brookner
Andrews Kurth LLP
1717 Main St., Suite 3700
Dallas, TX 75201
214-659-4457
Attorneys for the Mirant Committee

Richard S. Baum
Baum Law Offices, LLP
254 Broadway
P.O. Box 1260
Monticello, NY 12701
845-791-1000
Attorneys for the Monticello Central School District

Kevin M. Lippman
David Leamon
Munsch, Hardt, Kopf & Harr, P.C.
1445 Ross Ave., Suite 4000
Dallas, TX 75202-2790
214-855-7553
Attorneys for Rockland, New York

Walter F. Garigliano
Garigliano Law Offices LLP
449 Broadway
P.O. Drawer 1069
Monticello, NY 12701
845-796-1010
Attorneys for Sullivan County

Mark Thompson
Simpson, Thacher & Bartlett, L.L.P.
425 Lexington Avenue
New York, NY 10017
214-455-2000
Attorneys for the Mirant Committee

Leslie Scharf
Howard Siegel
Brown, Rudnick, Berlack, Israels, L.L.P.
120 West 45th Street
New York, NY 10036
212-704-0100
*Attorneys for the Ad Hoc Committee of
Equity Holders*

Deborah Williamson
Cox & Smith, Incorporated
112 E. Pecan Street, Suite 1800
San Antonio, TX 78205
210-554-5500
*Attorneys for the Official Committee of
Unsecured Creditors of Mirant Americas
Generation, L.L.C. (The Magi Committee)*

Mark Ledwin
Wilson, Elser, Moskowitz, Edelman &
Dicker
3 Gannett Drive
White Plains, NY 10604
212-490-3000
*Attorneys for the Towns of Lumerland,
Bethel, Forestburgh, County of Sullivan
and Eldred Central School*

Kristian Gluck
Sharon Beausoleil-Mayer
Fulbright & Jaworski, L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, TX 75201
214-855-8000
*Attorneys for Verizon Capital Corp., Bank
One, N.A., Union Banca Corporation and
Numerous Related Special Purpose
Entities*

Gregory Petrick
Cadwalader, Wickersham & Taft
100 Maiden Lane
New York, NY 10039
212-504-6000
Attorneys for the Magi Committee

Frasher Murphy
Winstead, Sechrest & Minick, P.C.
1201 Elm Street, Suite 1201
Dallas, TX 75270
214-745-5400
*Attorneys for the Informal Committee of
Miran Mid-Atlantic LLC PTC Holders*

Josephine Garrett
Attorney at Law
411 West 7th Street, Suite 902
Fort Worth, TX 76102
817-335-5432
Attorneys for Unitil Energy

Scott Shelley
Solomon Noh
Shearman & Sterling
5900 Lexington Avenue
New York, NY 10022
212-848-4000
*Attorneys for Citibank and Credit Suisse
First Boston*

Jeffrey Hurt
Hurt & Lilly
10670 N. Central Expressway, Suite 505
Dallas, TX 75231
214-382-5656
Attorneys for MH Davidson & Co.

Michelle Larson
Weil, Gotshal & Manges
200 Crescent Court, Suite 300
Dallas, TX 75201
214-746-7700
Attorneys for Lehman Brothers

James Brouner
Kessler & Collins, P.C.
5950 Sherry Lane, Suite 222
Dallas, TX 75225
214-379-0792
*Attorneys for Monticello Central School
District*

Dale Wootton
Attorney at Law
5306 Junius
Dallas, TX 75214
214-824-5200
Attorneys for the Town of Wawayanda

Paul Silverstein
Andrews & Kurth L.L.P.
450 Lexington Avenue
New York, NY 10017
212-850-2800
Attorneys for Mirant Committee

Eric J. Taube
Hohmann, Taube & Summers, L.L.P.
100 Congress Ave., Suite 1600
Austin, TX 78701
512-472-5997
Attorneys for the Equity Committee

ANDREWS & KURTH, L.L.P
PAUL SILVERSTEIN
450 LEXINGTON AVE.
NEW YORK, NY 10017

ATTORNEY GENERAL OF GEORGIA
40 CAPITOL SQUARE, SW
ATLANTA, GA 30303

BANK OF AMERICA SECURITIES LLC
SCOTT REIFER
300 HARMON MEADOW BOULEVARD
SECAUCUS, NJ 07094

BANK OF NEW YORK/UBS AG DESIGNED EQUITIES
JOHN MANCUSO
ONE WALL STREET
14TH FLOOR
NEW YORK, NY 10286

BANK OF TOKYO-MITSUBISHI TRUST CO.
BILL RHODES
1251 AVENUE OF THE AMERICAS
NEW YORK, NY 10020-1104

BANK ONE, N.A.
CARL SHAFER, FIRST VICE PRESIDENT
1717 MAIN STREET
4TH FLOOR
DALLAS, TX 75201

BARCLAYS BANK PLC
EDWARD HAMWAY
200 PARK AVENUE
4TH FLOOR
NEW YORK, NY 10166

BARCLAYS CAPITAL
LARRY HAMMOND
222 BROADWAY
NEW YORK, NY 10038

BAYERISCHE LANDESBANK GIROZENTRALE
SEAN O'SULLIVAN
560 LEXINGTON AVENUE
17TH FLOOR
NEW YORK, NY 10022

BEAR STEARNS SECURITIES CORP.
VINCENT MARZELLA
ONE METROTECH CENTER NORTH
4TH FLOOR
BROOKLYN, NY 11201-3862

BOSTON SAFE DEPOSIT & TRUST CO.
MELISSA TARASOVICH
525 WILLIAM PENN PLACE
PITTSBURGH, PA 15259

CIBC WORLD MARKETS CORP.
SANJEEVA SENANANYAKE
425 LEXINGTON AVENUE, 17th Floor
17TH FLOOR
NEW YORK, NY 10022

CITIBANK, N.A.
DAVID A. LESLIE
3800 CITIBANK CENTER, B3-15
TAMPA, FL 33610

CITIGROUP GLOBAL MARKETS INC.
PAT HALLER
333 WEST 34TH STREET
NEW YORK, NY 10001

CITIGROUP/SALOMON SMITH BARNEY
JOHN DORANS
TREVOR HOUSTON
250 WEST STREET, 8TH FLOOR
NEW YORK, NY 10013

CLEARY GOTTLIEB STEEN & HAMILTON
SETH GROSSHANDLER
ONE LIBERTY PLAZA
NEW YORK, NY 10006

COMMERZBANK AG NEW YORK BRANCH
MARY HAROLD
2 WORLD FINANCIAL CENTER
225 LIBERTY STREET
NEW YORK, NY 10281-1060

COMPTROLLER OF PUBLIC ACCOUNTS
STATE COMPTROLLER OF PUBLIC ACCOUNTS
REVENUE ACCOUNTING
DIVISION-BANKRUPTCY SECTION
PO BOX 13528
AUSTIN, TX 78711

CREDIT LYONNAIS AMERICAS
DARRELL STANLEY
1301 TRAVIS STREET
SUITE 2100
HOUSTON, TX 77002

CREDIT LYONNAIS NEW YORK BRANCH
ALAN SIDRANE
1301 AVENUE OF THE AMERICAS
NEW YORK, NY 10019

CREDIT SUISSE FIRST BOSTON
DIDIER SIFFER
MONIQUE RENTA dDAVID SAWYER
11 MADISON AVENUE
NEW YORK, NY 10010-3629

DEUTSCHE BANK AG
MARK B. COHEN, CO-CHAIR
ANCA TRIFAN
60 WALL STREET
NEW YORK, NY 10019

DEUTSCHE BANK TRUST COMPANY AMERICAS
JOHN LASHER
648 GRASSMERE PARK ROAD
NASHVILLE, TN 37211

DRESDNER KLEINWORT WASSERSTEIN
PAUL KEHOE
1301 AVENUE OF THE AMERICAS
NEW YORK, NY 10029-6163

DZ BANK AG
WILLIAM PROCASKY
609 FIFTH AVENUE
NEW YORK, NY 10017

ENVIRONMENTAL PROTECTION AGENCY
ATLANTA FEDERAL CENTER
61 FORSYTH STREET, SW
ATLANTA, GA 30303-3104

EXPORT DEVELOPMENT CORPORATION
SAMUEL ASIEDU
151 O'CONNOR
OTTAWA, K1A 1K3 CANADA

FLEET NATIONAL BANK
PEGGY PECKHAM
100 FEDERAL STREET
MAIL CODE MA DE 10006A
BOSTON, MA 02110

GOLDMAN, SACHS & CO.
PATRICIA BALDWIN
1 NEW YORK PLAZA
45TH FLOOR
NEW YORK, NY 10004

HUNTON & WILLIAMS LLP
BENJAMIN C. ACKERLY
RIVERFRONT PLAZA
EAST TOWER 951 EAST BYRD ST
RICHMOND, VA 23219

CREDIT SUISSE FIRST BOSTON
C/O ISSUER SERVICES
ADP PROXY SERVICES
51 MERCEDES WAY
EDGEWOOD, NY 11717

DEUTSCHE BANK SECURITIES INC.
SCOTT HABURA
ANDREA AUGUSTINA
1251 AVENUE OF THE AMERICAS
NEW YORK, NY 10020

DEXIA CREDIT LOCAL
FERNANDO FERREYEA
445 PARK AVENUE
8TH FLOOR
NEW YORK, NY 10022

DUKE ENERGY TRADING AND MARKETING, L.L.C
LISA J. MELLENCAMP
5400 WESTHEIMER COURT
HOUSTON, TX 77056

ENVIRONMENTAL PROTECTION AGENCY
FOUNTAIN PLACE 12TH FLOOR
SUITE 1200
1445 ROSS AVENUE
DALLAS, TX 75202-2733

ENVIRONMENTAL PROTECTION AGENCY
EPA EAST
1201 CONSTITUTION AVENUE, N.W.
ROOM NUMBER 4101 M
WASHINGTON, DC 20004

FEDERAL ENERGY REGULATORY COMMISSION
DENNIS LANE
MAGALIE R. SALAS
888 FIRST STREET, N.E.
WASHINGTON, DC 20426

GEORGIA DEPARTMENT OF LABOR
148 ANDREW YOUNG INTERNATIONAL BLVD. NE
ATLANTA, GA 30303-1751

HUNTON & WILLIAMS LLP
MICHAEL P. MASSAD, JR.
ENERGY PLAZA, 30TH FLOOR
1601 BRYAN STREET
DALLAS, TX 75201

HYPOVEREINSBANK
LORI ANN CURNYN
150 EAST 42ND STREET
NEW YORK, NY 10017-4679

ING CAPITAL LLC
CHARLES O'NEIL
1325 AVENUE OF THE AMERICAS
NEW YORK, NY 10019

JP MORGAN CHASE
PAULA DABNER
14201 DALLAS PARKWAY
DALLAS, TX 75254

JP MORGAN SECURITIES INC.
SEAN ROONEY
34 EXCHANGE PLACE
JERSEY CITY, NJ 07302

KELLEY DRYE & WARREN LLP
J CARR E LEEN K WOLFORD M BANE
MARK R. SOMERSTEIN DEBRA SUDOCK
101 PARK AVENUE
NEW YORK, NY 10078

LEHMAN BROTHERS, INC.
FRANK TURNER
745 SEVENTH AVENUE
3RD FLOOR
NEW YORK, NY 10019

MIZUHO CORPORATE BANK
YASUO IMAIZUMI
NOEL PURCELL
1251 AVENUE OF THE AMERICAS
NEW YORK, NY 10020

MORGAN STANLEY & CO. INC
VICTOR REICH
ONE PIERREPONT PLAZA
BROOKLYN, NY 11201

NEUBERGER BERMAN LLC
605 THIRD AVENUE
NEW YORK, NY 10158

NEW YORK MERCANTILE EXCHANGE, INC.
BRIAN REGAN
WORLD FINANCIAL CENTER
ONE NORTH END AVENUE
NEW YORK, NY 10282

PERSHING SECURITIES CORPORATION
AL HERNANDEZ
1 PERSHING PLAZA
JERSEY CITY, NJ 07399

INTERNAL REVENUE SERVICE
SPECIAL PROCEDURES STAFF
INTERNAL REV SVCE MAIL CODE 5020-DAL
1100 COMMERCE STREET ROOM 9B8
DALLAS, TX 75242

