

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
DECLARATION OF MARK D. LANSING, 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 Declaration of Mark D. Lansing, Esq. (the "Lansing Declaration") 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, and 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.¹ Debtors submitted the Lansing Declaration and the Affidavit of James J. Barriere, Esq. (the "Barriere Affidavit") as exhibits to the Omnibus Response.²

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 and this Court's guidance, the first question presently before the Court is whether section 505(a)(2) prevents this Court from hearing the tax matters described in the 505 Motion. The Debtors have asserted that the conduct of the 41 BARs that heard the grievances of O&R and the Debtors did not properly comply with the

¹ The Debtors filed an amended version of the Omnibus Objection on December 5, 2003, which added an index and table of contents but otherwise appears to be substantively identical to the originally filed version.

² Rockland independently seeks to have the Court strike the Barriere Affidavit pursuant to a contemporaneously filed motion to strike.

applicable law, such that O&R and the Debtors were denied due process, thus precluding a finding that a contest and adjudication occurred. 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 ¶ 9(f) ("the assessment has been arbitrarily maintained by the Assessor"); id. at ¶ 19 ("the assessments under challenge herein, are illegal and unconstitutional, as violative of the Due Process and Equal Protection Clauses of the Federal and New York Constitutions"). The second question presently before the Court, whether, under section 505(a)(1)'s permissive standard, this Court should hear the 505 Motion, is a mixed question of law and fact in that the generally accepted legal standard for determining whether a court should decline to exercise jurisdiction under section 505(a)(1) involves a six-factor factual inquiry. See, e.g., *In re Cody, Inc.*, 281 B.R. 182, 192-193 (S.D.N.Y. 2002).³

5. None of the statements contained in the Lansing Declaration are admissible for purposes of the Court's present inquiry because they lack any tendency to make the existence of any fact that is of consequence to the determination of either of these two questions more probable or less probable than it would be without the statements. Many of the statements in the Lansing Declaration are also inadmissible on other grounds, including that they are based on hearsay, fail to satisfy the requirements for admissibility for lay opinion testimony, or are essentially legal arguments and conclusions that are not otherwise admissible under the Federal Rules of Evidence (the "FRE"). Accordingly, the Court should strike the Lansing Declaration from the record.

³ The six factors are: (i) The complexity of the tax issues to be decided; (ii) The need to administer the bankruptcy case in an orderly and efficient manner; (iii) The burden on the bankruptcy court's docket; (iv) The length of time required for trial and decision; (v) The asset and liability structure of the debtor; (vi) The prejudice to the debtor relative to the prejudice to the taxing authority from inconsistent assessments.

III.

ARGUMENT AND AUTHORITY

A. Standard

6. 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) (emphasis added). An opinion by a non-expert is only admissible as lay opinion testimony if such opinion is rationally based on the perception of the witness, helpful to a clear understanding of the witness' testimony or the determination of a fact in issue and not based on scientific, technical, or other specialized knowledge within the scope of FRE 702. See FRE 701. Such opinions must be rationally based upon Lansing's first-hand knowledge and personal observations of the 41 BARs at issue. 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 be elicited only if it is based on the witness's first-hand knowledge or observations"); see also Miss. Chem. Corp. v. Dresser-Rand Co., 287 F.3d 359, 373 (5th Cir. 2002) ("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"). Furthermore, the opinion must have a rational connection to those facts. Miss. Chem. Corp., 287 F.3d at 373. Merely speculative lay witness opinion testimony is inadmissible. See Washington v. Department of Transp., 8 F.3d 296, 300 (5th Cir. 1993).

B. Specific Objections

7. The statements in paragraph 5 of the Lansing Declaration are inadmissible as mere speculation that the BAR review process does not constitute a contest and adjudication for purposes of section 505(a)(2) of the Bankruptcy Code, and such statements do not have any tendency to make the existence of any fact that is of consequence to the determination of the

issues presently before the Court more probable or less probable than it would be without the evidence. See Washington, 8 F.3d at 300. See FRE 401, 402 and 701.

8. The statements in paragraph 6 of the Lansing Declaration are inadmissible on several grounds. First, the statements contain and are predicated upon hearsay, which is inadmissible under FRE 802: “many BAR members have candidly stated” Second, several statements are inadmissible speculation: “[n]one of the BAR members that I have appeared before had any knowledge,” and “BAR members simply relied upon the assessor.” Washington, 8 F.3d at 300. The Lansing Declaration is silent on its face as to how Lansing came to have such knowledge about the BAR members lack thereof, and, even if true, the statements are irrelevant under FRE 401 and 402 because they do not have any tendency to make the existence of any fact, specifically the knowledge of the members of the 41 BARs in question, more probable or less probable than it would be without the evidence.

