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

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

SIXTH INTERIM REPORT OF

WILLIAM K. SNYDER, COURT-APPOINTED EXAMINER

Date Submitted: June 10, 2005

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I.
INTRODUCTION

The Examiner's Sixth Interim Report is the first of the Examiner's regularly-submitted interim reports to be made available to the general public. Although the Examiner has filed comments, reports and other pleadings from time to time to respond to specific issues or directives from the Court, the vast majority of the Examiner's various investigations are recounted in his interim reports, which have been submitted to the Court and a small group of parties-in-interest on a regular basis since the appointment of the Examiner in April 2004.[1]

The Examiner's responsibility to prepare and submit interim reports[2] is set forth in the *Order Defining Role of Examiner*, entered April 29, 2004 (as amended July 7, 2004, September 15, 2004 and December 6, 2004, the "**Role of Examiner Order**"). In the original Role of Examiner Order, the Court directed that "[a]ll reports of the Examiner shall be submitted under seal."[3] However, in early July 2004, the Court suggested altering the Role of Examiner Order to permit the Examiner to file two reports — one publicly-filed report containing non-confidential information and another, submitted under seal, containing any necessary confidential information. This concept was incorporated in the next iteration of the Role of Examiner Order, which states that "*[a]s necessary to protect confidential information*, and notwithstanding anything else herein, reports of the Examiner shall be submitted under seal with copies provided to [the enumerated parties], unless otherwise ordered by the Court."[4]

Since that time, the Examiner has submitted each of his interim reports under seal with the belief that they contained then-confidential information pertaining to the Debtors. However, a significant amount of previously-confidential information has been made public through the filing of the Debtors' proposed disclosure statement and plan of reorganization and the introduction into evidence of the Debtors' business plans and various expert reports in connection with the hearing to determine the total enterprise value of the Debtors (the "**Valuation Hearing**"), which began on April 18, 2005 and is expected to conclude after the filing of this report. In addition, the Examiner has received numerous requests from creditors and other parties-in-interest (including The Southern Company) for copies of his reports. Accordingly, the Examiner has commenced a review of each of the five previously-submitted interim reports for information that remains confidential *at this time*. Based on either the passage of time or the release of the information in other pleadings or exhibits admitted during public hearings, the Examiner believes that there is a strong possibility that little or no confidential information remains in his earlier interim reports. If that is confirmed through his upcoming

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[1] The specific list of parties-in-interest who have received the Examiner's interim reports to date is set forth in Section II.C. below.

[2] By convention, the Examiner's various reports are referred to by sequence — *e.g.*, First Interim Report, Fifth Interim Report.

[3] Role of Examiner Order (April 29, 2004), at 6-7. For ease of reference, the parenthetical date in this and other citations to the Role of Examiner Order indicates the specific iteration of the Role of Examiner Order being referenced.

[4] Role of Examiner Order (July 7, 2004), at 7 (emphasis added). This reflected a change from the language in the original Role of Examiner Order, which directed that "*[a]ll* reports of the Examiner shall be submitted under seal with copies provided to [the enumerated parties], unless otherwise ordered by the Court." Role of Examiner Order (April 29, 2004), at 6-7 (emphasis added).

review, the Examiner expects to file a motion in the next few weeks seeking authorization to make all of his interim reports publicly available by filing them with the Court subject to necessary redactions, if any.

II.
BACKGROUND

A. Prior Reports

The Examiner's First Interim Report, dated June 30, 2004, and Second Interim Report, dated October 12, 2004, presented a discussion of "Highly and Immediately Critical" issues that consumed much of the Examiner's time during the first several months of his employment in these Chapter 11 cases. These issues were identified by the Examiner following initial interviews and consultations with the Debtors and the three official Committees, and were compiled in a "Mirant Examiner Action Plan" that was presented to the Court in chambers on April 28, 2004 and appended to the First Interim Report.

The Third Interim Report, dated December 10, 2004, discussed the progress made in connection with the Examiner's investigations relating to compliance with the *Order Approving Specified Information Blocking Procedures and Permitting Trading in the Debtors' Securities, Bank Debt, Purchase or Sale of Trade Debt and Issuing of Analyst Reports Upon Establishment of a Screening Wall Effective July 25, 2003*, entered by the Court on August 18, 2003 (as amended April 21, 2004 and September 15, 2004, the "**Continued Trading Order**")[5] and proposed revisions to that procedural order to cure the problems that had arisen in applying and enforcing the order. In addition, the Third Interim Report gave an account of the Examiner's ongoing investigations into intercompany claims asserted by and against Mirant Americas, Inc.[6] and Mirant's potential claims against The Southern Company ("**Southern**").

The Fourth Interim Report, dated February 10, 2005, presented a final report on the Examiner's notional accounting for an internal hedge which was implemented at the Court's direction to track the effect on MIRMA's gross revenue of changing power prices. The Examiner also presented information on the conclusion of his investigation into compliance with the Continued Trading Order; however, subsequent events caused the Examiner to reopen that investigation and re-urge the Court in the Fifth Interim Report to modify the Continued Trading Order.

