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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
)	Jointly Administered
Debtors.)	Hearing Date and Time: July 14, 2004
)	@ 10:30 a.m.

**DEBTORS' OBJECTION TO AMENDED APPLICATION OF JAMES A.
WARD FOR PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM**

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

Mirant Corporation ("Mirant") and its affiliated debtors (collectively, the "Debtors"), as debtors and debtors-in-possession, file this Objection (the "Objection") to the Amended Application of James A. Ward for Payment of Administrative Expense Claim (the "Application"), and in support of their Objection respectfully represent as follows:

PRELIMINARY STATEMENT

By his Application, James A. Ward ("Ward") seeks allowance and payment of a purported administrative expense claim in the amount of \$70,652.13. For the reasons set forth below, the Application should be denied in its entirety. In particular, Ward seeks to elevate to

administrative expense status an alleged claim for payments due under a prepetition consulting agreement pursuant to which his services were never requested by the Debtors nor ever rendered, both during the prepetition and postpetition periods. Accordingly, Ward is not entitled to an administrative claim against the Debtors.

FACTUAL BACKGROUND

1. On July 14, 2003 and various dates thereafter (collectively, the “Petition Date”), the Debtors filed voluntary chapter 11 petitions. The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of title 11 of the Bankruptcy Code.

2. This Court has entered orders approving the joint administration of the Debtors’ chapter 11 cases.

3. Three official committees (collectively, the “Committees”) have been appointed by the Office of the United States Trustee for the Northern District of Texas in these administratively consolidated cases.

4. Prior to the Petition Date, Ward was a Controller for Mirant. On August 28, 2002, Mirant and Mirant Services, LLC, a debtor-in-possession in the above-captioned chapter 11 cases, entered into a Consulting Agreement and General Release of All Claims with Ward (the “Agreement”). A copy of the Agreement is attached hereto as Exhibit “A.” Pursuant to the Agreement, Ward’s resignation as Controller of Mirant became effective September 11, 2002, and Ward, among other things, released and discharged the Debtors from any and all claims, except claims to benefits to which Ward may have been entitled under certain benefit plans. The Agreement further provided that Ward would remain available to consult with Mirant on various matters, including transition matters relating to the business of Mirant, the KPMG audit of

Mirant and certain litigation pending at the time. Mirant, in turn, agreed to make periodic consulting payments to Ward.

5. The Debtors never found it necessary to consult with Ward, and his services were never requested or provided under the Agreement. Notwithstanding the fact that the Debtors did not request Ward's services, in accordance with the Agreement, prior to the Petition Date, the Debtors made consulting payments to Ward totaling approximately \$242,000, minus normal withholdings. While the final consulting payment under the Agreement was due on September 30, 2003, in the amount of \$83,333.33, minus normal withholdings, no further payments were made under the Agreement after the Petition Date as the Debtors never requested, and Ward never performed, and there was no expectation that he would ever perform, any postpetition services under the Agreement. Thus, Ward conferred no benefit upon the Debtors' estates to warrant the making of any payments.

6. On or about December 16, 2003, Ward filed proof of claim # 7039 against Mirant asserting an unsecured claim with respect to the final consulting payment under the Agreement, the postpetition portion of which Ward alleged was entitled to administrative priority (the "Postpetition Consulting Payment"). On or about June 16, 2004, Ward filed his Application seeking allowance and payment of the Postpetition Consulting Payment in the amount of \$70,652.13.

OBJECTION

Ward has Failed to Prove that He Provided Services Necessary for the Preservation of the Debtors' Estate.

