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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)
Debtors.)	Jointly Administered
_____)	

**MOTION OF THE DEBTORS PURSUANT SECTION 362(d) TO MODIFY
THE AUTOMATIC STAY SOLELY TO ALLOW CERTAIN APPELLATE
PROCEEDINGS TO PROCEED**

Mirant Corporation (“Mirant”) and its affiliated debtors (collectively, the “Debtors”), as debtors-in-possession, file this motion (the “Motion”) for entry of an order pursuant to Bankruptcy Code section 362(d) modifying the automatic stay to allow three appeals, including a hearing in one of those appeals currently scheduled for August 12, 2003, before the Ninth Circuit Court of Appeals, to proceed to resolution of all outstanding appellate issues. Having prevailed in each of the underlying cases, the Debtors expect to prevail in all three appeals should this Court allows the Debtors to participate. Therefore, given the amount of prepetition preparation and expense incurred in connection with the Debtors’ preparation for the appellate hearings (and especially with respect to the August 12, 2003 hearing before the Ninth Circuit Court of Appeals), and the concomitant benefits to the Debtors in disposing of potentially significant

claims against certain Debtors separate lawsuits if they prevail on appeal, the Debtors submit that sufficient cause exists to modify the stay to allow the appellate proceedings to go forward. In support of the Motion, the Debtors respectfully state 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”), each of the Debtors filed a voluntary petition 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 The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

3. The Cases are Jointly Administered. On July 15, 2003, this Court granted the Debtors’ motion for an order requesting that the Debtors’ bankruptcy estates be jointly administered.

4. Creditors’ Committees. On July 18, 2003, a creditors’ committee was appointed for Mirant Corporation. Also on July 18, 2003, a separate creditors’ committee was appointed for Mirant Americas Generation, LLC.

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 “CCAA”). The Canadian Debtors are subject to the sole and exclusive jurisdiction of the Canadian Court.

FACTUAL BACKGROUND:

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. Mirant employs in excess of 7,000 employees worldwide, of which approximately 1,100 employees are based at Mirant's corporate headquarters in Atlanta and approximately 5,900 employees are based at operating facilities. In 2002, Mirant recorded a \$542 million loss in earnings before interest, taxes and depreciation ("EBITDA") on a consolidated basis. Its 2002 operating revenues were approximately \$6.4 billion.

Facts Relevant to the Motion: The Prepetition Litigation

7. Mirant, along with Mirant Americas Energy Marketing, LP, Mirant California, LLC, Mirant Delta, LLC, Mirant Potrero, LLC, Mirant California Investments, Inc., and Mirant Americas, Inc. (the "Mirant Defendants") are involved in several prepetition actions regarding the sale of wholesale energy and capacity, including the following:

- People of the State of California ex rel. Bill Lockyer v. Mirant Corporation, et al., C-02-1914 VRW (C.D. Cal.), appeal pending, 03-15638 (9th Cir.) (regarding the sale of a type of wholesale energy capacity referred to as ancillary services) (“Ancillary Services Action”).
- Public Utility District of Snohomish, et al v. Dynegy Power Mktg, et al., CV-02-01993-RHW (S.D. Cal), appeal pending, 03-55191 (9th Cir.) (regarding allegations that the Mirant Defendants, or some of them, and other non-Mirant related entities manipulated wholesale energy markets) (“Snohomish”).
- People of the State of California ex rel. Bill Lockyer v. Mirant Corporation, et al., C-02-2207 VRW (C.D. Cal.), appeal pending, 03-15585 (9th Cir.) (regarding whether filings by the Mirant Defendants with the Federal Energy Regulatory Commission (“FERC”) of rates charged for wholesale electricity complied with federal law) (“Unfiled Rate Action”).

8. The facts and procedural posture of each of the foregoing cases is summarized below.

Factual Summary of the Ancillary Services Action

9. Mirant owns electric generation facilities in Northern California from which it sells both wholesale energy and capacity from those facilities. A seller of capacity (such as Mirant) agrees with its customers that it will provide a specified amount of energy if called upon by the capacity buyer to do so. Tariffs approved by FERC refer to one sort of capacity sold in California as “ancillary services.”