The Fifth Interim Report, dated April 15, 2005, focused principally on various matters relating to the Valuation Hearing. In addition, the Examiner reported on his investigation into allegations that the Equity Committee was responsible for an inflammatory press release, dated March 31, 2005, that contained a number of misleading and factually inaccurate statements concerning certain rulings by the Court in connection with the Valuation Hearing. The conclusion of that investigation is described in Section III.C. below. The Fifth Interim Report also identified certain inadequacies the Examiner perceives in the Debtors' *First Amended*

[5] Although the Examiner recognizes that the different constituencies use different names to refer to the Continued Trading Order, the Examiner adopts the Court's nomenclature for purposes of consistency.

[6] The product of that investigation was set forth in the *Examiner's Report of Claims Asserted by and Against Mirant Americas, Inc.*, which was filed with the Court on January 28, 2005.

Disclosure Statement Relating to the Debtors' First Amended Plan of Reorganization, filed March 25, 2005 (the "**Amended Disclosure Statement**").[7] In particular, the Examiner noted the lack of disclosure concerning outstanding intercompany and third party claims against the various Debtors on an individual basis, including the ramifications of the Debtors' proposal to waive intercompany claims and the apparent ability of non-Debtor affiliates to vote on account of their intercompany claims against certain Debtors. The Examiner further noted that the liquidation analysis attached as Exhibit C to the Amended Disclosure Statement fails to inform creditors of their potential recoveries in a liquidation scenario in the absence of an order substantively consolidating the Debtors — information that is necessary for any voting creditor to determine whether a proposed plan of reorganization presents a better alternative than a liquidation. Finally, as noted above, the Examiner re-urged his recommendation that the Court consider modifications to the Continued Trading Order. Among other deficiencies and internal inconsistencies, the Continued Trading Order contains no requirement for a Committee member to advise the United States Trustee if its holdings in the Debtors' securities drop below a certain level.[8] Based on indications that certain members of the official Committees are engaged in trading of the securities or debt comprising their respective claims against the Debtors, the Examiner believes it is possible that the holdings of one or more Committee members may be significantly less than at the time of that member's appointment to a Committee.

B. The Cases

On July 14, 2003, July 15, 2003, August 18, 2003, October 3, 2003 and November 18, 2003, Mirant Corporation ("**Mirant**") and substantially all of its wholly-owned and certain non-wholly-owned U.S. subsidiaries (collectively, the "**Debtors**" or the "**Company**") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division (the "**Court**") (collectively, the "**Cases**").

Three official committees have been appointed in the Cases:

- the Official Committee of Unsecured Creditors of Mirant Americas Generation, LLC (the "**MAGI Committee**"), currently comprised of California Public

[7] In commenting on the adequacy of the Amended Disclosure Statement, the Examiner takes no position on the Debtors' proposed plan of reorganization. Rather, the purpose of the Examiner's comment is to identify additional matters that the Examiner believes should be disclosed before the Debtors are authorized to solicit votes on a plan of reorganization.

[8] The absence of such a provision is notable in light of the fact that the order on which the Continued Trading Order was based — the *Order Approving Specified Information Blocking Procedures and Permitting Trading in the Debtors' Securities Upon Establishment of a Screening Wall*, *In re Worldcom, Inc., et al.*, Case No. 02-13533 (ALG) (Bankr. S.D. N.Y. August 6, 2002) — contains precisely such a provision requiring notice to the United States Trustee when a committee member's holdings drop below $20 million.

Employees Retirement System, Elliott Associates, McKay Shields and Wells Fargo Bank Minnesota, National Association;[9]

- the Official Committee of Unsecured Creditors of Mirant Corporation (the "**Mirant Committee**"), currently comprised of Citibank, N.A., Hypovereins Bank, Appaloosa Management LP, Deutsche Bank, Wachovia Securities, HSBC Bank USA and Law Debenture Trust Company of New York; and

- the Official Committee of Equity Security Holders of Mirant Corporation (the "**Equity Committee**"), currently comprised of Tejas Securities Group, Inc., Roger B. Smith, Andres Forero and Michael Willingham.

The MAGI Committee, the Mirant Committee and the Equity Committee are referred to herein as the "**Committees**." In addition, an ad hoc committee of bondholders (the "**Ad Hoc Committee**") of Mirant Americas Generation, LLC ("**MAGI**") made an appearance in the Cases in August 2004.

