

Kevin M. Lippman, Esq.
Texas Bar No. 00784479
J. David Leamon, Esq.
Texas Bar No. 24038025
MUNSCH HARDT KOPF & HARR, P.C.
4000 Fountain Place
1445 Ross Avenue
Dallas, Texas 75202-2790
Telephone: (214) 855-7500
Telecopier: (214) 855-7584

Attorneys for County of Rockland, State of New York

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

| | | |
|-------------------------------------|---|---------------------------------|
| In re: | § | Chapter 11 Case |
| | § | |
| MIRANT CORPORATION, <u>et al.</u> , | § | Case No. 03-46590 (DML) |
| | § | Jointly Administered |
| Debtors. | § | |
| | § | Hearing Date: December 10, 2003 |
| | § | Hearing Time: 10:30 a.m. |

**MOTION OF COUNTY OF ROCKLAND TO STRIKE
AFFIDAVIT OF JAMES J. BARRIERE, ESQ. IN SUPPORT OF
DEBTORS' OMNIBUS RESPONSE TO JURISDICTIONAL CHALLENGES**

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

The County of Rockland ("Rockland") files this Motion to Strike (the "Motion") the Affidavit of James J. Barriere, Esq. (the "Barriere Affidavit") in Support of Debtors' Omnibus Response (the "Omnibus Response") to the Jurisdictional Challenges to Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a) and 505(a) for the Determination of Tax Liability (the "505 Motion"), and in support thereof, respectfully shows the following:

I.

BACKGROUND

1. Debtors Mirant New York, Inc., Mirant NY-Gen, LLC, Mirant Bowline, LLC, and Mirant Lovett, LLC (collectively, the "Debtors") filed the 505 Motion on September 30, 2003. On October 29, 2003, the Court held an initial hearing on the 505 Motion, after which it conducted an "in chambers" conference among counsel for Debtors and certain of the New York taxing

authorities, including Rockland, during which it was generally agreed that the procedural and jurisdictional issues raised by the 505 Motion needed to be resolved before, and separately from, the substantive valuation issues contemplated in the 505 Motion, which ultimately resulted in the Court's Omnibus Scheduling Order and Discovery Plan dated October 30, 2003 (the "Scheduling Order").

2. Pursuant to the Scheduling Order, Rockland and several other of the taxing authorities filed responsive pleadings relating to these threshold jurisdictional issues on or about November 21, 2003. On December 2, 2003, Debtors filed their Omnibus Response to this collective body of responsive pleadings. Debtors submitted the Barriere Affidavit and the Declaration of Mark D. Lansing, Esq. (the "Lansing Declaration") as exhibits to the Omnibus Response.¹

3. By letter dated December 8, 2003, this Court issued its guidance to the Debtors and the various taxing authorities regarding the December 10, 2003 hearing on the 505 Motion, indicating therein that the issues at bar are primarily "whether section 505(a)(2) prevents [this Court] from hearing the tax matters described in the [505] Motion" and "whether, under section 505(a)(1)'s permissive standard, [this Court] should hear the [505] Motion." (emphasis in original).

II.

SUMMARY OF MOTION

4. Pursuant to the Scheduling Order, the only issues currently before the Court on the 505 Motion are questions of law, specifically, whether the Court has jurisdiction to adjudicate the 505 Motion, and, if so, whether the Court should exercise, or abstain from exercising, such jurisdiction. Debtors have asserted in its Omnibus Response that the BAR review process, as applied to O&R and Debtors by 41 different BARs, denied O&R and Debtors adequate due

¹ Rockland independently seeks to have the Court strike the Lansing Declaration pursuant to a contemporaneously filed motion to strike.

process, which it attempts to support with the Barriere Affidavit. The Barriere Affidavit, however, does not meet the threshold requirements for admissibility under the Federal Rules of Evidence (the “FRE”) because it contains statements that are irrelevant, are based on hearsay or otherwise fail to satisfy the requirements for admissibility for lay opinion testimony. Accordingly, the Court should strike the Barriere Affidavit from the record.

III.

ARGUMENT AND AUTHORITY

5. On a macro level, Barriere states in paragraph 20 of the Barriere Affidavit that he has represented the Debtors "in these matters" since 2000. Thus, to the extent Barriere's statements in the Barriere Affidavit purport to apply to any of the BAR proceedings prior to 2000, such statements are inadmissible as hearsay under FRE 802 because they are not based on Barriere's first-hand knowledge of personal observations of those BAR proceedings.