10. Plaintiff in the Ancillary Services Action alleged that, from 1999 until the present, the Mirant Defendants sold ancillary services while concurrently generating an amount of energy such that its generating facilities could not have produced the energy required under ancillary

services obligations if called upon to do so. Plaintiff alleged that actions by the Mirant Defendants violated California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, et seq. (the "UCL"). Plaintiff sought equitable relief, including restitution of payments made for ancillary services that were never provided, disgorgement of any profits made from the alleged actions and an injunction preventing further undertaking of those actions.

11. Prior to the Petition Date, the Mirant Defendants vigorously defended the Ancillary Services Action and prevailed before the United States District Court, Northern District of California, as discussed below.

Factual Summary of Snohomish

12. Plaintiff in Snohomish alleged that the Mirant Defendants and other entities manipulated wholesale electricity prices between 1998 and 2002. Plaintiff further alleged that defendants' actions violated the UCL and California's antitrust law, the Cartwright Act, Cal. Bus. & Prof. Code §§ 16720, et seq. Plaintiff sought equitable relief, including restitution of payments made for inflated energy, disgorgement of any profits made from the alleged actions and an injunction preventing further undertaking of those actions. Plaintiff also sought treble compensatory damages for violations of the Cartwright Act.

13. Prior to the Petition Date, the Mirant Defendants vigorously defended the Snohomish action and prevailed before the United States District Court, Southern District of California, as discussed below.

Factual Summary of the Unfiled Rate Action

14. Plaintiff in the Unfiled Rate Action alleged that, from 1998 until 2001, the Mirant Defendants, or some of them, failed to file the rates it charged for wholesale electricity, in violation of 16 U.S.C § 824d and 18 C.F.R. § 35.1. Plaintiff also alleged that the prices charged by the Mirant Defendants further violated federal law because they were "unjust and unreasonable." Plaintiff alleged that actions by the Mirant Defendants violated the UCL. Plaintiff seeks civil penalties of \$2,500 per day for each violation.

15. Prior to the Petition Date, the Mirant Defendants vigorously defended the Unfiled Rate Action and prevailed before the United States District Court, Northern District of California, as discussed below.²

Procedural Summary of the Ancillary Services and Unfiled Rate Actions

16. Plaintiff in the Ancillary Services and Unfiled Rate Actions filed complaints in those cases on March 11, 2002 and April 9, 2002, respectively. Both actions were removed to the United States District Court for the Northern District of California and reassigned to the Honorable Vaughn Walker as related matters. Plaintiff also filed related cases regarding ancillary services (altogether “Other Ancillary Services Actions”) and unfiled rates (altogether “Other Unfiled Rates Actions”) against other owners of energy generation facilities, such as NRG, Energy Inc. (“NRG”).³ Those cases were also reassigned before Judge Walker as related matters.

17. The Mirant Defendants in their actions and the defendants in each of the Other Ancillary Services and Other Unfiled Rate Actions moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that the filed rate doctrine and the Supremacy Clause of the United States Constitution preclude plaintiff’s claims. On March 25, 2003, Judge Walker granted defendants’, including that filed by the Mirant Defendants, motions to dismiss. On March 28, 2003, plaintiff filed notices of appeal in each of those actions against all generators, including the Mirant Defendants, appealing Judge Walker’s March 25, 2003 order.

18. The Ninth Circuit Court of Appeals consolidated all appeals in the Ancillary Services Actions and the Other Ancillary Services Actions on April 9, 2003.

² The appeals in the Ancillary Services Actions, the Unfiled Rate Actions and Snohomish, are hereinafter referred to collectively as the “Appeals.”

³ Plaintiff filed an action involving ancillary services against NRG, People of the State of California ex rel. Bill Lockyer v. Dynegy, Inc., et al., C-02-1854 VRW (C.D. Cal.), appeal pending, 03-15588 (9th Cir.), but did not file an action involving unfiled rates against NRG.

19. The Ninth Circuit Court of Appeals consolidated all appeals in the Unfiled Rate Actions and the Other Unfiled Rate Actions on May 27, 2003. A briefing schedule has been set but no hearing date has been determined in the Unfiled Rate Actions. If not for the bankruptcy, the Mirant Defendants would have assisted in preparation for, and participated in, oral argument for this appeal whenever it occurs.