7. Ward's assertion that the payment constitutes an administrative expense finds no support in section 503(b)(1)(A) of the Bankruptcy Code. Section 503(b)(1)(A) provides, in pertinent part, that "there shall be allowed, administrative expenses, . . . including—(1)(A) the

actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case.” 11 U.S.C. § 503(b)(1)(A). Thus, as a prerequisite to asserting an administrative claim under section 503(b)(1)(A) of the Bankruptcy Code, a claimant must demonstrate that he has provided goods or services necessary for preservation of the estate. See NL Indus., Inc. v. GHR Energy Corp., 940 F.2d 957, 966 (5th Cir. 1991) (a creditor can recover a claim from the estate as an administrative expense only if it can prove that such expense was an “actual, necessary cost ... of preserving the estate”); see also In re SGS Studio, Inc., 256 B.R. 580, 582 (Bankr. N.D. Tex. 2000) (administrative expense claimant has the burden of proving that its claim is for “actual, necessary costs and expenses of preserving the estate”); Toma Steel Supply, Inc. v. TransAmerican Natural Gas Corp. (In re TransAmerican Natural Gas Corp.), 978 F.2d 1409, 1416 (5th Cir. 1992) (same). Courts “have construed the words ‘actual’ and ‘necessary’ narrowly,” and thus the debt must benefit the debtor’s estate and its creditors. NL Indus., 940 F.2d at 966; TransAmerican Natural Gas, 978 F.2d at 1416.

8. The Fifth Circuit Court of Appeals has crafted a two prong test for determining whether a creditor has established a prima facie entitlement to an administrative expense claim:

A prima facie case under § 503(b)(1) may be established by evidence that (1) the claim arises from a transaction with the debtor-in-possession; and (2) the goods or services supplied enhanced the ability of the debtor-in-possession’s business to function as a going concern. After the movant has established a prima facie case, the burden of producing evidence shifts to the objector; but the burden of persuasion, by a preponderance of the evidence, remains with the movant.

TransAmerican Natural Gas, 978 F.2d at 1416 (citing cases) (emphasis added). Ward has failed to establish a prima facie case because he has failed to satisfy his burden of proof on both prongs of the TransAmerican Natural Gas test. Ward fails the first prong of the test, i.e., that there be a

postpetition transaction between the Debtors and Ward, as the basis for Ward's alleged administrative claim is the Agreement, which was executed prepetition. Additionally, not only did Ward not render any services under the Agreement during the postpetition period to the Debtors as debtors-in-possession, but Ward never rendered any services whatsoever.

9. Ward also fails the second prong of the TransAmerican Natural Gas test, i.e., that Ward supply services that enhance the ability of the Debtors' business to function as a going concern. Ward merely states in conclusory fashion that the obligation of the Debtors to Ward "constitutes an actual, necessary cost of preserving the estate." Application, ¶ 7. Ward offers no support for this allegation. These conclusory statements alone, however, are insufficient to satisfy Ward's burden of proving that the services he provided, if any, enhanced the ability of the Debtors' business to function as a going concern.

10. For an expense to be an actual expense necessary to the preservation of the estate, it must be an expense that provides a benefit to the debtor. See In re Phones for All, Inc., 288 F.3d 730, 732 (5th Cir. 2002) (affirming denial of administrative priority to claim for severance benefits arising from a prepetition employment agreement asserted by employee who was discharged postpetition in part because services rendered by employee "did not represent services that conferred a benefit on the estate as required to garner administrative priority status"); see also SGS Studio, 256 B.R. at 583 (holding that a "lender's costs of unsuccessfully soliciting business from a debtor does not translate into an administrative expense to be borne by the creditors of a bankruptcy estate without an actual, tangible benefit to the estate and the debtor's ability to function as a going concern") (emphasis added). The Fifth Circuit has stated that "[t]he purpose of the benefit analysis under § 503 is to determine whether the estate received a benefit," noting that the primary purpose of granting administrative priority to claims for

benefits provided to the estate is to “prevent unjust enrichment of the debtor’s estate, rather than simply to compensate the creditor.” TransAmerican Natural Gas, 978 F.2d at 1419-20 (citations omitted) (upholding bankruptcy court’s allowance of administrative expense claim of postpetition supplier of well casing and bankruptcy court’s finding that supplier had “met its burden of proving that its sale of casing benefited [the debtor’s] estate”). Ward cites no authority or evidence to support his Application or that he has provided services that conferred a benefit upon the Debtors or their estates and enhanced the ability of the Debtors’ business to function as a going concern.