9. The statements in paragraph 6 of the Lansing Declaration are also not admissible as lay opinion testimony under FRE 701 because they are not based upon Lansing's first-hand knowledge or observations of the qualifications and knowledge of the members of the 41 BARs in question See Dijo, Inc., 2003 U.S. App. LEXIS 23719 at *16. That Lansing has “appeared before of number of different BARs” or that other “BARs engaged in little or no dialogue” is of no consequence to the Court's determination of the questions presently before the Court, or whether O&R's or the Debtors' were afforded adequate due process during each of the 41 BAR review proceedings underlying their claims. The Lansing Declaration does not contain direct testimony that the 41 BARs “engaged in little or no dialogue” or that the 41 BARs in question did not have “any knowledge regarding the valuation of an electric generation station.”

10. The statement in paragraph 7 that “the BAR has been a mere rubber stamp” is inadmissible under FRE 401 because the statement has no tendency to make the existence of any fact that is of consequence to the determination of the issues at bar more probable or less

probable than it would be without the statements. The statement is not admissible under FRE 701 because it is not predicated on Lansing's first-hand knowledge of the 41 BARs in question and is inadmissible speculation.

11. The statement in paragraph 8 that the "BAR members were not familiar with the basic terms and concepts" is based upon hearsay that is inadmissible under FRE 802. The statement is also inadmissible under FRE 401 and 402, because even taken at face value, the lack of familiarity of certain concepts by members of one BAR has no bearing on whether, or to what degree, the members of the 41 BARs at issue were "familiar with the basic terms and concepts."

12. The statements in paragraph 9 are inadmissible as legal arguments that have no tendency to make the existence of any fact that is of consequence to the determination of the issues at bar more probable or less probable than it would be without the statements. Such arguments are not properly submitted as fact evidence, and are not admissible as lay opinion testimony under FRE 701 because the statement is not predicated upon Lansing's first-hand knowledge or personal observations, but rather are based upon his interpretation of an opinion of the New York Court of Appeals.

13. The statement in paragraph 9 that the "BARs have never applied the income or sales comparison approach to valuation for electric general stations" is inadmissible speculation, and is also irrelevant. Washington, 8 F.3d at 300; FRE 401, 402. The actions of BARs other than the 41 in question are irrelevant to the issues before the Court, thus inadmissible under FRE 401. Furthermore, such statements go to the substantive nature of the 505 Motion and are not properly before the Court for consideration at this time.

14. The statement in paragraph 10 is inadmissible because it is Lansing's personal opinion about a point of law, and is not predicated upon Lansing's first-hand knowledge or personal observations of whether the 41 BARs in question conducted "a meaningful review of challenges." The statement in paragraph 10 contributes nothing to the factual inquiry of whether

a particular BAR out of the 41 at issue conducted a meaningful review of O&R's or the Debtors' challenges, nor does Lansing's lay opinion, notwithstanding its inadmissibility under FRE 701, have any bearing on the answer to the first question regarding the fundamental interplay of proceedings under Article 5 of the NYRPTL and section 505(a)(2) of the Bankruptcy Code.

15. The statements in paragraphs 11 through 13 are not admissible as lay opinion testimony under FRE 701 because Lansing's opinion is not based on first-hand knowledge or personal observation, but rather are Lansing's conjecture of what he thinks the law says and what he thinks the intent behind the law is. See, e.g., Lansing Declaration at ¶ 11 ("If the statutory construct truly conceived that the BAR meeting constituted an adjudication, it would not have established . . .") (emphasis added); id. at ¶ 12 ("New York law and procedure reveal," "New York law recognized") (emphasis added); id. at ¶ 13 ("the Real Property Tax Law recognized") (emphasis added). The statements in paragraphs 11 through 13 may be appropriate for pleadings or oral argument by counsel, but they do not satisfy the FRE requirements for admissible evidence, and are also inadmissible as mere speculation. See Washington, 8 F.3d at 300.

16. The statements in paragraphs 14 through 16 are inadmissible because they are legal arguments based upon Lansing's personal interpretation of the NYRPTL, and are not lay opinion testimony based upon Lansing's first-hand knowledge or personal observations of what transpired during the 41 BAR proceedings at issue. As with the statements paragraphs in 11 through 13, the statements in paragraphs 14 through 16 are inadmissible under FRE 401 and 402 because they have no tendency to make the existence of any fact that is of consequence to the determination of the issues before the Court more probable or less probable than it would be without the statements. The statements in paragraphs 14 through 16 are also inadmissible as speculation. See Washington, 8 F.3d at 300

17. The statement in paragraph 17, which purports to evidence "the fact" that "both parties require, generally, four to six months to obtain a trial ready appraisal report," is not

admissible as lay opinion testimony under FRE 701 because it is not based upon Lansing's first-hand knowledge or personal observations regarding how long it will take in each of the 41 pending tax certiorari proceedings to "obtain a trial ready appraisal report," but rather represents Lansing's speculation about timing. Lansing does not offer direct testimony about how long it will take the Debtors to obtain such a report. Accordingly, the statements in paragraph 17 have no tendency to make the existence of any fact that is of consequence to the determination of the issues before the Court more probable or less probable than it would be without the statements, and are therefore inadmissible under FRE 401 and 402. The statements in paragraph 17 are also inadmissible as speculation. See Washington, 8 F.3d at 300.