C. The Role of the Examiner

The Examiner, William K. Snyder, was appointed by the United States Trustee and approved by the Court on April 13, 2004. As noted above, the Examiner's role was originally stated in the Role of Examiner Order. The Role of Examiner Order was amended and restated (i) on May 27, 2004, to provide specific procedures for the compensation of the Examiner and his professionals, (ii) on July 7, 2004, to permit the Debtors to receive a copy of the Examiner's reports, (iii) on September 15, 2004, to permit the "**Owner Lessors**"[10] (as defined below) and U.S. Bank National Association, in its capacity as "Lease Indenture Trustee" and "Pass Through Trustee" (the "**MIRMA Trustee**"),[11] to receive a copy of the Examiner's reports; and (iv) on December 6, 2004, to permit Dean Nancy Rapoport, in her capacity as chair of the Fee Review Committee, to receive a copy of the Examiner's reports.[12] At this time, the Examiner's interim reports are provided to the Debtors, the Committees, the United States Trustee, the Owner Lessors, the MIRMA Trustee, and Dean Rapoport.

Acting *sua sponte*, the Court significantly expanded the Examiner's powers in a *Memorandum Order Expanding Role of Examiner*, entered July 30, 2004 (the "**July 30 Order**").

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[9] On January 31, 2005, the Examiner learned that Lehman Brothers, JPMorgan Chase and Royal Bank of Scotland have all resigned their positions as members of the MAGI Committee, leaving the MAGI Committee with four active members.

[10] The Owner Lessors comprise Morgantown OL1 LLC, Morgantown OL2 LLC, Morgantown OL3 LLC, Morgantown OL4 LLC, Morgantown OL5 LLC, Morgantown OL6 LLC, Morgantown OL7 LLC, Dickerson OL1 LLC, Dickerson OL2 LLC, Dickerson OL3 LLC and Dickerson OL4 LLC.

[11] The MIRMA Trustee serves as "Pass Through Trustee" and "Indenture Trustee" for the three series of notes issued to generate the necessary funds to finance the Owner Lessors' purchase (and subsequent lease to MIRMA) of the Morgantown and Dickerson power generation facilities.

[12] Although counsel for the Ad Hoc Committee has been designated as a "**Permitted Person**" (as defined in the Continued Trading Order), their request to be added to the list of constituencies authorized to receive a copy of the Examiner's reports was denied on November 5, 2004.

Shortly thereafter, the Mirant and MAGI Committees sought reconsideration of various components of that order. Among other things, the July 30 Order authorized the Examiner to—

- conduct monthly status conferences;
- identify and work to resolve any issue necessary or useful to advance the reorganization of the Debtors;
- maintain a notional accounting in connection with certain hedging transactions sought by the MAGI Committee on behalf of Mirant Mid-Atlantic, LLC ("**MIRMA**");
- investigate potential bases for litigation likely to materially affect the assets or liabilities of the Debtors;
- monitor plan negotiations and, if requested, mediate;
- investigate any conduct by a "Protected Person" that indicates a breach of such person's fiduciary duties in the Cases;
- coordinate with the Fee Review Committee; and
- review and monitor the operation and compliance of the Continued Trading Order (as defined below).[13]

Following a period of briefing by the parties, the Court entered its *Memorandum Order Regarding Reconsideration of Expanded Role of Examiner* on September 1, 2004 (the "**Expanded Examiner Order**"). The Expanded Order clarified the Court's direction to the Examiner as originally stated in the July 30 Order. The Expanded Examiner Order, together with the Role of Examiner Order, defines the scope of the Examiner's powers and duties.

D. Examiner's Staffing and Budget

The fees earned and expenses incurred by the Examiner and his professionals have continued to accrue at a rate within the $900,000.00 quarterly budget imposed by the Court pursuant to the Expanded Examiner Order.

E. Disclaimer

This Sixth Interim Report has been prepared based on the Examiner's own investigations. In addition to data gathered by the Examiner and his professionals, this report is based upon pleadings filed in these and other cases and other written and oral information, data and communications supplied to the Examiner by various parties-in-interest, including (i) Mirant Corporation, its numerous subsidiaries and affiliates and their respective officers, directors,

[13] This represents a summary of the Court's more detailed instructions to the Examiner in the Expanded Examiner Order. The Examiner understands his duties and obligations to be precisely as set forth in the Expanded Examiner Order and the Role of Examiner Order.

employees, professionals, agents and advisors; (ii) the Committees and their respective professionals, agents and advisors; and (iii) various individual creditors of Mirant and their professionals, agents, and advisors.

The Examiner has attempted to provide information obtained from reliable sources; however, the Examiner has not independently verified all of the information and the data referenced in this report and the same are enclosed for reference purposes only. The Examiner makes no representations or warranties as to the accuracy or completeness of such information and data and shall have no liability for any representations (express or implied) contained herein, for any omissions from this report or for any other written or oral communications transmitted by or to the Examiner in the course of the preparation of this report. The Examiner and his professionals are "Protected Persons" and "Protected Professionals" as those terms are used in the Court's *Order Restricting Pursuit of Certain Persons*, entered on August 5 and September 29, 2003.

