

**ANDREWS KURTH LLP**

Paul N. Silverstein  
S.D.N.Y. Bar No. PS-5098  
450 Lexington Avenue  
New York, New York 10017  
Telephone: (212) 850-2800  
Facsimile: (212) 850-2929

Jason S. Brookner  
Texas State Bar No. 24033684  
Monica S. Blacker  
Texas State Bar No. 00795634  
1717 Main Street, Suite 3700  
Dallas, Texas 75201  
Telephone: (214) 659-4400  
Facsimile: (214) 659-4401

**COUNSEL TO THE OFFICIAL COMMITTEE OF  
UNSECURED CREDITORS OF MIRANT CORPORATION, ET AL.**

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

IN RE:	§ Chapter 11
	§
MIRANT CORPORATION, <i>et al.</i> ,	§ Case No. 03-46590-DML-11
	§
Debtors.	§ Jointly Administered

**MIRANT COMMITTEE’S REPLY TO DEBTORS’ RESPONSES TO  
APPLICATIONS FOR ORDERS AUTHORIZING EMPLOYMENT OF  
PA CONSULTING GROUP, INC., CAPSTONE CORPORATE RECOVERY, LLC  
AND SHEARMAN & STERLING LLP PURSUANT TO  
SECTION 1103(B) OF THE BANKRUPTCY CODE**

The Official Committee of Unsecured Creditors of Mirant Corporation, *et al.* (the “Mirant Committee”) for its reply to the Debtors’ responses to the Mirant Committee’s applications for orders authorizing its retention of PA Consulting Group, Inc. (“PA”), Capstone Corporate Recovery, LLC (“Capstone”) and Shearman LLP (“Shearman”) pursuant to Section 1103(b) of the Bankruptcy Code, respectfully represents:

**MIRANT COMMITTEE’S REPLY TO  
DEBTORS RESPONSES TO APPLICATIONS  
TO EMPLOY PA, CAPSTONE AND SHEARMAN**

## INTRODUCTION

1. It is fundamental that great deference should be given to a creditors committee's selection of its professionals. The Mirant Committee, after deliberation, determined to employ PA, Capstone and Shearman to perform the services described in the applications (and below).

2. Debtors' counsel's objections to the Mirant Committee's applications represents a new low in the Debtors' efforts to control these cases.<sup>1</sup> After the Debtors' recent unsuccessful attacks on two active and prominent members of the Mirant Committee, Appaloosa Partners and Citibank, one would have hoped that some maturity had entered the process. Why are the Debtors opposing the Mirant Committee's applications to retain PA, Capstone and Shearman? Why has the integrity of the Committee -- which recently filed a joint objection to the Debtors' exclusivity extension, and committed to engage in reorganization discussions with the MAGI Committee -- been challenged by the Debtors?

3. The Debtors argue, in essence, that Citibank has somehow "hijacked" the Mirant Committee for its own benefit. Such a suggestion is wrong and is an insult to all of the members of the Mirant Committee, who have dedicated an enormous amount of time and effort to these cases, take their duties seriously and are committed to achieving a prompt and successful reorganization.

4. The Debtors seem to be leveling their attack against Citibank, in particular, because it has been consistent, both pre- and post-petition, in unabashedly maintaining that the "emperor" has no "clothes." Citibank opposed the Debtors' pre-petition restructuring efforts,

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<sup>1</sup> That the out-of-the-money Equity Committee supports the Debtors' efforts should be given no weight by the Court.

which were unsuccessful.<sup>2</sup> Citibank maintained that the business plan and financial assumptions underlying the Debtors' pre-petition restructuring efforts were fatally flawed and could not lead to a feasible and long term solution. The Debtors have conceded that their pre-petition business plan and underlying assumptions were flawed. Indeed, as the Court may recall the same pre-petition business plan and its underlying assumptions were not even reviewed by the Debtors' Chief Restructuring Officer in connection with the formulation of the Debtors' March 1, 2004 business plan. The Debtors' March 1, 2004 business plan has likewise been questioned and, despite the tens of millions of dollars expended on the Debtors' counsel and a pool of financial, crisis management and operational "experts" retained by the Debtors, it appears that there has been little real progress towards reorganization.

