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ATTORNEYS FOR THE DEBTORS AND DEBTORS-IN-POSSESSION

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

In re)	chapter 11 Case
MIRANT CORPORATION, <u>et al.</u> ,)	Case No. 03-46590 (DML)
)	Jointly Administered
Debtors.)	
)	Date: December 3, 2003
)	Time: 10:30 A.M.

**DEBTORS' MOTION FOR THE ENTRY OF AN ORDER (i) ENFORCING THE
AUTOMATIC STAY PROHIBITING MEDIANEWS GROUP, INC. FROM
TERMINATING ITS SWAP AGREEMENT WITH THE DEBTORS, (ii) HOLDING
MEDIANEWS IN CIVIL CONTEMPT OF THE AUTOMATIC STAY, (iii) ASSESSING
SANCTIONS, AND (iv) GRANTING RELATED RELIEF**

Mirant Corporation (“Mirant”) and its affiliated debtors (collectively, the “Debtors”), as debtors-in-possession, hereby file this motion (the “Motion”) for the entry of an order (i) enforcing the automatic stay prohibiting MediaNews Group, Inc. (“MediaNews”) from terminating its contract with the Debtors, (ii) holding MediaNews in civil contempt of the automatic stay of section 362 of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the

“Bankruptcy Code”), (iii) assessing sanctions, and (iv) granting related relief, and respectfully represent as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

PROCEDURAL BACKGROUND

2. The Cases. Commencing on July 14, 2003, and concluding in the early morning hours of July 15, 2003, (the “Petition Date”), certain of the Debtors (collectively, the “Initial Debtors”) filed voluntary petitions in this Court for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330, as amended (the “Bankruptcy Code”).¹ On August 18, 2003, Mirant EcoElectrica Investments I, Ltd. and Puerto Rico Power Investments, Ltd. (collectively, the “New Debtors”) commenced chapter 11 cases under the Bankruptcy Code. On October 3, 2003, the following additional Debtors filed voluntary petitions in this Court for relief under chapter 11: (i) Mirant Wrightsville Management, Inc.; (ii) Mirant Wrightsville Investments, Inc.; (iii) Wrightsville Power Facility, L.L.C.; and (iv) Wrightsville Development Funding, L.L.C. (collectively, the “Wrightsville Debtors”). The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

¹ Concurrently, Mirant caused two of its Canadian subsidiaries, Mirant Canada Energy Marketing, Ltd and Mirant Canada Energy Marketing Investments, Inc. (collectively, the “Canadian Debtors”) to commence plenary insolvency proceedings (the “Canadian Proceedings”) in the Court of Queen’s Bench of Alberta Judicial District of Calgary (the “Canadian Court”) pursuant to the *Companies’ Creditors Arrangement Act*. The Canadian Debtors are subject to the sole and exclusive jurisdiction of the Canadian Court.

3. The Cases are Jointly Administered. On July 15, 2003, this Court granted the motion for an order requesting that the bankruptcy estates of the Initial Debtors be jointly administered. On September 8, 2003, the Court entered the order approving joint administration of the cases of the New Debtors with those of the Initial Debtors. Also on September 8, 2003, the Court granted the motion for an order directing that orders entered in the cases of the Initial Debtors be made applicable to those of the New Debtors. On October 6, 2003, the Debtors filed a motion requesting the joint administration of the cases of the Wrightsville Debtors with those of the Initial Debtors. Also on October 6, 2003, the Debtors filed a motion for the entry of an order directing that certain orders entered in the cases of the Initial Debtors be made applicable to the Wrightsville Debtors.

4. The Creditors' Committees. Three official committees have been appointed by the Office of the United States Trustee for the Northern District of Texas in these administratively consolidated cases. Specifically, an official unsecured creditors' committee and an official committee of equity security holders have been appointed for Mirant Corporation and an official unsecured creditors' committee has been appointed for Mirant Americas Generation, LLC (collectively, the "Committees").

FACTUAL BACKGROUND

A. The Debtors' Business Operations

5. Mirant and its direct and indirect subsidiaries comprise one of the world's largest generators and marketers of electricity. Through its direct and indirect subsidiaries, Mirant produces, sells and delivers reliable energy products and services to utilities, municipal systems, aggregators, electric-cooperative utilities, producers, generators, marketers and large industrial customers in North America, the Philippines and the Caribbean. Mirant's core

business centers on the production and sale of electricity and electrical capacity (essentially the ability to produce electricity on demand). Mirant currently owns or controls more than 21,800 megawatts of electric generating capacity around the world, of which more than 18,000 megawatts is located in the United States. In 2002, Mirant produced 73 million megawatt-hours of electricity, sold 312 million megawatt-hours of electricity and sold or marketed an aggregate average of 21 billion cubic feet per day of natural gas.

6. As of July 31, 2003, Mirant employed about 6,700 employees worldwide. Approximately 1,000 employees are based at Mirant's corporate headquarters in Atlanta, and approximately 5,700 employees are based at operating facilities. Approximately 1,000 employees are subject to collective bargaining agreements. In 2002, Mirant recorded a \$542 million loss in earnings before interest, taxes and depreciation on a consolidated basis. Its 2002 operating revenues were approximately \$6.4 billion.