JP MORGAN CHASE
ANTHONY IANNO
BERT VALDMAN
277 PARK AVENUE
NEW YORK, NY 10072

KATTEN MUCHIN ZAVIS ROSENMAN
JOHN R. WEISS
525 WEST MONROE STREET
SUITE 1600
CHICAGO, IL 60661-3693

LEHMAN BROTHERS INC.
JOHN BYRNE
70 HUDSON STREET
JERSEY CITY, NJ 07302

MERRILL LYNCH PROFESSIONAL CLEARING CORP.
ROMALO CATALANO
101 HUDSON STREET
JERSEY CITY, NJ 07302

MORGAN STANLEY
WILLIAM MCCOY
1221 AVENUE OF THE AMERICAS
NEW YORK, NY 10020

MORGAN STANLEY SENIOR FUNDING INC.
DANIEL ALLEN
1633 BROADWAY
25TH FLOOR
NEW YORK, NY 10019

NEUBERGER BERMAN LLC
C/O ISSUER SERVICES
ADP PROXY SERVICES
51 MERCEDES WAY
EDGEWOOD, NY 11717

OFFICE OF ATTORNEY GENERAL
MAIN JUSTICE BUILDING
ROOM 5111
10TH & CONSTITUTION AVENUE, N.W.
WASHINGTON, DC 20530

REFCO GROUP LTD., LLC
DENNIS KLEJNA
ONE WORLD FINANCIAL CENTER
200 LIBERTY STREET, TOWER A
NEW YORK, NY 10281-1094

SECURITIES AND EXCHANGE COMMISSION
ANGELA D. DODD
MIDWEST REGIONAL OFFICE
175 WEST JACKSON BLVD, SUITE 900
CHICAGO, IL 60604

STATE STREET BANK AND TRUST COMPANY
TIM MURRAY
1776 HERITAGE DRIVE
GLOBAL CORPORATION ACTION UNIT
QUINCY, MA 02171

TEXAS WORKFORCE COMMISSION
TEC BUILDING BANKRUPTCY
101 EAST 15TH STREET
AUSTIN, TX 78778

THE NORTHERN TRUST COMPANY
KAREN GREENE
ROBERT VALENTINE
801 CANAL C-IN
CHICAGO, IL 60607

UBS SECURITIES LLC
CARLOS LEDE
677 WASHINGTON BOULEVARD
STAMFORD, CT 06901

UBS WARBURG
WALTER HULSE
299 PARK AVENUE
NEW YORK, NY 10171

UNITED STATES TRUSTEE'S OFFICE
GEORGE F. MCELREATH
EARLE CABELL FEDERAL BUILDING
1100 COMMERCE STREET, ROOM 9C60
DALLAS, TX 75242

WACHOVIA SECURITIES
JILL AKRE
1339 CHESTNUT STREET
MAIL CODE PA4810
PHILADELPHIA, PA 19107

WELLS FARGO BANK MINNESOTA, NA
C/O ISSUER SERVICES
ADP PROXY SERVICES
51 MERCEDES WAY
EDGEWOOD, NY 11717

WESTDEUTSCHE LANDESBANK GIROZENTRALE
FELICIA LAFORGIA
1211 AVENUE OF THE AMERICAS
NEW YORK, NY 10036

SHEARMAN & STERLING
FREDRIC SOSNICK / SCOTT C. SHELLEY
MAUREEN PEYTON KING / SOLOMON J. NOAH
599 LEXINGTON AVENUE
NEW YORK, NY 10022-6069

TD SECURITIES (USA) INC.
RON ZELLER
DEBORAH GRAVINESE
31 WEST 52ND STREET
NEW YORK, NY 10019-6101

THE BANK OF NEW YORK
CECILE LAMARCO
ONE WALL STREET
NEW YORK, NY 10286

THOMPSON & KNIGHT, LLP
DAVID BENNETT
JUDITH W. ROSS
1700 PACIFIC AVENUE, SUITE 3300
DALLAS, TX 75201-4693

UBS WARBURG
DAVID KALAL
IMPAIRED LOAN MANAGEMENT, STAMFORD BRANCH
677 WASHINGTON BOULEVARD
STAMFORD, CT 06901

UNITED STATES ATTORNEY
OFFICE OF THE UNITED STATES ATTORNEY
3RD FLOOR, 1100 COMMERCE STREET
DALLAS, TX 75242

US BANK NATIONAL ASSOCIATION
KEITH FROHILCHER
1555 RIVERCENTER DRIVE
SUITE 0300
MILWAUKEE, WI 53212

WACHOVIA SECURITIES
GEN SIMMS
CLASS ACTION AND BANKRUPTCY
111 8TH AVENUE
NEW YORK, NY 10011

WELLS FARGO BANK MINNESOTA, NA
1600 EAST MADISON AVENUE
MANKATO, MN 56001

ROBERTS & GRANT, P.C.
T. GLOVER ROBERTS
RICHARD G. GRANT
3102 OAK LAWN AVENUE, SUITE 700
DALLAS, TX 75219

CREDIT LYONNNAIS
1301 AVENUE OF THE AMERICAS
ATTN: GLENN W. MUSCOSKY, VP ASSET RECOVERY
NEW YORK, NY 10019-6022

FLEETBOSTON FINANCIAL
100 FEDERAL STREET, MAIL CODE MA DE 10019C
ATTN: MARTIN A. OPPENHEIMER, SR. COUNSEL
BOSTON, MA 02110

MCCREARY, VESELKA, BRAGG & ALLEN, P.C.
MICHAEL REED, ESQ.
P.O. BOX 26990
AUSTIN, TX 78755

ANDREWS & KURTH, L.L.P.
JASON BROOKNER
1717 MAIN STREET
SUITE 3700
DALLAS, TX 75201

GARDNER CARTON & DOUGLAS LLC
HAROLD L. KAPLAN / TRACY L. TREGER
MARK F. HEBBELN / SALLY SICONOLFI
191 NORTH WACKER DRIVE, SUITE 3700
CHICAGO, IL 60606

ANGELIQUE RISON
503 N MIDLAND DRIVE
ROCKLAND, NY 10960

THE ROYAL BANK OF SCOTLAND
MING CHU / CHARLES GREER / THOMAS KEEFE
GUARI KETCHER / BETHANY THOMAS
101 PARK AVENUE
NEW YORK, NY 10178

KBC BANK N.V.
MICHAEL CURRAN
125 WEST 55TH STREET
NEW YORK, NY 10019

MORRISON & FOERSTER LLP
LARREN M. NASHESKY
1290 AVENUE OF THE AMERICAS
NEW YORK, NY 10104-0050

MORRISON & FOERSTER LLP
KENNETH W. IRVIN
WILLIAM MCCARRON, JR.
2000 PENNSYLVANIA AVENUE, NW, SUITE 5500
WASHINGTON, DC 20006-1888

CURTIS LAW FIRM, PLLC
STEPHANIE D. CURTIS
BANK OF AMERICA PLAZA
901 MAIN STREET, SUITE 6515
DALLAS, TX 75202

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON
STEVEN W. SOULE
320 SOUTH BOSTON AVE; STE 400
TULSA, OK 74103-3708

STUTZMAN, BROMBERG, ESSERMAN & PLIFKA
A PROFESSIONAL CORPORATION
SANDER L. ESSERMAN
JOE HARTWICK
2323 BRYAN STREET, SUITE 2200
DALLAS, TX 75201-2689

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
ROGER FRANKEL
JONATHAN P. GUY
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007

HUGHES HUBBARD & REED LLP
DANIEL S. LUBELL
JEFFREY S. MARGOLIN
ONE BATTERY PARK PLAZA
NEW YORK, NY 10004

HOWARD, RICE, NEMOROVSKI, CANADY,
FALK & RABKIN
GARY M. KAPLAN, ESQ
THREE EMBARCADERO CTR, 7TH FL
SAN FRANCISCO, CA 94111-4065

LEVENE, NEALE, BENDER, RANKIN & BRILL L.L.P.
DAVID L. NEALE, ESQ.
1801 AVENUE OF THE STARS, SUITE 1120
LOS ANGELES, CA 90067

SUTHERLAND ASBILL & BRENNAN LLP
RICHARD G. MURPHY, JR.
PAUL B. TURNER
1275 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, DC 20004

J. MICHAEL MCBRIDE, P.C.
J. MICHAEL MCBRIDE, ESQ.
411 WEST SEVENTH STREET, SUITE 210
FORT WORTH, TX 76102

QUADRANGLE GROUP LLC
JOSIAH ROTENBERG
375 PARK AVENUE, 14TH FLOOR
NEW YORK, NY 10152

WASHINGTON GAS ENERGY SERVICES, INC.
TELEMAC N. CHRYSSIKOS
1100 H STREET, N.W., 12TH FLOOR
WASHINGTON, DC 20080

UNITIL SERVICE CORPORATION
MARK H. COLLIN, CFO
6 LIBERTY LANE
HAMPTON, NH 03842

LEBOEUF, LAMB, GREENE & MACRAE, L.L.P.
ELIZABETH PAGE SMITH, ESQ.
125 WEST 55TH STREET
NEW YORK, NY 10019

LEBOEUF, LAMB, GREENE & MACRAE, L.L.P.
SCOTT J. MUELLER, ESQ.
260 FRANKLIN STREET
BOSTON, MA 02110

ENTERGY SERVICES, INC.
ALAN H. KATZ, SENIOR COUNSEL
639 LOYOLA AVENUE, 26TH FLOOR
NEW ORLEANS, LA 70113

APACHE CORPORATION & APACHE CANADA, LTD.
CHRISTOPHER W. BARNES
2000 POST OAK BOULEVARD, SUITE 100
HOUSTON, TX 77056-4400

BABST, CALLAND, CLEMENTS & ZOMNIR P.C.
NORMAN E. GILKEY
GREGORY D. CRIBBS
TWO GATEWAY CENTER
PITTSBURGH, PA 15222

MEYERS, RODBELL & ROSENBAUM, P.A.
ROBERT H. ROSENBAUM
M. EVAN MEYERS
BERKSHIRE BUILDING
6801 KENILWORTH AVENUE, SUITE 400
RIVERDALE, MD 20737-1385

HUNTON & WILLIAMS LLP
BRADLEY R. DUNCAN
KIMBERLY L. NELSON
1751 PINNACLE DRIVE
MCLEAN, VA 22102

WEIL GOTSHAL & MANGES LLP
MARTIN A. SOSLAND
MICHELLE V. LARSON
STEVE A. YOUNGMAN
100 CRESCENT COURT, SUITE 1300
DALLAS, TX 75201

WEIL GOTSHAL & MANGES LLP
PAUL M. BASTA
767 FIFTH AVENUE
NEW YORK, NY 10153

U.S. DEPARTMENT OF JUSTICE
J. CHRISTOPHER KOHN
TRACY J. WHITAKER / MATTHEW J. TROY
PO BOX 875, BEN FRANKLIN STATION
WASHINGTON, DC 20044

PATTON BOGGS LLP
CLIFTON R. JESSUP, JR.
BRUCE H. WHITE / WILLIAM L. MEDFORD
2001 ROSS AVENUE, SUITE 3000
DALLAS, TX 75201

SEGREST & SEGREST, P.C.
PHILIP R. SEGREST
28015 WEST STATE HIGHWAY 84
MCGREGOR, TX 76657

COX & SMITH INCORPORATED
DEBORAH D. WILLIAMSON
CAROL E. JENDRZEY / THOMAS RICE
112 E. PECAN, SUITE 1800
SAN ANTONIO, TX 78205