5. For the reasons set forth herein, the Mirant Committee respectfully submits that the Debtors' present smokescreen is aimed at diverting the Committee's efforts toward a prompt and efficient reorganization of the Debtors at a very significant juncture in these cases. The Mirant Committee's determinations to employ PA, Capstone and Shearman should be respected, and its applications under Section 1103(b) of the Bankruptcy Code granted.

### **FACTUAL BACKGROUND**

6. The Mirant Committee determined to employ PA, Capstone and Shearman in furtherance of its fiduciary duties to its constituents. Details of the Mirant Committee's internal discussions, deliberations and decision making processes are confidential and not matters for public review or consumption.

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<sup>2</sup> Upon information and belief, White & Case, the Debtors' principal counsel, likewise opposed the Debtors' pre-petition restructuring efforts.

7. As a general matter, it is worthwhile to note that after hearings held before this Court on April 7<sup>th</sup>, PA and Capstone were authorized to share with the Committee and its investment banker, Miller Buckfire Lewis & Ying (“MBLY”), pre-petition work product and analyses prepared by PA and Capstone based on the extensive information and data provided to them by the Debtors pre-petition. It appears that PA and Capstone (in their capacity as pre-petition consultants to the bank agents) may have had better access to information with respect to the Debtors’ businesses, as compared with that accorded to the Committee’s post-petition financial advisors, and had better developed financial models keyed to the Debtors’ businesses.

8. The Debtors opposed the Mirant Committee’s requests to allow PA and Capstone to review post-petition materials provided to the Mirant Committee by the Debtors. The Court indicated that the Committee might retain PA and Capstone if it sought to share post-petition materials with them. The Court made clear that any newly retained advisors would need to replace existing advisors already retained by the Mirant Committee. After considering the PA and Capstone materials and analyses based on pre-petition data, the Mirant Committee determined to employ PA and Capstone as its advisors in place of existing advisors, RCM and Huron. MBL Y, which welcomes the involvement of PA and Capstone, has worked with the Committee to develop a revised “work plan” for itself, PA and Capstone. The Committee believes that the details of its revised workplan are confidential. The Committee, however, will upon the Court’s request, submit such workplan for the Court’s *in camera* review.

9. Pre-petition, Shearman worked closely with PA and Capstone. In connection with its determination to employ PA and Capstone, the Mirant Committee determined to employ Shearman as its co-counsel. Simpson Thacher filed its motion to withdraw as co-counsel to the Mirant Committee.

10. The Mirant Committee believes that it would be inappropriate, and serve no purpose, to comment or discuss publicly the details of its internal determinations with respect to the retention of professionals other than to assure the Court and the United States Trustee that the Committee's decision was an appropriate *bona fide* determination and should be respected.

The Debtors' Responses to the Committee's Application  
To Retain Shearman

11. Cutting through the invective, the Debtors, in essence, advance two allegations in opposition to the Committee's retention of Shearman. First, the Debtors allege that Shearman represents an interest adverse to the Mirant Committee with respect to pre-petition letters of credit. The Debtors essentially contend that Shearman's prior representation of the agent banks would cause the Committee to change its position with respect to existing pre-petition letters of credit to the detriment of the Debtors' estate and its creditors. Second, the Debtors allege that because Shearman previously represented lenders and/or underwriters for various securities issued by and/or credit facilities entered into by the Debtors prior to the Petition Date, Shearman is "conflicted" and thus cannot represent the Committee. The Debtors also point to their alleged need for more information about Shearman's relationships with the bank agents.