6. Paragraph 11 of the Barriere Affidavit states:

Section 525 requires the local BAR to meet and consider assessment complaints on Grievance Day. In a given township, there may be hundreds of residential and commercial complaints filed on Grievance Day. Nevertheless, the statute requires the BAR to meet and review them all on that one day. As a result, the BAR cannot substantively consider the Debtors' complaints in any meaningful way but still must make a determination on such complaints.

7. These statements should be stricken because they are not admissible as a lay opinion under FRE 701 because such opinions and inferences are not rationally based on Barriere's first-hand perception of the 41 BAR proceedings that served as the basis of the 41 tax certiorari proceedings.² See, e.g., Dijo, Inc. v. Hilton Hotels, Corp., 2003 U.S. App. LEXIS 23719, *16 (5th Cir. Nov. 20, 2003) ("it has always been the rule that lay opinion testimony may

² FRE 701 provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

be elicited only if it is based on the witness's first-hand knowledge or observations"). This is insufficient to make Barriere's opinions admissible because "a lay opinion must be based on personal perception, must be one that a normal person would form from those perceptions, and must be helpful to the jury." Miss. Chem. Corp. v. Dresser-Rand Co., 287 F.3d 359, 373 (5th Cir. 2002). Furthermore, the opinion must have a rational connection to those facts. Id. Speculative opinion testimony by lay witnesses is generally considered inadmissible. Washington v. Department of Transp., 8 F.3d 296, 300 (5th Cir. 1993).

8. Barriere has not demonstrated that he was present at any, much less all, of the 41 BAR hearings upon which he bases this opinion. There is no direct testimony that Barriere has first-hand knowledge that there were "hundreds" of complaints before each of the 41 BARs in question, nor any direct testimony by Barriere that he has first-hand knowledge that the 41 BARs failed to "substantively consider" O&R and Debtors' complaints. Rather, these statements merely represent Barriere's speculative conclusion on the qualitative nature of the BAR proceedings, which is inadmissible. See Washington, 8 F.3d at 300. The statements in paragraph 11 are also inadmissible because they have not been authenticated as required under FRE 901.

9. Paragraph 12 of the Barriere Affidavit states, in relevant part, that:

In my experience, I have found that most petitioners to the BAR and their counsel are aware that the BAR process is no more than a routine procedure that is followed in order to get their grievance into court. . . . As a result, most petitioners have their complaints duly filed on Grievance Day with the understanding that this is merely a perfunctory step towards getting their grievance into court.

10. These statements are inadmissible as hearsay under FRE 801 because they are based on what Barriere believes is the understanding of "most petitioners" and "their counsel." Likewise, because the opinion expressed by these statements is based upon the understanding of others, and not upon the first-hand knowledge or observations of Barriere, the opinion is inadmissible under FRE 701. Even if not barred under FRE 802, these statements are inadmissible under FRE 401 and 402 because the understanding of unrelated third party

petitioners and their counsel is wholly irrelevant to the determination of whether each of the 41 particular BAR proceedings involving O&R or the Debtors' satisfied the statutory requirements of Article 5 of the NYRPTL.³ The understanding of such other petitioners and counsel is also irrelevant to a determination of the legal issue of whether a proceeding under Article 5 of the NYRPTL constitutes a contest and adjudication under section 505(a)(2) of the Bankruptcy Code. As such, these statements do not have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the statements. These statements have also not been properly authenticated under FRE 901. Accordingly, these statements are inadmissible.

11. Paragraph 13 of the Barriere Affidavit states, in relevant part, that:

a petitioner is given no rights at all with regard to the conduct of the BAR process. It may not pose questions to the assessor or BAR, conduct any discovery, or compel a hearing on the merits of its complaint.

12. These statements are inadmissible as a lay opinion under FRE 701 because they are not based upon Barriere's first-hand knowledge. These statements do not represent Barriere's personal observation that each of the 41 BARs in question prohibited O&R or the Debtors from asking questions, that O&R or the Debtors sought, and were categorically denied, any discovery, or that O&R or the Debtors' requested a separate or additional hearing and were denied. Rather, these statements are just another speculative opinion relating to Article 5 of the NYRPTL and are not based on first-hand knowledge, and thus do not have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the statements under FRE 401 and 402. Accordingly, these statements are inadmissible.

³ Evidence is admissible only if it is relevant. FRE 402 (2003). FRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FRE 401 (2003).

13. Paragraph 14 of the Barriere Affidavit states, in relevant part, that:

With respect to the Adversary Proceedings for 1995 to 2002, the relevant BARs conducted no hearings and took no testimony. No inquiry was made into the substantive merits of Debtors' claims and no opportunity to appear before the BAR in support of its claim was afforded.