11. Here, the Debtors’ obligation to pay Ward, if any, constitutes a prepetition debt. At best, Ward has an unsecured claim against the Debtors under the Agreement prior to the Petition Date. Ward’s Application is merely an attempt by a general unsecured creditor to elevate a portion of its alleged prepetition claims against the Debtors to administrative expense status. As Ward has not rendered services to the Debtors under the Agreement and therefore has not conferred an actual and necessary benefit to the estates, there is simply no basis to treat Ward’s claims as administrative expenses. Thus, this Court should deny the Application.

CONCLUSION

For the foregoing reasons, the Debtors respectfully request that the Court deny the Application.

Dated: Fort Worth, Texas
July 9, 2004

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By: /s/ Ian T. Peck
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-and-

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ATTORNEYS FOR THE DEBTORS AND
DEBTORS-IN-POSSESSION

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 document upon all persons listed below and upon all persons on the Limited Service List via email, facsimile or overnight courier on the 9th day of July, 2004 in accordance with the Federal Rules of Bankruptcy Procedure:

Randy Agnew
Bodoin, Burnside, Burge & Agnew, P.C.
Burnett Plaza, Suite 3450
801 Cherry Street, Unit 31
Fort Worth, Texas 76102
Fax: 817.377.1213

/s/ Ian T. Peck

Exhibit “A”

**CONSULTING AGREEMENT AND
GENERAL RELEASE OF ALL CLAIMS**

This Agreement is entered into by and between James A. Ward ("Ward") and Mirant Corporation and Mirant Services LLC, a subsidiary of Mirant Corporation (hereinafter jointly referred to as "Mirant").

Whereas, Ward has been employed with Mirant; and

Whereas, Ward would like to retire from active employment with Mirant; and

Whereas, Mirant is willing to provide Ward benefits to which he is not otherwise entitled and would not normally receive in this situation and which are in exchange for Ward signing the Agreement; and

Whereas, the parties to this Agreement desire to resolve all issues between them relating to Ward's employment, termination of employment and retirement.

Now, therefore, in consideration of the foregoing and of the mutual covenants and agreements set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Ward and Mirant agree as follows:

1. **RETIREMENT.** Mirant and Ward have discussed his resignation as Controller effective August 30, 2002. Since Ward will be entitled to additional retirement benefits if he remains a Mirant employee until September 11, 2002, and therefore he will remain an employee of the Company until September 11, 2002, at which time he will retire from Mirant.

2. **Consulting Agreement.** Ward will be entitled to receive consulting payments of \$25,000, minus normal withholdings on October 31, November 30 and December 31, 2002 and \$83,333.33, minus normal withholdings on March 31, 2003; on June 30, 2003 and on September 30, 2003, if he has been in full compliance with the

terms of paragraph 5.3 of this Agreement at the time the consulting payments are due. Mirant will have the sole discretion of determining whether Ward has complied with paragraph 5.3 but, it will not unreasonably withhold such payments. Should Mirant determine that Ward is in breach of paragraph 5.3, Mirant agrees to immediately notify Ward and give him 30 days to cure such breach.