The information contained herein has been prepared to assist the Court and the constituencies in making their own evaluations of the circumstances described herein and does not purport to contain all of the information that an interested party may need or desire to review in conducting its own evaluation.

This report includes certain statements, estimates and projections provided by the Company's management and professionals with respect to the Company's forecasted future performance. Such statements, estimates and projections reflect various assumptions by the Company concerning forecasted results, which have been included solely for illustrative purposes. No representations are made as to the accuracy of such statements, estimates, or projections or with respect to any other materials herein. This report contains conclusions based on information available to the Examiner as of 9:00 am CDT June 9, 2005.

III.
DISCUSSION OF ISSUES

A. Lack of Information Flow from Debtors

1. Discussion

Believing them largely to have been resolved,[14] the Examiner last reported on issues relating to the flow of information from the Debtors in the Fourth Interim Report. However, while the flow of information in the Cases generally has improved (in large part due to the large quantity of information made public in connection with the valuation hearing), the Debtors' professionals have continued to refuse to comply with requests for information from the Examiner. Their prolonged resistance to the Examiner has made it increasingly difficult for the Examiner to carry out the instructions of the Court, monitor "possible conflicts Debtors and the two creditors' committees face,"[15] ensure that inter-Debtor issues are resolved properly and

[14] Save and except for the numerous discovery disputes that have been described in prior interim reports and continue to arise on a regular basis.
[15] July 30 Order, at 6.

make certain that the interests of "orphan creditor constituencies"[16] are as well protected as those of any other constituency. In explaining the Examiner's role in these Cases, the Court has stated that "as a neutral watchdog, the Examiner offers to all constituencies the comfort of ensured transparency and a fair reorganization process."[17] However, that transparency has been too often clouded by the resistance of the Debtors' professionals to the Examiner's efforts.[18]

(a) Causes of Action/Tolling Agreements

As a notable example, in response to creditor inquiries concerning the status of the Debtors' efforts to obtain tolling agreements Examiner's counsel contacted Debtors' counsel by letter, dated April 29, 2005, requesting a schedule of all causes of action and potential defendants that the Debtors have identified and that are subject to limitations periods expiring on or before July 14, 2005, including causes of action against other Debtors, officers and directors.[19] The Examiner also requested information on the status of any tolling agreements reached between the Debtors and potential defendants. This information is necessary because **the Examiner is concerned that** the Amended Disclosure Statement provides an incomplete picture of the Debtors' efforts to pursue avoidance actions and other litigation and to obtain tolling agreements relating to the impending limitations period.[20] Without it, the Examiner is not in a position to respond to inquiries from creditors or assure creditors that these causes of action (which could yield significant value to the Debtors' estates) are being adequately protected in light of the sliding schedule for approval of a disclosure statement and solicitation on a plan of reorganization and the impending expiration of the 11 U.S.C. §§ 108 and 546 statutes of limitations on July 14, 2005.

As of June 8, 2005, the Debtors had not responded to the Examiner's request for information despite several reminders. Apparently in response to the Examiner's April 29 letter, however, on June 7, 2005 the Debtors filed a *Motion to: (I) Approve Stipulation Tolling Statute of Limitations and Authorize the Debtors to Enter into Other Tolling Agreements with Third Parties, (II) Extend Statute of Limitations Relating to Third Parties, and (III) Preserve the Debtors' Right to Utilize Sections 502(b)(1) and 502(d) After Expiration of Applicable Statute of Limitations Periods* (the "**Tolling Motion**") seeking, among other things, to toll the applicable limitations period (which expires July 14, 2005) as to all causes of action against other Debtors, non-Debtor affiliates, and non-Debtor third parties. Although the Tolling Motion indicates that the Debtors may be "entering into tolling agreements with *identified* defendants," the Tolling Motion nowhere lists the potential defendants identified by the Debtors to date.[21] Moreover, the

[16] July 30 Order, at 8.
[17] Expanded Examiner Order, at 6 n. 10.
[18] In this regard, the Examiner would note that, in every instance, the Debtors themselves (including senior management) have consistently been forthright with the Examiner and accommodating of his requests.
[19] A copy of the letter is attached as Exhibit 1 hereto.
[20] For example, the Debtors have made various statements in open court indicating their apparent intention to bring fraudulent transfer causes of action against PEPCO and/or the Owner Lessors arising from the Debtors' December 2000 acquisition of PEPCO's generation business, yet no such potential fraudulent transfers are listed or otherwise described in the Amended Disclosure Statement.
[21] Tolling Motion, at 2-3 (emphasis added).

Tolling Motion seeks the entry of an order tolling the applicable limitations period with respect to *all* third parties, whether "identified" or not.

In light of the broad relief requested by the Debtors in the Tolling Motion, the information requested by the Examiner on April 29 (which should have been provided in any event) is now all the more important. In addition to its significance to the overall reorganization process, this information must be made available so that potential defendants are apprised that the Tolling Motion could affect their rights, thus avoiding subsequent notice issues.