12. The Debtors alleged concerns relating to letters of credit -- to the effect that Shearman, on behalf of bank agents, Citibank and CSFB, has "staked out positions ... which are adverse to the interests of the Mirant Committee" -- are disingenuous at best. The Mirant Committee's position with respect to pre-petition letters of credit has been clear to the Debtors from the inception of these cases and such position has been, and will be, firmly maintained. In furtherance of its fiduciary duties to its constituents -- notwithstanding that banks who are members of the Mirant Committee have letter of credit exposure -- the Mirant Committee has maintained that pre-petition letters of credit should be drawn and not be replaced by new letters

of credit under the GECC DIP facility. “Hundred cent dollars” (directly or indirectly) in exchange for pre-petition obligations under a credit facility in the same claim amount is obviously a preferable result for the Debtors’ estates and creditors. By their terms, many of the prepetition letters of credit were scheduled to mature during these cases. As a consequence, the beneficiaries of the letters of credit were entitled to draw upon them. To minimize unnecessary draws, while at the same time preserving the Debtors’ estates “interest” in the unfunded pre-petition letters of credit, the bank agents agreed to extend various letters of credit, which benefited all parties in interest. The Mirant Committee did not oppose those extensions nor did the Debtors.

13. In their response, the Debtors request for additional information regarding “the type of representation [Shearman] has provided to Citibank and CSFB” appears improper. The Court seems aware of Shearman’s activities in these cases, as presumably are the Debtors given the specifics contained in their Response. At its core, the Debtors contend that by representing another constituency in these cases Shearman is somehow precluded from representing the Committee. Such a position is completely at odds with the fact that virtually all of the professionals in these cases represented other clients during the prepetition negotiations related to the Debtors’ failed restructuring efforts, and were compensated by the Debtors for those services, including: (i) Andrews Kurth, which represented a group of parent bondholders holding billions of dollars in claims; (ii) Cadwalader Wickersham & Taft, as counsel, and Houlihan Lokey Howard & Zukin, as financial advisor, for certain MAGI bondholders in connection with, a prepetition lawsuit against the Debtors alleging, *inter alia*, fraudulent conveyances and breaches of fiduciary duty by MAGI and its directors; (iii) Simpson Thatcher, which represented a group of banks, including TD Securities (USA) Inc. (an entity that became a member of the

Mirant Committee), that sought representation apart from the agent banks; and (iv) Huron which, pre-petition, acted as financial advisor for Hypovereins Bank, a member of the Mirant Committee. The Debtors' desire to interfere with the Mirant Committee's inner workings at this critical point (when it did not see fit to do so at the commencement of these cases) should be viewed as what it really is -- an attempt to exert control over the Mirant Committee -- and should not be tolerated.

14. Finally, the Debtors call into question Shearman's previous representation of investment banks in connection with securities of the Debtors. As noted in the Sosnick Declaration, each of those engagements terminated pre-petition. Nevertheless, should any issues arise with respect to the subject matter of any of such prior representations, Shearman would have no role in such matters, and they would be handled exclusively by Andrews Kurth.

Debtors' Response to Committee's Application to Retain PA and Capstone

15. In response to the Committee's application to employ PA and Capstone, the Debtors contend that "no other committee has retained an energy industry consultant." Here too, the Debtors are not accurate. The MAGI Committee and the Equity Committee each have retained energy consultants, either under Section 1103(b) of the Code, or as experts pursuant to existing orders of this Court. As to the Debtors, there does not appear to be a professional person in America who is not on the payroll, including energy consultants.

16. The Debtors contend that the Mirant Committee has failed to explain what specific services PA, Capstone and MBLY would perform for the Mirant Committee and how those specific services relate to, or compare with, the existing services currently performed by Huron, RCM and MBLY. As indicated above, with the assistance of MBLY, the Mirant Committee has prepared a detailed workplan setting forth the specific services to be performed

by each firm. As indicated by the Court, costs of transition would not be borne by the Debtors' estate. The Committee believes that its revised work plan for MBLY, PA and Capstone is confidential. Should the Court desire an *in camera* review of the Committee's revised work plan, it will obviously be provided to the Court on a confidential basis.