20. The parties have filed all scheduled appellate briefs in the Ancillary Services Action and the Ninth Circuit will hear argument on those appeals on **August 12, 2003**. The Mirant Defendants will assist in preparation for, and may participate in, this oral argument. Attempting to stay oral argument in the Ancillary Services Action appeal would be futile. The Ninth Circuit already expedited briefing and oral argument for appeal in the action on April 9, 2003. On May 30, 2003, it further ordered that “extensions of time are discouraged.”

21. Even though the Mirant Defendants have not yet answered the complaints in the Unfiled Rate and Ancillary Services Actions, they have already performed considerable work. In both cases, the Mirant Defendants filed a notice of removal, opposed the plaintiff’s motions to remand, filed briefs in support of motions to dismiss the complaints, filed briefs in opposition to plaintiff’s motions to stay motions by the Mirant Defendants to dismiss and filed motions to certify as frivolous plaintiff’s appeals of the denials of their motions to remand. In the Ancillary Services Action, the Mirant Defendants have also filed a brief in opposition to Appellant’s Opening Brief and responded to discovery filed prior to removal of that action. Resolution of the sufficiency of the complaints has already taken over one year. Were the cases to survive beyond that stage and into discovery, litigation would likely extend two years or more and consume considerable expense.

Procedural Summary of Snohomish

22. Plaintiff in Snohomish filed its complaint on July 15, 2002 in the Central District of California. The case was transferred to the Southern District of California by the Multi-District Litigation panel. On October 31, 2002, defendants, including Mirant, in Snohomish filed

a motion to dismiss the complaint. On January 6, 2003, the Court granted the motion to dismiss on the grounds that the filed rate doctrine and the Supremacy Clause of the United States Constitution precluded plaintiff's claims.

23. On January 28, 2003, plaintiff filed a notice of appeal. No hearing date has yet been set for the Snohomish appeal. Mirant will assist in preparation for, and may participate in, oral argument for this appeal whenever it occurs.

24. Even though Mirant has not yet answered the complaint in Snohomish, it has already performed considerable work. Mirant has filed a notice of removal, opposed the Snohomish plaintiff's motion to remand, filed briefs in support of a motion to dismiss the complaint, filed briefs in support of a motion to strike portions of the complaint and filed briefs in support of a motion to transfer the action to the Southern District of California before the Honorable Robert Whaley. Resolution of the sufficiency of the complaint in Snohomish has already taken over one year. Were the case to survive and go into discovery, litigation would likely extend two years or more and consume considerable expense. The broad scope of alleged wrongs taken with the large number of Mirant employees with jobs related to trading (who would likely be required to sit for depositions), and the complexity of energy trading issues generally, could mean that discovery would involve production of millions of pages of documents. Moreover, expert testimony would be necessary in a large number of disciplines (including economics, trading issues and energy transmission systems and reliability).

**Court Rulings Regarding Bankruptcy Code Section 362 in Snohomish and
the Ancillary Services Action**

25. On November 22, 2002, an involuntary bankruptcy petition was filed against NRG.⁴ On December 13, 2002, NRG filed a notice of bankruptcy filing seeking a stay of the

⁴ NRG opposed the involuntary petition for bankruptcy. NRG subsequently filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code on May 14, 2003.

Ancillary Services Action against it pursuant to Bankruptcy Code section 362(a). On January 3, 2003, plaintiff opposed that notice arguing that the Ancillary Services Action fell within the “police or regulatory power” exception set forth in Bankruptcy Code § 362(b)(4). On March 25, 2003, Judge Walker entered an order holding that NRG’s bankruptcy filing did not stay the action against NRG because of the exception set forth in Bankruptcy Code § 362(b)(4).

26. On May 16, 2003, while the consolidated appeal of the Ancillary Services Actions was pending before the Ninth Circuit Court of Appeals, NRG filed with the Ninth Circuit a notice of its May 14, 2003 voluntary Chapter 11 bankruptcy petition. NRG filed the notice in cases before the Ninth Circuit, including the Ancillary Services Actions and Snohomish.