CADWALADER, WICKERSHAM & TAFT LLP
BRUCE R. ZIRINSKY
GREGORY M. PETRICK / INGRID BAGBY
100 MAIDEN LANE
NEW YORK, NY 10038

PIPER RUDNICK LLP
MARK J. FRIEDMAN
SUSAN S. MAHER
6225 SMITH AVENUE
BALTIMORE, MD 21209-3600

LOCKE LIDDELL & SAPP LLP
PATRICIA WILLIAMS PREWITT
3400 JP MORGAN CHASE TOWER
600 TRAVIS STREET
HOUSTON, TX 77002-3095

MIRANT CORPORATION
ZACHARY STARBIRD
1155 PERIMETER CENTER WEST
ATLANTA, GA 30338

HAYNES AND BOONE, LLP
JUDITH ELKIN
901 MAIN STREET
SUITE 3100
DALLAS, TX 75202

HAYNES AND BOONE, LLP
IAN PECK
201 MAIN STREET
SUITE 2200
FORT WORTH, TX 76102

WHITE & CASE LLP
ATTN: CRAIG AVERCH
633 WEST FIFTH STREET
SUITE 1900
LOS ANGELES, CA 90071-2007

SITRICK AND COMPANY, INC.
ATTN: MICHAEL S. SITRICK
1840 CENTURY PARK EAST
SUITE 800
LOS ANGELES, CA 90067-2109

ALIX PARTNERS, LLC
ATTN: MEADE A. MONGER
2100 MCKINNEY AVENUE
SUITE 800
DALLAS, TX 75201

STRASBURGER & PRICE, L.L.P.
ROBERT P. FRANKE
901 MAIN STREET
SUITE 4300
DALLAS, TX 75202-3794

BLACKWELL SANDERS PEPPER MARTIN LLP
KATHRYN B. BUSSING
2300 MAIN STREET
SUITE 1000
KANSAS CITY, MO 64108

BANK OF AMERICA
MICHAEL J. MCKENNEY
101 S. TRYON STREET
MAIL CODE NC1-002-31-31
CHARLOTTE, NC 28255

CSX TRANSPORTATION CO.
ATTN: RUTH C. SALTER-J220
301 WEST BAY STREET
JACKSONVILLE, FL 32202

O'MELVENY & MEYERS LLP
ADAM C. HARRIS
ABBAY W. EHRLICH
30 ROCKEFELLER PLAZA
NEW YORK, NY 10112

BEAR, STEARNS & CO. INC
THOMAS BOYCE
JAMES G. GEREHTY, JR.
383 MADISON AVENUE
NEW YORK, NY 10179

WHITE & CASE LLP
ATTN: TOM LAURIA
WACHOVIA FINANCIAL CENTER
200 SOUTH BISCAYNE BOULEVARD
MIAMI, FL 33131

FORSHEY & PROSTOK, L.L.P.
ATTN: J. ROBERT FORSHEY
777 MAIN STREET
SUITE 1290
FORT WORTH, TX 76102

THE BLACKSTONE GROUP
ATTN: TIMOTHY R. COLEMAN
345 PARK AVENUE
NEW YORK, NY 10154

JCI JONES CHEMICALS, INC.
ATTN: ANGELA MARVIN
808 SARASOTA QUAY
SARASOTA, FL 34236

ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.
A. ANDREW GALLO
7620 METRO CENTER DRIVE
AUSTIN, TX 78744

SKADDEN , ARPS, SLATE, MEAGHER & FLOM LLP
J. GREGORY MILMOE
ALAN CARR
FOUR TIMES SQUARE
NEW YORK, NY 10036

CRT CAPITAL GROUP LLC
NAT FURMAN
262 HARBOR DRIVE
STAMFORD, CT 06902

SHIPMAN & GOODWIN LLP
IRA H. GOLDMAN
ROBERT M. BORDEN / CORINNE L. BURNICK
ONE AMERICAN ROW
HARTFORD, CT 06103-2819

GOODRICH POSTNIKOFF & ALBERTSON, LLP
JOSEPH F. POSTNIKOFF
KEVIN G. HERD / CHRISTOPHER J. BURR
777 MAIN STREET, SUITE 1360
FORT WORTH, TX 76102

JONES DAY
DULCIE D. BRAND, ESQ.
555 WEST FIFTH STREET, SUITE 4600
LOS ANGELES, CA 90013-1025

REED SMITH LLP
ROBERT M. MARINO, ESQ.
1301 K. STREET, NW
SUITE 1100 EAST TOWER
WASHINGTON, DC 20005-3317

TRAVELERS INSURANCE COMPANY
LISA MORING
LITIGATION CASE MANAGER
ONE TOWER SQUARE 5 MN
HARTFORD, CT 06183-4044

JONES DAY
DEBRA K. SIMPSON, ESQ.
2727 NORTH HARWOOD STREET
DALLAS, TX 75201

CITIBANK, N.A.
JOHN DORANS
250 WEST STREET, 8TH FLOOR
NEW YORK, NY 10013

CREEDON KELLER & PARTNERS, INC.
SABRINA BHATIA
123 SECOND STREET, SUITE 120
SAUSALITO, CA 94965

GLENN M. REISMAN
TWO CORPORATE DRIVE, SUITE 636
P.O. BOX 861
SHELTON, CT 06484-0861

STROOCK & STROOCK & LAVAN LLP
MARVIN J. GOLDSTEIN / KRISTOPHER M. HANSEN
JOSHUA A. LEFKOWITZ / SHERRY MILLMAN
180 MAIDEN LANE
NEW YORK, NY 10038

HANNIFY & KING
A PROFESSIONAL CORPORATION
HARRY B. MURPHY
ONE BEACON STREET
BOSTON, MA 02108

CITY OF ZEELAND
C/O JAMES G. VANTINE, JR.
MILLER, CANFIELD, PADDOCK AND STONE, PLC
444 WEST MICHIGAN AVENUE
KALAMAZOO, MI 49007

BINGHAM MCCUTCHEN LLP
RONALD J. SILVERMAN
JEFFREY T. KIRSHNER / JAMES C. MOON
399 PARK AVENUE
NEW YORK, NY 10022

REED SMITH LLP
JOSEPH S. LUCHINI, ESQ.
3110 FAIRVIEW PARK DRIVE
SUITE 1400
FALLS CHURCH, VA 22042

JONES DAY
MICHELLE MORGAN HARNER, ESQ.
77 WEST WACKER
CHICAGO, IL 60601

APPALOOSA MANAGEMENT LP
RONALD GOLDSTEIN, CO-CHAIR
26 MAIN STREET, 1ST FLOOR
CHATHAM, NJ 07928

HSBC BANK USA
RUSS PALADINO
452 FIFTH AVENUE
NEW YORK, NY 10018

TRILOGY CAPITAL, LLC
STEVEN GIDUMAL
780 THIRD AVENUE, 16TH FLOOR
NEW YORK, NY 10017

HOGAN & HARTSON, L.L.P.
EDWARD C. DOLAN
555 THIRTEENTH STREET, N.W.
WASHINGTON, DC 20004

HUGHES & LUCE, L.L.P.
WILLIAM B. FINKELSTEIN
MATTHEW J. CLEAVES
1717 MAIN STREET, SUITE 2800
DALLAS, TX 75201

KANE, RUSSELL, COLEMAN & LOGAN, P.C.
JOSEPH A. FRIEDMAN
1601 ELM STREET
3700 THANKSGIVING TOWER
DALLAS, TX 75201

CITY OF ZEELAND
C/O JAMES A. DONKERSLOOT
17 SOUTH ELM STREET
P.O. BOX 230
ZEELAND, MI 49464

WINSTEAD SECHREST & MINICK, P.C.
R. MICHAEL FARQUHAR
PHILLIP L. LAMBERSON / J. FRASHER MURPHY
5400 RENAISSANCE TOWER, 121 ELM STREET
DALLAS, TX 75270

HURT & LILLY, LLP
JEFFREY W. HURT
10670 NORTH CENTRAL EXPRESSWAY
SUITE 505
DALLAS, TX 75231-2108

ARCH COAL, INC.
JANET L. HORGAN
ASSISTANT GENERAL COUNSEL
CITY PLACE ONE, SUITE 300
ST. LOUIS, MO 63141

FULBRIGHT & JAWORSKI, L.L.P.
LOUIS R. STRUBECK, JR.
MICHAEL W. ANGLIN
2200 ROSS AVENUE, SUITE 2800
DALLAS, TX 75201-2784

BANK ONE, N.A. LAW DEPARTMENT
DAREN PERKINS, SR. COUNSEL LAW & COMPLIANCE
GOVERNMENT RELATIONS
1717 MAIN STREET, 9TH FLOOR
DALLAS, TX 75201

VERIZON CAPITAL GROUP
AUDREY E. PRASHKER
JAMES J. JORDON / PETER D. RUTHERFORD
245 PARK AVENUE, 40TH FLOOR
NEW YORK, NY 10167-4098

ELLIOTT ASSOCIATES, LP
ATTN: DON GROPPER
712 FIFTH AVENUE, 36TH FLOOR
NEW YORK, NY 10019

WELLS FARGO BANK MINNESOTA, NA
ATTN: THOMAS M. KORSMAN
MAC N9303-120
SIXTH AND MARQUETTE
MINNEAPOLIS, MN 55479

FULBRIGHT & JAWORSKI, LLP
ATTN: PATRICIA L. BARSALOU
300 CONVENT STREET, SUITE 2200
SAN ANTONIO, TX 78205

JP MORGAN CHASE BANK
STEPHANIE PARKER, VP
270 PARK AVENUE, 20TH FLOOR
NEW YORK, NY 10017

CALIFORNIA PUBLIC EMPLOYEES RETIREMENT
SYSTEM
TOM BAKER
LINCOLN PLAZA
400 P STREET
SACRAMENTO, CA 95814

M.H. DAVIDSON & CO., LLC
ANTHONY YOSELOFF
885 THIRD AVENUE
SUITE 3300
NEW YORK, NY 10022

BERGMAN & BIRD, L.L.P.
JACK R. BIRD
4514 TRAVIS STREET, SUITE 300
TRAVIS WALK
DALLAS, TX 75205

BANK ONE, N.A.
CARL SHAFER, FIRST VICE PRESIDENT
P.O. BOX 655145
MAIL CODE TX1-2454
DALLAS, TX 75265-5415

UNION BANK OF CALIFORNIA
JOEL STEINER, VP SPECIAL ASSETS
C/O BANKERS COMMERCIAL CORP.
445 SOUTH FIGUEROA STREET, SUITE 403
LOS ANGELES, CA 90071

SEAPORT GROUP, LLC, THE
JOHN C SOSNOWSKI
317 MADISON AVENUE, SUITE 811
NEW YORK, NY 10017

JP MORGAN CHASE BANK
LYNNE M BARRY, VP & ASSISTANT GENERAL COUNSEL
270 PARK AVENUE, 39TH FLOOR
NEW YORK, NY 10017

FULBRIGHT & JAWORSKI LLP
ATTN: EVELYN H. BIERY
SHARON M. BEAUSOLEIL-MAYER
1301 MCKINNEY, SUITE 5100
HOUSTON, TX 77010-3095

GULFTERRA ENERGY PARTNERS, LP
ATTN: MICHAEL MCGINNIS, SENIOR COUNSEL
1001 LOUISIANA, SUITE 1840A
HOUSTON, TX 77002

MACKAY SHIELDS FINANCIAL
DON MORGAN
9 WEST 57TH STREET
NEW YORK, NY 10019

EL PASO MERCHANT ENERGY, L.P.
CHUCK BROWN, SENIOR COUNSEL
1001 LOUISIANA, SUITE 1903A
HOUSTON, TX 77002

SIMPSON THACHER & BARTLETT LLP
MARK THOMPSON
RICHARD W. DOUGLAS
425 LEXINGTON AVENUE
NEW YORK, NY 10017-3954

JONES DAY
ERICA M. RYLAND
222 EAST 41ST STREET
NEW YORK, NY 10017

LOOMIS, EWERT, PARSLEY, DAVIS & GOTTING, PC
JEFFREY S. THEUER
232 S. CAPITOL AVENUE, SUITE 1000
LANSING, MI 48933

PAUL, HASTINGS, JANOFSKY & WALKER LLP
JONATHAN BIRENBAUM
1055 WASHINGTON BOULEVARD
STAMFORD, CT 06901

SPAIN & GILLON, LLC
WALTER F. MCARDLE
THE ZINZER BUILDING
2117 SECOND AVENUE NORTH
BIRMINGHAM, AL 35203

IOS CAPITAL, LLC
JEFF HALL
BANKRUPTCY ADMINISTRATION
1738 BASS ROAD, PO BOX 13708
MACON, GA 31208-3708

SCHIFF HARDIN & WAITE
EUGENE J. GEEKIE, JR.
JASON M. TORF
6600 SEARS TOWER
CHICAGO, IL 60606-6473

CHADBOURNE & PARK LLP
JOSEPH H. SMOLINSKY
30 ROCKEFELLER PLAZA
NEW YORK, NY 10012

SHANNON, GRACEY, RATLIFF & MILLER, L.L.P.
JOHN Y. BONDS, III
777 MAIN STREET, SUITE 3800
FORT WORTH, TX 76102

RIDDELL WILLIAMS P.S.
JOSEPH E. SHICKICH JR.
1001 4TH AVENUE, SUITE 4500
SEATTLE, WA 98154-1065

THE DELAWARE BAY COMPANY, INC.
NARAYAN RAJ
680 FIFTH AVENUE, 22ND FLOOR
NEW YORK, NY 10019

CARRINGTON, COLEMAN, SLOMAN
& BLUMENTHAL LLP
STEPHEN A. GOODWIN
200 CRESCENT COURT, SUITE 1500
DALLAS, TX 75201

RIEMER & BRAUNSTEIN LLP
JONATHAN D. YELLIN
THREE CENTER PLAZA
BOSTON, MA 02108

JAMES SHAW
237 N.E. WAVECREST WAY
BOCA RATON, FL 33432-4219

CONSTELLATION POWER SOURCE, INC.
CYNTHIA HARKNESS
111 MARKET PLACE, SUITE 500
BALTIMORE, MD 21202

BRACEWELL & PATTERSON, L.L.P.
SAMUEL M. STRICKLIN
JOHN C. LEININGER / MICHAEL D. ANDERSON
500 NORTH AKARD ST., SUITE 4000
DALLAS, TX 75201