Amazingly, the Examiner has recently learned that AP Services, LLC ("**APS**") has prepared two preference analyses for the Debtors dated March 23, 2005 and June 3, 2005. Why these analyses were not shared with the Examiner — particularly in light of the fact that they would be directly responsive to the Examiner's request for information — is indefensible and inexcusable. Upon information and belief, these reports reveal tens of millions of dollars worth of potential preference claims (and additional potential defendants) that are not included in the list of claims set forth in Schedule 7 of the Amended Disclosure Statement.

(b) Creditor Claims

The Examiner has also met with resistance in connection with his efforts to evaluate the Debtors' estimates of the total claims (or range of claims) that must be satisfied before equity holders can receive any distribution. The Examiner received some preliminary (and incomplete) information from the Debtors in late February and early March 2005. However, this data (i) failed to account for significant potential rejection claims, (ii) excluded estimated claim amounts for certain other claims and (iii) provided no estimated claims amounts or ranges for other, significant potential claims asserted by another twenty-eight creditors. The Debtors invited the Examiner to participate in a meeting with advisors from the Debtors and the three Committees on March 31, 2005 to discuss outstanding claims and potential preference causes of action. That meeting was canceled by the Debtors on March 30. Since then, the Debtors have not indicated to the Examiner that the meeting will be rescheduled, and the Examiner's requests to reschedule the meeting have gone unanswered.

Based on the limited information currently available to the Examiner, the resolution of certain disputed claims could swing current claims estimates by several hundred million. Therefore, even when the Court assigns the Debtors a total enterprise value at the conclusion of the Valuation Hearing, the ultimate question of whether value remains for equity could still remain unanswered.

2. Next Steps

In order to conduct his investigations and discharge his duties to the Court thoroughly and accurately, the Examiner must have full, complete and timely access to information. The Court, in the Role of Examiner Order, ordered that "[a]ll Protected Persons (as that term is used in this court's Order Restricting Pursuit of Certain Persons entered on August 5 and September 29, 2003) … shall cooperate with the Examiner."[22] In order that the Examiner may fulfill his

[22] Role of Examiner Order (April 29, 2004), at 7.

duties, complete his mandated investigations, and protect the several estates and their creditors (orphan or otherwise) from the conflicts that may arise when opposing interests are represented by common professionals, the Examiner asks the Court to direct all professionals in the Cases to cooperate fully with the Examiner and take such other measures as the Court deems appropriate in light of these circumstances.

B. Recent Press Release

1. Discussion

In the Fifth Interim Report, the Examiner reported on a March 31, 2005 press release attributed to the Equity Committee that contained materially misleading statements and led to fears that confidential information may have been leaked. The Examiner conducted a preliminary investigation, and the Equity Committee issued a press release of its own disavowing the March 31 press release. On April 11, 2005, the Court denied the Mirant Committee's motion to impose a gag order and appropriate sanctions on the Equity Committee, but directed each member of the Equity Committee to file an affidavit with the Court affirming that such member participated neither in the formulation nor the release of the March 31 press release (or, in the alternative, describing such member's involvement). Of the five individuals who submitted affidavits, three confirmed they had no involvement in the preparation of the press release, nor any involvement with the group responsible for issuing the press release.

Michael Willingham's affidavit confirmed that he had provided non-confidential information to The Brunswick Group ("**Brunswick**"), the public relations firm that had issued the press release, and had reviewed a draft of the press release before its issuance. Mr. Willingham's affidavit also revealed that he had contributed $4,460 to the Mirant Shareholders' Rights Group LLC (the "**Shareholders' Rights Group**") to defray the expense of retaining Brunswick, and approached Mr. Pickens to discuss whether Tejas would be interested in contributing. Mr. Willingham's affidavit also indicated that he had directed Brunswick to "an internet site where shareholders discuss issues concerning them, which included access to court filings publicly available through the PACER system."[23]

Tom Pickens, a representative of Tejas Securities, also confirmed that he had provided non-confidential information to The Brunswick Group ("**Brunswick**"), the public relations firm that had issued the press release, and had viewed (but not commented upon) a draft of the press release before its issuance. Mr. Pickens also confirmed that, with his assent, Tejas made contributions totaling $50,000 to the Shareholders' Rights Group to enable the group to retain Brunswick to aid in its publicity efforts.

Following the filing of the five affidavits, Examiner's counsel had additional conversations with Mr. Michael Buckley, a representative of Brunswick. Mr. Buckley confirmed that the members of the Equity Committee he had been in contact with had refused to provide him with anything other than publicly-available documents and copies of correspondence originating from various shareholders. Examiner's counsel reviewed various online discussion boards and websites — including the website believed to be that referenced in Mr. Willingham's

[23] *Declaration of Michael Willingham*, dated April 23, 2005, at 3.

affidavit and the website of Matt Wilson (counsel for another active group of Mirant shareholders). Although not mentioned in Mr. Willingham's affidavit, it appears that Mr. Willingham is more than tangentially involved with the content and maintenance of one of the websites. Based on the Examiner's review, the website contains no documents known to the Examiner to be confidential or containing non-public information belonging to the Debtors.