27. On May 21, 2003, the Ninth Circuit ordered that the appeal in Snohomish be stayed as to NRG under Bankruptcy Code § 362. The Ninth Circuit again sided with NRG on May 30, 2003, ordering all appeals against NRG to be stayed. Also, on July 18, 2003, PG&E Energy Trading Holdings Corp. (“PG&E”), a co-defendant in Snohomish, filed a notice of bankruptcy filing in Snohomish. On July 25, 2003, the Ninth Circuit entered an order staying the action against PG&E, and noting: “The clerk is in receipt of notice of PG&E Energy Trading Holdings Corporation's bankruptcy petition. Proceedings are stayed as to that appellee as well. 11 U.S.C. § 362(a). On or before September 22, 2003, debtor shall file a report on the status of the bankruptcy petition.” The Debtors have not yet filed notices of stay in the Appeals, although they believe that the Ninth Circuit would similarly stay the Appeals as against the Debtors.

RELIEF REQUESTED

28. By this Motion, Debtors request the following:

Ancillary Services Actions: That this Court enter an order modifying the automatic stay of section 362(a) for the sole and limited purpose of allowing the August 12, 2003 appellate hearing as to the Mirant Defendants named in the Ancillary Services Actions to occur as scheduled by the Ninth Circuit and allowing the Ninth Circuit to enter an order disposing of the appeal.

Unfiled Rate Actions and Snohomish: That this Court enter an order modifying the automatic stay of section 362(a) for the sole purpose of allowing any briefs to be filed and the hearing as to the Mirant Defendants named in the Unfiled Rate Action appeal and Snohomish appeal when such appeals are eventually set for hearing by the Ninth Circuit, to occur as scheduled by the Ninth Circuit and allowing the Ninth Circuit to enter an order disposing of the appeals.

A. General Principles Regarding Bankruptcy Code Section 362.

29. The automatic stay of section 362 prohibits anyone from proceeding against the debtor in any action outside the bankruptcy court, without first obtaining relief from the automatic stay. In re Fowler, 259 B.R. 856, 857 (Bankr. E.D. Tex. 2001). Courts have ruled that “any action” includes “all appeals in proceedings that were originally filed against the debtor.” In re Voluntary Purchasing Groups, 205 B.R. 80, 81 (Bankr. E.D. Tex. 1996). The Fifth Circuit Court of Appeals has specifically ruled that “whether a proceeding is against the debtor within the meaning of section 362(a)(1) is determined from an examination of the posture of the case at the initial proceeding.” Freeman v. Commissioner of Internal Revenue, 799 F.2d 1091, 1092-93 (5th Cir. 1986). In the case at hand, although the plaintiffs in these cases are appealing the motion to dismiss brought by the Mirant Defendants, the posture of the case at the initial proceeding demonstrates beyond any doubt that the Appeals are against the Debtors and that the automatic stay applies.

30. Although Bankruptcy Code section 362(b)(4) contains an exception to the automatic stay with respect to certain, defined actions by a governmental unit to legitimately enforce their police and regulatory power, such exception is not applicable to the Appeals. The Ninth Circuit indicated as much on (a) May 21, 2003 and May 30, 2003 when it stayed all appeals naming NRG (a co-defendant of the Mirant Defendants) because of NRG’s bankruptcy filing; and (b) July 25, 2003 when it stayed the Snohomish appeal as to PG&E.

31. The purpose of section 362(b)(4) is explained in the following legislative history:
Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer

protection, safety or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.⁵

S.Rep. No. 989, 95th Cong., 2d Sess. 52 (1978), *reprinted* 1978 U.S. Code Cong. & Admin. News 5787, 5838.

32. Thus, not every government action against a debtor can be characterized as one that enforces police or regulatory power and thus automatically coming within the section 362(b)(4) exception to the automatic stay. For example, in Chao v. Hospital Staffing Services, Inc., 270 F.3d 374 (6th Cir. 2001), the Sixth Circuit ruled that the Department of Labor's claim under the Fair Labor Standards Act against a debtor was not excepted from the automatic stay under section 362(b)(4) noting that "some suits by governmental units, even though they would effectuate certain declared public policies, will nevertheless be regarded as largely in furtherance of private interests." Id. at 389. *See also*, In re Charter First Mortgage, Inc., 42 B.R. 380, 385 (Bankr. D. Org. 1984) (governmental agency stayed from seeking restitution of moneys on behalf of its citizens based on alleged violations of consumer protection laws).

