

BROWN RUDNICK BERLACK ISRAELS

120 West 45th Street
New York, New York 10036
(212) 704-0100
Edward S. Weisfelner, Esq.
Leslie H. Scharf, Esq.

-and-

City Place I, 185 Asylum Street
Hartford, Connecticut 06103-3402
(860) 509-6500

Howard L. Siegel, Esq.

-and-

One Financial Center
Boston, Massachusetts 02111
(617) 856-8200

William R. Baldiga, Esq.

Eric J. Taube, Esq.

Mark C. Taylor, Esq.

HOHMANN, TAUBE & SUMMERS, L.L.P.

100 Congress Avenue, Suite 1600

Austin, Texas 78701

Telephone: (512) 472-5997

Facsimile: (512) 472-5248

ELECTRONICALLY FILED

DATE 3/2/04

DOCKET NO. _____

ATTORNEYS FOR OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS

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

-----X
:
In re: :
:
MIRANT CORPORATION, et al., :
:
:
Debtors. :
:
-----X

Chapter 11
Case No. 03-46590 (DML)

(Jointly Administered)

**MOTION OF OFFICIAL COMMITTEE OF EQUITY HOLDERS FOR DISCOVERY
UNDER BANKRUPTCY RULE 2004 AS TO CERTAIN MATTERS CONCERNING
CONDUCT OF CASE AND RELATED MATTERS**

The Official Committee of Equity Security Holders (the "Equity Committee") appointed in the chapter 11 cases of Mirant Corporation, et al. (collectively, the "Debtors") hereby submits this Motion for Discovery Under Bankruptcy Rule 2004 as to Certain Matters Concerning Conduct of Case and Related Matters, and in support thereof states as follows:

I. BRIEF BACKGROUND

1. On July 14, 2003, the Debtors commenced their cases under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

2. Two official committees of unsecured creditors ultimately were formed in these cases by the United States Trustee, one for the creditors of Mirant Corporation and its affiliates (the "Mirant Committee") and one for the creditors of Mirant Americas Generation, LLC and its subsidiaries (the "MAGI Committee").

3. On September 18, 2003, the United States Trustee formed the official Equity Committee to represent the interests of the Debtors' equity security holders pursuant to Section 1102(a) of the Bankruptcy Code. Thereafter, the Equity Committee retained Brown Rudnick Berlack Israels LLP and Hohmann, Taube & Summers, L.L.P. as co-counsel and Peter J. Solomon Company as its financial advisor.

4. Before the commencement of these cases, the Debtors engaged in extensive and protracted negotiations with their bank lenders and certain bondholders regarding terms of an out-of-court debt restructuring and/or a "pre-packaged" reorganization. Those negotiations reportedly failed at the proverbial eleventh hour after all, or substantially all, of the requisite creditors had determined to support the proposed restructuring. The commencement of these cases followed the abrupt and unexpected failure of these efforts.

5. The members of the Mirant Committee and the MAGI Committee consist, in large part, of the participants in the failed prepetition negotiations.

6. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§157 and 1334. Venue is proper in this Court as to this Motion pursuant to 28 U.S.C. §§1408 and 1409. This Motion is a "core proceeding," as that term is used in 28 U.S.C. §157(b)(2)(A).

REQUEST FOR APPROVAL OF DISCOVERY

7. These cases have been, and promise to continue to be, large, complex and expensive. While certain business priorities have, as in other large cases, required significant expenditure of professional expertise, time and resulting cost, these cases also have been characterized by an unfortunately high level of disputes as to case administration, issues most often left to the business judgment of a debtor's executive management and other matters that usually do not require significant attention of estate professionals or the Court.

8. Recently there have been a number of media reports suggesting that a significant contributor to the difficult administration of these cases, and to the disappointing failure of pre-petition negotiations, is the existence of a disabling conflict of interest within one or more members of the Mirant Committee. These alleged conflicts are reportedly derived, at least in part, from the asserted purchase of credit insurance or similar financial protection by at least one of the Debtors' largest creditors, Citibank, N.A., that provided (and may continue to provide) to such creditor, or similarly situated creditors, substantial economic benefit upon failure of the prepetition negotiations or other lack of progress in the Debtors' reorganization process. (Indeed it is hard to see how an entity with credit insurance could qualify as a creditor, let alone a member of an official committee.)

9. Citibank is a member of the Mirant Committee; five of the other ten members of that Committee are also large commercial banks.

10. It has been reported that the Mirant Committee intends to itself investigate Citibank's alleged conflicts and related issues, and that Citibank has agreed to cooperate with such investigation.