DAMON & MORE, LLP
WILLIAM F. SAVINO
BETH ANN BIVONA
1000 CATHEDRAL PLACE, 298 MAIN STREET
BUFFALO, NY 14202

PERRYVILLE ENERGY PARTNERS, L.L.C.
C/O CLECO CORPORATION
MARK PEARCE
2030 DONAHUE FERRY ROAD, PO BOX 5000
PINEVILLE, LA 71361-5000

WESTPORT PETROLEUM, INC.
DENNIS BJORKLAND
300 NORTH LAKE AVENUE
SUITE 1020
PASADENA, CA 91101

MCDERMOTT, WILL & EMERY
PAUL J. PANTANO, JR.
600 THIRTEENTH STREET, N.W.
WASHINGTON, DC 20005

COUCH WHITE, LLP
ALGIRD F. WHITE, JR.
540 BROADWAY
P.O. BOX 22222
ALBANY, NY 12201

DUKE ENERGY CORPORATION
STEVE HELLMAN
5400 WESTHEIMER COURT
HOUSTON, TX 77056-5310

LINEBARGER GOGGAN BLAIR & SAMPSON, LLP
ELIZABETH WELLER
2323 BRYAN STREET, SUITE 1600
DALLAS, TX 75201

COMMODITY FUTURES TRADING COMMISSION
OFFICE OF GENERAL COUNSEL
GLYNN L. MAYS / BELLA ROSENBERG
1555 21ST STREET, NW
WASHINGTON, DC 20581

GIBBONS, DEL DEO, DOLAN, GRIFFINGER &
VECCHIONE
A PROFESSIONAL CORPORATION
DAVID N. RAVIN / MARK B. CONLAN
ONE RIVERFRONT PLAZA
NEWARK, NJ 07102

BECKETT AND LEE, LLP
THOMAS A. LEE III
P.O. BOX 3001
MALVERN, PA 19355-0701

VINSON & ELKINS, L.L.P.
WILLIAM L. WALLANDER
3700 TRAMMELL CROW CENTER
2001 ROSS AVENUE
DALLAS, TX 75201

LATHROP & GAGE L.C.
STEPHEN B. SUTTON
SUITE 2800
2345 GRAND BOULEVARD
KANSAS CITY, MO 64108

OFFICE OF THE ATTORNEY GENERAL
BANKRUPTCY AND COLLECTION DIVISION
P.O. BOX 12548
AUSTIN, TX 78711-2548

HOLLAND & KNIGHT LLP
LEONARD H. GILBERT
A/F MITSUBISHI POWER & MITSUBISHI HEAVY INDUS.
PO BOX 1288
TAMPA, FL 33601

VINSON & ELKINS, L.L.P.
JOHN E. WEST
2300 FIRST CITY TOWER
1001 FANNIN STREET
HOUSTON, TX 77002

SUZANNE M. KLAR
80 PARK PLAZA, T5D
PO BOX 570
NEWARK, NJ 07101

LATHAM & WATKINS LLP
ROBERT J. ROSENBERG
SHARI SIEGEL / MARK A. BROUDE
885 THIRD AVENUE
NEW YORK, NY 10022

THELEN REID & PRIEST
MARTIN G. BUNIN
875 THIRD AVENUE
NEW YORK, NY 10022

DEPARTMENT OF JUSTICE
SUSAN T. EGNOR, ASSISTANT ATTORNEY GENERAL
1515 SW 5TH AVENUE, SUITE 410
PORTLAND, OR 97201

BROWN RUDNICK BERLACK ISRAELS LLP
EDWARD S. WEISFELNER
LESLIE H. SCHARF
120 WEST 45TH STREET
NEW YORK, NY 10036

NOSSAMAN, GUTHNER, KNOX & ELLIOT, LLP
ALLAN H. ICKOWITZ
JOHN W. KIM
445 SOUTH FIGUEROA STREET, 31ST FLOOR
LOS ANGELES, CA 90071

BURNS & MCDONNELL ENGINEERING COMPANY, INC.
GERARD T. BUKOWSKI
VICE PRESIDENT AND GENERAL COUNSEL
9400 WARD PARKWAY
KANSAS CITY, MO 64114

KAYE SCHOLER LLP
MARC S. COHEN
1999 AVENUE OF THE STARS, SUITE 1700
LOS ANGELES, CA 90067

HOLLAND & KNIGHT LLP
SUZANNE E. GILBERT
A/F MITSUBISHI POWER & MITSUBISHI HEAVY INDUS.
P.O. BOX 1526
ORLANDO, FL 32802-1526

STATE OF MARYLAND DEPT. OF LABOR
UNEMPLOYMENT INSURANCE CONTRIB'S DIV.
UNEMP. INS. DIV. - LITIGATION & PROSECUTION UNIT
1100 NORTH EUTAW STREET, ROOM 400
BALTIMORE, MD 21201

ARNOLD GALLAGHER SAYDAK PERCELL
ROBERTS & POTTER, P.C.
LOREN S. SCOTT
P.O. BOX 1758
EUGENE, OR 97440-1758

NORFOLK SOUTHERN CORPORATION
ATTN: WILLIAM H. JOHNSON, GENERAL ATTORNEY
THREE COMMERCIAL PLACE
NORFOLK, VA 23510

LAW, SNAKARD & GAMBILL, P.C.
PAMELA ARNOLD BASSEL
1600 W. 7TH STREET
SUITE 500
FORT WORTH, TX 76102

SCARCELLA ROSEN & SLOME LLP
JACQUELINE L. GIORGIO
333 EARLE OVINGTON BLVD.
NINTH FLOOR
UNIONDALE, NY 11553

PHAETON INTERNATIONAL/PHOENIX PARTNERS
JOANN MCNIFF
33 S. FRANKLIN AVENUE
BERGENFIELD, NJ 07621

TEJAS SECURITIES GROUP, INC.
MORRIS WEISS
JOHN GORMAN
112 E. PECAN, SUITE 1510
SAN ANTONIO, TX 78205

ROGER B. SMITH
301 KEMP ROAD
SUWANEE, GA 30024-1607

ANDRES FORERO
705 E. 43RD STREET
AUSTIN, TX 78751

STEINHART & FALCONER LLP
MATTHEW S. COVINGTON
KARI S. GREGORY
333 MARKET STREET, 32ND FLOOR
SAN FRANCISCO, CA 94105-2150

POSTERNAK BLANKSTEIN & LUND LLP
ROBERT OWEN RESNICK
100 CHARLES RIVER PLAZA
BOSTON, MA 02114

LAW DEBENTURE TRUST COMPANY OF NEW YORK
ATTN: DANIEL FISHER
767 THIRD AVENUE, 31ST FLOOR
NEW YORK, NY 10017

ENVIORNMENTAL PROTECTION AGENCY
ARIEL RIOS BUILDING
1200 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, DC 20460

PASCO COUNTY BOARD OF COUNTY COMMISSIONERS
C/O KRISTI WOODEN, PASCO COUNTY ATTY'S OFFICE
WEST PASCO GOVERNMENT CENTER
7530 LITTLE ROAD, SUITE 340
NEW PORT RICHEY, FL 34654

JENNINGS, HAUG & CUNNINGHAM, L.L.P.
PHILIP G. MITCHELL
2800 N. CENTRAL AVENUE
SUITE 1800
PHOENIX, AZ 85004-1049

SMITH MANAGEMENT, LLC
ELIZABETH PIERCE
885 THIRD AVENUE, 34TH FLOOR
NEW YORK, NY 10022

ARIA PARTNERS
DANA MESSINA
11100 SANTA MONICA BOULEVARD
SUITE 825
LOS ANGELES, CA 90025

L. MATT WILSON
950 E. PACES FERRY ROAD
SUITE 3250
ATLANTA, GA 30326

MICHAEL WILLINGHAM
9202 MEAUX DRIVE
HOUSTON, TX 77031

JOSEPHINE GARRETT
JOSEPHINE GARRETT, P.C.
411 WEST 7TH STREET
SUITE 902
FORT WORTH, TX 76102

LEBOEUF, LAMB, GREENE & MACRAE, L.L.P.
BENNETT G. YOUNG
ONE EMBARCADERO CENTER
SUITE 400
SAN FRANCISCO, CA 94111-3619

BROWN RUDNICK BERLACK ISRAELS LLP
HOWARD L. SIEGEL
CITY PLACE I, 185 ASYLUM STREET
HARTFORD, CT 06103-3402

MADISON CAPITAL MANAGEMENT
CRAIG KLEIN
6143 SOUTH WILLOW DRIVE
SUITE 200
GREENWOOD VILLAGE, CO 80111

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
ELAINE Z. COLE
340 E. MAIN STREET
ROCHESTER, NY 14604

PHELPS DUNBAR LLP
KATERINE M. DETERMAN
CANAL PLACE, SUITE 2000
365 CANAL STREET
NEW ORLEANS, LA 70130-6534

OFFICE OF CONSUMER ADVOCATE
MICHAEL W. HOLMES
F. ANNE ROSS
117 MANCHESTER STREET
CONCORD, NH 03301

SANDELL ASSET MANAGEMENT
HERBERT LUST
JASON KROH
1251 AVENUE OF THE AMERICAS
NEW YORK, NY 10020

WARNER, STEVENS & DOBY, L.L.P.
DAVID T. COHEN
1700 CITY CENTER TOWER II
301 COMMERCE STREET
FORT WORTH, TX 76102

MOORE & VAN ALLEN, PLLC
DAVID B. WHEELER
40 CALHOUN STRRET, SUITE 300
POST OFFICE BOX 22828
CHARLESTON, SC 29413-2828

LOCKE LIDDELL & SAPP LLP
ATTN: GREGORY A. LOWRY
2200 ROSS AVENUE
SUITE 2200
DALLAS, TX 75201-6776

HOHMANN, TAUBE & SUMMERS, L.L.P.
ERIC J. TAUBE
MARK C. TAYLOR
100 CONGRESS AVENUE, SUITE 1600
AUSTIN, TX 78701

BROWN RUDNICK BERLACK ISRAELS LLP
WILLIAM R. BALDIGA
ONE FINANCIAL CENTER
BOSTON, MA 02111

LEBOEUF, LAMB, GREENE & MACRAE, L.L.P.
ADELAIDE MAUDSLEY
136 SOUTH MAIN STREET
1000 KEARNS BUILDING
SALT LAKE CITY, UT 84101

PENSION BENEFIT GUARANTY CORPORATION
OFFICE OF THE GENERAL COUNSEL
KENNETH J. COOPER
1200 K STREET, N.W., SUITE 340
WASHINGTON, DC 20005-4026

LINEBARGER GOGGAN BLAIR & SAMPSON, LLP
LORI ROBERTSON
1949 SOUTH IH 35 (78741)
P.O. BOX 17428
AUSTIN, TX 78760-7428

PENNSYLVANIA DEPARTMENT OF LABOR AND
INDUSTRY
SHARON L. ROYER, UC TAX AGENT/BANKRUPTCY REP
HARRISBURG BANKRUPTCY & COMPLIANCE
1171 S. CAMERON ST., ROOM 312
HARRISBURG, PA 17104-2513

KELLER ROHRBACK, P.L.C.
GARY A. GOTTO
3101 NORTH CENTRAL AVENUE
SUITE 900
PHOENIX, AZ 85012-2600

RUBIN & RUDMAN, LLP
KENNETH M. BARNA
50 ROWES WHARF
BOSTON, MA 02110-3319

CONTRARIAN CAPITAL MANAGEMENT, L.L.C.
SETH LAX
411 WEST PUTNAM AVENUE
SUITE 225
GREENWICH, CT 06830

MCDERMOTT, WILL & EMERY
NATHAN F. COCO
HANNAH J. MUFSON
227 WEST MONROE STREET
CHICAGO, IL 60606-5096

SEWARD & KISSELL LLP
SEAN C. SERPE
ONE BATTERY PARK PLAZA
NEW YORK, NY 10004

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
R. DOUGLAS NOAH, JR.
5000 RENAISSANCE TOWER
1201 ELM STREET
DALLAS, TX 75270

HOGAN & HARTSON L.L.P.
SCOTT A. GOLDEN
875 THIRD AVENUE
NEW YORK, NY 10022

HANCE, SCARBOROUGH, WRIGHT, GINSBERG
& BRUSILOW LLP
E. P. KEIFFER
1401 ELM STREET, SUITE 4750
DALLAS, TX 75202

STATE OF CALIFORNIA WATER, ENERGY, et al
c/o LYNN HAMILTON BUTLER
PORTER ROGERS DAHLMAN & GORDON
2600 VIA FORTUNA, SUITE 130
AUSTIN, TX 78746

CLARK COUNTY, NEVADA
c/o MARK J. PETROCCHI
COLVIN & PETROCCHI, LLP
801 CHERRY ST, SUITE 2485, UNIT #35
FORT WORTH, TX 76102-6863

NEW YORK STATE DEPT. OF LAW
ENVIORNMENTAL PROTECTION BUREAU
MAUREEN F. LEARY, ASST. ATTORNEY GENERAL
THE CAPITOL
ALBANY, NY 12224

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
MARK G. LEDWIN
3 GANNETT DRIVE
WHITE PLAINS, NY 10604

PEEL, BRIMLEY & SPANGLER
RICHARD L. PEEL
701 NORTH GREEN VALLEY PARKWAY
SUITE 220
HENDERSON, NV 89074-6178

RICHARD D. NOBLES, ESQ.
CALIFORNIA STATE LANDS COMMISSION
100 HOWE AVENUE, SUITE 100 SOUTH
SACRAMENTO, CA 95825-8202

NEIL HERSKOWITZ
RIVERSIDE CONTRACTING LLC
PO BOX 626
PLANETARIUM STATION
NEW YORK, NY 10024-0540

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[Briefs and Other Related Documents](#)

Only the Westlaw citation is currently available.