33. The Appeals also are not exempt from the stay. With respect to the Ancillary Services Action and the Unfiled Rate Action, the attorney general's role is akin to a lead plaintiff in a class action lawsuit alleging unfair business practices and seeking restitution. Any citizen of California presumably could have filed those meritless cases against the Mirant Defendants and those cases would have been stayed by the commencement of these bankruptcy cases under section 362(a). By the same token, the attorney general plaintiff in those cases is also stayed as he is merely pursuing claims for a pecuniary purpose. A contrary rule would eviscerate the

⁵ *See also*, comments of Representative Don Edwards, member of the conference committee responsible for reconciling the House and Senate Bill for the Bankruptcy Reform Act of 1978 in which the police and regulatory powers exception was enacted. According to Representative Edwards, the police and regulatory powers exception "is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate." *E.E.O.C. v. McLean Trucking Co.*, 834 F.2d 398 (4th Cir. 1987), quoting 124 Cong. Rec. H11,089, reprinted in 1978 U.S.C.C.A.N. 6436, 6444-45. (Emphasis added.)

protections afforded by the automatic stay because a state agency would simply substitute in as plaintiff in such cases (or commence its own cases) thereby “rescuing” the private litigants from the automatic stay with the intention of proceeding on the exact same theories commenced by the private plaintiffs. Similarly, in Snohomish, the governmental entity plaintiff in that case is merely seeking to advance its pecuniary interest and is not unlike any other private party litigant. The Appeals are stayed by section 362(a) and they cannot go forward under section 362(b)(4).⁶

34. The foregoing is crucial because the automatic stay “is deemed ‘one of the fundamental debtor protections provided by the bankruptcy laws.’ ” Fowler, citing H.R.Rep. No. 595, 95th Cong., 1st Sess. 340 (1997). “It is clear that the purpose of the automatic stay is to protect the debtor and the estate from creditors and provide the debtor with a breathing spell in order to accommodate the development of a reorganization. In re United States Brass Corp., 176 B.R. 11, 12 (Bankr. E.D. Tex. 1994). This breathing spell prevents “a chaotic and uncontrolled scramble for the debtor’s assets in a variety of uncoordinated proceedings in different courts.” Id. at 858.

35. However, the Court may grant relief from the automatic stay “for cause” under 11 U.S.C § 362(d)(1), which provides as follows:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay – (1) for cause, including the lack of adequate protection of an interest in property.

Id.; see also, In re R. Fowler, 259 B.R. at 858. Other than for “lack of adequate protection” the Bankruptcy Code does not provide any guidance for determining “cause.” Although the

⁶ *E.g.*, In re Javens, 107 F.3d 359, 366 (6th Cir.1997) (“By creating exceptions for police and regulatory actions, Congress removed local regulation only from the effect of the automatic stay; it did not eliminate the bankruptcy court’s power to enjoin the enforcement of local regulation which is shown to be used in bad faith.”).

determination of cause is ultimately left to the discretion of the Bankruptcy Court and decided on a case by case basis, the courts have developed a set of factors to aid in making this determination.

B. Factors to Determine Whether Litigation Should Proceed.

36. The factors relevant to the Motion at hand include: 1) whether relief would result in a partial or complete resolution of the issues; 2) the interests of judicial economy and the expeditious and economical resolution of litigation; 3) whether the parties are ready for trial in the other proceeding; 4) impact of the stay on the parties and whether the balancing of the respective hardships tips in favor of the debtor or creditor, resulting from denial or granting of the relief, 5) the likelihood of success on the merits; 6) the cost of defense or other potential burden to the bankruptcy estate and the impact of the litigation on other creditors; and 7) whether the resources used to prepare the matter for trial would be wasted due to the stay enjoining the action from proceeding. *Id.* at 859; *In re Blan*, 237 B.R. 737, 739 (8th Cir. 1999); *In re America West Airlines*, 148 B.R. 920, 923 (Bankr. D. Ariz. 1993). The foregoing factors favor the relief requested herein.