11. The Equity Committee has also been informed that other factors contributing to a difficult relationship between the Mirant Committee and the Debtors has been (i) the reportedly abusive conduct of at least one other member representative of the Mirant Committee towards Debtors' senior management, and (ii) the Committee's adamant insistence on the resignation of one or more members of the Debtors' senior management. The Equity Committee has reason to be concerned that the conduct of the Mirant Committee, or certain of its members, may have seriously eroded the moral of the Debtors' employee base and adversely affected the Debtors' search for a new Chief Financial Officer. Indeed, the Equity Committee's professionals have been informed that many of the Mirant Committee's objections to seemingly proper motions have been motivated by animus over and retribution for the Mirant Committee's inability to dictate an immediate change in management.¹

12. The Equity Committee is concerned that the apparent conflicts of at least one prominent member of the Mirant Committee, the press reports of an "investigation" to be conducted by the very body as to which such institution is a member (and the obvious conflicts inherent in that "investigation" itself), and the rampant rumors of inappropriate creditor committee member behavior are contributing toward additional and unnecessary expenses in these

¹ Indeed, a recent media report indicates that Citibank's efforts to replace management could be motivated by Citibank's desire to be selected by the Debtors to advise and lead its refinancing. In particular, the report alleges that if the management of the Debtors changes before that refinancing, Citibank may have a better chance of being selected to manage the refinancing efforts.

proceedings.² These factors also lead to a lack of confidence by investors and others in the effectiveness of the reorganization process in these cases, and a multiplicity of contested matters not contributive to enterprise value or reorganization progress, all to the substantial detriment of Mirant's stockholders and other parties in interest.

STATEMENT OF APPLICABLE LAW

13. One of the enumerated rights and responsibilities of the Equity Committee is to investigate the conduct of the Debtors and other matter relevant to these cases. See 11 U.S.C. § 1103(c)(2). The Equity Committee is also properly concerned with matters concerning the administration of these cases. See 11 U.S.C. § 1103(c)(1).

14. Examinations, document production and other discovery are available to parties in interest in a case, including official committees, to investigate "any matter which may affect the administration of the debtor's estate." Bankruptcy Rule 2004.

15. Here, the conduct and acts recently reported on may have, and may continue to have, a material and adverse effect on the estates and the interests of all creditors and stockholders. A conflict of interest within a committee member that may impair such member's performance of its fiduciary duties to its constituents has been found to be properly investigated by an official committee by relief awarded under Bankruptcy Rule 2004. See, e.g., In re Venturelink Holdings, Inc., 299 B.R. 420, 423-24 (Bankr. N.D. Tex. 2003). Even the appearance of such impairment warrants discovery and, if a breach of duty has occurred, removal from the committee. Id.

² The Office of the United States Trustee has investigated an alleged incident of inappropriate Committee member behavior at the October 30, 2003 meeting between the Debtors and the Mirant Committee, but has declined to take action to remove the member in question. It should be noted that the Equity Committee does not intend to replicate the Trustee's investigation into this incident, nor does it intend to challenge the Trustee's conclusions with respect to the incident.

16. Accordingly, the relief requested by the Equity Committee here is proper in purpose, intended to address material issues as to the proper administration of these cases, and well within the bounds of discovery routinely permitted to be conducted pursuant to Rule 2004. See, e.g., In re Bennett Funding Group, Inc., 203 B.R. 24, 27-8 (Bankr. N.D.N.Y. 1996) (broad examination of third parties proper when concerning administration of the estate or case); Venturelink, supra, 299 B.R. at 423-24 (same).

PROPOSED DISCOVERY PLAN BY THE EQUITY COMMITTEE

17. As part of the Equity Committee's efforts to undertake the examination proposed by this motion, the following discovery framework would be utilized:

- a. Initial pointed document requests would be directed to Citibank and the other members of the Mirant Committee in a form substantially similar to Schedule A to the proposed order attached to the instant motion papers;
- b. Depositions would be conducted of individuals at Citibank and certain other members of the Mirant Committee having knowledge and information relating to the documents produced under subsection (a) above; and
- c. Depositions would be conducted of members of the Mirant Committee having knowledge and information (a) relating to the Debtors' pre-petition restructuring efforts; and/or (b) the post-petition conduct by certain Mirant Committee members relative to the Debtors' efforts to effectively administer these chapter 11 cases.

CERTIFICATION UNDER N.D. TX. L.B.R. 2004.1

18. As required by Local Rule 2004.1 of this Court, counsel for the Equity Committee contacted counsel for Citibank, N.A. and counsel for the Mirant Committee to arrange for mutually agreeable dates, places and times for the examinations and other relief sought by this Motion, and to otherwise attempt to consensually resolve any objections they may have to such relief.