3. GENERAL RELEASE.

Ward, for himself, his successors, heirs and assigns, hereby forever releases and discharges Mirant Corporation, Mirant Services, LLC, Mirant Mid-Atlantic Services, LLC and other entities or related business entities of the Mirant Corporation System and its past, present and future officers, directors, employees, agents, attorneys, predecessors and successors (hereinafter "Releasees") (for purposes of this Agreement "related business entity" includes, but is not limited to, The Southern Company and any entity that was a subsidiary or affiliate of The Southern Company for periods prior to April 2, 2001 (hereinafter "Southern Business Entity")), from any claims, causes of action, contracts or liabilities whatsoever, in law or in equity, whether known or unknown or suspected to exist by Ward, which Ward has had or may now have against Releasees, including but not limited to those claims arising from or connected with Ward's employment with Mirant or the termination of that employment. Such claims or causes of action shall include, but not be limited to, claims under Title VII of the Civil Rights Act of 1964, The Americans With Disabilities Act or any other federal, state or local laws dealing with employment discrimination, and any claims or causes of action for wrongful discharge or breach of contract. Without limiting the generality of the foregoing, Ward hereby acknowledges and covenants that he has knowingly relinquished and forever released any and all

remedies which might otherwise be available to him, including claims for back pay, liquidated damages, recovery of interest, costs, punitive damages, compensatory damages or attorney's fees, and any claims for reinstatement to a regular position with Mirant.

Ward specifically agrees that the Release extends to all claims of every nature and kind whatsoever, known or unknown, past or present, which existed prior to the execution of this Agreement, including, but not limited to, all claims involving or arising out of Ward's employment or the termination of such employment. Ward further agrees and covenants not to sue any of the Releasees on the basis of any action predating this Agreement.

This Agreement does not release claims to benefits to which Ward may be entitled under the Mirant Services LLC Employee Health and Welfare Benefits Plan for Non-Union Employees, the Mirant Services LLC Pension Plan, the Mirant Services LLC Employee Health and Welfare Benefits Plan for Retirees. However, nothing contained herein is intended to or shall be construed to require Mirant to institute or continue in effect any particular plan or benefit sponsored by Mirant and it hereby reserves the right to amend or terminate any of its benefit programs at any time and in accordance with the procedures set forth in such plans.

4. RETURN OF MATERIALS AND PROPERTY.

Ward agrees that he has delivered or will deliver to Mirant: (1) all materials of Mirant's or of any corporate affiliate, including documents, correspondence, plans, records, notes, drawings or papers and any copies thereof in Ward's possession or control, including in particular all notes or records Ward has, irrespective of how the information was maintained, related to Mirant, made or compiled by or delivered to Ward; (2) all property of Mirant, including all credit or charge cards and keys; (3) all Mirant owned

telephones, beepers, computer software, computer discs, copies thereof, hard copies of computer reports, computer passwords, other passwords, and any other Mirant owned computer or telecommunications-related information or sources of information concerning any aspect of the business of Mirant.

5. **ADDITIONAL COVENANTS.**

5.1 **Confidentiality of this Agreement.** Ward agrees to keep the terms and conditions of this Agreement confidential and not to disclose its terms and conditions to any other person or entity, except as may be required to enable Ward to fulfill his legal and contractual obligations hereunder, for Ward to communicate with his immediate family, or for Ward to communicate with legal counsel or tax advisors in connection with tax preparation and/or advice.

Notwithstanding the foregoing, nothing in this Agreement is intended to prohibit Ward from performing any duty or obligation that shall arise as a matter of law. Specifically, Ward shall continue to be under a duty to truthfully respond to any legal and valid subpoena or other legal process. This Agreement is not intended in any way to proscribe Ward's right and ability to provide information, pursuant to a valid request, to any federal, state or local government in the lawful exercise of such governments' governmental functions.

5.2 **Confidential Information.** In exchange for the consideration provided in this Agreement, Ward agrees that for a period of three years from the date of execution of this Agreement, that he will maintain the confidentiality of and not disclose to any individual confidential information to which he was privy while an employee of Mirant unless pursuant to an order of a court with competent jurisdiction. More specifically,

Ward agrees to maintain the confidentiality of records, documents, materials and information not generally known outside of Mirant. This includes, but is not limited to, Mirant's financial, technical, personnel, payroll, budget information, and strategic planning information.