Supreme Court of the United States

John M. LAMIE, Petitioner,
v.
UNITED STATES TRUSTEE.

No. 02-693.

Argued Nov. 10, 2003.

Decided Jan. 26, 2004.

Background: In case converted from Chapter 11 to Chapter 7, debtor's counsel filed application for payment of legal fees incurred prepetition, during the Chapter 11 proceeding, and after conversion of case. United States Trustee (UST) objected to extent that application sought payment for services rendered post-conversion. The United States Bankruptcy Court for the Western District of Virginia, William F. Stone, Jr., J., [253 B.R. 724](#), sustained the objections only to the extent that funds held by attorney in prepetition retainer were insufficient to cover the allowed fees and expenses. The UST appealed, and debtor cross-appealed. The District Court, James P. Jones, J., [260 B.R. 273](#), affirmed, and parties filed cross-appeals. The Fourth Circuit Court of Appeals, Niemeyer, Circuit Judge, [290 F.3d 739](#), affirmed in part and reversed in part. Certiorari was granted.

Holding: Abrogating [In re Ames Dept. Stores, Inc., 76 F.3d 66](#); [In re Top Grade Sausage, Inc., 227 F.3d 123](#); and [In re Century Cleaning Services, Inc., 195 F.3d 1053](#), the United States Supreme Court, Justice Kennedy, held that bankruptcy statute governing compensation of professionals does not allow Chapter 7 debtor's attorney to be compensated from estate, unless attorney is employed by trustee with approval of bankruptcy court.

Affirmed.

Justice Stevens concurred in judgment and filed opinion, in which Justice Souter and Justice Breyer joined.

[\[1\] Bankruptcy 3174](#)[51k3174 Most Cited Cases](#)

Bankruptcy statute governing compensation of professionals does not allow Chapter 7 debtor's attorney to be compensated from estate, unless attorney is employed by trustee, as authorized under bankruptcy statute governing employment of professional persons by trustee, with approval of bankruptcy court; abrogating [In re Ames Dept. Stores, Inc., 76 F.3d 66](#); [In re Top Grade Sausage, Inc., 227 F.3d 123](#); and [In re Century Cleaning Services, Inc., 195 F.3d 1053](#). Bankr.Code, [11 U.S.C.A. § § 327, 330\(a\)\(1\)](#).

[\[2\] Statutes 188](#)[361k188 Most Cited Cases](#)[\[2\] Statutes 223.1](#)[361k223.1 Most Cited Cases](#)

Starting point in discerning Congressional intent is existing statutory text, and not predecessor statutes.

[\[3\] Statutes 181\(2\)](#)[361k181\(2\) Most Cited Cases](#)[\[3\] Statutes 188](#)[361k188 Most Cited Cases](#)

When statute's language is plain, sole function of courts, at least where the disposition required by statute's text is not absurd, is to enforce statute according to its terms.

[\[4\] Statutes 190](#)[361k190 Most Cited Cases](#)[\[4\] Statutes 217.2](#)[361k217.2 Most Cited Cases](#)

Mere fact that statute is awkward, or even ungrammatical, does not make it ambiguous, so as to permit court to resort to its legislative history in interpreting it.

[\[5\] Statutes 202](#)[361k202 Most Cited Cases](#)[\[5\] Statutes 206](#)[361k206 Most Cited Cases](#)

Surplusage does not always produce ambiguity, and court's preference for construing statute so as to avoid

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surplusage is not absolute.

[6] Statutes  206
[361k206 Most Cited Cases](#)

When there are two ways to read statute's text, under one of which the text is plain but certain language is mere surplusage, and under the other of which there is no surplusage but text is ambiguous, it is inappropriate, absent other indications, to apply rule against surplusage constructions.

[7] Constitutional Law  70.1(2)
[92k70.1\(2\) Most Cited Cases](#)

There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.

[8] Constitutional Law  70.1(2)
[92k70.1\(2\) Most Cited Cases](#)

It is beyond court's province, when construing statute, to rescue Congress from its drafting errors, and to provide for what court might think is preferred result.

Syllabus [\[FN*\]](#)

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

*1 Before 1994, [§ 330\(a\) of the Bankruptcy Code](#) authorized a court to "award to a trustee, to an examiner, to a professional person employed under [section 327](#) ..., or to the debtor's attorney" "(1) reasonable compensation for ... services rendered by such trustee, examiner, professional person, or attorney" (Emphasis added to highlight text later deleted.) In 1994 Congress amended the Code with a reform Act. The Act altered [§ 330\(a\)](#) by deleting "or to the debtor's attorney" from what was [§ 330\(a\)](#) and is now [§ 330\(a\)\(1\)](#). This change created apparent legislative drafting error in the current section. The section is left with a missing "or" that infects its grammar. And its inclusion of "attorney" in what was [§ 330\(a\)\(1\)](#) and is now [§ 330\(a\)\(1\)\(A\)](#) defeats the neat parallelism that otherwise marks the relationship between current [§ 330\(a\)\(1\)](#) ("trustee, ... examiner, [or] professional person") and [330\(a\)\(1\)\(A\)](#) ("trustee, examiner, professional person, or attorney"). In this

case, petitioner filed an application with the Bankruptcy Court seeking attorney's fees under [§ 330\(a\)\(1\)](#) for the time he spent working on a behalf of a debtor in a chapter 7 proceeding. The Government objected to the application. It argued that [§ 330\(a\)](#) makes no provision for the estate to compensate an attorney who is not employed by the estate trustee and approved by the court under [§ 327](#). Petitioner admitted he was not employed by the trustee and approved by the court under [§ 327](#), but nonetheless contended [§ 330\(a\)](#) authorized a fee award to him because he was a debtor's attorney. In denying petitioner's application, the Bankruptcy Court, District Court, and Fourth Circuit all held that in a chapter 7 proceeding [§ 330\(a\)\(1\)](#) does not authorize payment of attorney's fees unless the attorney has been appointed under [§ 327](#).

Held: Under the Code's plain language, [§ 330\(a\)\(1\)](#) does not authorize compensation awards to debtors' attorneys from estate funds, unless they are employed as authorized by [§ 327](#). If the attorney is to be paid from estate funds under [§ 330\(a\)\(1\)](#) in a chapter 7 case, he must be employed by the trustee and approved by the court. Pp. ---- - ----5-15.

(a) Petitioner argues that this Court must look to legislative history to determine Congress' intent because the existing statutory text is ambiguous in light of its predecessor. He claims that subsection (A)'s "attorney" is facially irreconcilable with the section's first part since the two parts' lists were previously parallel. He claims also that only a drafting error can explain the missing conjunction "or" between "an examiner" and "a professional person" since the text was previously grammatically correct. The starting point in discerning congressional intent, however, is the existing statutory text, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 119 S.Ct. 755, 142 L.Ed.2d 881, and not predecessor statutes. So this Court begins with the present statute. Pp. ---- - ----5-6.

(b) That the present statute is awkward, and even ungrammatical, does not make it ambiguous on the point at issue. A debtor's attorney not engaged under [§ 327](#) does not fall within the eligible class of persons that the first part of [§ 330\(a\)\(1\)](#) authorizes to receive compensation: trustees, examiners, and [§ 327](#) professional persons. Subsection (A) allows compensation for services rendered by four types of persons (the same three plus attorneys), but unless an applicant is in one of the classes named in the first part, the kind of service rendered is irrelevant. The missing "or" does not change this conclusion.

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Numerous federal statutes inadvertently lack a conjunction, but are read for their plain meaning. Here, the missing "or" neither alters the text's substance nor obscures its meaning. Subsection (A)'s nonparalleled fourth category also does not cloud the statute's meaning. "Attorney" can be straightforwardly read to refer to those attorneys who qualify as [§ 327](#) professional persons. Likewise, neighboring [§ 331](#), which permits both debtors' attorneys and [§ 327](#) professional persons to receive interim compensation, most straightforwardly refers to [§ 327](#) debtors' attorneys. This reading may make "attorney" in [§ 330\(a\)\(1\)\(A\)](#) surplusage, but surplusage does not always produce ambiguity. When there are two ways to read the text--either attorney is surplusage, which makes the text plain, or attorney is nonsurplusage, which makes the text ambiguous--applying a rule against surplusage is inappropriate. Pp. ---- - ----6-9.

*2 (c) The plain meaning that [§ 330\(a\)\(1\)](#) sets forth does not lead to absurd results. Petitioner's arguments--that this Court's interpretation will lead to a departure from the principle of prompt and effectual administration of bankruptcy law and attributes to Congress an intent to eliminate compensation essential to debtors' receipt of legal services--overstate [§ 330\(a\)\(1\)](#)'s effect. Compensation remains available through various permitted means. Compensation for debtors' attorneys in chapter 12 and 13 bankruptcies, for example, is not much disturbed by [§ 330](#) as a whole. Moreover, compensation for debtors' attorneys in chapter 7 proceedings is not altogether prohibited. [Sections 327](#) and [330](#), taken together, allow chapter 7 trustees to engage attorneys, including debtors' counsel, and allow courts to award them fees. Section [§ 327](#)'s limitation on a debtor's incurring debts for professional services without the trustee's approval also advances the trustee's responsibility for preserving the chapter 7 estate. Add to this the apparent sound functioning of the bankruptcy system in the Fifth and Eleventh Circuits, which have both adopted the plain meaning approach, and petitioner's arguments become unconvincing. And [§ 330\(a\)\(1\)](#) does not prevent a debtor from engaging in the common practice of paying counsel compensation in advance to ensure that a bankruptcy filing is in order. Pp. ---- - ----9-11.

(d) With a plain, nonabsurd meaning in view, this Court will not read "attorney" in [§ 330\(a\)\(1\)\(A\)](#) to refer to "debtors' attorneys," in effect enlarging the statute's scope. See [Iselin v. United States](#), 270 U.S. 245, 251, 46 S.Ct. 248, 70 L.Ed. 566. This Court's

unwillingness to soften the import of Congress' chosen words even if it believes the words lead to a harsh outcome is longstanding. P. ----11.

(e) Though it is unnecessary to rely on the 1994 Act's legislative history, it is instructive to note that the history creates more confusion than clarity about the congressional intent. History and policy considerations lend support both to petitioner's interpretation and to the holding reached here. This uncertainty illustrates the difficulty of relying on legislative history and the advantage of resting on the statutory text. Pp. ---- - ----12-14.

*3 [290 F.3d 739](#), affirmed.

KENNEDY, J., delivered the opinion of the Court, in which [REHNQUIST](#), C. J., and [O'CONNOR](#), [SOUTER](#), THOMAS, [GINSBURG](#), and [BREYER](#), JJ., joined, and in which [SCALIA](#), J., joined except for Part III. [STEVENS](#), J., filed an opinion concurring in the judgment, in which [SOUTER](#) and [BREYER](#), JJ., joined.

Thomas C. Goldstein, Washington, DC, for petitioner.

[Lisa S. Blatt](#), Washington, DC, for respondent.

[John M. Lamie](#), Browning, Lamie & Gifford, Abingdon, VA, Thomas C. Goldstein, Counsel of Record, Amy Howe, Goldstein & Howe, P.C., Washington, DC, [G. Eric Brunstad, Jr.](#), New Haven, CT, John A. E. Pottow, Assistant Professor of Law, University of Michigan Law School, Ann Arbor, MI, [Craig Goldblatt](#), [Andrew Currie](#), Wilmer, Cutler & Pickering, Washington, DC, for the petitioner.