19. The Mirant Committee, through its counsel, has refused to consent to a date and time for the examinations and production of documents sought through this Motion.

20. With respect to the Equity Committee's request for documents relating to alleged credit insurance, credit protection, credit default contracts, guaranties or other assurances or credit enhancements, counsel for Citibank proposes to provide an affidavit from Citibank, or, if necessary, produce a bank officer for a deposition, which allegedly would establish that the division of Citibank that holds Mirant debt does not now and never has had credit protection of any type.

21. With respect to the Equity Committee's request for documents constituting or relating to all forward contracts, hedge or swap contracts, securities contracts, commodity contracts, short positions, puts, calls, options, or other derivative products, counsel for Citibank proposes to provide an affidavit, or if necessary, produce a bank officer for a deposition that allegedly would establish that while the Salomon Smith Barney division of Citibank did trade a relatively small amount of Mirant derivatives prepetition, the derivate positions were "long" and predicated on its assessment that Mirant actually would not be forced into Chapter 11 proceedings.

22. Finally, Citibank declined to produce any documents or provide depositions with respect to disputes within the Mirant Committee or prepetition negotiations and other communications between Citibank and/or any other member of the Mirant Committee.

CONCLUSION

WHEREFORE, the Equity Committee respectfully requests that this Court:

1. enter the proposed order submitted herewith; and
2. grant to the Equity Committee such other and further relief as may be fair and

warranted.

Dated: Fort Worth, Texas
March 2, 2004

Respectfully submitted,

**THE OFFICIAL COMMITTEE OF EQUITY
SECURITY HOLDERS OF MIRANT
CORPORATION**

By: /s/ Eric J. Taube

Eric J. Taube, Esq.
 State Bar No. 19679350
 Mark C. Taylor, Esq.
 State Bar No. 00797065
HOHMANN, TAUBE & SUMMERS, L.L.P.
 100 Congress Avenue, Suite 1600
 Austin, Texas 78701
 Telephone: (512) 472-5997
 Facsimile: (512) 472-5248

and

BROWN RUDNICK BERLACK ISRAELS

120 West 45th Street
New York, New York 10036
(212) 704-0100

Edward S. Weisfelner, Esq.

Leslie H. Scharf, Esq.

-and-

City Place I, 185 Asylum Street
Hartford, Connecticut 06103-3402
(860) 509-6500

Howard L. Siegel, Esq.

-and-

One Financial Center
Boston, Massachusetts 02111
(617) 856-8200

William R. Baldiga, Esq.

NOTICE OF HEARING

Please take notice that the above-referenced Motion is hereby set for hearing on Wednesday, April 7, 2004 at 12:00 p.m. before this Court.

/s/ Eric J. Taube

Eric J. Taube

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the forgoing document has been served upon all persons listed on the Official Limited Service List dated February 13, 2004 via U.S. mail on this 2nd day of March, 2004.

/s/ Eric J. Taube

Eric J. Taube

HOHMANN, TAUBE & SUMMERS, L.L.P.

ATTORNEYS AT LAW
100 CONGRESS AVENUE
SUITE 1600
AUSTIN, TEXAS 78701-4042
TELEPHONE (512) 472-5997
FAX (512) 472-5248

Date Transmitted: March 2, 2004

Time Transmitted: 2:07 PM

Number of pages being sent (including this form): **10**Please deliver this telecopy to: **Janice**Location: **U.S. Bankruptcy Court**Comments: **Please call me with the docket number for this Motion. I appreciate your assistance. Thank you!**This telecopy is being sent by: **Sherri Savala, Assistant to Eric J. Taube**Telecopier Number: **(817) 333-6001**

Telephone Number:

Client/Matter Number: **6283.04**

IF YOU DO NOT RECEIVE ALL OF THE PAGES, PLEASE CALL BACK AS SOON AS POSSIBLE.

OPERATOR: (512) 472-5997: Ann Marie Jezisek or Sherri Savala

 A hard copy will be sent via U.S. Mail A hard copy will not be sent

This form and the materials telecopied with this form constitute privileged and confidential proprietary information. It is intended only for the use of the person or entity named above. Any use or dissemination of this form or the materials telecopied herewith except by such person or entity is not authorized. If you have received this telecopy in error, this form and the materials telecopied herewith should be returned immediately to the sender via the U.S. Postal Service and you must notify sender at (512) 472-5997. You may call collect.