B. The Parties' Swap Agreement

7. Debtor Mirant Americas Energy Marketing, L.P. ("MAEM"), an affiliate of Mirant, and MediaNews (formerly "Affiliated Newspapers Investments Inc.") are parties to an International Swap Dealers Association Master Agreement dated March 17, 1998 (the "Swap Agreement").

8. Under the Swap Agreement, MAEM, the floating price payer, and MediaNews, the fixed price payer, agreed to exchange ("swap") cash flows on a quarterly basis based on the pricing of 48.8 Gram Newsprint. Monthly pricing under the Swap Agreement is calculated on the date of publication of the "Paper Trader" (a monthly trade journal), and payment is required to be tendered within five business days following the last pricing date in each quarter. The floating price called for in the Swap Agreement, which provides the basis for

calculating payments, is based on an index appearing in Paper Trader each month that provides the average contract transaction price for 48.8 Gram Newsprint.² The calculation periods under the Swap Agreement commenced on May 1, 1998, and end on April 30, 2005. At the time of the Debtors' filing of chapter 11 on July 14, 2003, the Swap Agreement was in full force and effect.

C. MediaNews Continued to Operate Under the Swap Agreement Despite the Commencement of the Debtors' Chapter 11 Cases

9. MediaNews most certainly had knowledge of the commencement of the Debtors' chapter 11 cases shortly after the cases were commenced as the bankruptcy filings were prominently reported upon in the national press.

10. Despite the commencement of the Debtors' chapter 11 cases on July 14, 2003, MediaNews continued to operate under the Swap Agreement and did not take any action regarding the Swap Agreement as a result of the commencement of the Debtors' chapter 11 cases. Further, as had been the ordinary course of business between the companies for the previous five years, the calculation index governing payment and calculation of profits under the Swap Agreement was issued in the Paper Trader at the end of July. A second calculation index was issued at the end of August. At no point during either of these months did MediaNews express any concerns that the Debtors' chapter 11 filing would affect the companies' continued contractual relationship. Pursuant to the payment terms in the Swap Agreement, MediaNews' next quarterly payment of over \$700,000 was due five business days following the end of the quarter, thereby making MediaNews' payment to Debtors due on September 8, 2003.

² The fallback reference price, if necessary, is calculated based on an index provided in "Pulp Paper Week."

D. MediaNews' Seeks Relief From the Swap Agreement

11. In August 2003, MediaNews contacted the Debtors and offered \$1 million (the "Exit Offer") to exit the Swap Agreement and be relieved from its obligations thereunder. MediaNews did not take the position that the chapter 11 filing had affected the parties' contractual relationship – it simply wanted to exit the Swap Agreement prior to its expiration, presumably because it had been, and would continue to be, obligated to make substantial quarterly payments to the Debtors until April 31, 2005 and could likely secure a more favorable pricing arrangement with a different trading partner. In response to MediaNews' Exit Offer, the Debtors advised MediaNews that, based on projected payments that would come due under the Swap Agreement, the Swap Agreement was worth at least \$3 million and that the Debtors therefore could not take MediaNews' \$1 million Exit Offer to creditors for their consideration. Indeed, the Debtors had determined from at least one third party that the Debtors could expect to receive even more than \$3 million during the remaining term of the Swap Agreement.

E. MediaNews Purports to Terminate the Swap Agreement

12. Faced with the fact that it would be unable to exit the contract for \$1 million as it had hoped, but would instead continue to be obligated to make substantial quarterly payments to Debtors pursuant to the Agreement's terms, and thus unable to seek an alternate trading arrangement with more favorable pricing terms, MediaNews then attempted to terminate the Swap Agreement under the guise that the filing of bankruptcy constituted an Event of Default³ thereby entitling it to terminate the Swap Agreement.

³ Capitalized terms used but not defined herein shall have the meaning ascribed such terms in the Swap Agreement.

13. In that regard, on September 4, 2003, nearly two months after the Debtors filed for protection under chapter 11, and shortly after the Debtors' rejection of MediaNews' Exit Offer, MediaNews sent a letter to the Debtors informing them that it was terminating the Swap Agreement by virtue of the Debtors' Event of Default under Section 5(a)(vii) of the Swap Agreement.⁴ A copy of MediaNews' September 4, 2003 letter is attached hereto as *Exhibit A*.

14. On September 9, 2003, the Debtors, by and through their counsel, sent a letter to MediaNews, advising that MediaNews' attempt to terminate was ineffective given MediaNews' unreasonable delay in exercising its contractual right to terminate. A copy of the Debtors' counsel's September 9, 2003 letter is attached hereto as *Exhibit B*. The Debtors further advised MediaNews that if it did not immediately withdraw its notice of termination and pay all amounts currently due under the Swap Agreement, the Debtors would be forced to seek a Bankruptcy Court order finding MediaNews in violation of the automatic stay. MediaNews refused to comply with the Debtors' requests to withdraw its notice of termination and refused to pay the approximately \$700,000 quarterly payment that was due on September 8, 2003.⁵

RELIEF REQUESTED

15. By this Motion, the Debtors request that the Court enter an order (a) enforcing the automatic stay prohibiting MediaNews from terminating the Swap Agreement and interfering with the Debtors' rights thereunder, (b) holding MediaNews in civil contempt of the automatic stay and (c) assessing sanctions against MediaNews in the amount of at least the

⁴ Section 5(a)(viii) of the Swap Agreement provides that Debtors' institution of "a proceeding seeking a judgment of insolvency or bankruptcy" is an Event of Default.