### **LEGAL AUTHORITIES**

#### Mechanics of Sections 328(c) and 1103(b)

17. Under the plain meaning of Section 1103(b) of the Bankruptcy Code, professionals employed and retained under Section 1103 – – unlike those retained by a debtor under Section 327(a) – – need not be “disinterested.”<sup>3</sup> Section 1103(b) is the sole statutory provision that addresses a committee's right to select counsel. *In re Enron Corp.*, No. 01-16034 (AJG), 2002 WL 32034346, at \*6 (Bankr. S.D.N.Y. May 23, 2002). Thus, the only standard that is relevant to a committee's retention of counsel is that:

An attorney or accountant employed to represent a committee appointed under Section 1102 of this title may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case....

11 U.S.C. § 1103(b). The Supreme Court recently reaffirmed that the Bankruptcy Code must be interpreted in accordance with its plain meaning. *See Lamie v. U.S. Trustee*, No. 02-693, 2004 WL 110846 (Jan. 26, 2004) (courts are required to apply a statute in accordance with its plain meaning even when it is a product of an apparent drafting error); *see also United States v. Ron*

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<sup>3</sup> Section 327(a) of the Bankruptcy Code, which relates to a debtor's appointment of professional advisors, provides:

Except as otherwise provided in this Section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

*Pair Enter., Inc.*, 489 U.S. 235, 242 (1989) (“[t]he plain meaning of legislation should be conclusive”). Accordingly, under the plain meaning of Section 1103(b) of the Bankruptcy Code, a professional employed and retained by a creditors’ committee need not be disinterested. *Enron*, 2002 WL 32034346 , at \*7, *aff’d In re Enron Corp.*, No. 02 Civ. 5638 (BSJ), 2003 WL 223455 (S.D.N.Y. Feb. 3, 2003); *accord In re Mesta Machine Co.*, 67 B.R. 151, 157-58 (Bankr. W.D. Pa. 1986) (same); *also In re Jensen-Farley Pictures, Inc.*, 47 B.R. 557, 579 (Bankr. D. Utah 1985) (same).

18. A committee’s right to employ professionals is not restricted, as the Debtors suggest it is, by Section 328(c) of the Bankruptcy Code. Section 328(c) provides:

Except as provided in Section 327(c), 327(e), or 1107(b) of this title, the court *may* deny allowance of compensation for services and reimbursement of expenses of a professional person employed under Section 327 or 1103 of this title if, at any time during such professional person’s employment under Section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

11 U.S.C. § 328(c) (emphasis added). Based upon the plain meaning of Section 328(c), it is not a standard for retention of Committee professionals. *In re Enron Corp.*, No. 01-16034 (AJG), 2002 WL 32034346 (Bankr. S.D.N.Y. May 23, 2002). Moreover, it is clear that even if the “disinterested” standard were to apply to committee counsel for compensation purposes, the court is not required to, but may, in its discretion, deny compensation to those who are not “disinterested” or hold an “interest adverse.” *See In re Prince*, 40 F.3d 356, 359 (11<sup>th</sup> Cir. 1994) (“We also agree with both the district court and bankruptcy court that the language of 11 U.S.C. § 328(c) *permits* a court to deny compensation to professionals found not to be disinterested

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11 U.S.C. § 327(a).

persons, but does not *require* a denial of fees in those instances.”) (emphasis in original); *see also Gray v. English*, 30 F.3d 1319, 1323-24 (10<sup>th</sup> Cir. 1994) (“We are satisfied that § 328(c) was intended to give the bankruptcy court some discretion with respect to attorney fee awards when the attorney loses his disinterested status during the course of administering a bankrupt’s estate. The permissive ‘may deny’ language does not require the court to deny legal fees or disgorge previously paid fees in all cases.”); *In re CIC Investment Corp.*, 192 B.R. 549, 553 (9<sup>th</sup> Cir. BAP 1996) (same); *In re Petro-Serve Ltd.*, 97 B.R. 856, 865 (Bankr. S.D. Miss. 1989) (same); *In re Global Marine, Inc.*, 108 B.R. 998, 1006 (Bankr. S.D. Tex. 1987) (same); *In re GHR Energy Corp.*, 60 B.R. 52, 68 (Bankr. S.D. Tex. 1985) (same).

