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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-11
)	Jointly Administered
Debtors.)	
_____)	

DEBTORS' MOTION FOR CONTEMPT

TO THE HONORABLE D. MICHAEL LYNN, UNITED STATES BANKRUPTCY JUDGE:

Mirant Corporation (“Mirant”) and its affiliated debtors (collectively, the “Debtors”), as debtors-in-possession, file this Motion for Contempt (the “Motion”) against Cruz Bustamante¹ (“Bustamante”). In support of the relief requested in the Motion, the Debtors respectfully represent as follows:

¹ Cruz Bustamante is the Lieutenant Governor of the State of California. As described below, Bustamante did not sue the Debtors in his capacity as the Lieutenant Governor. He “brings this action individually on behalf of those similarly situated, on behalf of the general public and as a representative taxpayer....” Pongetti Affid., Ex. F (First Amended Complaint, ¶ 10).

PROCEDURAL BACKGROUND

1. 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 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.² On August 18, 2003, Mirant EcoElectrica Investments I, Ltd. and Puerto Rico Power Investments, Ltd. commenced chapter 11 cases under the Bankruptcy Code (collectively, the "New Debtors"). The Debtors continue to manage and operate their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

2. 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. A motion for joint administration of the cases of the New Debtors with the Debtors' cases was filed with this Court on August 20, 2003, and was entered on September 8, 2003. This Court also entered an order on September 8, 2003, which provides that certain orders entered in the chapter 11 cases of Mirant Corporation, *et al.* are applicable to the New Debtors' cases and the New Debtors.

3. Unsecured Creditors' Committees. On July 25, 2003, the Office of the United States Trustee for the Northern District of Texas announced the formation of two official unsecured creditors' committees; one for Mirant Corporation and the other for Mirant Americas Generation, LLC. The appointment lists of members of both official unsecured creditors' committees were filed in their respective chapter 11 cases on July 25, 2003.

² 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.

4. Mirant Corporation Equity Committee. On September 18, 2003, the Office of the United States Trustee for the Northern District of Texas announced the formation of the official committee of equity security holders for Debtor Mirant (the “Equity Committee”). The appointment list of the members of the Equity Committee was filed in Debtor Mirant’s Chapter 11 case on September 18, 2003.

FACTUAL BACKGROUND

A. The Debtor’s 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 on a consolidated basis. Its 2002 operating revenues were approximately \$6.4 billion.

B. Facts Specifically Relevant to The Motion

7. Bustamante v. The McGraw Hill Companies, et al. On November 20, 2002, Bustamante filed a complaint (the “Complaint”) against Debtors Mirant Corporation (Case No. 03-46590 BJH), Mirant Americas Energy Marketing, LP (Case No. 03-46591 DML), Mirant California, LLC (Case No. 03-46620 DML), Mirant Delta, LLC (Case No. 03-446629 DML), and Mirant Potrero, LLC (Case No. 03-46648 BJH) (“Mirant Defendants”) and other defendants. See Affidavit of Robert P. Pongetti (“Pongetti Affid.”) at ¶¶ 1-2. The Complaint purports to commence a class action against various defendants (including the Mirant Defendants) for allegedly artificially inflating natural gas prices by reporting false information to publishers of gas indices. Id. at ¶ 1. The Debtors dispute the allegations set forth in the Complaint. Id.

8. Bustamante’s Complaint Was Dismissed. On April 25, 2003, the defendants, including the Mirant Defendants, filed demurrers to the Complaint.³ Id. at ¶ 2. On July 8, 2003, the court sustained the defendants’ demurrers and dismissed the Complaint with leave to amend. Id., Ex. A. Because the court in Bustamante did not specify a date by which the amendment was required to be filed, the amendment had to be filed no later than 10 days after the notice of ruling on the demurer was served on Bustamante. See Cal. Civ. Proc. Code § 472a(c), (d); Cal. Rule of Court 325(e). Id. at ¶ 2. Defendants served Bustamante with the notice of the ruling on the demurrer on July 15, 2003, by United States mail, which extended the time for Bustamante to file an amended complaint for five additional days. Id. Consequently, Bustamante had until July 30, 2003, to amend his Complaint. Id.

9. The Mirant Defendants Notified Bustamante Of The Automatic Stay. As noted, the Mirant Defendants filed petitions for bankruptcy on the Petition Date. On July 29, 2003, the Mirant Defendants filed a Suggestion of Stay and served a copy on all parties in Bustamante

³ A demurrer is roughly the California state court equivalent of a motion to dismiss under FRCP 12(b)(6).

notifying them of the Bankruptcy Petitions and the automatic stay pursuant to Bankruptcy Code section 362. Id. at ¶ 4, Ex. C. The Suggestion of Stay included a copy of this Court’s July 16, 2003 Order directing compliance with the automatic stay mandated by section 362 of the Bankruptcy Code. Id. at ¶ 4. That Order enjoined all persons from “commencing or continuing . . . any judicial . . . proceeding against any of the debtors.” Id., Ex. C.