14. Taken on their face, these statements directly contradict O&R's and the Debtors' prior judicial admissions contained in their 41 tax certiorari petitions that O&R and the Debtors filed grievances with the BARs, hearings were held and no change was made to the assessments in question. See, e.g., In re Application of Mirant New York, Inc. v. The Assessor of the Town of Stony Point, et al., in the Supreme Court of the State of New York, County of Rockland, Index No. 4696/01, filed Jul. 27, 2001 at ¶ 6 ("said Assessment Board of Review received and acted upon said protest and application for reduction of assessment"). If Barriere's statement that O&R or the Debtors were given "no opportunity to appear before the BAR" is true, then the representations made by O&R and the Debtors in their tax certiorari petitions would have to be false. Likewise, in the footnote to paragraph 14 of the Barriere Affidavit, Barriere admits that "[s]ome of the BARs requested documents," thus undermining his own blanket statement that no inquiry was made. Regardless, the statements are also otherwise inadmissible under the FRE.

15. These statements are inadmissible as a lay opinion under FRE 701 because they are not based upon Barriere's first-hand knowledge or personal observation that each of the 41 BARs held "no hearing" on the grievances filed by O&R and the Debtors. Likewise, Barriere fails to show that he directly observed the failure of each of the 41 BARs to take testimony. Furthermore, to the extent that the BARs are not required under New York law to affirmatively take testimony, these statements are irrelevant because they do not have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the statements. These statements are also inadmissible as hearsay under FRE 801 to the extent they purport to provide testimony

regarding BAR proceedings that predate Barriere's representation of the Debtors. Accordingly, these statements are inadmissible.

16. Barriere's opinions in the footnote to paragraph 14 are also inadmissible. The entire text of the footnote reads:

Some of the BARs requested documents relating to Debtor's operating income and expenses, but inasmuch as the data provided supported the fact that the subject facilities were not operating at a profit, Debtor does not believe the information was a factor in the BARs ultimate decision to reject Debtor's complaints and simply adopt the values assigned by their assessor.

17. The statement that "Debtor does not believe the information was a factor in the BARs ultimate decision" is inadmissible because it is not based upon Barriere's first-hand knowledge or personal observation of the BAR deliberations, and is thus not an admissible lay opinion testimony under FRE 701. These statements are also irrelevant under FRE 401 and 402 because these statements do not have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the statements.

18. Paragraph 16 of the Barriere Affidavit states, in relevant part, that:

Unlike the Article 7 proceedings considered in the Cody, Inc. v. County of Orange and Town of Woodbury, 281 B.R. 182 (Bankr. S.D.N.Y. 2003) case relied on by the Taxing Authorities, all of the instant proceedings were still pending in state court at the time Debtors filed their chapter 11 petitions. None of the proceedings in any of the tax years has been finally adjudicated.

19. These statements are inadmissible as a lay opinion under FRE 701 because the opinion offered, that none of the tax certiorari proceedings "has been finally adjudicated," is not based on Barriere's first-hand knowledge, but rather is an inadmissible speculative conclusion on an ultimate issue of law. See Washington, 8 F.3d at 300.

20. Paragraph 21 of the Barriere Affidavit states that:

I believe the Taxing Authorities are simply wrong by averring that these matters could go to trial within three or four months in New York State court. In my estimation, the earliest these matters could be tried in New York State court is late 2004 early 2005.

21. Barriere's opinion regarding trial dates are inadmissible under FRE 401, 402 and 701 because they are mere speculation not predicated upon Barriere's first-hand knowledge of particular facts and do not have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the statements. See Washington, 8 F.3d at 300.

IV. PRAYER

WHEREFORE, for the foregoing reasons, Rockland respectfully prays that this Court enter an order striking the Barriere Affidavit, and that this Court grant Rockland such other and further relief as it may be justly entitled.

Respectfully submitted,

By: 

Kevin M. Lippman, Esq.
Texas Bar No. 00784479
J. David Leamon, Esq.
Texas Bar No. 24038025
MUNSCH HARDT KOPF & HARR, P.C.
4000 Fountain Place
1445 Ross Avenue
Dallas, Texas 75202-2790
Telephone: (214) 855-7500
Telecopier: (214) 855-7584
Email: klippman@munsch.com
Email: dleamon@munsch.com

**ATTORNEYS FOR COUNTY OF
ROCKLAND, STATE OF NEW YORK**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of December, 2003, a true and correct copy of the foregoing document and exhibit was served upon each of the parties listed on the attached service list via facsimile and United States first class mail, postage prepaid.