C. The Automatic Stay Should Be Modified To Allow The Ninth Circuit Court Of Appeals To Reach A Final Determination Of The Issues on Appeal.

(i) *Relief from the automatic stay will result in a complete resolution of the Appeals issues.*

37. In the cases at hand, modification of the stay to allow the Appeals to continue to final determination will likely result in a complete resolution of the appellate issues. The Mirant Defendants prevailed at the District Court level and are confident the Ninth Circuit will affirm the District Court's judgment in the Ancillary Services cases after the hearing on August 12, 2003. The Mirant Defendants are similarly confident with respect to the Unfiled Rate Actions and Snohomish.

38. However, no matter which way the Ninth Circuit rules, the Appeals will be concluded and there will be a complete resolution of all the issues on Appeal. If the Ninth

Circuit affirms the District Court judgments, the Debtors will have prevailed again. On the other hand, if the Court overturns any of the judgments, those cases will be remanded to the District Court for further proceedings. And in the latter instance, the stay will remain in place as to any such further proceedings before the District Court.

This factor weighs in favor of granting the motion for modification of the stay.

(ii) *The Stay Should Be Modified In The Interests Of Judicial Economy And To Facilitate The Expeditious And Economical Resolution Of Litigation.*

39. In the cases at hand, the Mirant Defendants have filed numerous motions including, notice of removal, opposed the plaintiff's motions to remand, filed briefs in support of the motions to dismiss and filed motions to certify as frivolous plaintiff's appeals of the denials of their motions to remand.

40. Furthermore, the District Courts have expended numerous judicial resources in coming to the determination that motions by the Mirant Defendants to dismiss should be granted. It is probably the case that the Ninth Circuit Court of Appeals has already considered the briefs filed by the parties in the Ancillary Services Action appeal and is prepared to hear the matter on August 12. Indeed, the Ninth Circuit will hear oral argument on August 12, whether or not the Mirant Defendants are parties to the action. If the Ancillary Services Action case is stayed and the cases of the other defendants proceed, the Ninth Circuit may be required to consider separate appeals with duplicative issues. Such unnecessary duplication and waste of judicial resources will be avoided if the Motion is granted.

(iii) *The Parties Are Prepared And Ready For The August 12, 2003 Proceeding.*

41. In all three Appeals, the parties are ready to proceed with the appellate process. The Ninth Circuit Court of Appeals consolidated all appeals in the Unfiled Rate Actions on May 27, 2003, and set a briefing schedule. Oral argument will be set in the Snohomish appeal as well. The Ninth Circuit Court of Appeals consolidated all appeals in the Ancillary Services Actions on April 9, 2003, the parties have filed all scheduled appellate briefs in those actions, and the Ninth

Circuit will hear argument on those appeals on August 12, 2003. This factor weighs in favor of modifying the stay as requested.

(iv) *The Balancing Of The Respective Hardships Tips In Favor Of The Debtors, And Justifies Modifying The Stay As Requested.*

42. No parties will suffer any harm if the stay is modified to allow the Ninth Circuit Appeals process to continue. The stay should be modified to allow the Court of Appeals to rule. Debtors do not expect any objection to the Motion from any other parties to the Appeal proceedings.

(v) *Likelihood Of Success On The Merits.*

43. The fifth factor considered is styled as the *creditor's* chance of success on the merits. In re Blan, 237 B.R. at 739 (creditor sought stay relief to pursue litigation against the Debtor). Thus, this factor is typically considered when the *creditor* is seeking relief from stay to proceed with an action against the debtor in the non-bankruptcy forum. But if the creditor's likely success is low, it would be a waste of resources to proceed and stay relief should be denied. However, in the case at hand, the *Debtors* are requesting relief. The fact that the plaintiffs have lost their cases in District Court, and are likely to lose on appeal, weighs in favor of allowing a limited modification of the stay as requested so those Appeals may continue. The Debtors and their estates will benefit by permitting the Appeals to continue as the matters will likely be resolved in the Debtors' favor by the Ninth Circuit.