⁵ Instead of making its quarterly payment as required under the Swap Agreement, MediaNews remitted payment that it purportedly believed to be required pursuant to the termination provisions of the Swap Agreement.

Debtors' attorneys' fees and costs in connection with the Motion plus \$50,000 per day until such time as MediaNews complies with the stay, rescinds its purported termination notice and ceases interfering with the Debtors' rights under the Swap Agreement.

16. The relevant portion of Section 560 of the Bankruptcy Code provides the following:

The exercise of any contractual right of any swap participant to cause the termination of a swap agreement *because of* a condition of the kind specified in Section 365(e)(1) of this title...shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title.

11 U.S.C. § 560 (emphasis added).

17. The contractual conditions specified in Section 365(e)(1), as referenced by Section 560, are (1) the insolvency or financial condition of the debtor at any time before the closing of the case; (2) the commencement of a case under this title; or (3) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement. 11 U.S.C. § 365(e)(1).

18. Although these provisions provided MediaNews with the right to terminate its contractual relationship with the Debtors under the Swap Agreement when the Debtors filed their chapter 11 case on July 14, 2003, MediaNews did not elect this remedy and instead chose to continue its relationship with the Debtors under the Swap Agreement. Indeed, MediaNews continued to operate under the Swap Agreement without complaint for the immediate period following the filing of chapter 11 by the Debtors, and waited until September 4, 2003, some seven weeks later, to belatedly advise the Debtors that MediaNews was exercising its right to terminate under the Swap Agreement due to the Debtors' filing of chapter 11.

However, MediaNews’s tardy submission occurred after it had clearly waived its contractual right to terminate, and MediaNews is now estopped from terminating the Swap Agreement. Accordingly, by seeking to terminate the Swap Agreement at this time, MediaNews is in blatant violation of the automatic stay.

BASIS FOR RELIEF REQUESTED

A. MediaNews Waived its Right to Terminate the Swap Agreement

19. As set forth in the Swap Agreement and its accompanying schedules, the Swap Agreement is governed by and construed in accordance with the laws of the State of New York. Under binding contract principles set forth under New York law, by virtue of its delay in exercising its right to terminate the Swap Agreement, MediaNews has waived its right to terminate the Swap Agreement and is estopped from doing so at this time.

1. The Doctrine of Waiver Under New York Law

20. It is well established in New York that waiver is “the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it.” Werking v. Amity Estates, Inc., 155 N.Y.S.2d 633, 642 (N.Y. App. Ct. 1956) (quoting Whitney on Contracts, 4th Ed., 1946, p.273). See also New York Telephone Co. v. Jamestown Telephone Corporation, 282 N.Y. 365, 372-73 (N.Y. App. Ct. 1940) (holding that “acceptance of a benefit under the contract with knowledge of the wrong constitutes a waiver of the wrong”); AM Cosmetics, Inc. v. Solomon, 67 F.Supp.2d 312 (S.D.N.Y. 1999) (applying New York law, and holding that if an injured party chooses not to terminate a contract upon the other party’s breach, “he surrenders his right to terminate later based on that breach”). Moreover, under settled New York law, waiver exists “without the need to show reliance or detriment by

the asserting party.” Waldman v. Cohen, 512 N.Y.S.2d 205, 209 (N.Y. App. Div. 1st Dep’t 1987).

21. Knowledge of the existence of a known right requires a showing that the waiving party was “aware of certain facts.” Savasta v. 470 Newport Associates, 579 N.Y.S.2d 167, 169 (N.Y. App. Div. 2d Dep’t 1992). That is, the waiving party must be aware that it possesses certain rights under a contract.

22. Intent to relinquish a known contractual right is shown where an express agreement to relinquish the right exists. Bono v. Cucinella, 748 N.Y.S.2d 610, 612 (N.Y. App. Div. 2d Dep’t 2002). See also In Re Estate of Stillman, 371 N.Y.S.2d 78, 81 (N.Y. Surr. Ct. 1975). Under New York law, intent is also established “by such conduct or failure to act as to evince an intent not to claim the purported advantage.” Hadden v. Consolidated Edison Co. of New York, 45 N.Y.2d 466, 469 (N.Y. App. Ct. 1978).

23. A party that possesses the right to terminate its agreement with another party waives that right by failing to exercise it in a timely manner. 1602 Avenue Y, Inc. v. Markowitz, 711 N.Y.S.2d 473, 474 (N.Y. App. Div. 2d Dep’t 2000). See also Boody v. Giambra, 744 N.Y.S.2d 803, 809 (N.Y. Sup. Ct. Erie Cty. 2002) (recognizing that it is well settled that a right to terminate a contract may be waived); Bigda v. Fischbach Corporation, 849 F. Supp. 895 (S.D.N.Y. 1994).

24. In Markowitz, the plaintiff entered into separate lease agreements with the defendant owners of two gasoline stations. Id. at 473. Both leases required that the plaintiff “replace” the underground storage tanks and related equipment. Id. When the plaintiff failed to replace the storage tanks as required by the leases and instead only upgraded the existing tanks, the defendants sought to exercise their right to terminate the subject leases. Id.