By: 
J. David Leamon

SERVICE LIST

Robin E. Phelan
Judith Elkin
Haynes and Boone LLP
901 Main Street, Suite 3100
Dallas, Texas 75202
Fax 214/651-5940

Thomas E. Lauria
White & Case LLP
Wachovia Financial Center
200 South Biscayne Blvd.
Miami, Florida 33131
Fax: 305/358-5744

Gregory M. Petrick
Cadwalader, Wickersham and Taft
100 Maiden Lane
New York, NY 10038
Fax: 212/504-6666

Mark A. Weistbart, Esq.
Kessler & Collins, P.C.
5950 Sherry Lane
Suite 222
Dallas, TX 75225
Fax: 214/373-4714

Jonathan P. Nye
Whiteman, Osterman & Hanna
One Commerce Plaza
Albany, New York 12210
Fax: 518/487-7777

Frank J. Phillips, Esq.
Town of Stony Point
50 Route 9W
Monte Plaza
Stony Point, NY 10980
Fax: 845/786-7207

Mark G. Ledwin, Esq.
Wilson, Elser, Moskowitz, Edelman &
Dicker LLP
3 Gannett Drive
White Plains, NY 10604
Fax: 914/323-7001

Thomas J. Cawley, Esq.
Sullivan County Department of Law
100 North Street
P.O. Box 5012
Monticello, NY 12701
Fax: 845/794-4924

Walter F. Garigliano, Esq.
Garigliano Law Offices, LLP
449 Broadway - P.O. Drawer 1069
Monticello, NY 12701-1069
Fax: 845/796-1040

John S. Edwards, Esquire
Tracy & Edwards
317 Little Tor Road South
New City, NY 10956
Fax: 845/634-6538

George McElreath
Assistant U.S. Trustee
U.S. Courthouse, Room 9-C-60
1100 Commerce Street
Dallas, Texas 75242
Fax: 214/767-8971

Karen Ann Alinauskas
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017
Fax: 212/455-2502

Deborah D. Williamson
Cox & Smith
112 E. Pecan St., Suite 1800
San Antonio, TX 78205
Fax: 210/226-8395

John Mitchell
Vinson & Elkins L.L.P.
2001 Ross Avenue
3700 Trammell Crow Center
Dallas, TX 75201
Fax: 214/220-7716

Fina Del Principio
County of Rockland
Office of the County Attorney
11 New Hempstead Road
New City, New York 10956
Fax: 845/638-5676

James K. Riley, Esq.
O'Connell & Riley
144 East Central Avenue
Pearl River, NY 10965-2532
Fax: 845/620-0722

R. Douglas Noah, Jr., Esq.
Wilson, Elser, Moskowitz, Edelman &
Dicker LLP
5000 Renaissance Tower
1201 Elm Street
Dallas, TX 75270
Fax: 214/698-1101

Henri Shawn, Esq.
Shawn Law Offices
30 North Street
P.O. Box 1320
Monticello, NY 12701-1320
Fax: 845/791-4660

Michael L. Carey, Esq.
Jacobowitz and Gubits, LLP
158 Orange Avenue-P.O. Box 367
Walden, NY 12586
Fax: 845/778-5173

Craig Averch
Michelle C. Campbell
White & Case LLP
633 West Fifth St.
Los Angeles, CA 90071
Fax: 213/687-0758

Jason S. Brookner
Andrews & Kurth
1717 Main St., Suite 3700
Dallas, TX 75201
Fax: 214/659-4829

Morton I. Baum
Baum Law Offices LLP
254 Broadway
P.O. Box 1260
Monticello, NY 12701
Fax: 845/794-5763

Eric J. Taube
Hohmann, Taube & Summers, L.L.P.
100 Congress Ave., Suite 1600
Austin, TX 78701
Fax: 512/472-5248

Jonathan S. Krueger, Esq.
Vinson & Elkins LLP
666 Fifth Avenue, 27th Floor
New York, NY 10103-0040
Fax: 917/206-8100

Paul A. Feigenbaum, Esq.
Segal, Goldman, Mazzotta & Siegel, PC
9 Washington Square
Albany, NY 12205
Fax: 518/452-0417

Glen A. Plotsky, Esq.
Bavoso & Plotsky
19 East Main Street
P.O. Box 3139
Port Jervis, NY 12771
Fax: 845/858-8002

Alan Simon
Village of Hillburn
83 South Main Street
Spring Valley, NY 10977
Fax: 845/356-0755

Dale Wootton, Esq.
5306 Junius
Dallas, TX 75214
Fax: 214/824-5281