19. The Debtors base their entire argument on a passage appearing in *In re Caldor, Inc.*, 193 B.R. 165 (Bankr. S.D.N.Y. 1996), which was not integral to the court’s holding in that case and, moreover, appears to be based on a misreading of the applicable provisions of the Bankruptcy Code. In that case, the court wrote – – without any support other than Section 328(c) of the Bankruptcy Code – – that “under § 328(c) of the [Bankruptcy Code], a professional person retained under § 1103 will be denied allowance of compensation and reimbursement of expenses if, at any time during that person’s employment, he is not a disinterested person or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.” *Caldor*, 193 B.R. at 171. The problem with that passage, of course, is that it is at odds with the actual language of Section 328(c) of the Bankruptcy Code. As mentioned above, it is clear that Section 328(c) is permissive in nature and, accordingly, courts are not required to, but rather have discretion to, disallow compensation for professionals who are not “disinterested.”

20. The court in *In re Enron Corp.*, No. 01-16034 (AJG), 2002 WL 32034346 (Bankr. S.D.N.Y. May 23, 2002) (which is a more recent case from the same district) did not adopt the reading of *Caldor* that the Debtors now advance. In fact, in *Enron*, the court engaged in a lengthy discussion of how a professional retained under Section 1103(b) of the Bankruptcy Code need not be “disinterested,” while observing that the court could, upon its discretion, disallow compensation owed to such professional if it was found not to be “disinterested”:

[U]nlike § 1103(b), § 327(a) also prohibits the professional to be employed from holding an adverse interest and prohibits the professional to be employed from being not disinterested. [Citing to 11 U.S.C. § 327(a)] Stated another way, on its face and for purposes of retaining professionals only, § 1103(b) does not disqualify a professional from representing a committee appointed under § 1102 of the [Bankruptcy Code] solely because such professional holds an interest adverse to the estate or is not disinterested under 11 U.S.C. § 101(14).

That being said, 11 U.S.C. § 328(c) provides that the court may deny the allowance of compensation for services rendered and reimbursement of expenses to a professional employed under § 1103 if, at any time during such professionals [sic] employment, such professional is not disinterested, or represents or holds an interest adverse to the estate with respect to the matter on which such professional person is employed.

*Enron*, 2002 WL 32034346 , at \*7. As the Debtors point out, the *Enron* court further indicated that Section 328(c) has been interpreted to impose additional considerations in analyzing the retention of committee professionals under Section 1103(b); however, the only case the court cited to have adopted such an interpretation was *Caldor*. In the end, the *Enron* court did not specifically reconcile its view with that of the *Caldor* court because it did not need to do so – – the committee counsel passed muster under either interpretation. Nevertheless, the court’s position is apparent: a professional employed under Section 1103 of the Bankruptcy Code need not be “disinterested,” and the power to disallow compensation to professionals who are not “disinterested” – – which is set forth in Section 328(c) – – is discretionary in nature.

21. Based upon those parameters, courts have gone to great lengths to approve of a committee's choice of counsel. *See, e.g., Enron*, 2002 WL 32034346, at 4 ("One's choice of counsel is entitled to great deference."). For example, in *In re Nat'l Century Fin. Enter., Inc.*, 298 B.R. 112 (Bankr. S.D. Ohio 2003), the court approved the retention of two law firms to act as co-counsel to a subcommittee of the creditors' committee despite the fact that (i) one of the law firms had represented a debtor prior to the petition date in a proposed initial public offering of the debtor's stock, (ii) each of the law firms continued to represent members of the subcommittee in matters unrelated to the bankruptcy cases, and (iii) one of the law firms would continue to represent a committee member in connection with the cases. To address the United States Trustee's concerns relating to conflict of interest issues that may arise from committee counsels' connections with various committee members, the court observed that if one of the law firms confronted a conflict in connection with any matter, its co-counsel could represent the subcommittee in connection therewith, and vice versa. That same reasoning applies to the Mirant Committee's selection of Shearman as co-counsel to Andrews Kurth.