2. Next Steps

At the commencement of this investigation, the Examiner's chief concern was to assure that no confidential information was being disseminated by the Equity Committee or its members. To date, the Examiner has seen no evidence that the Equity Committee or its members have shared confidential information with any unauthorized parties. Accordingly, the Examiner concludes that, absent further direction, no further action by the Examiner is required in connection with this matter.

C. Continued Confidentiality of Examiner's Reports

At the direction of the Court, Debtors' counsel has "previewed" near-final drafts of the Examiner's interim reports to ensure that confidential information belonging to the Debtors is not inadvertently compromised. While the Court's directive may have been well-intentioned, it has placed the Examiner in the untenable position of providing advance notice of the outcome of his investigations to a party-in-interest who has twice leaked such information to unauthorized parties. Accordingly, the Examiner believes it appropriate that he be relieved of this obligation.

1. The Examiner's Obligation to Consult the Debtors

In order to understand the basis for the Examiner's request, it is important to understand the source of the Examiner's obligation to provide the Debtors with advance copies of his interim reports. Following the release of the Second Interim Report (and reflecting the confidentiality of the content of the report), the Court convened an in-chambers status conference on October 27, 2004 to discuss certain matters raised in the report. In that status conference, Debtors' counsel raised a concern over a statement by the Examiner regarding the relative value of the Morgantown and Dickerson facilities, which Debtors' counsel alleged was based on confidential information. According to Debtors' counsel, the Examiner's statement — in addition to being wholly unfounded — threatened to embolden certain defendants engaged in litigation with the Debtors and undermine the Debtors' ongoing trial strategy in connection with their efforts to recharacterize the various facility and ground leases associated with the Debtors' operation of the Morgantown and Dickerson plants.[24]

In fact, the Examiner's conclusion was supported at the time by public statements made by lead co-counsel for the Debtors.

> The Morgantown and Dickerson plants make money. They are projected by us to make money. They also eat lots of cash for

[24] The Court dismissed the Debtors' claim for recharacterization of those leases as a financing transaction by order entered April 7, 2005. *Mirant Mid-Atlantic, LLC, et al. v. Morgantown OL1 LLC, et al. (In re Mirant Corporation, et al.)*, Adv. No. 04-04283 (Bankr N.D. Tex. April 19, 2005).

> capital expenditures, particularly environmental capital expenditures. It's anticipated we're going to spend $750 million in capital expenditures over the next few years. But the Morgantown and Dickerson plants are projected by us to make lots of money even after the capital expenditures. That is not an issue. We agree with the owner/lessors and the pass-through certificate noteholders that based on our projections, these plants make money.[25]

Additionally, the Debtors' 2004 Business Plan, released in March 2004,[26] indicated that Morgantown and Dickerson facilities accounted for almost 23% of the Debtors' North American power generation capacity (2,345 MW).[27]

In response to the concerns raised by White & Case, the Court directed the Examiner to provide Debtors' counsel with a draft of each interim report subsequently prepared by the Examiner to afford the Debtors the opportunity to redact confidential information that was provided to the Examiner but not intended for further dissemination. Since that time, the Examiner has provided the Debtors with a draft of each interim report.[28]

2. The First Unauthorized Disclosure

On December 8, 2004, Examiner's counsel provided a near-final draft of the Third Interim Report to only Thomas Lauria, as lead counsel for the Debtors. As noted in the cover email, the purpose of that "preview" was to allow Debtors' counsel "the opportunity to redact any information that is confidential (i.e., not known to parties other than the Examiner and the Debtors)." This procedure comported with the Court's directive to the Examiner to allow the Debtors' the opportunity to redact any information that, although shared with the Examiner, was not intended to be shared with any other party.[29]

On December 9, however, Examiner's counsel received a phone call from lead counsel for the Mirant Committee, asking about certain of the conclusions reached by the Examiner in the draft Third Interim Report. Upon further inquiry, it was revealed to Examiner's counsel that the Mirant Committee's counsel had reviewed a copy of the draft Third Interim Report, which prompted his questions. Upon further inquiry, Examiner's counsel confirmed that White & Case in fact leaked the content of the draft report, and received assurances that it would not happen again.

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[25] Transcript of March 24, 2004 hearing, at 122-23.

[26] Although the Debtors' 2004 Business Plan was previously maintained as a confidential document, it became public upon its introduction into evidence during the course of the Valuation Hearing.

[27] Although not released until after the Examiner's statement regarding the value of the Morgantown and Dickerson facilities contained in the Second Interim Report, the Debtors' 2005 Business Plan, released in October 2004, further confirmed their value.