44. Moreover, Judge Walker certified the appeal of the denial of the motions to remand in the Unfiled Rate and Ancillary Services Actions as frivolous.⁷ In addition, two different judges (Judge Walker and Judge Whaley) have concluded that these cases are

⁷ On August 21, 2002, Mirant moved to certify as frivolous the appeals of the denial of plaintiff's motions to remand in the Ancillary Services and Unfiled Rate Actions. It did so to prevent both cases from being stayed pending resolution of those appeals. Plaintiff opposed Mirant's motions in both cases on August 26, 2002. On September 3, 2002, Judge Walker granted Mirant's motion and certified plaintiff's appeals as frivolous.

preempted on two separate grounds -- the filed rate and Supremacy Clause doctrines.

Accordingly, the Mirant Defendants will likely prevail on these appeals.

(vi) *The Costs Of Defense To The Estate Are Minimal And Creditors Are Not Significantly Impacted.*

45. In the cases at hand, it will not be prohibitively expensive to allow the Appeals to continue. In the Ancillary Services Action, all the briefs have been filed and the parties are prepared to proceed on August 12. In Snohomish and the Unfiled Rate cases, Mirant need only draft briefs opposing Appellant's opening briefs and attend the oral argument. The costs are minimal, therefore, there is no prejudice to creditors. On the other hand, it is very important to the Mirant Defendants that the Ninth Circuit affirm the District Court judgments because the Mirant Defendants would like to be rid of the cases once and for all.

(vii) *The Resources Used To Prepare The Appellate Briefs And Argument Would Be Wasted If The Stay Is Not Modified.*

46. The Mirant Defendants have already expended considerable resources proceeding with these three cases to date. In Snohomish, although the Mirant Defendants have not yet answered the complaint, it has already filed a notice of removal, opposed the plaintiff's motion to remand, filed briefs in support of a motion to dismiss the complaint, filed briefs in support of a motion to strike portions of the complaint and filed briefs in support of a motion to transfer the action to the Southern District of California before Judge Whaley. In the Unfiled Rate and Ancillary Services Actions, the Mirant Defendants have filed a notice of removal, opposed the plaintiff's motions to remand, filed briefs in support of motions to dismiss the complaints, filed briefs in opposition to plaintiff's motions to stay the Mirant Defendants' motions to dismiss and filed motions to certify as frivolous plaintiff's appeals of denials of his motions to remand. In the Ancillary Services Action, the Mirant Defendants have also filed a brief in opposition to Appellant's Opening Brief and responded to discovery filed prior to removal of the action. If the stay is not modified to allow the Court of Appeals to hear oral argument and reach a final determination of the issues on appeal, much of this work may need to be duplicated.

D. The Court Should Grant A Limited Modification Of The Stay Allowing The Court Of Appeals To Reach A Final Determination Of The Appeals but Otherwise Leave The Stay Intact.

47. 11 U.S.C. 362(d) allows the courts great latitude when adjusting the stay, providing that “the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay.” *Id.* The courts have exercised this power numerous times to modify the application of the stay to suit the situation at hand. For example, the court in In re United States Brass Corp., 176 B.R. 11 (Bankr. E.D. Tex. 1994), provided for a limited modification of the stay, ruling that the stay would be modified solely to allow oral argument to proceed before the Supreme Court of the State of Texas and allowing that court to rule on the issues before it.

48. In U.S. Brass, the debtor and the debtor’s co-defendant wished to proceed with oral argument before the Supreme Court to determine the debtor’s liability with respect to issues raised by the plaintiff. The hearing would continue with or without the debtor because the co-defendant was not in bankruptcy and therefore not protected by the automatic stay. Both parties argued that the oral argument should include the debtor and argued that the stay should be modified for the limited purpose of allowing the Supreme Court to hear oral argument and issue its ruling. The plaintiff’s opposed.

