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PROPOSED ATTORNEYS FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF MIRANT AMERICAS GENERATION, LLC

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

In re	)	**Chapter 11 Case**
	)	
MIRANT CORPORATION, et al.,	)	**Case No. 03-46590 (DML)**
	)	
Debtors	)	**Jointly Administered**

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF MIRANT AMERICAS GENERATION, LLC TO THE DEBTORS' APPLICATION FOR ENTRY OF AN ORDER PURSUANT TO 11 U.S.C. §327(e) AUTHORIZING THE EMPLOYMENT AND RETENTION OF PAUL, HASTINGS, JANOVSKY & WALKER LLP AS SPECIAL COUNSEL FOR THE DEBTORS NUNC PRO TUNC TO THE PETITION DATE

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

The Official Committee of Unsecured Creditors of Mirant Americas Generation, LLC (the "MAGI Committee"), hereby submits this objection to the *Application for Entry of an Order Pursuant to 11 U.S.C. § 327(e) Authorizing the Employment and Retention of Paul, Hastings, Janovsky & Walker LLP* ("Paul Hastings") *as Special Counsel for the Debtors Nunc Pro Tunc to the Petition Date* (the "Application"). In support of this objection, the MAGI Committee respectfully represents as follows:

The Application to Employ Paul Hastings

1. On July 24, 2003, the Mirant Corporation ("Mirant") and its affiliated debtors (collectively, the "Debtors") filed the Application to employ Paul Hastings as special counsel for various purposes including representing the Debtors with respect to (i) ongoing collective bargaining negotiations; (ii) the sale of certain energy-producing projects; and (iii) "general corporate governance and operational matters." *See* Application, at ¶ 7. The Application states that since September 2000, Paul Hastings has been representing and providing legal advice to the Debtors, including advice concerning collective bargaining agreements and the sale of various assets. *See* Application ¶¶ 7, 9.

2. The Application also discloses that Paul Hastings currently represents an officer of Mirant in connection with an ongoing investigation by the United States Securities and Exchange Commission (the "SEC") with respect to Mirant's accounting policies. Further, the Application states that Mirant has agreed to indemnify the officer, including the costs of legal representation. *See* Application ¶ 7 (emphasis added). As set forth in more detail in the Affidavit of Jonathan Birnenbaum, a partner at Paul Hastings, submitted in support of the Application (the "Birnenbaum Affidavit"), Paul Hastings currently represents Ms. Angela Nagy, Controller of Mirant, in the investigation by the SEC. *See* Birnenbaum Aff. ¶ 9(a).

3. On July 25, 2003, the Court entered an Interim Order provisionally permitting the Debtors to employ Paul Hastings as special counsel for the Debtors. In accordance with that Interim Order, the MAGI Committee now submits its objection to the final approval of the retention of Paul Hastings.

Basis for the Objection

4. The MAGI Committee objects to the Application on the grounds that Paul Hastings's proposed simultaneous representation of both (i) an officer of Mirant subject to an SEC investigation and having potential indemnification claims and (ii) the Debtors' corporate affairs is inappropriate and inefficient and, therefore, should not be approved.

5. The Bankruptcy Code requires that an attorney employed by the debtor's estate (i) must be disinterested; and (ii) may not hold or represent an interest adverse to the estate. 11 U.S.C. §§ 101(13), 326; *Pierson & Gaylen v. Creel & Atwood (In re Consolidated Bancshares, Inc.*), 785 F.2d 1249, 1256 (5th Cir. 1986) ("*Consolidated Bancshares*"). To be qualified for employment, the attorney must meet both of these requirements. *See, e.g., Diamond Lumber, Inc. v. Unsecured Creditors' Comm. of Diamond Lumber, Inc.*, 88 B.R. 773, 776 (N.D. Tex. 1988).

6. In order to meet the no adverse interest requirement, the attorney "must not be or represent a party that has an economic interest in, rival claim with, or bias against the estate." *In re Mich. General Corp.*, 77 B.R. 97, 103 (Bankr. N.D. Tex. 1987). To be considered "disinterested", the attorney must not be "a creditor, equity holder, insider or have an interest materially adverse to the estate." *Id.* The "disinterestedness" requirement has been described as being "[B]road enough to include anyone who in the slightest degree might have some interest or relationship that would color the independent and impartial attitude required by the Code....Indirect or remote associations or affiliations, as well as direct, may engender conflicting loyalties." 3 COLLIER ON BANKRUPTCY §§ 327.04[2][a][iii][E], 327.04[2][b] (15th ed. Revised 2003).

7. In interpreting these requirements, the Fifth Circuit has stated that courts faced with questions of counsel disinterestedness and adverse interests must be "guided by the principal that court-appointed attorneys are officers of the court, and fiduciaries, … and the court must strictly apply the equitable principle that a fiduciary can only serve one master." *Consolidated Bancshares,* 785 F.2d at 1256 n.7 (remanding to bankruptcy court party's request for denial of counsel fees because of conflicts caused by counsel's dual representation of director and debtors). Consistent with these concerns, courts previously have refused to approve the retention of special counsel by debtors where the proposed counsel also represented a director, officer or other insider with potential claims against the estates. *See In re The Red Lion, Inc.,* 166 B.R. 296 (Bankr. S.D. Tex. 1994) (refusing to approve retention of special counsel that also represented insiders, where debtors may have had claim against those insiders); *In re Baldwin-United Corp.,* 45 B.R. 378 (Bankr. S.D. Ohio 1983) (refusing to approve retention of law firm representing debtors with respect to specific matters, and simultaneously representing directors in securities law action).

8. Pursuant to this authority, Paul Hastings' proposed retention by the Debtors is inappropriate, because it is in conflict with the Bankruptcy Code requirement that a professional retained by the estate not hold or represent any interest adverse to the estate. Paul Hastings may not be able to carry out its duties to the Debtors in a manner that will represent the best interests of the Debtors' estates when the firm is representing an officer of Mirant in connection with an ongoing SEC investigation into Mirant's accounting policies, as well as representing the Debtors in connection with, among other things, "general corporate governance and operational matters that arise in connection

with the Debtors' business." These two roles are inconsistent, particularly when the officer will have claims against the Mirant estate for indemnification. Further, it is entirely possible that during the SEC investigation, the interests of the individual Mirant officer and the interests of the Debtors may diverge, thereby requiring Paul Hastings to "serve two masters" – precisely the situation that concerned the Fifth Circuit in *Consolidated Bancshares.* Unless Paul Hastings agrees to cease its representation of any and all Mirant officers, directors or other insiders, the retention of Paul Hastings by the Debtors would be inconsistent with the Bankruptcy Code and should not be approved.

Conclusion

WHEREFORE, the MAGI Committee respectfully requests that this Court deny final approval of the Paul Hastings Application and for such other and further relief as may be just and proper.

DATED: August 20, 2003

Respectfully submitted,

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PROPOSED ATTORNEYS FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF MIRANT AMERICAS GENERATION, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of August, 2003, a true and correct copy of the above and foregoing *Objection* was served by electronic mail to the parties listed below and by United States First Class Mail on the parties on the Limited Service List.

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