25. The court held that the owners had waived their right to terminate the leases. Id. at 474. Specifically, the court noted that the owners had observed plaintiff's upgrade work being performed, and were specifically advised that the storage tanks were being upgraded and not replaced. Id. Yet the owners did not take any action to terminate the lease until much later and only after a dispute arose between the parties over the nonpayment of rent. Id. The court expressly held that because the owners had failed to immediately seek termination of the leases after learning that the tanks had been upgraded and not replaced, and continued to operate under the terms of the lease for an extended time, the owners waived their right to seek termination of the leases on the basis that the tanks had not been replaced. Id.

2. MediaNews Waived Its Right to Terminate

26. Turning to the instant case, the first element of waiver, knowledge of the existence of a known right, is present since MediaNews cannot dispute that it was aware of its contractual right to terminate the Swap Agreement upon the Debtors' filing of chapter 11. American Express Co. v. Paonessa, 395 N.Y.S.2d 837, 839 (N.Y. App. Div. 4th Dep't 1977) (a party is charged with knowledge of the provisions of its own contract).

27. As for the second element of waiver, it is equally clear that MediaNews intended to relinquish its right to terminate the Swap Agreement. Indeed, by failing to exercise its contractual right to terminate within a reasonable time following the Debtors' bankruptcy filing, MediaNews "evinced an intent not to claim the purported advantage." Hadden, 45 N.Y. 2d at 469. Instead of seeking to terminate the Swap Agreement following the Debtors' July 14, 2003 filing, as some 30 of the Debtors' other trading partners did, MediaNews elected to continue its contractual relationship with the Debtors under the terms of the Swap Agreement.

Indeed, MediaNews continued to perform for an additional seven weeks, during which time two

separate monthly indexes were issued in the Paper Trader and payments thereon were calculated as provided under the Swap Agreement.

28. By electing to continue performance, MediaNews forever abandoned its only other alternative, which was to terminate the Swap Agreement pursuant to its terms. ESPN, Inc. v. Office of the Comm'r of Baseball, 76 F. Supp. 2d 383, 387-89 (S.D.N.Y. 1999) (holding that the non-breaching party's election to continue performance pursuant to an agreement following a breach precludes the non-breaching party from terminating the agreement); Apex Pool Equip. Corp. v. Lee, 419 F.2d 556, 562-63 (2d Cir. 1969) (same). This course of action plainly establishes MediaNews' intent not to terminate. Accordingly, because MediaNews waived its right to terminate the Swap Agreement, it is now estopped from doing so. Markowitz, 711 N.Y.S.2d at 474. See also Price v. Concourse Super Service Station, Inc., 223 N.Y.S.2d 958, 963 (N.Y. Sup. Ct. Sp. Term 1961) (holding that plaintiff waived its right to terminate in event of default where he did not take action within reasonable time following his knowledge of a technical breach of contract).

3. MediaNews Had an Improper Ulterior Motive in Seeking to Terminate

29. The Debtors find themselves in a position similar to that of the plaintiff in Markowitz. As in Markowitz, MediaNews was aware that an event constituting a default under its contract with the Debtors occurred, yet it did not take any action to terminate the contract until much later. Moreover, as was also the case in Markowitz, MediaNews appears to have an ulterior motive in seeking to terminate the Swap Agreement at this time. Whereas the Markowitz defendant sought to terminate the agreement only after disputes later arose concerning rent payments – which were completely independent of the alleged event of default – MediaNews here seeks to terminate its agreement for similarly independent reasons.

30. Indeed, the timeline of events makes it clear that MediaNews' motive in seeking termination of the Swap Agreement had nothing to do with the Debtors' chapter 11 filing, but was the result of: 1) the Debtors' rejection of MediaNews' Exit Offer – a rejection that was *wholly independent* from the chapter 11 filing, the alleged Event of Default; and 2) MediaNews' belief that if it could be relieved of its obligations under the Swap Agreement, it would be free to secure a more lucrative swap arrangement with a new trading partner. Thus, MediaNews did not seek termination “because of” the bankruptcy filing, as required by § 560. Accordingly, MediaNews' attempt to terminate lacks the causal connection to the Debtors' chapter 11 filing that would make its termination notice effective under § 560.

31. In short, because the Debtors have performed all of their duties under the Swap Agreement, and in a thinly-veiled attempt to avoid a recurring contractual obligation to pay Debtors pursuant to the terms of the Agreement and to seek a better deal with a different trading partner, MediaNews is now left to grasp at a contractual right to terminate its Swap Agreement with Debtors that is simply inapplicable at this late date. See R & A Food Services, Inc. v. Halmar Equities, Inc., 717 N.Y.S. 2d 642, 643 (N.Y. App. Div. 2d Dep't 2000) (holding that a plaintiff seeking rescission must act “promptly” upon discovery of fraud to seek rescission of contract); Big Top Toy Stores, Inc. v. Ardsley Toy Shoppe, Inc., 315 N.Y.S.2d 897, 901 (N.Y. Sup. Ct. West. Cty. 1970) (same). See also LaRocco v. Campisi, 369 N.Y.S.2d 961, 964 (N.Y. City Civ. Ct. 1975); Tendler v. Lazar, 141 A.D.2d 717, 720 (N.Y. App. Div. 2d Dept. 1988).