[Joseph A. Guzinski](#), General Counsel, P. Matthew Sutko, Attorney, Executive Office for United States Trustees, Washington, D.C., [Theodore B. Olson](#), Solicitor General, Counsel of Record, Peter D. Keisler, Assistant Attorney General, Thomas G. Hungar, Deputy Solicitor General, [Lisa S. Blatt](#), Assistant to the Solicitor General, Department of Justice, Washington, D.C., for the respondent.

Justice KENNEDY delivered the opinion of the Court. [\[FN*\]](#)

[FN*](#) Justice SOUTER and Justice BREYER join this opinion in its entirety. Justice

SCALIA joins this opinion except for Part III.

Section 330(a)(1) of the Bankruptcy Code, 11 U.S.C. § 330(a)(1), regulates court awards of professional fees, including fees for services rendered by attorneys in connection with bankruptcy proceedings. Petitioner, a bankruptcy attorney, sought compensation under the section for legal services he provided to a bankrupt debtor after the proceeding was converted to a chapter 7 bankruptcy. His application for fees was denied by the Bankruptcy Court, the District Court, and the United States Court of Appeals for the Fourth Circuit. Each court held that in a chapter 7 proceeding § 330(a)(1) does not authorize payment of attorney's fees unless the attorney has been appointed under § 327 of the Code. See 11 U.S.C. §§ 327 and 701 et seq. Petitioner was not so appointed, and his fee request was denied. Having granted the petition for certiorari to review this holding, we now affirm.

I

In 1994 Congress amended the Bankruptcy Code. Bankruptcy Reform Act of 1994(Act), 108 Stat. 4106. The subject of professional fees was addressed and comprehensive changes were made. See 3 Collier on Bankruptcy ¶ 330.LH[5], pp. 330-75 to 330-76 (rev. 15th ed.2003). Most of the changes served to clarify the standards for the award of professional fees; but various courts disagree over the proper interpretation of the portion of the statute relevant to this dispute, concerning attorney's fees.

The Act replaced the predecessor section to the one in issue here. Compare 108 Stat. 4130-4131 (§ 224(b) of the Act amending 11 U.S.C. § 330(a)), with 11 U.S.C. § 330(a) (1988 ed.). Before the 1994 Act, § 330(a) had read as follows:

*4 "(a) After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, or to the debtor's attorney--

"(1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney ... and by any paraprofessional persons employed by such trustee, professional person, or attorney ...; and

"(2) reimbursement for actual, necessary expenses." *Ibid.* (emphasis added to highlight text later deleted).

Pursuant to the 1994 Act, 11 U.S.C. § 330(a)(1) now reads as follows:

"(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103--

"(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

"(B) reimbursement for actual, necessary expenses."

As can be noted, the 1994 enactment's principal, substantive alteration was its deletion of the five words at the end of what was § 330(a) and is now § 330(a)(1): "or to the debtor's attorney."

The deletion created apparent legislative drafting error. It left current § 330(a)(1) with a missing "or" that infects its grammar (*i.e.*, "an examiner, [or] a professional person ..."). Furthermore, the Act's inclusion of the word "attorney" in § 330(a)(1)(A) defeats the neat parallelism that otherwise marks the relationship between § § 330(a)(1) and 330(a)(1)(A) (*i.e.*, in § 330(a)(1): "trustee, ... examiner, [or] professional person;" in § 330(a)(1)(A): "trustee, examiner, professional person, or attorney") and so casts some doubt on the proper presence of "attorney." That the pre-1994 text had no grammatical error and was parallel in its structure strengthens the sense that error exists in the new text.

The Courts of Appeals for the Fifth and Eleventh Circuits, when asked to interpret current § 330(a)(1), concluded that its language was plain irrespective of these quirks and history. Under the statutory language as written, those courts held, fees may be awarded to attorneys for services rendered only to the extent they are payments to "a professional person employed under § 327," see, *e.g.*, § 327(a) (authorizing an appointed trustee in a chapter 7 bankruptcy action to "employ one or more attorneys ... to represent or assist the trustee in carrying out the trustee's duties under this title"); § 327(e) (authorizing an appointed trustee in a chapter 7 bankruptcy action to "employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, ..."). See *In re Pro-Snax Distributors, Inc.*, 157 F.3d 414 (C.A.5 1998); *In re American Steel Product, Inc.*, 197 F.3d 1354 (C.A.11 1999). The Courts of Appeals for the Second, Third, and Ninth Circuits, in contrast, concluded that the text's

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apparent errors rendered the section ambiguous, requiring consideration of the provision's legislative history. That history, those courts held, shows Congress intended [§ 330\(a\)\(1\)](#) to continue to allow compensation of chapter 7 debtors' attorneys, irrespective of qualification under [§ 327](#). *In re Ames Dept. Stores, Inc.*, 76 F.3d 66 (C.A.2 1996); *In re Top Grade Sausage, Inc.*, 227 F.3d 123 (C.A.3 2000); *In re Century Cleaning Services, Inc.*, 195 F.3d 1053 (C.A.9 1999). See also 3 Collier on Bankruptcy, *supra*, ¶ 330.LH[5], at 330-75 to 330-76.

This interpretive divide became relevant to petitioner in his representation of Equipment Services, Inc. (ESI). ESI retained petitioner to prepare, file, and prosecute a chapter 11 bankruptcy proceeding on its behalf. He did so, all the while representing ESI with the approval of the court under [§ 327](#). See *In re Equipment Services, Inc.*, 290 F.3d 739, 742 (C.A.4 2002) (case below). See also [11 U.S.C. § 1107\(a\)](#) (authorizing debtor-in-possession to exercise the statutory rights and powers of an estate trustee, including to retain counsel under [§ 327](#)). Three months into the chapter 11 reorganization, the United States Trustee (Government) filed a motion to convert the action into a chapter 7 liquidation proceeding. The court granted the Government's motion and appointed an estate trustee pursuant to [§ 701](#), [11 U.S.C. § 701\(a\)](#). This terminated ESI's status as debtor-in-possession and so terminated petitioner's service under [§ 327](#) as an attorney for the debtor-in-possession. Yet petitioner continued to provide legal services to ESI, the debtor, even though he did not have the trustee's authorization to do so. He prepared reports detailing debts incurred and property acquired since the initial filing; he amended asset schedules; and he appeared at a hearing on an adversary complaint.

*5 In due course petitioner filed an application seeking fees under [§ 330\(a\)\(1\)](#) for the time he spent on ESI's behalf after the chapter 7 conversion. The Government objected to the application. It argued that [§ 330\(a\)\(1\)](#) makes no provision for the estate to compensate an attorney not authorized under [§ 327](#). The court agreed and denied the fees. *In re Equipment Services, Inc.*, 253 B.R. 724 (Bankr.W.D.Va.2000). (Petitioner was paid fees for the services he provided to ESI before conversion of the proceeding to chapter 7 and when ESI was the debtor-in-possession. The parties do not contest those fees.)

Petitioner unsuccessfully sought reversal of the Bankruptcy Court's determination, first from the

District Court, see *In re Equipment Services, Inc.*, 260 B.R. 273 (W.D.Va.2001), then from the Court of Appeals, see [290 F.3d 739](#). Both courts concluded the plain language of [§ 330\(a\)\(1\)](#) controlled and that attorneys who provide services to debtors in chapter 7 proceedings must be hired by the trustee under [§ 327](#) to be eligible for compensation. The Court of Appeals acknowledged that its holding deepened the divide among the various Circuits, but held fast to the statute's plain language, "particularly because application of that plain language supports a reasonable interpretation of the Bankruptcy Code," [290 F.3d, at 745](#). We granted the petition for certiorari, [538 U.S. 905](#), [123 S.Ct. 1480](#), [155 L.Ed.2d 223 \(2003\)](#), and now resolve the issue.

II

[1] Petitioner argues that the existing statutory text is ambiguous and so requires us to consult legislative history to determine whether Congress intended to allow fees for services rendered by a debtor's attorney in a chapter 7 proceeding, where that attorney is not authorized under [§ 327](#). He makes the case for ambiguity, for the most part, by comparing the present statute with its predecessor. Thus, he says the statute is ambiguous because subsection (A)'s "attorney" is "facially irreconcilable" with the section's first part since

"[e]ither Congress inadvertently omitted the 'debtor's attorney' from the 'payees' list, on which the court of appeals relied, or it inadvertently retained the reference to the attorney in the latter, 'payees list.'" Brief for Petitioner 17.

*6 Similarly, with respect to the missing conjunction "or" he says,

"[t]here is no apparent reason, other than a drafting error, that Congress would have rewritten the statute to produce a grammatically incorrect provision." *Ibid*.

This is the analysis followed by the Courts of Appeals that hold the statute is ambiguous. See *In re Top Grade Sausage, supra*, at 129 (noting in its search for ambiguity that "[p]rior to amendment, it was undisputed that the repetition of officers in [§ 330\(a\)\(1\)\(A\)](#) was meant to parallel the officers previously listed in [§ 330\(a\)\(1\)](#)"; see also *In re Century Cleaning Services, supra*, at 1057-1058 (engaging in same resort to previous enactment to inquire as to the current text's ambiguity). One determines ambiguity, under this contention, by relying on the grammatical soundness of the prior statute. That contention is wrong.

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[2][3] The starting point in discerning congressional intent is the existing statutory text, see *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999), and not the predecessor statutes. It is well established that "when the statute's language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) (internal quotation marks omitted) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917))). So we begin with the present statute.

A

[4] The statute is awkward, and even ungrammatical; but that does not make it ambiguous on the point at issue. In its first part, the statute authorizes an award of compensation to one of three types of persons: trustees, examiners, and § 327 professional persons. A debtor's attorney not engaged as provided by § 327 is simply not included within the class of persons eligible for compensation. In subsection (A) the statute further defines what type of compensation may be awarded: compensation that is reasonable; and for actual, necessary services; and rendered by four types of persons (the same three plus attorneys). Unless the applicant for compensation is in one of the named classes of persons in the first part, the kind of service rendered is irrelevant.

The missing conjunction "or" does not change our conclusion. The Government points to numerous federal statutes that inadvertently lack a conjunction. They are read, nonetheless, for their plain meaning. See Brief for Respondent 17, n. 4. Here, the missing conjunction neither alters the text's substance nor obscures its meaning. This is not a case where a "not" is missing or where an "or" inadvertently substitutes for an "and." The sentence may be awkward; yet it is straightforward.

Subsection (A)'s nonparalleled fourth category of persons who can render compensable services does not cloud the statute's meaning. Petitioner reasons that since the section is a single sentence, and since it appears to strive for parallelism between those authorized to receive fees and those whose services are compensable, there is an ambiguity as to what "attorney" in § 330(a)(1)(A) refers to in § 330(a)(1).

He also points to neighboring § 331, which provides for both debtors' attorneys and § 327 professional persons to receive interim compensation after an order for relief is entered but before an application for § 330 fees is filed. He argues that since § 331 contemplates debtors' attorneys' receiving interim compensation there is reason to conclude that "attorney" in § 330(a)(1)(A) refers to debtors' attorneys in § 330(a)(1), though they go unmentioned in that clause.

*7 Subsection (A)'s "attorney," however, can be read in a straightforward fashion to refer to those attorneys whose fees are authorized by § 330(a)(1): attorneys qualified as § 327 professional persons, that is, in a chapter 7 context, those employed by the trustee and approved by the court. See § 327(a) (appointed trustee may "employ one or more attorneys ... to represent or assist the trustee in carrying out the trustee's duties under this title); § 327(e) (appointed trustee may "employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, ..."). Likewise, § 331's reference to interim compensation for debtors' attorneys most straightforwardly refers to debtors' attorneys authorized under § 327.

[5][6] It must be acknowledged that, under our reading of the text, the word "attorney" in subsection (A) may well be surplusage. Subsection (A)'s reference to § 327 professional persons undoubtedly includes attorneys, as much as does § 330(a)(1)'s reference to professional persons. That is not controlling, however. Surplusage does not always produce ambiguity and our preference for avoiding surplusage constructions is not absolute. See *Chickasaw Nation v. United States*, 534 U.S. 84, 94, 122 S.Ct. 528, 151 L.Ed.2d 474 (2001) (the preference "is sometimes offset by the canon that permits a court to reject words 'as surplusage' if 'inadvertently inserted or if repugnant to the rest of the statute' "). Where there are two ways to read the text--either attorney is surplusage, in which case the text is plain; or attorney is nonsurplusage (*i.e.*, it refers to an ambiguous component in § 330(a)(1)), in which case the text is ambiguous--applying the rule against surplusage is, absent other indications, inappropriate. We should prefer the plain meaning since that approach respects the words of Congress. In this manner we avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history.