[28] A draft of the Third Interim Report, filed December 10, 2004, was provided to the Debtors December 8, 2004. A draft of the Fourth Interim Report, filed February 10, 2005, was provided to the Debtors February 8, 2005. A draft of the Fifth Interim Report, filed April 15, 2005, was provided to the Debtors April 12, 2005.

[29] In the three reports submitted by the Examiner since the October 27 status conference, only one passage of one report was deemed by Debtors' counsel to warrant redaction.

3. The Second Unauthorized Disclosure

The second breach of the confidential nature of the Examiner's reports was all the more egregious because, rather than simply leaking a copy of the draft report to a party who would ultimately receive a copy of the report in its final form, White & Case leaked the content of the Examiner's report *in open court*.

The Examiner's near-final draft of the Fifth Interim Report was provided to Debtors' counsel on April 12, 2005 at 10:00 am. In light of the disclosure of the draft Third Interim Report, the cover email accompanying the draft Fifth Interim Report admonished Debtors' counsel that "while you may circulate this draft internally to necessary members of the W&C team, this document should not be circulated outside White & Case, and should definitely not be circulated to other constituencies."

Nevertheless, only a few hours later at the conclusion of certain hearings on April 12, 2005, Mr. Lauria revealed that he had seen a draft of the Examiner's Fifth Interim Report that "characterizes the positions of the parties and the various reports."[30] Additional discussion on the record further revealed that the Examiner's Fifth Interim Report contained a summary of the confidential expert reports submitted in connection with the Valuation Hearing. After Mr. Lauria (joined by counsel for the Mirant Committee) suggested that the Examiner was improperly taking a position on the determination of the Debtors' enterprise value, another White & Case partner confirmed the summary's neutral format, stating "[j]ust so there's no mis-impression, I have seen some version of [the Examiner's] summary. It certainly at the time I saw it was entirely neutral."[31] As a postscript, counsel and financial advisors for the Debtors and each Committee ultimately approved the content of the summary, which was included in the Fifth Interim Report and has been referenced by the Court during the course of the Valuation Hearing.

4. Next Steps

These disclosures by Debtors' counsel — whether advertent or otherwise — are inexcusable. Indeed, White & Case has admonished Examiner's counsel on various occasions that the mere *existence* of certain information provided to the Examiner on a confidential basis is itself confidential.[32] In addition, while the continued need to maintain the confidentiality of the Examiner's interim reports has been occasionally questioned, the content of the Examiner's reports has been strictly guarded by the Examiner and his professionals throughout the Examiner's tenure in these Chapter 11 cases.[33] This does not represent the only instance in which the Debtors have wielded confidentiality as an offensive weapon. The Examiner finds it particularly ironic that, while the Debtors originally obtained the right to preview the Examiner's

[30] Transcript of April 12, 2005 Hearing, at 72:1-2.
[31] Transcript of Hearing April 12, 2005, at 88:3-6.
[32] Indeed, the Examiner has occasionally been prevented from providing a *complete* report of the status of an investigation or his ultimate findings because it would require the Examiner to disclose the mere *existence* of confidential information provided by the Debtors to the Examiner.
[33] The Examiner queries in this regard whether the recent incident involving the transmittal of a copy of the Examiner's confidential summary of expert reports to The Wall Street Journal could have been avoided had the publicly-available April 12 hearing transcript not revealed its existence.

interim reports under the pretext of safeguarding confidential information, they have since violated that very confidentiality on two separate occasions.[34]

It is beyond cavil that the Examiner's investigations — and the Examiner's conclusions reached in connection with those investigations — must be safeguarded from outside influence. The Examiner "is first and foremost disinterested and nonadversarial. The benefits of his investigative efforts flow solely to the debtor and to its creditors and shareholders, but he answers solely to the court."[35] As another court observed, an examiner is "a Court fiduciary and is amenable to no other purpose or interested party."[36] Yet, under the Court's current directive, the Examiner must provide a "preview" of his reports to one of the constituencies whose actions and positions are being investigated and reported on by the Examiner. In light of the violations of the confidentiality of the Examiner's draft reports, the Examiner submits that the unusual license granted to the Debtors is no longer appropriate. Accordingly, the Examiner believes it appropriate at this time for the Court to relieve him of the obligation to allow the Debtors the opportunity to review and comment upon his reports before filing.

D. Southern Spin-Off

1. Discussion

Since his appointment, the Examiner has actively monitored the Debtors' investigation of potential causes of action against Southern and worked with the Debtors to ensure these claims are preserved for the benefit of the Debtors' estates and their creditors. For at least some of these causes of action, the applicable limitations period under Section 108 of the Bankruptcy Code expires on or about July 14, 2005.