5.3 Duty to Consult and to Cooperate. In consideration for the benefits being provided pursuant to this Agreement, Ward acknowledges and agrees that for a period of three months from the date of execution of this Agreement he will be fully available to provide consulting services and cooperate with Mirant, any of its affiliates, officers, directors or employees in connection with transition matters relating to the business of Mirant. More specifically, Ward Agrees to make himself fully available to assist with KPMG's current audit of Mirant's financial records. For purposes of this Agreement, the term "fully available" means that Ward will make his consulting obligations to Mirant during the remaining months of 2002 a primary business priority. Ward further acknowledges and agrees that until September 30, 2003, he will be available and will cooperate with Mirant, any of its affiliates, officers, directors or employees in connection with transition matters relating to the business of Mirant. For purposes of this Agreement, the parties agree that Ward will make himself available on a reasonable basis until September, 30, 2003, as requested by Mirant.

Additionally, Ward agrees that he will assist and fully cooperate in defending any litigation, claims or administrative proceedings that may arise against Mirant, its affiliates, officers, directors or employees, that are in any way related to his former duties or area of responsibility at Mirant. He agrees to assist in the defense of any such actions for as long as such actions remain pending by making himself available at reasonable

times and places to review documents, and to assist counsel as necessary. Mirant will reimburse Ward for any reasonable out of pocket expenses incurred in such assistance or cooperation.

The parties agree that if Mirant needs Ward's consulting services at the end of the consulting period or increase the scope of this agreement, the parties will meet in good faith to formulate mutually acceptable terms for an extension of the consulting period.

5.4 Nondisparagement. Ward agrees and covenants that he will not make any disparaging statements about or relating to Mirant, its related or affiliated entities, its officers, director's employees or agents, its business practices, its products or its employment practices.

6. NON-ADMISSION OF LIABILITY.

Ward and Mirant agree that this Agreement shall not in any way be construed or interpreted as an admission of liability of wrongdoing by either of them, any such liability or wrongdoing being expressly denied.

7. ACKNOWLEDGMENTS.

7.1 Understanding of Agreement. Ward acknowledges that he fully understands the extent and impact of the provisions of this Agreement (especially that it is intended to release potentially valuable claims). In addition, Ward acknowledges that it has been recommended to him to consult with an attorney regarding this Agreement and that he has been given adequate time to consider this Agreement prior to its execution.

WARD STATES THAT AND ACKNOWLEDGES THAT HE HAS READ THE FOREGOING AGREEMENT AND UNDERSTANDS THAT IT CONTAINS A

GENERAL RELEASE OF ANY AND ALL CLAIMS WHICH HE MIGHT HAVE AGAINST RELEASEES AND THAT HE IS EXECUTING THIS AGREEMENT VOLUNTARILY.

7.2 **Severability.** The unenforceability or invalidity of any particular provision of this Agreement shall not affect its other provisions, and to the extent necessary to give such other provisions effect, they shall be deemed severable.

7.3 **Modifications: Waivers.** The Parties acknowledge and agree that the terms of this Agreement may not be modified or waived other than in writing signed by both Parties.

8. **DIRECTOR & OFFICER INSURANCE AND INDEMNIFICATION**

Mirant agrees that Ward has been and will continue to be covered under the Company's Director and Officer Insurance policy as specifically provided under the terms of such policy including all limitations provided therein. Mirant further agrees that Ward is covered under the indemnification provision of Mirant's Bi-Laws for the time that he was an officer of Mirant.

This section, in no way provides for additional coverage or modifies Mirant's By-Laws or Director & Officer Insurance. Any limitations found within those policies remain in effect and unchanged.

9. APPLICABLE LAW; ENFORCEMENT.

This Agreement is entered into in the State of Georgia and shall be governed by the laws thereof.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date set forth below.

WARD:

James A. Ward [SEAL]
James A. Ward

Date: Aug 28, 2002

MIRANT CORPORATION
MIRANT SERVICES LLC

By: Don Dwyer

Date: 8/28/02

[Signature]
Witness