18. The statements in paragraphs 18 are inadmissible hearsay under FRE 802. Specifically, Lansing's testimony that "the Town vehemently argued;" the "Town argued;" the "Town agreed;" and the "Town's insistence" are all inadmissible hearsay. These statements are not admissible as an exception to hearsay as an admission by a party opponent under FRE 801(d)(2) because it is facially impossible to tell from the Lansing Declaration who ostensibly made such statements that Lansing ascribes to the "Town."

19. The conclusionary statement in paragraph 18 is inadmissible because it is also predicated upon such hearsay. Furthermore, to the extent such conclusion is offered as lay opinion testimony, is not admissible under FRE 701 because the premise for which the conclusion stands, that a BAR "cannot determine the value of an electric generating station" without an appraisal report, is not based upon Lansing's first-hand knowledge or personal observation that any of the 41 BARs in question did not, in fact, have an appraisal report (such as from the assessor), or, that each of the 41 BARs were, in fact, unable to determine the value of O&R's and the Debtors' property without such a report. As with the majority of the statements in the Lansing Declaration, Lansing's conclusion may be appropriately found in the Debtors' pleadings or oral argument by counsel, but does not satisfy the FRE requirements for admissible evidence.

20. The statements in paragraph 19 are not admissible because they are based upon hearsay, are legal arguments and conclusions and do not have the tendency to make the existence of any fact that is of consequence to the determination of the issues before the Court more probable or less probable than it would be without the statements. First, Lansing's testimony regarding the contents of the Affidavit of Walter Gargliano is hearsay. While the Debtors can seek to refer to such Affidavit in its pleadings or oral arguments, its presence in Lansing's testimony renders it hearsay. Second, Lansing's generalized statement that "the BAR simply 'denies' the complaint for 'insufficient evidence,' by checking a box on a pre-printed form" is not admissible because, on its face, the statement is not shown to be based upon Lansing's first-hand observations or personal knowledge that each of the 41 BARs in question did "not engage in fact finding." Lansing Declaration at ¶ 19. Third, the statement is also not admissible because it purports to offer the contents of up to 41 separate documents as evidence without producing and authenticating the documents in question. See FRE 901, 1005. Lansing's conclusion that the 41 BARs in question did "not engage in fact finding" is also inadmissible as speculation. See Washington, 8 F.3d at 300.

21. The statements in paragraphs 20 and 21 of the Lansing Declaration are not admissible under FRE 401 and 402 because they are Lansing's legal arguments, opinions and conclusions about points of law, and do not have the tendency to make the existence of any fact that is of consequence to the determination of the issues before the Court more probable or less probable than it would be without the statements.

22. The statement that "Defendants also contend" in paragraph 22 is inadmissible as hearsay under FRE 802. The statement is not admissible as an exception to hearsay as an admission by a party opponent under FRE 801(d)(2) because the parties who so allegedly "contend" are not specifically identified. Also, the statements in paragraphs 22 and 23 are legal arguments, e.g., "New York law is straight forward and settled" and "the Court must apply," that may be appropriate in the Debtors' pleadings or oral arguments, but are not admissible as

evidence under the FRE. Such arguments are also not admissible as lay opinion under FRE 701 because they are speculation, not admissible lay opinion testimony. See Washington, 8 F.3d at 300.

23. The statement in paragraph 24 is not admissible under FRE 401 and 402 because it does not have the tendency to make the existence of any fact, e.g., the existence of a market for New York power generation plants or facts bearing on the valuation of the Debtors' property, that is of consequence to the determination of the issues before the Court more probable or less probable than it would be without this statement. The alleged "nationwide deregulation of the electric transmission grid," even hypothetically viewed as true, has nothing to do with the issues presently before the Court.

24. The statement in paragraph 25 is not admissible because it is a legal argument that does not have the tendency to make the existence of any fact that is of consequence to the determination of the issues before the Court more probable or less probable than it would be without this statement.

25. The testimony in paragraph 26 is not admissible because Lansing's opinion regarding "universally accepted appraisal practice" has not been properly authenticated under FRE 901, and is not properly the subject of lay opinion testimony. See FRE 901(b)(9) (authentication of a "Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result."). The Debtors have not offered Lansing as an expert in appraisal methods or practice, and Lansing's opinion is of the type based on scientific, technical, or other specialized knowledge within the scope of FRE 702, thus inadmissible under FRE 701.

26. The statements in paragraph 27 are not admissible because they are legal arguments that should be presented in the Debtors' pleadings or oral arguments, and do not satisfy the FRE requirements for admissible evidence because they do not have the tendency to

make the existence of any fact that is of consequence to the determination of the issues before the Court more probable or less probable than it would be without this statement.

27. The statements in paragraph 28 are not admissible because they purport to offer into evidence the contents of a public record, the court dockets of the New York courts where the 41 tax certiorari proceedings are pending, without offering a copy of such documents into evidence pursuant to FRE 1005.⁴ These statements are also not admissible because they are speculative. 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 Lansing Declaration, 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**

⁴ FRE 1005 states:

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

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

DALLAS 906428_1 7143.1

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