4. The Swap Agreement's “No Waiver” Clause Does Not Save MediaNews

32. Finally, MediaNews may attempt to assert that its unreasonable delay in seeking to terminate the Swap Agreement is justified because the Swap Agreement contains a “no waiver” clause. That clause reads, in pertinent part, that “failure or delay in exercising any

right, power or privilege in respect of this Agreement shall not be presumed to operate as a waiver...” Swap Agreement at ¶ 9(f). However, New York law is clear that “the existence of a nonwaiver clause does not in itself preclude waiver of a contract clause.” Dice v. Inwood Hills Condominium, 655 N.Y.S.2d 562 (N.Y. N.Y. App. Div. 2d Dep’t 1997). See also Bigda v. Fischbach Corporation, 849 F. Supp. 895, 900 (S.D.N.Y. 1994) (refusing to entertain plaintiff’s request to extend a “boilerplate” no waiver clause to permit plaintiff to continue to perform under the contract while reserving a right to sue at some later point).

33. Moreover, it has long been the rule in New York that parties may waive a “no waiver” clause. Lee v. Wright, 108 A.D.2d 678 (N.Y. App. Div. 1st Dep’t 1985) (citations omitted); TSS Seedman’s Inc. v. Elota Realty Company, 72 N.Y.2d 1024 (N.Y. App. 1988) (holding that even where a “nonwaiver” clause was found in the lease, a landlord’s acceptance of rent with knowledge of a lease violation constituted a waiver of the right to terminate the tenancy for breach of a contractual condition). Accordingly, because MediaNews continued to operate under the terms of the Swap Agreement for an extended period following the Debtors’ chapter 11 filing, MediaNews waived its right to terminate and effectively waived the “no waiver” provision provided for in the Swap Agreement.

B. MediaNews’ Delivery of the Termination Notice Is a Breach of the Automatic Stay

34. As a consequence of the Debtors’ chapter 11 filings, pursuant to section 362 of the Bankruptcy Code, all parties are stayed, among other things, from taking any action to “obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” 11 U.S.C. § 362(a)(3). As the legislative history of section 362(a) of the Bankruptcy Code provides:

[The automatic stay] [i]s one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan or simply to be relieved of the financial pressures that drove him into bankruptcy.

11 U.S.C. § 362, note of Committee on the Judiciary, S. Rep. No. 95-989 at 54, 55 (1978).

35. Because MediaNews waived its right to terminate under the Swap Agreement, that agreement is and remains property of the Debtors' estates, and thus is protected by the automatic stay. 11 U.S.C. § 541; see also United States v. Whiting Pools, Inc., 462 U.S. 198, 204-06 (1983) (the estate created by the filing of a chapter 11 petition is very broad and encompasses all property in which the debtor has an interest, even if the debtor does not have possession of the property). Moreover, to the extent the Debtor's rights under the Swap Agreement constitute intangible property, such rights are also included within the definition of property of the estate. In re Pester Refining Company, 58 B.R. 189, 192 (Bankr. S.D. Iowa 1985), *citing* In re Wegner Farms, Co., 49 B.R. 440, 443 (Bankr. N.D. Iowa 1985).

36. Simply put, at this point, MediaNews' purported termination is an improper attempt to defeat the Debtors' property rights under the Swap Agreement and is a clear violation of the automatic stay set forth in section 362(a)(3) of the Bankruptcy Code. See In re 48th Street Steakhouse, Inc., 835 F.2d 427, 430 (2d Cir. 1987), *cert. denied* 485 U.S. 1035; In re Computer Communications, Inc., 824 F.2d 725, 731 (9th Cir. 1987); Pester Refining Company, 58 B.R. at 192; see also In the Matter of Edwards Mobile Home Sales, Inc., 119 B.R. 857, 860 (Bankr. M.D. FL 1990) (holding that bonding company could not unilaterally terminate a surety bond without violating the automatic stay); Wegner Farms, 49 B.R. at 444 (same).

37. As a result of MediaNews' violation of the automatic stay, Media News purported attempt to terminate the Swap Agreement is void. See Kalb v. Feverstein, 308 U.S. 433, 438 (1939); Raymark Industries, Inc v. Lai, 973 F.2d 1125 (3d Cir. 1992); In re Schwartz, 954 F.2d 569 (9th Cir. 1992); 48th Street Steakhouse, Inc., 835 F.2d 427; Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306 (11th Cir. 1982).

38. In 48th Street Steakhouse, a prime-landlord served upon the prime-tenant under a lease for real property a notice of termination. 835 F.2d at 429. In response, the debtor-subtenant under the prime lease requested that the bankruptcy court find that the prime-landlord's delivery of the termination notice violated the debtor's rights in the prime-lease and the premises. Id. In reaching its decision, the Second Circuit Court of Appeals affirmed the bankruptcy court's findings that (a) the debtor's sublease constituted property of the estate under section 541 of the Bankruptcy Code, (b) the prime-landlord's attempt to terminate the prime-lease, in-turn terminating the debtor's interest in the sublease by operation of law, violated section 362(a)(3) of the Bankruptcy Code and (c) the landlord's termination notice was void. Id. at 430-431.