49. The U.S. Brass court ruled that the primary purpose of the automatic stay is to protect the debtor and the estate, not other parties. 176 B.R. at 12-13. The court further ruled that the “Debtor has an interest in participating in the resolution of this issue because it will affect the resolution of future litigation.” *Id.* at 13. The court ordered that “the automatic stay is hereby modified for the limited purpose of proceeding with oral argument before the Supreme Court and obtaining a final judgment.” *Id.*

50. The Mirant Defendants seek similar relief in this Motion. In the event the Court of Appeals reverses the judgment entered in favor of the Mirant Defendants, and remands the cases to the District Court for further proceedings, all of the same factors discussed above weigh

strongly in favor of maintaining the automatic stay and not allowing the litigation to continue at the District Court level. Continuation of these three cases in the District Court would result in the exact “chaotic and uncontrolled scramble for the debtor’s assets” that the automatic stay was designed to prevent, Fowler, 259 B.R. at 858, and unduly and negatively impact the “breathing spell” the Debtors are entitled to with respect to their prepetition litigation.

(i) *Relief From The Automatic Stay Will Not Result In A Complete Resolution Of The Issues If The Ninth Circuit Reverses The District Court Judgments.*

51. If the cases are remanded to the District Court, relief from stay would not result in a complete resolution of the issues. All of the cases are in the early stages and it will be some time before a trial date can be set in any of the cases. Preparation for trial in the cases will require countless hours of attorney and judicial time and would likely take at least one to two years to complete. This factor demonstrates that should the cases be remanded to the District Court, the stay should remain in effect.

(ii) *The Litigation Will Not Be Expeditiously Or Economically Concluded.*

52. If the cases are remanded to the District Court, judicial economy and expeditious and economical resolution of the litigation will no longer be at issue. The litigation will have to continue from the very early stages of litigation and will not be able to be resolved either expeditiously or economically. In all three cases, the Mirant Defendants have not yet answered the complaint and if the case were to survive beyond that stage and into discovery, litigation would likely extend well beyond one to two years and consume considerable resources.

(iii) *If The Cases On Appeal Are Remanded, The Parties Would Not Be Ready For Trial For Quite Some Time.*

53. Should the cases be remanded to the District Court, this factor will weigh heavily in favor of enforcing the stay. As is discussed above in greater detail, the cases are in very early stages of litigation and discovery.

(iv) *The Respective Hardships Favor the Mirant Defendants.*

54. As is discussed above, staying the cases if the Ninth Circuit remands them to the District Court will result in no undue hardship. Indeed, creditors would benefit because the estates would not incur legal fees in connection with the stayed litigation to any parties in interest. If the cases are remanded to the District Court, the Debtors and the bankruptcy estates would suffer significant hardship if the plaintiffs were allowed to proceed with their theories in the District Court. Significant estate resources will be expended to litigate the three cases and Debtors' management would be continually distracted in defending the cases. The Court should modify the stay to allow the Court of Appeals to reach a final determination of the issues before it, but should not extend this modification to any other court actions should the matter be remanded.

(v) *The Cost Of Defense And Other Potential Burdens To The Bankruptcy Estate And Creditors May Be Significant.*

55. The Mirant Defendants expect that litigation of the Unfiled Rate and Ancillary Services Actions could take at least two years for the cases to be prepared, involve hundreds of depositions, and millions of dollars in defense fees and costs (that would be unrecoverable by the Mirant Defendants if they prevailed on the merits, which they expects to if the cases are not disposed of). Moreover, Snohomish involves multiple parties with wide-reaching allegations regarding nearly every aspect of defendants' businesses. Snohomish could involve three years or more of litigation before trial, involving a similar number of depositions and cost. Because of the broad scope of allegations, large number of trading-related employees and complexity of energy trading issues, millions of pages of documents may be produced involving considerable time and expense. In addition, expert testimony would be necessary in a large number of areas, including economics, trading issues and energy transmission systems and reliability. The sheer magnitude of these cases requires that the stay remain in effect in the event the Ninth Circuit remands to the District Court.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has authorized BSI as service agent to cause to serve a true and correct copy of the foregoing Motion upon all persons on the Limited Service List on the 1st day of August, 2003 via first class mail, postage prepaid in accordance with the Federal Rules of Bankruptcy Procedure.

/s/ Robin Phelan