10. Bustamante Failed To Comply With The July 30, 2003 Deadline To File His Amended Complaint. Bustamante did not comply with the July 30, 2003, deadline to file his amended Complaint. Id. at ¶ 5. On August 12, 2003, the defendants, other than the Mirant Defendants, filed an *ex parte* application requesting that the court dismiss the action with prejudice.⁴ Id. On August 13, 2003, Bustamante filed his opposition to the defendants’ *ex parte* application (“*Ex Parte* Opposition”), attaching a declaration from Michael C. Eyerly (“Eyerly Declaration”), one of the attorneys for Bustamante. Id., Exs. D and E. In paragraph 5 of his declaration, Mr. Eyerly states that “[o]n July 31, 2003, our office received notice that the Mirant entities, named as defendants herein, filed for Chapter 11 bankruptcy relief in the United State Bankruptcy Court for the Northern District of Texas.” Id., Ex. E. On page 2 of his *Ex Parte* Opposition, Bustamante states that “[t]he bankruptcy filing stays the instant action” and stated “[a]s such, thereafter Plaintiff did not file his First Amended Complaint.” Id. Bustamante further stated:

Plaintiff believes this action is stayed, but because the *ex parte* application may be decided without a hearing, Plaintiff has filed this written opposition and has also filed his First Amended Complaint.

Id. On August 13, 2003, Bustamante filed a First Amended Complaint naming, among others, the Mirant Defendants. Id. at ¶ 6, Ex. F.

⁴ The Mirant Defendants did not join in the application because the Bustamante case was stayed as to them.

11. Mirant Defendants Contacted Bustamante Regarding His Stay Violation. On August 14, 2003, Bryan Merryman, a partner with the law firm of White & Case LLP, the attorneys of record for the Mirant Defendants in the Bustamante action, sent Raymond Boucher, the lead attorney for Bustamante, a letter reminding him of the Mirant Defendants' Bankruptcy Petitions, the significance of the automatic stay in place, and this Court's July 16, 2003, Order requiring compliance with the automatic stay. Id. at ¶ 7., Ex. G. The letter stated:

Your failure to dismiss the Mirant Defendants would constitute a willful violation of the automatic stay, subjecting you to payment of actual damages, punitive damages, costs and attorney fees, and could subject you to contempt of the Bankruptcy Court for violating its Order and the automatic stay after having been warned of the scope and applicability of the stay.

Id. Mr. Merryman asked counsel for Bustamante to immediately dismiss the Mirant Defendants. Bustamante did not dismiss the Mirant Defendants. Id. at ¶ 7. Neither Mr. Boucher nor other counsel for Bustamante responded to the August 14, 2003, letter. Id.

12. On September 2, 2003, Mr. Merryman sent Mr. Boucher another letter repeating the prior notifications of the Bankruptcy Petitions and the resulting automatic stay, and attaching a copy of his earlier letter of August 14, 2003, and a partially completed Request for Dismissal without prejudice of the First Amended Complaint as to the Mirant Defendants.⁵ Id. at ¶ 8, Ex. H. Bustamante did not dismiss the Mirant Defendants and neither Mr. Boucher nor other counsel for Bustamante responded to the September 2, 2003, letter. Id. at ¶ 8. Nor has Bustamante's counsel responded to any calls from the Debtors' counsel. Id. at ¶ 9.

RELIEF REQUESTED AND BASIS THEREFOR

13. By this Motion, the Debtors request that this Court enter an Order pursuant to section 105(a) of the Bankruptcy Code and rule 9020 of the Federal Rules of Bankruptcy

⁵ A Request for Dismissal is the form used in California state court to dismiss a defendant from a lawsuit. A dismissal without prejudice allows a plaintiff to file his claim later against the same defendant.

Procedure (the “Bankruptcy Rules”): (1) holding that Bustamante is in civil contempt for having violated the automatic stay of section 362 of the Bankruptcy Code; (2) allowing Bustamante to cure the contempt by immediately withdrawing the First Amended Complaint against the Mirant Defendants and terminating all proceedings against them; and (3) assessing appropriate sanctions for this civil contempt.

14. Stay Violations. By filing the First Amended Complaint against the Debtors, Bustamante has violated the automatic stay imposed by section 362. Section 362 operates as a stay, applicable to all entities of:

(1) the commencement or continuation, including the issuance or process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

...

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

...

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

11 U.S.C. § 362(a)(1), (3), (6).

15. By filing the First Amended Complaint, Bustamante has commenced an action or proceeding against the Debtors to recover a claim against the Debtors that arose before the commencement of the case under Chapter 11.⁶ Bustamante seeks to recover damages allegedly caused by the Mirant Defendants’ purportedly artificially inflating natural gas prices.

⁶ Section 101(5) Bankruptcy Code defines a “claim” as:

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach or performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

Bustamante's claim arose before the commencement of the Debtors' bankruptcy cases. Therefore, Bustamante's conduct violates section 362(a)(1) of the Bankruptcy Code.

16. Moreover, the filing of the First Amended Complaint violates the automatic stay pursuant to section 362(a)(3). In addition to damages, Bustamante seeks restitution and to disgorge profits of the Debtors. The funds and profits Bustamante seeks to recover in the First Amended Complaint constitute property of the estate. Thus, by filing the First Amended Complaint and attempting to seek restitution and disgorgement, Bustamante attempts to exercise control over property of the Debtors' estate in violation of section 362(a)(3).

17. Filing the First Amended Complaint against the Mirant Defendants also violates the automatic stay under section 362(a)(6), which provides "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title" is enjoined. The filing of the First Amended Complaint is an act to recover damages based on claims that arose prior to the Debtors' petitions for bankruptcy.

18. Contempt. By (i) filing the First Amended Complaint with knowledge of the automatic stay and knowledge of the First Amended Complaint's violation of the automatic stay; and (ii) refusing to dismiss the First Amended Complaint, Bustamante is in contempt of this Court for his willful violation of the automatic stay. This Court has the power to conduct civil contempt proceedings and issue orders in accordance with those proceedings pursuant to section 105 of the Bankruptcy Code. *Placid Refining Co. v. Terrebonne Fuel & Lube, Inc.* (*In re Terrebonne Fuel & Lube, Inc.*), 108 F.3d 609, 613 (5th Cir. 1997). The enforcement of the automatic stay by contempt-type proceedings constitutes a core matter over which this Court has jurisdiction to enter a final order. *In re Abercrombie*, 156 B.R. 782, 783 (Bankr. N.D. Tex. 1993).

19. A willful violation of the stay does not require a specific intent to violate the automatic stay. It is sufficient that the creditor knew of the automatic stay and that the creditor's actions were intentional. *Nissan Motor Acceptance Corp. v. Baker*, 239 B.R. 484, 488 (Bankr. N.D. Texas 1999); *see also Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 191 (9th Cir. 1995); *Cuffee v. Atl. Bus. & Comty. Dev. Corp. (In re Atl. Bus. & Comty. Dev. Corp.)*, 901 F.2d 325, 329 (3rd Cir. 1990). Knowledge of the bankruptcy filing is the legal equivalent of knowledge of the automatic stay because, once a party is informed of a bankruptcy filing, that party is under an affirmative duty to seek further information, which would reveal the scope and applicability of the automatic stay. *Coats v. Vawter (In re Coats)*, 168 B.R. 159, 166 (Bankr. S.D. Tex. 1993).

20. In this case, Bustamante's actions are a clear and continuing violation of the stay. Bustamante clearly had knowledge of the bankruptcy filing and of this Court's Order directing the parties to comply with the automatic stay. Pongetti Decl. ¶ 4. Despite having such knowledge, Bustamante proceeded to file a First Amended Complaint against the Mirant Defendants. *Id.* at ¶ 6. Bustamante continues to violate the automatic stay by refusing to dismiss the First Amended Complaint against the Mirant Debtors despite receiving numerous notices from Debtors' counsel that Bustamante's actions violate this Court's Order. *Id.* at ¶¶ 7-9. By filing the First Amended Complaint with knowledge of the automatic stay, Bustamante intentionally violated the automatic stay, and continues to willfully do so by refusing to dismiss the Mirant Defendants from the First Amended Complaint. Bustamante is thus in contempt.

21. Cure. The Debtors request that the Court enter an Order which provides that Bustamante may cure this civil contempt by immediately dismissing the Mirant Defendants from the First Amended Complaint.

22. Sanctions. The Debtors are entitled to recover from Bustamante their costs and attorneys' fees incurred in connection with bringing this Motion. *See In re Abacus Broadcasting Corp.*, 150 B.R. 925 (Bankr. W.D. Tex. 1993) (corporate debtor may seek costs and attorneys' fees pursuant to the court's contempt powers under 11 U.S.C. § 105(a)). Bustamante should be held in contempt of this Court and should be required, pursuant to this Court's equitable powers under section 105(a), to pay all of the Debtors' costs and reasonable attorneys' fees incurred in connection with this Motion. Bustamante had actual knowledge of the Debtors' bankruptcy filings and the automatic stay, knowingly and willfully filed the First Amended Complaint naming the Mirant Defendants to recover a prepetition claim, and has refused to dismiss the Mirant Defendants from the First Amended Complaint. As such, Bustamante is in contempt of this Court and should be brought to bear the consequences of that contempt by reimbursing the Debtors' costs and reasonable attorneys' fees incurred in connection with this Motion. The Debtors request that the Court issue an order assessing appropriate sanctions.

CONCLUSION

Based on the foregoing, the Debtors request that this Court grant the relief requested herein and such other relief that is necessary and appropriate.

RESPECTFULLY SUBMITTED THIS 25th DAY OF SEPTEMBER, 2003.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he provided true and correct copies of the forgoing to Bankruptcy Services, LLC and directed them to effect service upon all persons on the Limited Service List (without exhibits) and the addressees set forth below (with exhibits) via United States mail on the 25nd day of September, 2003.

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