39. Similarly, Computer Communications involved a communication equipment manufacturer that entered into an agreement to purchase equipment from the debtor. 824 F.2d at 727. The agreement among the parties provided in pertinent part that a filing for bankruptcy by either party constituted a default by the filing party allowing the non-filing party to terminate the agreement. Id. As a result of the debtor's filing for protection under chapter 11 of the Bankruptcy Code, the purchaser of the debtor's equipment terminated the agreement. Id. In defending its action, the purchaser argued that the applicable non-bankruptcy law exception under section 365(e) of the Bankruptcy Code allowed for the termination of its agreement with

the debtor. However, the Ninth Circuit Court of Appeals rejected this argument. *Id.* at 730. Specifically, the Ninth Circuit found that even if section 365(e) of the bankruptcy code allowed the purchaser to terminate its contract with the debtor, section 362 automatically stayed the purchaser's termination right. *Id.*, citing In re Minoco Group of Companies, Ltd., 799 F.2d 517, 519 (9th Cir. 1986) (the right to cancel an insurance policy is stayed by the automatic stay).

40. Finally, in Pester Refining, the debtor's insurance carrier notified the debtor of its intention to terminate an insurance policy after the debtor's filing of its chapter 11 case, unless the debtor agreed to pay increased premiums and to comply with two loss control measures as directed by the insurer. 58 B.R. at 190. In its response, the debtor requested that the bankruptcy court find the insurer's termination notice to be null and void as a violation of the automatic stay. *Id.* Upon determining that the insurance policy was property of the debtor's estate, the bankruptcy court found that the "attempted cancellation of the insurance contract violate[d] Section 362(a) which prohibits 'any act to obtain possession of property of the estate ... or to exercise control over property of the estate.'" *Id.* at 192, citing 11 U.S.C. § 362(a)(3). Therefore, the insurance carrier's attempt to cancel the insurance policy was found to be without effect. *Id.* at 192.

41. In short, the instant case is substantially similar to each of the non-debtor attempts to unilaterally terminate agreements with a chapter 11 debtor as discussed in 48th Street Steakhouse, Computer Communications and Pester Refining. MediaNews' purported termination notice seeks to extinguish the Debtors' rights in the Swap Agreement. Such an action is expressly prohibited by the automatic stay, and thus, Media News' purported attempt to terminate the Swap Agreement is void and of no force or effect. Moreover, MediaNews has been aware of its violation of the automatic stay since at least September 9, 2003, the date of the

Debtors' demand letter, yet MediaNews has taken no action to rescind its purported notice.

Absent the relief requested in the Motion, the Debtors submit that MediaNews will continue to flagrantly violate the automatic stay and interfere with the Debtors' rights under the Swap Agreement.

C. MediaNews Should Be Held In Civil Contempt For Its Disregard of the Automatic Stay

42. Section 105(a) of the Bankruptcy Code states that the Court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

43. Bankruptcy Rule 9020 provides that a contempt proceeding before a bankruptcy court is a contested matter governed by Bankruptcy Rule 9014. Fed. R. Bankr. P. 9020. Moreover, a violation of an order by a party with knowledge of such order constitutes contempt. See In the Matter of Hipp, Inc., 5 F.3d 109, 113 (5th Cir. 1993). Undeniably, the automatic stay is "essentially a court-ordered injunction, [and] any person or entity that violates the stay may be found in contempt of court." In re Jove Engineering, Inc., 92 F.3d 1539, 1546 (11th Cir. 1996), *citing* Carver v. Carver, 954 F.2d 1573, 1579 (11th Cir. 1992), *cert. denied*, 506 U.S. 986 (1992). To redress civil contempt, the Court may assess appropriate sanctions against the violating party to the extent necessary to compel such party's compliance with the stay or order being violated. See In re Walters, 868 F.2d 665, 669 (4th Cir. 1988).

44. As stated above, the assessment of sanctions in response to civil contempt should be in such amount as is necessary and appropriate to compel compliance with the order or decree being violated. Walters, 868 F.2d at 669. As a result of MediaNews' willful violation of the automatic stay, sanctions are warranted in this case in the amount of at least the Debtors'

attorneys' fees and costs in connection with the Motion, plus \$50,000 per day until MediaNews (i) complies with the automatic stay, (ii) rescinds its purported termination notice and (iii) ceases interfering with the Debtors' rights under the Swap Agreement. See In re Connecticut Pizza, Inc., 193 B.R. 217, 227 (Bankr. D. MD 1996); see also In re Rush-Hampton Industries, Inc., 98 F.3d 614, 617 (11th Cir. 1996) (the bankruptcy court has well-established powers under sections 362(h) and 105(a) to impose sanctions, including damages, costs and attorneys' fees for violations of the automatic stay).

45. The Debtors attempted in good faith to obtain MediaNews' compliance with the automatic stay and the Swap Agreement. MediaNews has failed and refused to comply with the Debtors' demand. Accordingly, the Debtors were left with no choice but to file the instant Motion to redress MediaNews' continuing violations of the automatic stay.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Debtors request that the Court enter an order (a) enforcing the automatic stay prohibiting MediaNews from terminating the Swap Agreement and interfering with the Debtors' rights thereunder, (b) holding MediaNews in civil contempt of the automatic stay, (c) assessing sanctions against MediaNews in the amount of at least the Debtors' attorneys' fees and costs in connection with the Motion plus \$50,000 per day until such time as MediaNews (i) complies with the automatic stay, (ii) rescinds its purported termination notice and (iii) ceases interfering with the Debtors' rights under the Swap Agreement and (d) granting such other and further relief as the Court deems just and proper.