As the Examiner has noted before, swift, decisive action is necessary to ensure the claims and causes of action against Southern are not inadvertently lost to unintended procedural defects and/or applicable statutes of limitations. At present, motions have been filed requesting that Chief Bankruptcy Judge Steven A. Felsenthal direct that the Southern claims be pursued, alternatively, by the Debtors, the Mirant Committee, the MAGI Committee or the Examiner.[37] Notwithstanding the growing urgency surrounding these claims, a hearing is not set on those motions until June 20, 2005. The Debtors and the Mirant Committee have advised Judge Felsenthal that they are drafting a complaint and will be ready to commence litigation against Southern prior to July 14, 2005. Although the Examiner has not reviewed the complaint, he is

[34] While the two disclosures of the confidential subject matter of the Examiner's reports are more than sufficient reason to rescind the Debtors' right to continue previewing the Examiner's reports, the Debtors' previews of the Examiner's reports provide Debtors' counsel with an unprecedented opportunity (whether actually exercised or not) to attempt to influence the outcome of the Examiner's investigations. Notwithstanding this exposure to potential outside influences, the Examiner affirms to the Court that the statements contained in his reports represent the Examiner's true and reasoned conclusions, and have not been unduly influenced by any party.

[35] *Matter of Baldwin United Corp.*, 46 B.R. 314, 316 (Bankr. S.D. Ohio 1985); *Kovalesky v. Carpenter*, 1997 WL 630144, *4 (S.D. N.Y. 1997).

[36] *In re Hamiel & Sons, Inc.*, 20 B.R. 830, 832 (Bankr. S.D. Ohio 1982).

[37] With the exception of the Examiner, whose assumption of the Southern claims was requested by the Equity Committee, each of the other proposed plaintiffs was self-nominated.

informed that the complaint will not include causes of action against directors of Mirant. Instead, the Debtors are currently pursuing tolling agreements relating to those causes of action, which agreements will require the approval of the Court prior to July 14, 2005 if they are to take effect in time to successfully toll the current limitations period applicable to such causes of action. If the Debtors are unsuccessful in obtaining tolling agreements with the directors of Mirant, there is no indication that the Debtors will commence the necessary litigation before July 14.

2. Next Steps

The Examiner will continue to monitor the investigation of, and preparations to litigate, the Southern claims.

E. Professionals' Fees

1. Discussion

The Fee Review Committee's March 2005 Monthly Report reflects the submission of over $229 million in fees and expenses from the various professionals. By constituency, the $229 million is broken down as follows:[38]

Total Fees and Expenses	Debtors	Mirant	Equity	MAGI	Monthly Totals
July 2003	$4,710,275	$51,033	$0	$57,487	$4,818,795
August 2003	6,377,874	518,427	0	850,644	7,746,945
September 2003	7,946,904	1,781,519	253,304	961,124	10,942,851
October 2003	7,801,083	2,336,493	628,101	1,239,618	12,005,294
November 2003	7,142,256	1,334,937	388,182	843,074	9,708,448
December 2003	7,300,096	1,394,012	377,553	726,747	9,798,409
January 2004	8,375,393	1,851,528	353,873	739,791	11,320,585
February 2004	9,571,438	1,121,550	245,879	887,823	11,826,691
March 2004	10,281,838	1,340,732	402,172	910,634	12,935,377
April 2004	8,553,613	1,560,031	452,620	1,001,973	11,568,236
May 2004	8,153,131	1,565,765	291,356	1,094,163	11,104,416
June 2004	7,569,553	2,491,673	384,106	1,511,932	11,957,264
July 2004	7,157,775	2,231,315	472,116	1,874,004	11,735,210
August 2004	7,113,236	2,432,584	397,557	1,986,498	11,929,875
September 2004	7,160,346	2,027,620	488,535	1,720,820	11,397,319
October 2004	9,357,882	2,176,592	491,802	1,906,804	13,933,080
November 2004	9,943,627	2,262,084	588,667	1,596,892	14,391,270
December 2004	8,758,272	1,784,842	571,235	1,254,680	12,369,029
January 2005	9,325,777	2,885,963	690,107	1,187,822	14,089,667
February 2005	8,209,222	2,793,719	704,945	1,245,557	12,953,443
March 2005	714,495	0	24,214	0	738,709
April 2005					
May 2005					
TOTALS	$161,524,084	$35,942,419	$8,206,322	$23,598,088	$229,270,913

[38] These figures are derived from the Mirant Fee Review Committee's March 2005 Monthly Report.

According to the March 2005 Monthly Report, these figures are believed to be final through February 2005. For the three months ending February 2005, fees and expenses have accrued at approximately $13.1 million per month — representing a significant increase in fees over the last few months. As the constituencies move directly into the valuation phase of the confirmation process and continue to negotiate the terms and content of the Amended Plan and Disclosure Statement, the Examiner expects that fees and expenses could continue to accrue at a similar, if not slightly higher, rate.

Based on these figures, the Examiner estimates total fees and expenses incurred in the Cases through May 31, 2005 to exceed $265,000,000.

Dated: June 10, 2005
Dallas, Texas

Respectfully submitted,

WILLIAM K. SNYDER, EXAMINER

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- and -

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