22. The Debtors' undue fervor to block the Mirant Committee from employing its co-counsel is highlighted by the Debtors' statement that Shearman has devoted "undivided loyalty" to Citibank.<sup>4</sup> The Debtors' conclusion that Shearman's relationship with Citibank will somehow impair its ability to advise the Mirant Committee is without merit. As co-counsel to the Mirant Committee, Shearman would take direction from the Committee. To assert that Shearman will seek to advance an agenda that is contrary to the interests of the Committee's constituents

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<sup>4</sup> The Debtors' citation of an eleven year old *American Lawyer* article that discussed a historical relationship between Shearman and Citibank that, as we understand, does not in any way reflect their current relationship, demonstrates the depths to which the Debtors' counsel has sunk.

suggests that Shearman will breach its fiduciary duties. The Mirant Committee is not aware of any basis for such a suggestion.

**WHEREFORE**, the Mirant Committee respectfully request that its applications to employ PA, Capstone and Shearman be granted together with such other and further relief as the Court deems just and proper.

Respectfully submitted this 17<sup>th</sup> day of May, 2004.

**ANDREWS KURTH LLP**

By: /s/ Monica S. Blacker  
Jason S. Brookner  
State Bar No. 24033684  
Monica S. Blacker  
State Bar No. 00796534  
1717 Main Street, Suite 3700  
Dallas, Texas 75201  
Telephone: (214) 659-4400  
Facsimile: (214) 659-4401

Paul N. Silverstein  
S.D.N.Y. Bar No. PS-5098  
450 Lexington Avenue  
New York, New York 10017  
Telephone: (212) 850-2800  
Facsimile: (212) 850-2929

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17<sup>th</sup> day of May, 2004, she caused a true and correct copy of the foregoing document to be served on the persons appearing below via e-mail and facsimile.

/s/ Jason S. Brookner  
Jason S. Brookner

Tom Lauria, White & Case  
Counsel for the Debtors  
[tlauria@whitecase.com](mailto:tlauria@whitecase.com)  
Fax: c/o Haynes and Boone, 817-348-2350

Robin Phelan, Haynes and Boone  
Counsel for the Debtors  
[phelanr@haynesboone.com](mailto:phelanr@haynesboone.com)  
Fax: 214-200-0649  
817-348-2350

Bruce Zirinsky, Gregory Petrick Cadwalader, Wickersham & Taft  
Counsel for the MAGI Committee  
[bruce.zirinsky@cwt.com](mailto:bruce.zirinsky@cwt.com)  
[gregory.petrick@cwt.com](mailto:gregory.petrick@cwt.com)  
Fax: 212-993-2747

Deborah Williamson, Cox and Smith  
Counsel for the MAGI Committee  
[ddwillia@coxsmith.com](mailto:ddwillia@coxsmith.com)  
Fax: 210-226-8395

Eric Taube, Hohmann Taube & Summers  
Counsel for the Equity Committee  
[erict@hts-law.com](mailto:erict@hts-law.com)  
Fax: 512-472-5248

Edward Weisfelner, Brown Rudnick Berlack Israels  
Counsel for the Equity Committee  
[eweisfelner@brbilaw.com](mailto:eweisfelner@brbilaw.com)  
Fax: 212-704-0196

George McElreath, Office of the U.S. Trustee  
[George.f.mcelreath@usdoj.gov](mailto:George.f.mcelreath@usdoj.gov)  
Fax: 214-767-8971