Dated: Fort Worth, Texas
October 24, 2003

HAYNES AND BOONE, LLP
901 Main Street
Suite 3100
Dallas, TX 75202
(214) 651-5000

By /s/ Meredyth A. Purdy

Robin Phelan
State Bar No. 15903000
Judith Elkin
State Bar No. 06522200
Meredyth A. Purdy
State Bar No. 24007882

and

Thomas E Lauria
State Bar No. 11998025
Gerard Uzzi
Linda M. Leali
WHITE & CASE LLP
Wachovia Financial Center
200 South Biscayne Blvd.
Miami, Florida 33131
(305) 371-2700

ATTORNEYS FOR THE DEBTORS AND
DEBTORS-IN-POSSESSION

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has authorized BSI as service agent to cause to serve a true and correct copy of the foregoing document upon all persons on the Limited Service List and upon all parties listed below via United States first class mail, postage prepaid, on the 24th day of October, 2003 in accordance with the Federal Rules of Bankruptcy Procedure:

/s/ Meredyth A. Purdy

MediaNews Group, Inc.
Attn: Joseph J. Lodovic, IV, President
1560 Broadway
Denver, CO 80202

Hughes, Hubbard & Reed LLP
Attn: David W. Wiltenburg, Esq.
One Battery Park Plaza
New York, NY 10004-1482

EXHIBIT A

MediaNews Group, Inc.
1560 Broadway
Denver, Colorado 80202

September 4, 2003

Mirant Americas Energy Marketing, LP
Legal Department-Americas Group
1155 Perimeter Center West, Suite 130
Atlanta, Georgia 30338-5416

Ladies and Gentlemen:

Reference is made to (i) the ISDA Master Agreement and related Credit Support Annex entered into by Mirant Americas Energy Marketing, LP ("Mirant", previously operating under the name of Southern Company Energy Marketing L.P.) and Affiliated Newspapers Investments Inc. (now known as MediaNews Group, Inc). ("MediaNews") dated March 17, 1998 (the "Agreement"), and (ii) the Revised Confirmation of Swap Transaction dated July 9, 1998, Document #107966 documenting a newsprint swap transaction. Capitalized terms used but not otherwise defined in this letter will have their respective meanings assigned in the Agreement. The Agreement is a "swap agreement" within the meaning of 11 U.S.C. § 560.

Pursuant to Section 6(a) of the Agreement, MediaNews hereby informs you of the designation of September 5, 2003 as the Early Termination Date in respect of all outstanding Transactions by virtue of Mirant's Event of Default under Section 5(a)(vii) of the Agreement. As the Non-defaulting Party, in accordance with Section 6(e)(i)(4) of the Agreement, MediaNews will provide its calculation of Loss to Mirant.

MediaNews reserves all rights and remedies it may have against Mirant under the Agreement and otherwise.

Very truly yours,

MediaNews Group, Inc.

By:


Joseph J. Lodovic, II
President

EXHIBIT B

LOS ANGELES
MIAMI
NEW YORK
PALO ALTO
SAN FRANCISCO
WASHINGTON, D.C.

BERLIN
BRATISLAVA
BRUSSELS
BUDAPEST
DRESDEN
DÜSSELDORF
FRANKFURT
HAMBURG
HELSINKI
ISTANBUL
LONDON
MILAN
MOSCOW
PARIS
PRAGUE
ROME
STOCKHOLM
WARSAW

WHITE & CASE

LIMITED LIABILITY PARTNERSHIP

WACHOVIA FINANCIAL CENTER, SUITE 4900
200 SOUTH BISCAYNE BOULEVARD
MIAMI, FLORIDA 33131-2352

TELEPHONE: (1-305) 371-2700
FACSIMILE: (1-305) 358-5744/5766

ALMATY
ANKARA
BANGKOK
BOMBAY/MUMBAI
HO CHI MINH CITY
HONG KONG
JAKARTA
SHANGHAI
SINGAPORE
TOKYO

JEDDAH
RIYADH

MEXICO CITY
SÃO PAULO

JOHANNESBURG

September 9, 2003

VIA FACSIMILE AND U.S. MAIL

MediaNews Group, Inc.
1560 Broadway
Denver, CO 80202

Attn: Mr. Joseph J. Lodovic, IV, President

Re: In re Mirant Corp. et al., Case No. 03-46590-DML

Dear Mr. Lodovic:

We are in receipt of your letter dated September 4, 2003 in which MediaNews Group, Inc. ("MediaNews") designates an Early Termination Date with respect to the ISDA Master Agreement and related Credit Support Annex entered into between Mirant Americas Energy Marketing, LP f/k/a Southern Company Energy Marketing L.P. ("MAEM") and MediaNews f/k/a Newspapers Investments Inc. (the "Agreement") dated March 17, 1998 and all outstanding transactions under the Agreement. Capitalized terms used but not defined herein will have the meaning assigned to them in the Agreement.

As you are aware, on July 14, 2003, and with respect to some debtors, July 15, 2003 (the "Petition Date"), Mirant Corporation and certain of its affiliates, including MAEM (collectively, the "Debtors"), filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division (the "Bankruptcy Court"), Case No. 03-46590-DML. We represent the Debtors in their chapter 11 cases.

As a consequence of the Debtors commencing their chapter 11 cases, the automatic stay provisions under section 362 of the Bankruptcy Code (the "Automatic Stay") prohibit, among other things, any act by a creditor to exercise control over property of the estate, including any act to wrongfully terminate an agreement to which a debtor is a party and any act to withhold amounts otherwise due MAEM.