B

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The plain meaning that [§ 330\(a\)\(1\)](#) sets forth does not lead to absurd results requiring us to treat the text as if it were ambiguous. See *supra*, at ---6 (citing [Hartford Underwriters](#)). Petitioner disagrees and argues that our interpretation will "entail an inexplicable, wholesale departure from ... the guiding principle of the 'prompt and effectual administration' of federal bankruptcy law." Brief for Petitioner 30. He says that our reading "attribute[s] to Congress an illogical, penny-wise and pound-foolish determination to eliminate entirely--as a purportedly asset-preserving measure--compensation that is essential to debtors' receipt of legal services." *Id.*, at 35.

These arguments overstate the effect of [§ 330\(a\)\(1\)](#). Under the text's instruction compensation remains available to debtors' attorneys through various permitted means. First, while [§ 330\(a\)\(1\)](#) requires proper authorization for payment to attorneys from estate funds in chapter 7 filings, it does not extend throughout all bankruptcy law. Compensation for debtors' attorneys in chapter 12 and 13 bankruptcies, for example, is not much disturbed by [§ 330](#) as a whole. See, e.g., [11 U.S.C. § 330\(a\)\(4\)\(B\)](#) ("In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney").

*8 Compensation for debtors' attorneys working on chapter 7 bankruptcies, moreover, is not altogether prohibited. [Sections 327](#) and [330](#), taken together, allow chapter 7 trustees to engage attorneys, including debtors' counsel, and allow courts to award them fees. See [§ § 327\(a\) and \(e\)](#). [Section 327's](#) limitation on debtors' incurring debts for professional services without the chapter 7 trustee's approval is not absurd. In the context of a chapter 7 liquidation it advances the trustee's responsibility for preserving the estate.

If we add to all this the apparent sound functioning of the bankruptcy system under the plain meaning approach, petitioner's arguments become unconvincing. Seeming order has attended the rule's application for five years in the Fifth Circuit and for four years in the Eleventh Circuit. See [In re American Steel Product, Inc.](#), [197 F.3d 1354 \(C.A.11 1999\)](#); [In re Pro-Snax Distributors, Inc.](#), [157 F.3d 414 \(C.A.5 1998\)](#). It appears to be routine for debtors to pay reasonable fees for legal services before filing for bankruptcy to ensure compliance with statutory requirements. See generally *Collier Compensation, Employment and Appointment of Trustees and Professionals in Bankruptcy Cases* ¶ 3.02[1], p. 3-2

(2002) ("In the majority of cases, the debtor's counsel will accept an individual or a joint consumer chapter 7 case only after being paid a retainer that covers the 'standard fee' and the cost of filing the petition"). So our interpretation accords with common practice. [Section 330\(a\)\(1\)](#) does not prevent a debtor from engaging counsel before a chapter 7 conversion and paying reasonable compensation in advance to ensure that the filing is in order. Indeed, the Code anticipates these arrangements. See, e.g., [§ 329](#) (debtors' attorneys must disclose fees they receive from a debtor in the year prior to its bankruptcy filing and courts may order excessive payments returned to the estate).

C

[7] Petitioner's argument stumbles on still harder ground in the face of another canon of interpretation. His interpretation of the Act--reading the word "attorney" in [§ 330\(a\)\(1\)\(A\)](#) to refer to "debtors' attorneys" in [§ 330\(a\)\(1\)](#)--would have us read an absent word into the statute. That is, his argument would result "not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." [Iselin v. United States](#), [270 U.S. 245, 251, 46 S.Ct. 248, 70 L.Ed. 566 \(1926\)](#). With a plain, nonabsurd meaning in view, we need not proceed in this way. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." [Mobil Oil Corp. v. Higginbotham](#), [436 U.S. 618, 625, 98 S.Ct. 2010, 56 L.Ed.2d 581 \(1978\)](#).

Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding. It results from "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill." [United States v. Locke](#), [471 U.S. 84, 95, 105 S.Ct. 1785, 85 L.Ed.2d 64 \(1985\)](#) (citing [Richards v. United States](#), [369 U.S. 1, 9, 82 S.Ct. 585, 7 L.Ed.2d 492 \(1962\)](#)).

*9 Adhering to conventional doctrines of statutory interpretation, we hold that [§ 330\(a\)\(1\)](#) does not authorize compensation awards to debtors' attorneys from estate funds, unless they are employed as authorized by [§ 327](#). If the attorney is to be paid from estate funds under [§ 330\(a\)\(1\)](#) in a chapter 7 case, he must be employed by the trustee and approved by the court.

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III

Though we find it unnecessary to rely on the legislative history behind the 1994 enactment of [§ 330\(a\)\(1\)](#), we find it instructive that the history creates more confusion than clarity about the congressional intent. History and policy considerations lend support both to petitioner's interpretation and to the holding we reach based on the plain language of the statute.

Petitioner, for instance, cites evidence supporting the conclusion that a scrivener's error obscures what was Congress' real intent. For over 100 years debtors' attorneys have been considered by Congress and the courts to be an integral part of the bankruptcy process. See Bankruptcy Act of 1898, ch. 541, § 59(d) and 64(b), 30 Stat. 561, 563. See also *In re Kross*, 96 F. 816 (S.D.N.Y.1899). It is fair to doubt that Congress would so rework their longstanding role without announcing the change in the congressional record. Cf. *Cohen v. de la Cruz*, 523 U.S. 213, 221, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998) ("We ... will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure" (internal quotation marks and citation omitted)).

The legislative processes behind the change also lend some support to petitioner's claim. In 1994 the original proposed draft of new [§ 330\(a\)\(1\)](#) featured two changes: stylistic changes throughout the section and the addition of a new provision giving the Government a right to object to fee applications. See S. 540, 103d Cong., 1st Sess. (1993), reprinted in [S.Rep. No. 103-168 \(1993\)](#). The right to object provision was added at [§ 330\(a\)\(1\)](#)'s end. Thus it came immediately after the critical text "or to the debtor's attorney," which the draft edited to read "or the debtors [*sic*] attorney." *Ibid.* Before voting the Act into law, however, Congress amended the proposed draft. See 140 Cong. Rec. 8383 (1994) (setting out amendment 1645 to S. 540). Amendment 1645 made only two changes to [§ 330\(a\)\(1\)](#): It deleted the Government's right to object provision and the critical words ("or the debtors [*sic*] attorney"). The rest of the original proposed draft remained intact. Legislative history explains the first deletion, for the provision was installed elsewhere, as new [§ 330\(a\)\(2\)](#). Nothing, however, explains the second. That the Government's right to object was deleted and reinstated (*i.e.*, reorganized), while the words at issue, which had preceded the moved provision, were deleted with no notation in the legislative history suggests the scrivener just reached

too far in his deletion. These factors combined to convince a leading treatise on bankruptcy law, Collier, that the deletion was a scrivener's error and ought not have any effect. See 3 Collier on Bankruptcy ¶ 330.LH[5], at 330-75 to 330-76.

There are other aspects of the legislative record, however, that undermine this interpretation. These considerations suggest Congress may have intended the change the scrivener worked. For example, amendment 1645 was part of a reform Act designed to curtail abuses in fee awards, according to statements by the amendment's sponsor. See 140 Cong. Rec., at 28753 (statement of Sen. Metzenbaum). These abuses were not ghosts seen only by Congress. Some bankruptcy courts had reached the same conclusion. See, *e.g.*, *In re NRG Resources, Inc.*, 64 B.R. 643 (W.D.La.1986). The deletion at issue furthered this reform by ensuring that chapter 7 debtors' attorneys would receive no estate compensation absent the trustee's authorization of their work. This objective is not inconsistent with the interest of involving debtors' attorneys in bankruptcy proceedings. As noted, the Act still allows debtors' attorneys to be compensated in different ways. See *supra*, at ---- - ----9-11.

*10 Amendment 1645, viewed in its entirety, gives further reason to think Congress may have intended the change. The amendment added a new section that authorizes fee awards to debtors' attorneys in chapter 12 and 13 bankruptcies. 140 Cong. Rec., at 8383 (setting out new [11 U.S.C. § 330\(a\)\(4\)\(B\)](#)). Since the amendment's deletion of "or the debtors [*sic*] attorney" from the original proposed draft affected chapter 12 and 13 debtors' attorneys as much as chapter 7 debtors' attorneys, [§ 330\(a\)\(4\)\(B\)](#) shows a special intent to authorize the formers' fee awards in the face of the new, broad exclusion.

If Congress' action does not prove the point, the House of Representatives' inaction may. The House passed the Act after having the deletion, as well as its impact, called to its attention. See Bankruptcy Reform: Hearing before the Subcommittee on Economic and Commercial Law of the House Committee on the Judiciary, 103d Cong., 2d Sess., 551 (1994). The National Association of Consumer Bankruptcy Attorneys (NACBA), which represents those lawyers most likely to be affected by [§ 330\(a\)\(1\)](#)'s change, declined to object to the deletion. *Ibid.* (noting the deletion but stating that the NACBA did "not oppose" Amendment 1645's passage). This alert, followed by the Legislature's nonresponse, should support a presumption of legislative

--- S.Ct. ---

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awareness and intention. The Act may now contain surplusage, along with grammatical error; but that may have been the result of trying to make the substantive change with the fewest possible textual alterations or of an error by the scrivener in carrying out the change.

These competing interpretations of the legislative history make it difficult to say with assurance whether petitioner or the Government lays better historical claim to the congressional intent. The alert to the change in policy was given, to be sure, before the House passed the final version, but that particular circumstance cannot bear too much weight. The alert was not the subject of testimony from any witness at the congressional hearing. It consisted of but two sentences contained within 472 pages of written statements delivered to the legislative subcommittee for its August 17, 1994, hearing day. Those 472 pages were added to 236 pages of prepared statements and testimony transcribed from the day's testifying witnesses. Within the NACBA's filing, the two relevant sentences appear on the 18th page of the 27-page report. Nothing in the legislative history confirms that this particular point bore on the congressional deliberations or was given specific consideration.

These uncertainties illustrate the difficulty of relying on legislative history here and the advantage of our determination to rest our holding on the statutory text.

* * *

*11 [8] If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think ... is the preferred result." United States v. Granderson, 511 U.S. 39, 68, 114 S.Ct. 1259, 127 L.Ed.2d 611 (1994) (concurring opinion). This allows both of our branches to adhere to our respected, and respective, constitutional roles. In the meantime, we must determine intent from the statute before us. The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice STEVENS, concurring in the judgment, joined by Justice SOUTER and Justice BREYER, concurring.

As the majority recognizes, *ante*, at ---- - ----12-13, a leading bankruptcy law treatise concluded that the 1994 amendments to § 330(a)(1) contained an unintended error. 3 Collier on Bankruptcy ¶ 330.LH[5], pp. 330-75 to 330-76 (rev. 15th ed.2003). Whenever there is such a plausible basis for believing that a significant change in statutory law resulted from a scrivener's error, I believe we have a duty to examine legislative history. [FN1] In this case, that history reveals that the National Association of Consumer Bankruptcy Attorneys (NACBA) not only called the assumed drafting error to Congress' attention in a timely fashion, but also deemed the error unworthy of objection. [FN2] This evidence convinces me that the Court's reading of the text, which surely is more natural than petitioner's, is correct. I therefore concur in the judgment.

[FN1]. As Chief Justice Marshall stated, "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived" United States v. Fisher, 2 Cranch 358, 386, 2 L.Ed. 304 (1805).

[FN2]. See *ante*, at ----14. Specifically, three months after the Senate passed the relevant amendment, the NACBA submitted written comments to the House Subcommittee on Economic and Commercial Law, which was considering the change. Those comments first noted that the amended version of § 330(a)(1) "appears to have some minor drafting errors, including the apparently inadvertent removal of debtors' attorneys from the list of professionals whose compensation awards are covered." Bankruptcy Reform: Hearing on H.R. 5116 before the Subcommittee on Economic and Commercial Law of the House Committee on the Judiciary, 103d Cong., 2d Sess., 551 (1994). With no proviso that these alleged errors be corrected, the NACBA then expressly did "not oppose" passage of the amendment. *Ibid.* (emphasis added).

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Briefs and Other Related Documents ([Back to top](#))

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- [2003 WL 22705280 \(Oral Argument\) Oral Argument \(Nov. 10, 2003\)](#)
- [2003 WL 22118386 \(Appellate Brief\) Reply Brief for the Petitioner \(Sep. 10, 2003\)](#)
- [2003 WL 21839367 \(Appellate Brief\) Brief for the Respondent \(Aug. 06, 2003\)](#)
- [2003 WL 21295241 \(Appellate Brief\) Brief for the Petitioner \(May. 30, 2003\)](#)
- [2003 WL 21251590 \(Appellate Filing\) Brief for Amicus Curiae National Association of Consumer Bankruptcy Attorneys \(Feb. 07, 2003\)](#)
- [2003 WL 21251605 \(Appellate Filing\) Brief for the Respondent \(Feb. 05, 2003\)](#)
- [2002 WL 32101155 \(Appellate Filing\) Petition for a Writ of Certiorari \(Nov. 04, 2002\)](#)

END OF DOCUMENT

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

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

TAWANA C. MARSHALL, CLERK

THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

In re)
)

MIRANT CORPORATION, et al.,)
)

Debtors.)
)

Chapter 11 Case

Case No. 03-46590 (DML)-11
Jointly Administered

**ORDER REGARDING MOTIONS TO DISMISS AND/OR ABSTAIN FROM HEARING
DEBTORS' MOTION PURSUANT TO 11 U.S.C. §§ 105(a) AND 505(a) FOR THE
DETERMINATION OF TAX LIABILITY**

On September 30, 2003, the Debtors filed their Motion Pursuant to 11 U.S.C. §§ 105(a) and 505(a) for the Determination of Tax Liability (the "505 Motion"). Pursuant to this Court's Omnibus Scheduling Order and Discovery Plan, the following challenges to the Court's jurisdiction and/or requests for abstention were made (collectively, the "Jurisdiction / Abstention Motions"):

- Opposition of Monticello Central School District to Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a) and 505(a) for the Determination of Tax Liability;
- Motion of County of Rockland to Dismiss Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a) and 505(a) for the Determination of Tax Liability or, Alternatively, to Abstain;
- Response of Haverstraw Tax Authorities, Stony Point Tax Authorities, and the Ramapo Tax Authorities to Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a) and 505(a) for the Determination of Tax Liability;
- Motion of The Town of Lumberland, NY, The Town of Forestburgh, NY, The County of Sullivan, NY and The Eldred Central School District to Abstain and/or Dismiss Debtors' Motion to Determine Certain Tax Liabilities Under 11 U.S.C. § 505(a); and
- Motion of the Town of Wawayanda in Opposition to the Court's Jurisdiction and Request for Abstention and Memorandum of Law.

The following responses were filed to the Jurisdiction / Abstention Motions:

**ORDER REGARDING MOTIONS TO DISMISS AND/OR ABSTAIN FROM HEARING
DEBTORS' MOTION PURSUANT TO 11 U.S.C. §§ 105(a) AND 505 (a) FOR THE
DETERMINATION OF TAX LIABILITY**

- Debtors' Omnibus Response to the Jurisdictional Challenges to Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a) and 505(a) for the Determination of Tax Liability (the "Debtors' Response"); and
- Omnibus Response of Official Committee of Unsecured Creditors of Mirant Corporation, Et Al., in Opposition to Jurisdictional Challenges Relating to Debtors' Motion for Determination of Tax Liability Pursuant to 11 U.S.C. §§ 105(a) and 505(a) (the "Committee Response").

The Court, having considered the 505 Motion, the Jurisdiction / Abstention Motions, the Debtors' Response and the Committee Response, conducted a hearing on the foregoing matters on December 10, 2003, in Fort Worth, Texas (the "Hearing"). At the Hearing, the Debtors offered to present testimony and the Court heard arguments of counsel and after considering the submissions of all pleadings, affidavits and other documentary evidence, issued a decision from the bench at the Hearing resolving the Jurisdiction / Abstention Motions (the "Ruling").

Therefore, for the reasons more fully set forth in the official transcript of the Hearing and the Ruling, each of which are expressly incorporated as if fully contained herein, the Court enters the following Order:

ORDERED, that this Court has jurisdiction over the 505 Motion pursuant to 28 U.S.C. §§ 1334 and 157 and Bankruptcy Code § 505(a). The 505 Motion constitutes a core proceeding pursuant to 28 U.S.C. § 157(b)(2). It is further

ORDERED that Bankruptcy Code § 505(a)(2) does not deprive this Court of subject matter jurisdiction over the 505 Motion. It is further

ORDERED that the Court will hold a trial of the 505 Motion beginning on September 20, 2004 and continuing from day to day until completed. Docket call for such trial will occur on Wednesday, September 1, 2004 at 10:30 a.m. It is further

ORDERED that, subject to further motion, the Court will abstain from hearing and ruling on the tax issues that are the subject of the following proceedings (that have been ordered remanded to the applicable county of the Supreme Court for the State of New York, the "Tax Certiorari Proceedings") so long as judgment is entered in such action or trial of the applicable Tax Certiorari Proceeding is commenced and proceeding as of August 1, 2004:

| | | |
|--|---|------------------------------------|
| MIRANT NEW YORK, INC. and/or | : | Adv. Pro. Nos. |
| SOUTHERN ENERGY LOVETT, LLC, | : | 03-05019-ASH, 03-05020-ASH, 03- |
| | : | 05021-ASH, 03-05042-ASH |
| Petitioners, | : | |
| -against- | : | Rockland County Index Nos. |
| | : | 4357-00, 4696-01, 3122-02, 5279-03 |
| ASSESSOR OF THE TOWN OF STONY POINT, et al., | : | |
| | : | |
| Respondents. | : | |

| | | |
|---|---|----------------------------------|
| ----- | X | ----- |
| MIRANT NEW YORK, INC., and/or | : | Adv. Pro. Nos. |
| SOUTHERN ENERGY GEN-NY LLC, and/or | : | 03-05047-ASH, 03-05048-ASH, 03- |
| SOUTHERN ENERGY BOWLINE, LLC, and/or | : | 05051-ASH, 03-05053-ASH, 03- |
| ORANGE AND ROCKLAND UTILITIES, INC., | : | 05055-ASH, 03-05056-ASH, 03- |
| | : | 05057-ASH, 03-05058-ASH, 03- |
| Petitioners, | : | 05059-ASH |
| -against- | : | |
| | : | Rockland County Index Nos. |
| ASSESSOR OF THE TOWN OF HAVERSTRAW, et al., | : | 4133-95, 4346-96, 4424-97, 4639- |
| | : | 98, 4238-99, 4358-00, 4694-01, |
| Respondents. | : | 5120-02, 5278-03 |

| | | |
|--|---|------------------------------------|
| ----- | X | ----- |
| MIRANT NEW YORK, INC. and/or | : | Adv. Pro. Nos. |
| SOUTHERN ENERGY NY-GEN LLC, | : | 03-05025-ASH, 03-05035-ASH, 03- |
| | : | 05036-ASH, 03-05037-ASH |
| Petitioners, | : | |
| -against- | : | Rockland County Index Nos. |
| | : | 2242-00, 2062-01, 2346-02, 2618-03 |
| ASSESSOR OF THE VILLAGE OF HILLBURN, et al., | : | |
| | : | |
| Respondents. | : | |

| | | |
|---|---|------------------------------------|
| ----- | X | ----- |
| MIRANT NEW YORK, INC. and/or | : | Adv. Pro. Nos. |
| SOUTHERN ENERGY NY-GEN LLC, | : | 03-05022-ASH, 03-05038-ASH, 03- |
| | : | 05039-ASH, 03-05045-ASH |
| Petitioners, | : | |
| -against- | : | Rockland County Index Nos. |
| | : | 4356-00, 4700-01, 5121-02, 5331-03 |
| ASSESSOR OF THE TOWN OF RAMAPO, et al., | : | |
| | : | |

Respondents.

MIRANT NEW YORK, INC. and/or
SOUTHERN ENERGY NEW YORK-GEN LLC,

Petitioners,

-against-

ASSESSOR OF THE TOWN OF FORESTBURGH, et al.,

X -----
:
: Adv. Pro. Nos.
: 03-05023-ASH, 03-05028-ASH, 03-
: 05041-ASH, 03-05044-ASH
:
:
: Sullivan County Index Nos.
: 1506-00, 1693-01, 1665-02, 1841-03
:
:
:

Respondents.

MIRANT NEW YORK, INC. and/or
SOUTHERN ENERGY NEW YORK-GEN LLC,

Petitioners,

-against-

ASSESSOR OF THE TOWN OF LUMBERLAND, et al.,

X -----
:
: Adv. Pro. Nos.
: 03-05027-ASH, 03-05030-ASH, 03-
: 05034-ASH, 03-05043-ASH
:
:
: Sullivan County Index Nos.
: 1507-00, 1691-01, 1666-02, 1839-03
:
:
:

Respondents.

MIRANT NEW YORK, INC. and/or
SOUTHERN ENERGY NEW YORK-GEN LLC,

Petitioners,

-against-

ASSESSOR OF THE TOWN OF BETHEL, et al.,

X -----
:
: Adv. Pro. Nos.
: 03-05031-ASH, 03-05032-ASH, 03-
: 05033-ASH, 03-05040-ASH
:
:
: Sullivan County Index Nos.
: 1505-00, 1692-01, 1667-02, 1840-03
:
:
:

Respondents.

MIRANT NEW YORK, INC. and/or
SOUTHERN ENERGY NEW YORK-GEN LLC,

Petitioners,

-against-

ASSESSOR OF THE TOWN OF WAWAYANDA, et al.,

X -----
:
: Adv. Pro. Nos.
: 03-05049-ASH, 03-05050-ASH, 03-
: 05052-ASH, 03-05054-ASH
:
:
: Orange County Index Nos.
: 4636-00, 4933-01, 5023-02, 5278-03
:
:
:

Respondents.

MIRANT NEW YORK, INC. and/or
SOUTHERN ENERGY NEW YORK-GEN LLC,

Petitioners,

-against-

ASSESSOR OF THE TOWN OF DEERPARK, et al.,

Respondents.

X -----
:
:
: Adv. Pro. Nos.
: 03-05024-ASH, 03-05026-ASH, 03-
: 05029-ASH, 03-05046-ASH
:
:
: Orange County Index Nos.
: 4635-00, 4932-01, 5021-02, 5280-03
:
:
:

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It is further

for good cause

ORDERED, that the foregoing August 1, 2004 deadline may be extended by order of this Court, upon motion by any party in interest, and upon notice and a hearing.

It is further

ORDERED, that, after notice and a hearing, should any respondent establish that the Debtors have materially delayed the trial date of any particular Tax Certiorari Proceeding, the Court will abstain indefinitely. It is further

ORDERED that the Court will conduct a status conference on these matters on Wednesday, August 11, 2004, at 10:30 a.m. It is further

ORDERED that the Omnibus Scheduling Order and Discovery Plan, entered by this Court on October 31, 2003, shall be amended by agreement of the parties consistent with the relief ordered herein, or, if no agreement can be reached, this Court will so amend the Scheduling Order.

SIGNED on this 8 day of January, 2004.

Handwritten signature of D. Michael Lynn

**HONORABLE D. MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE**

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

| | | |
|----------------------------|---|--------------------------|
| In re: | § | Case No. 03-46590-DML-11 |
| MIRANT CORPORATON, et al., | § | |
| | § | Chapter 11 |
| Debtors. | § | (Jointly Administered) |
| | § | |
| | § | |

**ORDER GRANTING MOTION FOR LEAVE TO APPEAL INTERLOCUTORY ORDER
REGARDING MOTIONS TO DISMISS AND/OR ABSTAIN FROM
HEARING DEBTORS' MOTION PURSUANT TO 11 U.S.C. §§ 105(A)
AND 505(A) FOR THE DETERMINATION OF TAX LIABILITY**

UPON CONSIDERATION of the Motion for Leave to Appeal Interlocutory Order Regarding Motions to Dismiss and/or Abstain from Hearing Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a) and 505(a) for the Determination of Tax Liability (the "Motion") filed by the the Towns of Haverstraw, New York, Stony Point, New York, and the Haverstraw-Stony Point Central School District in the above-numbered bankruptcy cases, the Court **FINDS** sufficient and proper cause existing for the relief requested and hereby **GRANTS** the Motion and **ORDERS** leave to appeal in accordance with the Federal Rules of Bankruptcy Procedure, the Local District Court and Bankruptcy Court Rules, and all other rules and orders applicable to such an appeal.

Dated this ____ day of _____, 2004.

U.S. DISTRICT COURT JUDGE

Submitted by:

Daniel C. Stewart, SBT #19206500

John E. Mitchell, SBT #00797095

Abigail B. Willie, SBT #24028226

VINSON & ELKINS L.L.P.

3700 Trammell Crow Center

2001 Ross Avenue

Dallas, Texas 75201-2975

Tel: 214-220-7700

Fax: 214-220-7716

**ATTORNEYS FOR THE TOWNS OF HAVERSTRAW,
NEW YORK, STONY POINT, NEW YORK, AND THE
HAVERSTRAW-STONY POINT CENTRAL SCHOOL DISTRICT**

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