Mr. Joseph J. Lodovic, IV
Page 2

In your letter, you indicate that MediaNews is terminating the Agreement "by virtue of Mirant's Event of Default under section 5(a)(vii) of the Agreement." The Event of Default for which MediaNews is purporting to terminate the Agreement, i.e., the commencement of MAEM's chapter 11 case, occurred approximately eight weeks ago. Because of the unreasonable delay between MediaNews' termination and the filing of MAEM's chapter 11 case, we believe that MediaNews is estopped from asserting such right to terminate based upon any Event of Default. Further, the extensive delay between the commencement of MAEM's chapter case and the declaration of an Event of Default belies the basis given by MediaNews for its purported termination.

Additionally, we have been advised that MediaNews has failed to pay to MAEM the amount of \$763,541.67 that was due on September 8, 2003 pursuant to the Agreement. Accordingly, we demand that MediaNews immediately withdraw its designation of an Early Termination Date and pay all amounts currently due under the Agreement or we will be forced to seek a Bankruptcy Court order finding MediaNews in violation of the Automatic Stay.

We appreciate your prompt attention to this matter. Should you have any questions please do not hesitate to contact me at (305) 995-5285.

Very truly yours,

Linda M. Leali

cc: Kenneth Satterly, Mirant Corporation

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

In re)	
)	chapter 11 Case
MIRANT CORPORATION, <u>et al.</u> ,)	Case No. 03-46590 (DML)
Debtors.)	Jointly Administered
)	

ORDER ON DEBTORS’ MOTION FOR THE ENTRY OF AN ORDER (i) ENFORCING THE AUTOMATIC STAY PROHIBITING MEDIANEWS GROUP, INC. FROM TERMINATING ITS SWAP AGREEMENT WITH THE DEBTORS, (ii) HOLDING MEDIANEWS IN CIVIL CONTEMPT OF THE AUTOMATIC STAY, (iii) ASSESSING SANCTIONS, AND (iv) GRANTING RELATED RELIEF

Upon the Motion for the Entry of an Order (i) Enforcing the Automatic Stay Prohibiting MediaNews Group, Inc. (“MediaNews”) From Terminating its Contract With the Debtors, (ii) Holding MediaNews in Civil Contempt of the Automatic Stay of Section 362 of Title 11 of the United States Code, 11 U.S.C. §§ 101, et seq., (iii) Assessing Sanctions, and (iv) Granting Related Relief dated October 24, 2003 (the “Motion”), of Mirant Corporation and its affiliated debtors (collectively, the “Debtors”), as debtors and debtors in possession; and it appearing that the Court has jurisdiction over this matter; and it appearing that due notice of the Motion has been provided and that no other or further notice need be provided; and it further appearing that the relief requested in the Motion is in the best interests of the Debtors, their estates and creditors; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefore, it is hereby:

FOUND THAT:

A. Mirant Americas Energy Marketing, L.P., one of the Debtors, and

MediaNews are parties to an International Swap Dealers Association Master Agreement, dated

March 17, 1998 (the “Swap Agreement”), pursuant to which, among other things, the parties agreed to exchange (“swap”) cash flows on a quarterly basis based on the pricing of 48.8 Gram Newsprint.

B. On or about September 4, 2003, MediaNews sent a letter to the Debtors purporting to terminate the Swap Agreement by virtue of the Debtors’ Event of Default under Section 5(a)(vii) of the Swap Agreement, which provided that Debtors’ institution of “a proceeding seeking a judgment of insolvency or bankruptcy” is an Event of Default.

C. On or about September 9, 2003, the Debtors, by and through their counsel, sent a letter to MediaNews, advising that MediaNews’ attempt to terminate was ineffective given MediaNews’ unreasonable delay in exercising its contractual right to terminate. The Debtors further advised MediaNews that if it did not immediately withdraw its notice of termination and pay all amounts currently due under the Swap Agreement, the Debtors would be forced to seek a Bankruptcy Court order finding MediaNews in violation of the automatic stay.

D. MediaNews refused to comply with the Debtors’ requests to withdraw its notice of termination and refused to pay the approximately \$700,000 quarterly payment that was due on September 8, 2003.

E. MediaNews did not seek to terminate the Swap Agreement because of the Debtors’ chapter 11 filing as required under the Bankruptcy Code.

F. MediaNews waived its right to seek termination by failing to exercise its right within a reasonable time following the Debtors’ chapter 11 filing.

G. On or about October 24, 2003, the Debtors filed the Motion, seeking, among other things, entry of an Order enforcing the automatic stay prohibiting MediaNews from terminating the Agreement and interfering with Debtors’ rights thereunder.

The Court, having considered the Motion and heard argument from the parties, and being otherwise fully advised in the premises, hereby

ORDERS AND ADJUDGES:

A. The Motion and all relief requested therein is granted in full and in all respects.

B. MediaNews' purported termination notice was ineffective and MediaNews' actions were taken in civil contempt and in violation of the automatic stay.

C. MediaNew is hereby assessed sanctions in the amount of the Debtors' attorneys' fees and costs in connection with the Motion plus \$50,000 per day until such time as MediaNews complies with the automatic stay, rescinds its purported termination notice, and ceases interfering with the Debtors' rights under the Swap Agreement.

D. The Court shall retain jurisdiction with respect to any matters, claims, rights or disputes arising from or related to the Motion or the implementation of this Order.

Signed this ___ day of _____, 2003.

HONORABLE D. MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE