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**COUNSEL TO CERTAIN MIRANT SHAREHOLDERS**

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

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

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**BRIEF IN SUPPORT OF**

**1) THE FIRST AND FINAL APPLICATION OF FRANK SMITH, KENT KOERPER, PETER DEPAVLOFF, BART ENGRAM, MARY LEIGHT AND L. MATT WILSON FOR ALLOWANCE OF COMPENSATION FOR FEES AND REIMBURSEMENT OF EXPENSES OF THE WILSON LAW FIRM, P.C. PURSUANT TO SECTION 503(b) OF THE BANKRUPTCY CODE AND 2) APPLICATION FOR ALLOWANCE AND PAYMENT OF A FEE ENHANCEMENT**

COME NOW, FRANK SMITH, KENT KOERPER, PETER DEPAVLOFF, BART ENGRAM, MARY LEIGHT AND L. MATT WILSON, (the “Wilson Shareholders” or the “Applicant”) by and through their undersigned counsel, The Wilson Law Firm, P.C. (“Wilson”), who hereby file their Brief in Support (the “Brief”) of 1) the First and Final Application for Allowance of Compensation for Fees and Reimbursement of Expenses pursuant to Sections 503(b)(3)(D) and

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(b)(4) of the Bankruptcy Code and Bankruptcy Rule 2016 (the “Fee Application”), and 2) Application for Allowance and Payment of a Fee Enhancement (the “Bonus Application”). In support of their Applications, the Wilson Shareholders respectfully represent as follows:

### INTRODUCTION

The Court should approve in full the Fee Application, and the alternative Bonus Application, for 1) hourly fees for The Wilson Law Firm, P.C. of \$686,473.25 for that portion of the entire case beginning September 18, 2003 through the Effective Date of the Plan, January 3, 2006 (the “Application Period”); 2) expenses in the amount of \$26,044.90 for the Application Period; and 3) contingency success fees in the amount of \$6.45 million, being exactly 1% of the 645,000,000 gain realized by existing shareholders by the terms and conditions of engagement.

Alternatively to the contingency success fee by the terms and conditions of engagement, the Applicant seeks an upward “success” fee enhancement for Wilson in the same amount of \$6.45 Million.

As the Fee Application and the Bonus Application both detail, Wilson played a crucial and critical role during the valuation hearings that resulted in significantly favorable provisions in the Court’s June 30 and July 27, 2005 Valuation Letter Rulings, that can objectively be traced to Wilson’s cross-examination, arguments, and suggestions, which effectively “set the stage” for the subsequent settlement negotiations which resulted in the final plan of reorganization. Wilson thereafter continued to urge greater equity recovery, arguing that the creditors were being overpaid, exactly as the market has now confirmed.

For all of the reasons set forth below, and in both the Fee Application and the Bonus

Application, the Court should allow reimbursement of Wilson's fees and expenses under Section 503(b) of the Bankruptcy Code based on the Applicant's efforts and results obtained on behalf of the equity interests in these Chapter 11 Cases.

### **PART ONE: FACTUAL BACKGROUND**

#### **A. Wilson and Phoenix were both original members of the Equity Committee.**

On July 14, 2003 and various dates thereafter (collectively, the "Petition Date"), Mirant Corporation and 82 of its direct and indirect subsidiaries (collectively, the "Debtors") filed voluntary chapter 11 petitions. The U.S. Trustee initially appointed a committee for the unsecured creditors of Mirant (the "Creditors Committee") and a committee for the unsecured creditors of Mirant Americas Generation, LLC (the MAG Committee). On August 4, 2003, shareholder Michael Sammons ("Sammons") filed a MOTION FOR THE APPOINTMENT OF STOCKHOLDERS' COMMITTEE, and on August 29, 2003, the U.S. Trustee sent an invitation to the fifty largest shareholders announcing the formation of an Equity Security Holders Committee. (The "Equity Committee"). On September 17, 2003, the Equity Committee was formed, with Sammons, L. Matt Wilson and the Phaeton International/Phoenix Partners (the "Phoenix Partners") as three of its nine initial members. L. Matt Wilson served on the Equity Committee from its initial appointment on September 18, 2003 until February 10, 2004. The Phoenix Partners served on the Equity Committee until July 26, 2004.

#### **B. A Consensual Plan of Reorganization Proved Impossible Prior to The Valuation Hearing.**

On November 22, 2004, the Equity Committee sought to compel Mirant to hold a

shareholders' meeting for the avowed purpose of removing and replacing the members of Mirant's Board of Directors. The Debtor responded with the argument that existing Equity was "out of the money" and should be denied further participation.

On January 19, 2005, the Debtors filed the Initial Plan and related disclosure statement (the "Initial Plan"). On March 25, 2005, the Debtors filed their First Amended Plan (the "First Amended Plan"). The Initial Plan and First Amended Plan were not consensual plans and neither plan provided any substantial recovery for equity. After nearly two years in bankruptcy, the Debtors and both the Creditors Committee and the MAG Committee were adamant that "Equity was out of the money."

Significantly, as the Equity Committee counsel later explained, despite his best efforts, Equity had been unable to even meet or participate in any plan negotiations or discussions: "Well, Your Honor, from the Equity Committee's point of view, that would be the first negotiation, because the record will reflect and the testimony will demonstrate that throughout the entire course of this case our Debtor, so vehemently interested in preserving equity value, refused systematically to meet with the Equity Committee one time, not once, despite repeated requests to counsel for the Debtor." (April 18, 2005 Valuation Hearing Transcript at Page 98-99.)

To resolve the issues raised by the motion to compel the shareholders meeting and the core valuation disputes related to proposed plans of reorganization, the Debtors agreed to conduct the Valuation Hearing and, on February 11, 2005, the Court entered an order scheduling the Valuation Hearing for April 11, 2005 through April 13, 2005, and establishing various discovery deadlines and procedures. The Valuation Hearing was necessary to break the impasse regarding valuation.

**C. The Wilson Law Firm, P.C. and the terms of The Wilson Shareholders' Engagements.**

The publication on January 19, 2005, of the Debtors' Initial Plan, which proposed to completely eliminate existing Equity, confirmed to The Wilson Law Firm, P.C., and L. Matt Wilson, as a former member of the Equity Committee, that the Equity Committee had not been able to negotiate any recovery for Shareholders.

In anticipation of a full-fledged valuation fight, in which Equity would need as much help as could be made available, and in which many public shareholders might need a vehicle for participation and information, Wilson prepared and presented an alternative means of public representation, open to all Shareholders, via an internet website, at <http://willaw.com/mirant/gnrl.htm>, according to which "The Wilson Law Firm, P.C. of Atlanta, offers its services to Mirant shareholders, as our Clients, for the purpose of advocating a higher recovery to existing shareholders than has been proposed by Mirant in its January 19, 2005, Plan of Reorganization for Mirant."

Mirant Shareholders were encouraged to sign-up as clients, by return of an electronic confirmation or by contacting the firm by email, telephone, or regular mail. Those who became clients were all obligated to the following terms and conditions:

The Wilson Law Firm, P.C. must naturally charge fees for its work, which we propose to do on the following basis:

All of our clients agree to support us in seeking official recognition by the U.S. Bankruptcy Court and payment of our hourly fees as an administrative expense of the Estate. In this regard, we will accurately record all of the time we spend on this matter, creating electronic "timeslips" each day for each layer. The "timeslips" will track:

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- \* The attorney doing the work
- \* A description of the work being done
- \* The date and the total time spent

We will charge fees at the rate of \$350 per hour for partners and \$250 per hour for associate attorneys. We do not expect any individual client to be responsible for the payment of our hourly fees. Rather, we anticipate applying to the Bankruptcy Court for approval of and payment of these fees as an expense of the Estate.

We will also charge a contingency fee, based on our success, in two distinct regards. First, we will charge one percent (1%) contingency fee based upon the difference between the stock price on the day you sign up to the day you sell your stock, times the number of shares you sell. Therefore, if we are successful in causing, or helping to cause, in any fashion, a rise in the stock price, you will agree to pay us one percent (1%) of the profit you actually realize. We will also seek to have the Court approve this fee, as an expense of the Estate, measured by the rise in price of the stock of all shareholders, as our actions will benefit all shareholders either in terms of a cash payment or stock options. If the Court does not approve this fee, then we will not expect any of our individual clients to pay us and we will accept payment from the Estate instead.

Second, we will charge a one percent (1%) contingency fee on any sales, leases, or IPO's we originate as a result, in whole or in part, of our efforts described herein. We will also seek to have the Court approve this fee, as an expense of the Estate, measured by the actual sales price, IPO proceeds, or financing proceeds. We also reserve the right to assert claims against the Debtor, or its reorganized successor, should Mirant reorganize and later seek to take advantage of asset sales prospects which we identified first.

We intend to enhance the value of the Debtor's Estate sufficiently to persuade the Court to approve all of our fees and expenses as charges to the Estate.

A true and correct copy of these terms and conditions as set forth on the website are attached to and incorporated into the Fee Application as Exhibit "2".

All of the Wilson Shareholder clients agreed to support Wilson “in seeking official recognition by the U.S. Bankruptcy Court and payment of our hourly fees as an administrative expense of the Estate.” True and correct copies of affidavits from each of the final clients listed on Wilson’s most recent Rule 2019 Statement are attached to the Fee Application as Exhibit “3”, wherein each of these clients confirms that he has read the Fee Application and the Bonus Application, wholly supports the amounts requested, and asks that the Court grant the application so that he can pay Wilson the fees to which it is entitled pursuant to the foregoing terms and conditions.

**D. The Valuation Hearing.**

On March 29, 2005, Wilson filed three motions on behalf of its clients: (i) Motion for Leave to Participate in Valuation Hearing; (ii) Motion for Indefinite Continuance of Valuation Hearing; and (iii) Motion to Reopen Discovery. *See* Docket Nos. 9000, 9001, and 9002, respectively. That same day, the Court granted Wilson permission to participate in the Valuation Hearing in the limited role of cross-examination, but denied the other motions. Therefore, Wilson was required to prove his contentions via cross examination and was ultimately not permitted to call witnesses.

The Court conducted the Valuation Hearing between April 18, 2005 and June 27, 2005. It was extensive and complex beyond any measure. Over one thousand trial exhibits and hundreds of demonstrative exhibits were submitted, over ten witnesses testified, and ten expert reports were submitted for the Court’s consideration. The Court heard twenty-five days of live witness testimony. The Court heard closing arguments on June 27, 2005.

Wilson was one of six parties who actively participated in the Valuation Hearing.<sup>1</sup> Wilson conducted vital cross-examinations of Curt Morgan (Mirant's Chief Operating Officer) on April 19, 2005 and June 23, 2005; Timothy Coleman (the Debtors' primary valuation expert) on May 4, 2005 and May 5, 2005; David Ying (the Corp. Committee's primary valuation expert) on May 10, 2005, May 11, 2005 and June 23, 2005; Dr. Richard D. Tabors (a valuation and power markets expert proffered by the Debtors) on April 21, 2005; Kumar Krishnan (Mirant's Director of Market Evaluation) on April 20, 2005; John William Holden, III (Mirant's Senior Vice President and Treasurer) on May 2, 2005; Todd Filsinger (the Corp. Committee's valuation witness and the managing partner at PA Consulting Group) on May 11, 2005 and May 23, 2005; Anders Maxwell (the Equity Committee's financial advisor) on June 8, 2005 and June 15, 2005; and Dr. Israel Shaked (Phoenix's expert witness and a professor of finance and economics at Boston University) on June 21, 2005.

As is set forth in much more detail in the Fee Application, Wilson elicited critical factual information and advanced key arguments that no other party raised. Wilson made every effort to coordinate with the Equity Committee in advance of the hearing<sup>2</sup>; although Wilson's offer was declined, making Wilson's (and the Equity Committee's) work even more difficult, the record is nevertheless clear that Wilson raised, on several occasions, very significant matters that represented

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The other parties were the Debtors, the Corp. Committee, the MAG Committee, the Equity Committee, and Phoenix. Of these six, Wilson and Phoenix were the only parties whose professionals were not paid by the estate. The Indenture Trustee did not participate in the Valuation Hearing.

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Attached hereto and incorporated herein by this reference as Exhibit "A", are three emails dated March 13-14, 2005 confirming Wilson's attempt to coordinate presentations which was refused by the Equity Committee.

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original contributions on behalf of Equity.

**E. The Court's Valuation Letter Rulings.**

On June 30, 2005, the Court issued its first Valuation Letter Ruling directing the Debtors and Blackstone (the Debtors' financial advisor) to modify the Debtors' business plan projections and certain aspects of the valuation methodology in the expert report prepared by Timothy Coleman of Blackstone to derive a new enterprise valuation for plan purposes. Wilson was specifically included within the described procedures, thereby recognizing his contribution to the valuation process.

One very significant reflection of Wilson's substantial contribution to the valuation process was the Court's instruction that "The Business Plan will include provision for taxes, including full use of net operation loss carry-forwards ("NOL"). At the confirmation hearing, Debtors shall show that they contemplate making full and good use of all available tax benefits." This was directly reflective of several specific contributions by Wilson, including challenge to the Debtor's 40% tax assumptions in the Business Plan, introduction of IRC Section 199, revealing the Debtor's actual historical effective tax rates, and arguing that the NOL could only be fairly evaluated by inclusion in the business plan and referral of this issue to independent accountants rather than the Debtor's valuation experts. As is more fully explained in both the Fee Application, this ruling represented an enormous victory for Equity, because the dollar value of the increase to value would be enormous.

The Court also specifically noted Wilson's *Till* motion: "With regard to the motion filed by Matt Wilson urging application of *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), to Debtors' valuation, I will carry that motion and address it in my memorandum opinion described below."

Wilson's *Till* motion represented another substantial and demonstrable contribution to this

case, which consumed both Mr. Lauria and Mr. Sosnick's entire closing arguments (June 27, 2005 Valuation transcript pages 5703-5726 and 5752-5754) during which the Applicant's position and presentation was mentioned no less than six times. By carrying the *Till* motion, the Court effectively left it hanging over the heads of the Debtor and the Creditors' Committee during the critical negotiations period that followed, thereby maximizing the leverage of the Equity Committee and the Phoenix Partners.

The Court's June 30 Valuation Letter Ruling also instructed that Blackstone recalculate its "discount rate to be applied to cash flows ... with a cost of equity of 12% to 16.6%" reflecting a substantial decrease in the cost of equity range advocated by most of the experts<sup>3</sup> which would result in a substantial increase in value for Equity consistent with *Till*, and with many of Wilson's other arguments made during his cross examination of the various expert witnesses.

On July 7, 2005, the Valuation Implementation Committee ("VIC") transmitted a letter to all of the Valuation Parties, including Wilson, explaining their understanding of the Court's June 30, 2005 letter and soliciting comments. On July 13, 2005, Wilson responded with a letter to the VIC, a true and correct copy of which is attached hereto and incorporated herein by this reference as Exhibit "B", specifically discussing the tax projections being conducted by an independent accounting firm so as to assure minimizing taxes, maximizing after tax income, and thus greatly impacting value based upon discounted cash flow methodology.

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For example, the Equity Committee's primary expert, Anders Maxwell, had used a cost of equity range from 15.1% to 22.9% for Mirant (U.S.), 13.3% for Mirant (Philippines) and 16.4% for Mirant Jamaica, *See* Equity Committee Exhibit 1, pages 36, 38 and 39.

The Court issued an amended letter ruling on July 26, 2005 (these letters are hereinafter referred to collectively as the “Valuation Letter Rulings”), which specifically noted “[r]especting taxes, I approve the use of Deloitte & Touche to recalculate taxes under the business plan, using their (and Debtor’s) best judgment as to how tax attributes should be utilized.” It cannot be disputed that this was another substantial victory for equity, because the introduction of the independent CPA assured no undervaluation of the NOL nor any misuse of any of the other available tax attributes. Again, with respect to the tax issues, Wilson’s arguments were directly targeted at these exact determinations. As a result, pursuant to the Court’s Valuation Letter Ruling, the Business plan’s tax projection was reduced from the erroneously assumed 40% rate to approximately 10% to 20% - with the largest declines in the early years while the NOL was being fully utilized - creating a tremendous corresponding increase in the resulting valuation. Attacking this assumed 40% rate had been one of Wilson’s key focuses during cross-examination.

Following in the wake of the very extensive Valuation Hearings, with the final valuation yet to be calculated and with the expectation of still more hearings, the Valuation Letter Rulings forced the Debtors and the Creditors’ Committee to recognize that the Court was open minded as to the valuation of the Debtors, that the Court would afford all of the Valuation Parties the full opportunity to assure that valuation was fairly and truthfully determined, and that there was a substantial possibility that the Court might very well find Equity to be “in the money.” Specifically, there was a clear expectation that the adjustments for the fuel pricing and other minor matters would provide a substantial increase in value; that the proper tax treatment would reduce taxes from 40% to approximately 20%, thereby increasing after tax income by 1/3; and that under the Blackstone model,

the lower costs of equity would result in total valuations which could approach or even surpass the \$11 billion threshold established by the Court in its June 30 Valuation Letter Ruling.

Additionally, the potential for further delay caused by litigation and appeals, together with the uncertainty of outcome, all created an environment that literally “set the stage” for the subsequent negotiations, by providing substantial additional leverage and incentive for negotiations towards a consensual plan of reorganization.

**F. A Fully Consensual Plan That Increased Recovery For Equity Holders.**

As a result of the Valuation Letter Rulings, meaningful negotiations were finally started between the Debtor and the official committees. In late August or early September, 2005, the “Term Sheet Agreement” was reached, which provided full payment to all creditors and a very meaningful recovery to Equity Holders. Equity Holders would receive (i) 3.75% of the shares of New Mirant Common Stock, (ii) New Mirant Warrants to purchase up to an additional 10% of the New Mirant Common Stock, and (iii) the right to receive cash payments equal to 50% of the Cash recoveries realized by New Mirant, if any, in connection with the designated avoidance actions set forth in the Plan.

While the Applicant claims no direct credit for the Term Sheet Agreement, the rare, exceptional, and substantial contributions of the Applicant in part led to the Term Sheet Agreement. Further, when the Term Sheet Agreement was reached and announced, the Applicant continued to argue substantial undervaluation of the Debtors. Because the Applicant had not agreed to support the Plan, Wilson was free to raise objections as leverage to force a higher recovery to equity, again acting as the voice of all public objecting shareholders. Following the effective date, the market has

since confirmed that Wilson was correct in the assessment that the Debtor was being substantially undervalued.

**G. Disclosure Statement Objections.**

Wilson timely filed its 1) CERTAIN SHAREHOLDERS' OBJECTIONS TO DISCLOSURE STATEMENT on or about March 7, 2005; its 2) CERTAIN SHAREHOLDERS' OBJECTIONS TO FIRST AMENDED DISCLOSURE STATEMENT on or about April 1, 2005; and its 3) CERTAIN SHAREHOLDERS' OBJECTIONS TO SECOND AMENDED DISCLOSURE STATEMENT on or about September 23, 2005, each to raise and preserve certain issues on behalf of all equity holders.

Each of these Objections contained and communicated to the Court matters which had been raised by public shareholders, thereby assuring full public participation and consideration in this significant case. Both as a result of direct negotiations with the Debtors' counsel, and instructions from the Court at the hearings on these objections, the Debtors ultimately made revisions to the Disclosure statement further reflecting valuable contributions by Wilson to the reorganization process.

For example, Wilson initially raised issues regarding the calculation of the 3.75% stock, and the 10% warrants, and the lack of a specific definition for the phrase "consolidated enterprise value" in regard to the determination of the Warrant strike price, which in turn establishes the value of the Warrants, in its first Objection, filed March 7, 2005; reiterated those objection in its second Objection, filed April 1, 2005, and in its third objection, filed September 23, 2005.

In response, each of the Debtors' subsequent Disclosure Statements provided additional information; however, the term "consolidated enterprise value" remained undefined. As a result, the

Warrant strike price had not been resolved on the record. The Court agreed that this information should be made a part the record, permitting Wilson to cross-examine the Debtors' witness sufficiently to establish the exact strike price determination mechanism so that there would not be any possibility of later confusion. (December 1, 2005 hearing transcript at page 126-130).

#### **H. The Plan Objection.**

On November 10, 2005, Wilson filed its Certain Shareholders' Objections to Debtors' Chapter 11 Plan which argued, *inter alia*, that 1) the Plan release provisions were over-broad and unlawful, 2) the Debtors could not prove that the Plan was superior to liquidation, 3) the Plan paid creditors at effective interest rate far in excess of those permitted by *Till*, 4) that in the event interested parties rejected the Plan, the Court should continue the valuation process to determine whether the Plan was fair and equitable, and 5) that in the event that interested parties rejected the Plan, the Court should require that the shareholder warrants be substantially increased so that the Plan would not discriminate unfairly and becomes fair and equitable.

#### **I. The Plan Confirmation.**

During the Confirmation Hearing on December 1, 2005, Wilson continued to argue the broadest possible position regarding the release provisions, contributing to a number of other objecting parties who resolved their issues regarding the release provisions. Wilson cross-examined Mr. Holden, III and Mr. Nick Leone (Senior Managing Director for the Blackstone Group, PL) for clarification regarding the Debtors' liquidation value and, in open court, elicited the definition of "consolidated enterprise value" to confirm the method by which the strike price of the warrants would be determined, a matter otherwise not previously of record. Significantly, Wilson also

elicited testimony that the Debtors had lost \$400 to \$500 Million in its trading and hedging operations in the calendar year 2005, despite assurances from the Debtor at the start of the case that its trading operations were not speculative in nature and that its hedging operation was designed to be strictly revenue neutral, with any movement in fuel prices to be directly offset by corresponding movements in energy prices.

Wilson also urged that, while the Plan “implied” a total enterprise value of approximately \$12.5 Billion, a liquidation might well come up with a number higher than \$12.5 Billion when considering valuation of the Philippines, the U.S. domestic assets, and recent kilowatt prices.<sup>4</sup>

**J. This Fee Application Is Timely Filed.**

Pursuant to the order confirming the Plan (the “Confirmation Order”), the deadline for professionals to file requests for payment of fees and reimbursement of expenses was forty-five (45) days after the Effective Date of the Plan. The Effective Date did not occur until January 3, 2006, which placed the deadline on February 17, 2006. However, pursuant to the Scheduling and Procedures Order Governing Compensation Applications filed on February 13, 2006 (the “Scheduling Order”), the deadline for professionals to file requests for payment of fees and reimbursement of expenses was extended to March 1, 2006. This Applicant has timely filed their Fee Application and Bonus Application.

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Applicant’s argument throughout this case that Mirant is worth substantially more than \$12.5 Billion has been borne out by New Mirant’s performance on the New York Stock Exchange since it was relisted on January 11, 2006. To date, New Mirant is trading higher than its initial price of \$24.50.

## **PART TWO: RELIEF REQUESTED**

As is more fully itemized in these Applicants' statement of Wilson's fees and expenses filed herewith ("Detailed Fee Statement")<sup>5</sup>, this Court should approve and order payment out of the estate of the following: 1) hourly fees for The Wilson Law Firm, P.C. of \$686,473.25 for that portion of the entire case beginning September 18, 2003 through the Effective Date of the Plan, January 3, 2006 (the "Application Period"); 2) expenses in the amount of \$26,044.90 for the Application Period; and 3) contingency success fees in the amount of \$6.45 million, being exactly 1% of the 645,000,000 gain realized by existing shareholders by the terms and conditions of engagement.

Alternatively to the contingency success fee by the terms and conditions of engagement, the Applicant seeks an upward "success" fee enhancement for Wilson in the same amount of \$6.45 Million.

In sum, Applicant is seeking reimbursement under both Applications, not a duplicate award. Pursuant to the Scheduling Order, the Applicants are simultaneously filing a separate application for allowance and payment of the alternative fee enhancement, and will timely submit a copy of its Bonus Application in electronic form to Dean Rapoport.

The Detailed Fee Statement describes the specific services performed by Wilson for each billing matter, including, but not limited to:

- a) The date the services were rendered;
- b) By whom the services were rendered;

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Copies of the Detailed Fee Statement is submitted herewith to the members of the FRC and is incorporated herein by reference.

- c) The nature of the services rendered;
- d) The time required for the performance of such services, and
- e) The fee associated for the performance of each service rendered.

Wilson estimates it will incur approximately an additional \$25,000 in fees and expenses in connection with the preparation of the Applications, in addressing issues with the FRC, and in the presentation of the Applications to the Court. The final amount will be provided to the Court at the hearing to approve these Applications.

While Wilson's fees and expenses appear substantial, Wilson made substantial contributions to these Chapter 11 cases and worked diligently to ensure that efforts were not duplicative.<sup>6</sup> In addition, the fees and expenses sought by this Applicant are relatively small in comparison to the majority of the other valuation parties or and similar parties in other cases. Accordingly, reasonable compensation for Wilson and reimbursement for actual, necessary expenses should be approved, and further, the amount sought as either a contingency success fee or an upward fee enhancement should also be approved.

### **PART THREE: JURISDICTION AND VENUE**

This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The Fee Application is made pursuant to section 503(b) of the

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As discussed *infra*, Wilson was careful throughout these cases, particularly during the Valuation Hearing, to ensure that efforts were not duplicative. In an email dated May 17, 2005, a copy of which is attached to the Fee Application as Exhibit "4", Wilson identified specific topics desired to be addressed by Anders Maxwell, the Equity Committee's expert. Some of these topics were covered, which reduced the need for additional cross examination by Wilson.

Bankruptcy Code (11 U.S.C. § 101, *et seq.*).

**PART FOUR: ANALYSIS OF SECTIONS 503(b)(3) AND (4) OF THE BANKRUPTCY  
CODE AND “SUBSTANTIAL CONTRIBUTION”**

**A. The Policy Goals of The Bankruptcy Code And 11 U.S.C. 503(b).**

The Bankruptcy Code (“The Code”) recognizes active and meaningful claimant participation for companies to achieve the Code’s overarching twin goals of a consensual, expeditious reorganization that preserves, to the greatest extent possible, the economic value of the restructured company. See *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.)*, 793 F.2d 1380, 1405 (5th Cir.1986), *aff'd*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988) (Congress included numerous provisions in The Code to foster rapid resolution of reorganization proceedings); *Acequia, Inc. v. Clinton (In re Acequia, Inc.)*, 34 F.3d 800, 808 (9th Cir.1994) (quick and equitable reorganization are goals of The Code); See also *Marandas v. Bishop (In re Sassalos)*, 160 B.R. 646, 653 (D.Or.1993) (“compromises are favored in bankruptcy”).

The theory of 11 U.S.C. § 503(b) “is to encourage *any* interested parties to make contributions to bankruptcy cases. *In re St. Mary Hospital*, 97 B.R. 199, 203 (Bankr. E.D.Penn 1989) (emphasis in original). The Bankruptcy Code thus recognizes and rewards “meaningful creditor participation in the reorganization process,” *In re Consolidated Bancshares*, 785 F.2d 1249, 1253 (5<sup>th</sup> Cir. 1986), and, through the payment of fees, attracts quality professionals to assist creditors. *In re Nine Associates, Inc.*, 76 B.R. 943, 944-945 (S.D.N.Y. 1987) (“[I]n an effort to attract professionals of the highest caliber, The Code consciously abandons the spirit of economy which once dominated the Bankruptcy Court...”).

Since “the policy aim of authorizing fee awards to creditors is to promote meaningful creditor participation in the reorganization process... a claimant is entitled to administrative fees and expense if these costs are incurred in making a substantial contribution to a chapter 9 or 11 case.” *In re DP Partners*, 106 F.3d at 672. The Code mandates recovery whenever a substantial contribution is made. “[U]nder the plain language of the statute, if [an Applicant] meets the requirements of section 503, it *shall* recover administrative expenses. This statutory mandate permits of no discretionary calls by the courts.” *In re DP Partners*, 106 F.3d 667, 671 (5<sup>th</sup> Cir. 1997) (emphasis in original).

**B. The Applicant’s Burden.**

The Applicant carries the burden of proof by a preponderance of the evidence to establish that it made a substantial contribution to the estate. *In re 1 Potato 2 Inc.*, 71 Bankr. 615, 618 (Bankr. D.Minn. 1987); See also *In re American Preferred Prescription, Inc.*, 194 B.R. 721, 727 (Bankr. S.D.N.Y. 1996). An Applicant must prove that its contribution provided a tangible benefit to the estate. *In re Harold Brown*, 147 B.R. 55, 58 (Bankr. D.Mass. 1992) (“The benefit must be significant and tangible.”). The determination of whether the Applicant’s participation has resulted in a substantial contribution to the estate is a question of fact and must be determined based on the unique facts of each case. *In re Hooker Investments, Inc.*, 188 B.R. 117, 120 (S.D.N.Y. 1995); See also *In re Consolidated Bancshares, Inc.*, 785 F.2d at 1253.

**C. The Factors In Determining Substantial Contribution.**

“The Fifth Circuit’s baseline cost-benefit test says that ‘[a]t a minimum...the court should weigh the cost of the claimed fees and expenses against the benefits conferred upon the estate which flow directly from those actions.’” *In re American Plumbing & Mechanical, Inc.*, 327 B.R. 273, 281

(Bankr.W.D.Tex. 2005) (citing *in re DP Partners*, 106 F.3d 667, 673 (5<sup>th</sup> Cir. 1997)). A “but-for” test is not used. *American Plumbing*, 327 B.R. at 293.

An Applicant makes a substantial contribution when its actions “foster and enhance, rather than retard or interrupt the progress of reorganization.” *In re DP Partners*, 106 F.3d at 672 quoting *In re Consolidated Bancshares, Inc.*, 785 F.2d at 1253. An Applicant makes a substantial contribution when its actions contribute to a result benefitting the estate. See generally *In re Richton Int’l Corp.*, 15 B.R. 854 (Bankr. S.D.N.Y. 1981). Wilson’s contribution to the Valuation Letter Rulings not only helped “set the stage” for the subsequent negotiations, but they also provided the greatest possible leverage in favor of equity.

Other factors considered by the Court in its determination of whether an Applicant has substantially contributed to the estate include: “whether the services provided a direct, significant, and demonstrable benefit to the estate; and... whether the services were duplicative of services rendered by attorneys for the committee, the committees themselves, or the Debtors and their attorneys.” *In re Buttes Gas*, 112 B.R. 194, 194 (Bankr. S.D.Tex. 1989).

An Applicant’s efforts that increase creditor recoveries as a class qualify as a substantial contribution. See *In re Pow Wow River Campground*, 296 B.R. 81, 87-88 (Bankr. D.N.H. 2003) (finding trade claimants who increased recovery of unsecured creditors from fifty to one hundred percent had made a substantial contribution). Improving the recovery of a sub-class of creditors is a similar benefit to the estate. See *In re Pettibone Corp.*, 138 B.R. 210 (Bankr. N.D.Ill. 1991) (holding that actions of plaintiff in product liability action may provide substantial contribution to the estate by increasing recovery to the sub-class of similarly situated claimants).

**D. Granting The Applicant’s Fee and Bonus Application Will Not Impair The Debtors Or Creditors.**

The Court will also consider whether the allowance of the Applications will result in an impairment to other claims. *In re Richton*, 15 B.R. at 856. In this case, the Debtors are worth in excess of \$12 Billion and they have ample cash and liquidity to support their operations. Granting the Applications will not impair the Debtors or the recoveries of other creditors. The Court in *In re Richton International Corporation* “emphasized that the Debtor’s estate [was] well-able to pay the allowances granted with no impairment of other creditors” before it awarded the applicant compensation and disbursements. *In re Richton*, 15 B.R. at 856.

**E. An Applicant’s Self-Interest Does Not Preclude Reimbursement Of Fees And Expenses Under 11 U.S.C. § 503(b) In This Circuit.**

As explained by the Fifth Circuit in *In re DP Partners*:

nothing in the Bankruptcy Code requires a self-deprecating, altruistic intent as a prerequisite to recovery of fees and expenses under section 503. Rather, section 503 patently states that a creditor is entitled to actual and necessary expenses “incurred... in making a substantial contribution in a case under chapter 9 or 11.”... The benefits, if any, conferred upon an estate are not diminished by selfish or shrewd motivations. We therefore hold that a creditor’s motive in taking actions that benefit the estate has little relevance in that determination whether the creditor has incurred actual and necessary expenses in making a substantial contribution to a case. *In re DP Partners*, 106 F.3d at 673.

Similarly, in *In re Celotex Corp.*, the Eleventh Circuit held that “the motive of the petitioner should not be a factor in determining whether a substantial contribution has been made in the bankruptcy proceeding.” *In re Celotex Corp.*, 227 F.3d 1336, 1339 (11<sup>th</sup> Cir. 2000). Central to the Eleventh Circuit’s analysis was its concern that “[e]xamining a creditor’s intent unnecessarily

complicates the analysis of whether a contribution of considerable value or worth has been made” and their realization that holding otherwise would be inconsistent with “common sense.” *Id.* at 1339.

As explained by the Eleventh Circuit:

Congress chose to include creditors in the class of those who may receive administrative expenses and fees for a substantial contribution... and it is difficult to imagine a circumstance in which a creditor will not be motivated by self-interest in a bankruptcy proceeding. To impose an altruism requirement on the ability to obtain administrative expenses under § 503(b)(3)-(4) would effectively render the section meaningless to creditors. *Id.*

Moreover, a number of bankruptcy courts have held that a creditor’s self-interest or motive is irrelevant to a Section 503(b) analysis. See e.g., *In re United Container LLC*, 305 B.R. 120, 126 (Bankr. M.D. Fla.2003); *In re Pow Wow River Campground, Inc.*, 296 B.R. 81, 86 (Bankr. D.N.H. 2003); *In re Amfesco Indus.*, 1988 U.S. Dist. LEXIS 14675, \*8 (E.D.N.Y. Dec. 21, 1988); *In re I Potato 2, Inc.*, 71 B.R. 615, 618 n.3 (Bankr. D.Minn. 1987); *In re W.G.S.C. Enters.*, 47 B.R. 53, 58 (Bankr. N.D.Ga. 1985); *In re Richton Int’l Corp.*, 15 B.R. 854, 856 (Bankr. S.D.N.Y. 1981). Thus, an Applicant’s self-interest is irrelevant to the substantial contribution analysis under 11 U.S.C. § 503(b).

**F. A Professional May Recover Under 11 U.S.C. § 503(b)(4) Regardless Of Whether The Creditor Has An Independent Allowable Expense Under 11U.S.C. § 503(b)(3).**

A law firm that represents a creditor who has made a substantial contribution in a Chapter 11 case may obtain an administrative claim for its reasonable fees and expenses under 11 U.S.C. § 503(b)(4) even though the creditor was not obligated to pay and has not paid those fees and expenses. *In re Western Asbestos Company*, 318 B.R. 527 (Bankr. N.D.Cal. 2004).

“Bankruptcy Courts in Texas have allowed attorneys’ fees and expenses without requiring

a formal showing of incurred expenses allowable under § 503(b)(3).” *In re American Plumbing & Mechanical, Inc.*, 327 B.R. at 278; see *In re Datavon, Inc.*, 303 B.R. 119, 122 (Bankr.N.D.Tex.2003); *In re Speeds Billiards & Games, Inc.*, 149 B.R. 434, 436, 441 (Bankr.E.D.Tex.1993); see also *In re Sedona Institute*, 220 B.R. 74, 78 (B.A.P. 9<sup>th</sup> Cir. 1998) (citing non-Texas cases). In *In re Datavon, Inc.*, though there was no request under § 503(b)(3), the Court stated that “§ 503 does not require that the creditor recover its other expenses in order for its attorney’s fees to be paid by the estate,” before eventually awarding an administrative award under § 503(b)(4). *In re Datavon, Inc.*, 303 B.R. at 122.

Although the Fifth Circuit has not squarely addressed this issue, it “seems to have no problem allowing attorneys’ fees and expenses to applicants who have not established allowable expenses under § 503(b)(3).” *In re American Plumbing & Mechanical, Inc.*, 327 B.R. 273, 278 (Bankr.W.D.Tex.2005). In *DP Partners*, the Fifth Circuit stated that “[a] closely-related but separate provision is subsection (b)(4)... [which] is expressly dependent upon a claimant qualifying for an administrative expense award in subsections (3), [and] requires that expenses, other than professional fees, be reasonable and necessary.” However, it is important to note that despite this language “there is in fact no mention of a [§ 503(b)(3) claim, or a] claim other than for attorney fees and expenses. The Fifth Circuit nevertheless remanded the case for a determination of the amount of attorney fees to be awarded.” *In re Gurley*, 235 B.R. 626, 634 (Bankr.W.D.Tenn.1999) citing *Matter of DP Partners Ltd. Partnership*, 106 F.3d. 667, 674 (5<sup>th</sup> Cir. 1997). On remand, the Bankruptcy Court awarded professional fees and expenses, and this decision was subsequently affirmed by the District Court for the Northern District of Texas. *DP Partners Limited Partnership*, 1998 WL 241243

(N.D.Tex.1998).

Even if a creditor has not directly incurred costs, § 503(b)(3) does not preclude an award under § 503(b)(4). “Section 503(b)(4)’s reference to an entity whose expense is allowable under paragraph (3) of this subsection is merely intended to identify the entity in question and not to limit compensation only to those professionals who rendered services to an entity which actually incurred an expense.” *In re Marquam Investment Corp.*, 176 B.R. 34, 37 (Bankr.D.Or. 1994) (rev’d on other grounds, 188 B.R. 434 (D.Or. 1995)); *see also In re Glickman, Berkowitz, Levinson & Weiner, P.C.*, 196 B.R. 291 (Bankr. E.D.Penn. 1996) (expressing concern that the fee request was made by the professional and noted that it should have been made on behalf of the creditor, but Court nonetheless treated the fee request as being made on behalf of the creditor). “There is no logical reason to afford disparate treatment to similarly situated creditors, both of whom provided a substantial benefit to the estate based solely upon whether they incurred independent expenses allowable under § 503(b)(3).” *In re Sedona Institute*, 220 B.R. at 80; *see also In re Gurley*, 235 B.R. at 634.

**PART FIVE: BECAUSE WILSON MADE SUBSTANTIAL CONTRIBUTIONS, HIS FEES AND EXPENSES SHOULD BE COMPENSATED ACCORDINGLY**

11 U.S.C. § 503(b)(3) provides, in pertinent part, that “After notice and a hearing, there shall be allowed administrative expenses... including (3) the actual, necessary expenses... incurred by - (D) ... an equity security holder ... in making a substantial contribution in a case under chapter 9 or 11 of this title.”

11 U.S.C. § 503(b)(4) provides, in pertinent part, for payment of:

reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature,

the extent and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant.

A request for compensation under 11 U.S.C. § 503(b)(4) “is similar to the standard that applies to requests for compensation under section 330, and so cases decided under section 330 should be relevant in determining compensation awards under section 503(b)(4).” 4 Collier on Bankruptcy ¶ 503.11 (King et al. eds., 15<sup>th</sup> rev. ed. 2001).

Using the case of *In re Interstate Stores, Inc.*<sup>7</sup> as a guide, the following services should be compensated under 11 U.S.C. § 503(b):

1. Attendance at certain important hearings and the examination of witnesses;
  - Wilson attended and participated in each of the Valuation Hearing and all subsequent important hearings in these cases.
2. Suggestions concerning the plan and other matters and meetings with respect to the plan;
  - There were no negotiations concerning the plan at any time prior to the Court’s Valuation Letter Ruling, which “set the stage” for the subsequent negotiations. Wilson does not claim any credit for the substance of these negotiations, as he did not participate therein.
3. Intelligent suggestions, even if not ultimately incorporated into the plan, if they sharpened the issues and alternatives in the minds of the participants;
  - As discussed in this Brief, Wilson provided many intelligent suggestions concerning the plan and other

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Although *In re Interstate Stores, Inc.* was decided under §§242 and 243 of the Bankruptcy Act, it is guiding authority under The Code. *See*, 4 Collier on Bankruptcy, §10.31[2][B].

crucial matters that sharpened the issues and alternatives in the minds of the participants.

4. Services with respect to the determination of the feasibility of an out-of-court reorganization, and the preparation of the plan and related documents. *In re Interstate Stores, Inc.*, 1 B.R. 755, 757-758 (B. Ct.S.D.N.Y. 1980).
  - As further discussed in this Brief, Wilson's many contributions during the valuation hearings provided leverage to Equity to achieve the settlement.

The Court, while ultimately awarding fees to professionals, found that the following services were not beneficial to the plan or reorganization:

1. Attendance by too many attorneys at certain hearings;
  - While other Valuation parties had numerous lawyers and paralegals present in Court, Wilson attended all but one hearing without any associates or paralegals, so there can be no objection based upon duplication of effort.
2. Excessive hourly rates of compensation requested, and mostly for routine tasks as reviewing applications, writing memoranda which often summarized the applications and attending court hearings; and
  - Wilson's hourly rates are among the lowest of any represented party and were primarily for time preparing for and attending hearings, or for drafting and preparing motions, such as the *Till* motion. Virtually none of the time recorded is for routine task such as would not be compensable.
3. Excessive monitoring of court proceedings for their clients without making significant contributions to the proceedings and preparing memoranda summarizing the proceedings. *Id.* at 757-759.
  - The total time expended by Wilson on behalf of all

public shareholders was reasonable for its participation in vital activities like the valuation hearings, the hearings on objections to the disclosure statement and confirmation, and for other essential work performed. The rates charged are actually much lower than would be appropriate for lawyers of similar experience and expertise, and the total fee sought as compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in non-bankruptcy cases.

The Court witnessed virtually all of the contributions of Wilson during the various hearings, such that on a purely subjective basis the Court can first judge for itself, as it stated it did several times on the record, as to whether Wilson was persuasive in its presentation, pointed out additional matters, clarified matters raised by others during the cross-examination of the expert witnesses, and generally met the burden of an applicant under § 503(b). *See, e.g., in re Penn-Dixie Industries, Inc.*, 119 B.R. 246 (Bankr.S.D.N.Y. 1982) (after recognizing counsel’s “vital and highly visible role” and “active participation and contribution to the outcome of the case,” the court stated that it was “cognizant of the extent and value of [counsel’s] services” in the case).

But, respectfully, the Court should not stop there. Rather, the Court should examine the record for the purely objective evidence confirming that Wilson made both substantial and tangible contributions to the estate. Detailed in the Application, and reproduced herein for the Court’s convenience, are twelve categories of evidence, listed A-J, as to which Wilson made substantial contributions on the record during the valuation hearings.

For example, while all of the equity parties argued for increased value recognition associated with the Lovett facility and the International Restricted Cash, Wilson provided additional points in support of those issues which may not have been fully explored by the other equity participants.

More importantly, Wilson provided original criticisms of the Debtor's valuations by pointing out what had not been done. Wilson proved positive equity value via both a \$/KW method and a price/earning ratio method which no other party explored. Wilson also directly attacked the debtor's 40% tax rate assumptions, presented evidence of IRS Code Section 199 and the Debtor's actual historically low tax rates, and challenged the methodology of separately valuing the Net Operating Loss. All of these matters were explicitly addressed in the Court's Valuation Letter Rulings.

Therefore, based upon a purely objective examination of the record in comparing the various expert reports, the parties' opening statements, and the cross-examination and arguments of Wilson, Wilson made many significant contributions in regard to issues which had tremendous positive dollar impacts in favor of equity.

**A. The Wilson Shareholders Provided Public Representation For All Shareholders.**

Wilson provided all shareholders with a transparent and open public representation of their interests, a public information service provide by no other party. The Equity Committee, while the statutory representative of Equity, was ultimately composed of four shareholders who did not and could not, by the terms of the Equity Committee Bylaws, function in the role of a transparent public representative. By comparison, the Wilson Shareholders group was open to all shareholders, provided important information to the public at large, solicited the views of all shareholders, and represented and communicated the views expressed in public to the Court.

Cases such as these, with several hundred thousand public shareholders, need a public protagonist who functions in the pubic arena, engages in public dialogue, responds to suggestions, ideas, and complaints, and who facilitates the public participation in the Court's process. Further,

such a role has been compensated under §503(b). *See in re Texaco, Inc.*, 90 B.R. 622 (Bankr.S.D.N.Y. 1988) (finding that work done by attorneys representing derivative claimants resulting in adequate disclosure to the shareholders and elucidation of the facts was a substantial contribution to the debtors' Chapter 11 cases). Now vindicated by the marketplace valuation of Mirant, the results in these cases of a 100% plus recovery for creditors and equity participation and recovery demonstrate the importance of this public participation.

**B. Wilson Pointed Out Significant HOLES In The Debtors' Valuation.**

Wilson, during the cross examination of the Debtor's and the Creditors Committee's experts, specifically pointed out the following points, each representing significant flaws with the Debtors' valuation methodology:

1) Blackstone never studied, evaluated, or explored a sale or IPO of the Philippines subsidiary, nor did the Debtor make any effort to explore such an IPO. (T 1655). Public news reports on February 17, 2006, confirm that the Debtor has now hired Credit Suisse to explore the sale of that subsidiary for "around \$3 billion" which would also remove \$700-800 Million of non-recourse international debt from the Debtor's consolidated balance sheet, thereby being worth \$3.7 to \$3.8 billion to the Debtor. A true and correct copy of the Reuters news report is attached hereto and incorporated herein by this reference as Exhibit "C".

2) Blackstone did not conduct or obtain appraisals, nor did it conduct any comparable sales analysis of any of the Debtors' operating assets, despite the fact that power plant sales are commonplace.

3) Houlihan Lokey's February 25, 2005 Expert Valuation Report grossly undervalued 2,753

MW of Mirant's capacity at \$0.00/kw; another 665 MW was undervalued at under \$100/kw; and another 1,818 MW was undervalued at under \$200/kw. In fact, none of the "Recent U.S. Generation Transactions" set forth in Exhibit F of that report were at or below those prices.

4) Blackstone never conducted any type of marketing of Mirant, or any significant portions of Mirant, and had not "looked to see if Mirant could get more on the open market."

5) Blackstone never did any analysis to see if the Debtors' cash flow would be sufficient to pay its current interest, and never explored any alternative plans of reorganization.

6) Despite many statements by the Debtors that their Plan was predicated upon the need for an investment grade credit rating, upon cross examination Mr. Holden admitted that it was neither necessary nor likely to be achieved, despite the willingness of the market to fund over \$2.0 Billion of exit financing at relatively favorable market rates.

7) Despite repeated representations to the Court that the Debtors needed to emerge from Bankruptcy quickly "because of favorable conditions in the capital markets", there was no such need because the Debtors' exit financing was largely on floating interest rates.

These last two points (#6 & #7, *supra*) were very important to the course of the proceedings, because it is now clear that the Debtor intended to "steamroll" its First Amended Plan through the Court very quickly, anticipating only 3 days for the entire valuation hearing. When the Court understood that there were in fact no outside market forces which mandated any rushed schedule, the Court realized that it could and should take the time to accurately determine value, thereby constructing the Valuation Implementation Committee process, which ultimately led the parties to the Term Sheet Agreement consensual plan.

**C. Wilson Proved Positive Equity Value by a Dollar Per Kilowatt Method.**

Dollars per kilowatt is a recognized method to compare the values of electrical generation assets, and thereby provide a basis upon which to build a plant by plant comparison value which would also serve as a basis for a proper liquidation valuation.

The Wilson Shareholders' Exhibit number seven (7), the asset sales and acquisitions of US investors owned utilities, 2001-March, 2005, by sector-generation, published March, 2005 by the C3 Group, LLC, an industry recognized publication, has no reported asset sales at \$0.00/KW.

Wilson's trial demonstrable number 4, created during the cross-examination of Dr. Ying, confirmed that Mirant was being valued at only \$280/KW, far below the public stock price implied values for NRC at \$328/KW, AES at \$625/KW or Calpine at \$680/KW. While evidence of \$/KW was readily available to the Equity Committee to prove that Mirant's plants were worth substantially more than shown on either the Houlihan Lokey report, or any of the other reports, Applicant was the only party to advance these arguments and present this evidence.

**D. Wilson Proved Positive Equity Value by a Price To Earning Ratio Method.**

The Creditors Committee expert, Dr. Ying, admitted on cross examination "that people examine price earnings ratios on companies" as "a method by which people derive value" and "make comparisons between companies." (T 2313-2314). No one other than the Wilson Shareholders introduced any evidence or otherwise even addressed this method, despite the fact that it is based upon market-determined share prices and publicly-reported earnings information.

With Dr. Ying on cross, using other exhibits in evidence, the following price to earnings ratios were confirmed on Wilson Shareholder's Exhibit #5 (T 2314-20):

<b>Wilson #5</b>	<b>Price/Earnings Ratio</b>
<b>AES</b>	<b>24.5</b>
<b>Dynergy</b>	<b>Infinite</b>
<b>NRG</b>	<b>19.6</b>
<b>Reliant</b>	<b>Infinite</b>
<b>Calpine</b>	<b>Infinite</b>
<b>Allegheny</b>	<b>33.2</b>
<b>Median</b>	<b>24.5</b>
<b>Average</b>	<b>25.8</b>

The Debtors' own projected profits, for the second half of 2005 and for full year 2006 (which all equity participants argued was artificially low and which the Court ultimately instructed the Debtors via the VIC to revise upward) were then used to project a market value for the reorganized Mirant at \$7.2 Billion, illustrated on Wilson Shareholder's Exhibit #9, representing approximately a \$1.2 Billion over-payment to the creditors at the expense of equity.

The February 3, 2006 \$27.50 closing price of new Mirant shares, times the 271,860,000 shares (300,000,000 x 90.62%) awarded to Class 3 creditors, yields a market value of \$7.4 Billion dollars, which is remarkably accurate compared to the value forecast by the Price/Earnings Ratio method, and confirms that the \$6.4 Billion in Class 3 creditors claims (which includes both principal and accrued interest) has received a "significant overpayment to the creditors", of approximate \$1.0 Billion, all at the expense of the previous equity interests.

*Therefore, the Price/Earnings Ration method of valuation has proven to be the most*

***accurate method of forecasting Mirant actual market value, and much more accurate than any other method offered or accepted into evidence by the Court!***

The Price/Earnings Ratio has been recognized as entirely appropriate, as either a direct valuation method, or even more commonly as a method by which to corroborate other methods based upon projected earnings. For example, *In re Mahoney* observed that “the application of the capitalization rate or price/earnings multiple converts earnings to capital sum that equates to equity value.” *In re Mahoney*, 251 B.R. 748, 752, n. 5 (Bankr.S.D.Fl. 2000). Further, *King Resources v. Baer*, 651 F.2d 1326 (10<sup>th</sup> Cir. 1980) affirmed the use of “an acceptable, even conservative, discount rate applied to proper future income projections and corroborated this result by comparing the discount rate to the price/earnings ratios of comparable companies.” *Baer*, 651 F.2d at 1334. *Muskegon Motor v. Davis*, 366 F.2d 522 (6<sup>th</sup> Cir. 1966) recognized that “price-earnings ratios of the larger companies in the same industrial grouping may be considered as relevant evidence” although not as a sole guide to value. *Muskegon Motor*, 366 F.2d at 528; *see also In re Pullman Construction*, 107 B.R. 909, 921-22 (Bankr.N.D.Ill. 1990) (finding that a Price-Earnings Multiple comparison between Peer Group companies “serves to corroborate the results of the cash flow analysis.”).

This important evidence was readily available to the Equity Committee as direct evidence of value or to corroborative the opinions offered by its expert. However, Wilson was the only attorney to advance the price to earnings ratio method of valuation, or to develop the necessary record evidence.

**E. Wilson Pointed Out Evidence Regarding The Value Of Lovett.**

Mr. Morgan, on cross examination by Wilson, admitted that the Debtors had determined a “negative \$20 Million valuation” for Lovett, based upon “a 12% weighted average cost of capital”, despite the fact that the Debtors would have both excess cash and excess lines of credit available at interest rates which Wilson also proved were much lower than 12%.

Ultimately the Court rejected the Debtors’ “negative \$20 Million valuation”, explaining in its July 26, 2005 letter that “\$15 Million is value attributable to the Lovett facility.” This represents a \$35 Million swing in favor of equity, as to which Wilson made demonstrable and substantial contributions.

**F. Wilson Shareholders Pointed Out Evidence Confirming that International Restricted Cash Was Significantly Overstated by the Debtor.**

Mr. Coleman admitted on cross examination that the international restricted cash for the Philippines was \$357 Million compared to an EBITDA of \$356 Million, on an operation where the government supplied all of the fuel and took all of the output, thereby eliminating virtually all price and credit risks, and where the government had a contractual obligation to pay within 90 days.

Mr. Coleman could not explain the need for so much restricted cash, finally admitting “I am not the person that went down into the detail and dug that up. That’s part of the business plan. So that’s where it came from.” (T 1669-72). The Debtors never satisfactorily explained this number with any other witness.

The Court specifically recognized \$450 Million of additional value in its June 30, 2005 letter ruling, which it later explained, in its July 26, 2005 letter to the VIC as “The bulk of this number is \$357 Million of International Restricted Funds.” This represents a \$357 Million swing in favor of

equity, as to which Wilson also made demonstrable and substantial contributions.

**G. Wilson Challenged the Debtors' 40% Tax Rate Assumption; Proved the Debtors' Historical Tax Rates; Proved IRC Section 199; and Challenged the Separate NOL Valuations.**

Wilson attacked the Debtor's assumptions on taxes in several important ways, the cumulative effect of which was tremendously significant.

First, Wilson directly challenged the Debtors' 40% Tax Rate Assumptions in its business plan by 1) introducing evidence of IRC Section 199, which will provide a 3% to 9% permanent deduction and 2) introducing evidence of the Debtors' actual historical tax rates, which ranges from 29% to 0%. The Equity Committee confirmed on the record these contributions. (T. 5771).

Second, while all of the other Equity participants were arguing over the discount rate to be applied to a separate NOL valuation, Wilson recognized that the better course was to argue that the NOL calculation be combined back into the business plan and calculated by the Debtor's independent CPA, because that would provide both certainty and transparency of calculation and the maximum boost to equity.

Because the valuation process was never completed, the exact dollar amount of this improvement will never be known. However, the comparison between the assumed 40% tax rate and the Debtors' highest historical tax rate of 29%, on Wilson Shareholders Ex. 10, demonstrated that this alone could raise value by as much as 18%. Since the Debtor's original range of values was between approximately \$7-8 billion, this represented an increase of approximately \$1.25 billion to \$1.44 billion, which the undersigned respectfully submits is actually an understatement of the most likely effect, because there is little chance of the debtor not achieving a tax rate lower than 29%.

\$1.25 billion to \$1.44 billion represents a staggering increase far beyond the amounts which could be obtained by any conceivable stand-alone NOL valuation - approximately half of the initial \$2.5 billion to \$3.1 billion shortfall that Equity needed to bridge - because a stand-alone NOL valuation would have always been predicated upon the erroneous assumption of a 40% tax rate. Therefore, while the other equity parties were properly focused on the NOL valuation issue, they failed to see the impact of the erroneous tax rate assumption nor understand that the only comprehensive and correct approach would be to roll the NOL and all of the tax issues back into the business plan, for a proper calculation by independent accountants who would consider all tax attributes and issues, as instructed by the Court in its Valuation Letter Ruling.

As the Supreme Court of the United States observed, in *Galveston Railway v. Texas*, “the commercial value of property consists in the expectation of income from it” which when reduced by taxes, reduced the value of the property. *Galveston Railway v. Texas*, 210 U.S. 217, 226 (1908). Wilson offered the most direct evidence that the future taxes would be below 40%, thereby contributing towards significant increased values.

The Court’s June 30, 2005 letter instructed the Debtors to adjust its Business Plan, in pertinent part, to “include provisions for taxes, including full use of net operating loss carry-forwards (‘NOL’). At the confirmation hearing, Debtors shall show that they contemplate making full and good use of all available tax benefits.” June 30, 2005 Letter from the Court., P.2, ¶4 (“June 30, 2005 Letter”).

The Court’s decision regarding taxes therefore represented a HUGE WIN for Equity, and the record is clear that Wilson made unique and substantial contributions to this win.

**H. Wilson Made The *ONLY Till* Motion.**

On or about May 23, 2005, the Applicant filed its “Motion and Memorandum of Law for Judgment as a Matter of Law, Pursuant to Fed. R. Civ. P. 50 and B.R. 7002” (the “*Till* Motion”). It is interesting to note that the Court specifically interrupted the opening statement by the Equity Committee to interject the *Till v. SCS Credit Corp.*, 541 U.S. 465, (2004), issues, and to specifically inquire as to whether it governed the determination of the weighted average cost of capital. Yet the Equity Committee did not seize the opportunity to pursue and argue that issue further. (T. 118-121). Thereafter, the Court again expressed interest in *Till*, (T. 2051-53), yet no party, and particularly no equity party, pursued the issue. Finally, it is extremely significant that no party other than Wilson ever brought any actual motion seeking any relief based upon *Till*. (T. 2989-2991).

The purpose of the *Till* Motion, and much of Wilson’s cross-examination impeaching the IBBOTSON report approach to the determination of the Cost of Equity, was to provide a legal and factual basis by which the Court could find that the Cost of Equity had to be based upon *Till* approved factors, such as to grossly reduce the Weighted Average Cost of Capital. The result would have mandated a raise in the values under any discounted cash flow methodology.

The Motion further asked the Court to make a preliminary determination that equity had to be found to be “in the money”, while reserving its ruling on the amount by which equity was “in the money” until the completion of the valuation process, so negotiations could have been pursued free from the threat of equity’s elimination.<sup>8</sup>

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It is noteworthy that the Equity Committee also generally sought application of *Till* in its Motion, which was filed after the Wilson Shareholders’ *Till* Motion.

When the Court “carried” the *Till* Motion, it was still available to the Equity Committee, as leverage during the negotiations, because the Court did not announce its denial of the Motion until long after the Term Sheet Agreement, which rendered the motion (and the entire valuation process) moot, because equity was, in point of fact, left “in the money”.

Applicant urged the broadest possible application of *Till*, ostensibly providing maximum bargaining leverage to the Equity Committee and an opportunity to this Court to properly address this issue, as it did in on pages 28 to 34 of the its December 9, 2005 Memorandum Opinion. The Court found *Till* “clearly relevant to the determination of value” and used its method by “taking a market-accepted risk-free interest rate or rate of return and adding to that a risk premium determined by the court based on the specific risks shown by the evidence.” (Opinion, pages 29 & 32). Therefore, while Applicant was not successful in convincing the court that *Till* dictated a finding that Mirant was solvent, Opinion, page 32, the Court did find the that *Till* was “extremely useful in designing an approach to valuation” and that the final Plan, reflecting the term sheet agreement, placed Equity in the money.

#### **I. Wilson Pointed out and Proved The Lowest Costs of Capital.**

Wilson brought to the Court’s attention the following evidence establishing a much lower Weighed Average Cost of Capital, and specifically a lower Cost of Equity portion of the WACC:

1) Wilson’s cross of Dr. Tabors pointed out that the New York ISO had constructed its demand curve on the basis of a 8.5% weighted average cost of capital and the New England ISO has used a 8.1% WAAC, both of which represented “industry consensus” that those returns would be sufficient to attract new capacity, new plants, and capital into their markets. (Valuation Transcript

at pages 812-813).

2) Wilson was the only lawyer to explore the actual low interest rates of the proposed exit financing, which demonstrated “the market response to [the reorganized Debtors] in terms of cost of capital”. (Valuation Transcript at page 1027). This was direct evidence of the capital markets’ actual response to New Mirant which the Court could use to determine a very low “risk premium determined by the court based on the specific risks shown by the evidence.” (Opinion, pages 29 & 32).

3) Wilson’s cross examination of Mr. Filsinger, confirmed that in his “Project Falcon” valuation, performed for the Creditors Committee, he used “consistently a 10% weighted average cost of capital.” (Valuation Transcript at page 2643).

It is reasonable to conclude that this evidence had some favorable impact upon the Court’s letter of June 30, 2004, which instructed the VIC to utilize a Weighted Average Cost of Equity of between 12% and 16.6%, well below that suggested by Blackstone and by the Equity Committee’s own expert, whose report was ultimately rejected by the Court.

#### **J. Wilson Proved That the Debtors Could Pay Current Interest.**

In response to the Debtor’s consistent allegation of a poor financial condition, missed business plan projections, and the like, which were used to justify the Initial Plan and First Amended Plan eliminating equity, Wilson was the only lawyer to both argue *and* prove that the Debtors actually had projected income and free cash flow sufficient to pay all of its existing creditors on a current interest basis.

Wilson used this evidence for several purposes. First, Wilson argued that any Debtor with

cash flow sufficient to service current interest on its debt, at either contract or market rates, must have either present equity value or be improving towards equity value, because that is the most to which creditors are entitled. This argument might have been persuasive with the Court, particularly as many parties described both improving general market conditions and specific improvements at the Debtor.

Second, this information provided assurances to the Court that alternative plans of reorganization were certainly available and feasible, such that there was little likelihood that further delay, revisions to the Plan, or anything else might threaten the successful reorganization of the Debtor.

**K. Wilson Participated in the VIC Proceeding.**

Wilson was recognized in the Court's June 30, 2005 letter ruling, establishing the VIC proceeding, as a valuation party and thereafter participated, including the matters set forth in his letter of July 13, 2005, Exhibit "B" hereto, that the Court reserved in its letter of July 26, 2005.

Pursuant to the Court's instruction set forth in its letter of July 26, 2005, specifically that "The VIC is not to respond to requests for information or data collection by any person. I refer here to Wilson's letter of July 14" Wilson refrained from any further active participation in the VIC process, thereby minimizing the fees and expenses during that period, other than to participate in all of the available VIC telephone conferences and to prepare for the inevitable follow-up hearing at the conclusion of the VIC process.

**L. Wilson Raised Important Objections to each Disclosure Statement.**

Wilson timely filed its CERTAIN SHAREHOLDERS' OBJECTIONS TO DISCLOSURE

STATEMENT on or about March 7, 2005; its CERTAIN SHAREHOLDERS' OBJECTIONS TO FIRST AMENDED DISCLOSURE STATEMENT on or about April 1, 2005; and its CERTAIN SHAREHOLDERS' OBJECTIONS TO SECOND AMENDED DISCLOSURE STATEMENT on or about September 23, 2005 each to raise and preserve certain issues on behalf of all equity holders.

Each of these Objections contained and communicated to the Court matters which had been raised by public shareholders assured public participation, consideration, and contributed to the orderly administration of these significant cases.

As a result of direct negotiations with the Debtors' counsel and instructions from the Court at the hearings on these objections, the Debtors ultimately made various revisions to the Disclosure statement, thereby reflecting valuable contributions by Wilson to the reorganization process.

For example, Wilson initially raised issues regarding the calculation of the 3.75% stock, and the 10% warrants, and the lack of a specific definition for the phrase "consolidated enterprise value" in regard to the determination of the Warrant strike price, which in turn establishes the value of the Warrants, in its first Objection, filed March 7, 2005; reiterated those objection in in its second Objection, filed April 1, 2005, and in its third objection, filed September 23, 2005. In response, each of the Debtors' subsequent Disclosure Statements provided additional information, although it was not until immediately prior to the Confirmation hearing, after the Equity Committee finally understood the calculation issue and raised it with the Debtors, was it resolved it on the record. (December 1, 2005 hearing transcript at page 40-41, 95). Because the "consolidated enterprise value" remained undefined, and the Warrant strike had therefore not been resolved on the record, the Court agreed that this information should be made a part the record, permitting Wilson to cross

examine the Debtors' witness sufficient to establish the exact strike price determination mechanism so that there would not be any possibility of later confusion. (December 1, 2005 hearing transcript at page 126-130).

**M. Wilson Raised the ONLY Equity Objections to Confirmation.**

Because the Equity Committee and the Phoenix parties had committed to support the Debtors' Plan of Reorganization, reflecting the Term Sheet Agreement, Wilson remained the only equity party to either advocate for a larger recovery for equity or to raise any potential objections to confirmation.

Wilson timely filed CERTAIN SHAREHOLDERS' OBJECTIONS TO DEBTORS' CHAPTER 11 PLAN, on or about November 10, 2005.

These Objections a Because the Equity Committee and the Phoenix parties had committed to support the Debtors' Plan of Reorganization, reflecting the Term Sheet Agreement, Wilson remained the only equity party to either advocate for a larger recovery for equity or to raise any potential objections to confirmation. gain contained and communicated to the Court matters which had been raised by public shareholders, who were otherwise not able to voice their objections to the Court though any other means, thereby assuring public participation and consideration in these significant cases.

These Objections also preserved, for all equity interests, the arguments available under *Till*, as it was filed and heard prior to the Court's issuance of its Memorandum Opinion on December 9, 2005. Therefore, the preservation of rights of appeal, on behalf of all equity interests, represents another valuable contribution by Wilson.

These Objections also preserved, for all equity interests, arguments which were conditional upon a shareholder rejection of the Plan, an eventuality which did not occur but the preservation of which also represented another substantial contribution by Wilson.

#### **PART FIVE: THE JOHNSON FACTORS**

Pursuant to *In re Lawler*, 807 F.2d 1207 (5<sup>th</sup> Cir. 1987), *Cooper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087 (5<sup>th</sup> Cir. 1982), *In re First Colonial Corp. of America*, 544 F.2d 1291 (5<sup>th</sup> Cir.) *cert. denied* 97 S.Ct. 1696 (1977), and *Johnson v. Georgia Highway Express, Inc.* 488 F.2d 714 (5<sup>th</sup> Cir. 1974), the following factors should be considered by this Court in its determination of whether Wilson's requested compensation for its fees and expenses rendered during these cases are reasonable:<sup>9</sup>

##### **A. Time And Labor Required.**

Wilson spent a significant amount of time and effort, as set forth in the Detailed Time Records, which when compared to the other parties who also prepared for and participated in the Valuation Hearing, prepared and filed objections to each Disclosure Statement, and prepared and filed objections to Confirmation, demonstrate that there was no unnecessary duplication of services and that staffing levels were maintained at absolute bare-bones levels.

##### **B. Novelty And Difficulty Of Issues.**

These are certainly some of the largest Bankruptcy cases in the United States to have achieved 100% + recovery for creditors and some substantial recovery for existing equity, making

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The facts of this application relevant to each of these factors are generally addressed throughout this brief, particularly also *supra* at Parts Four and Six, as well as in the Fee Applications, each of which is also incorporated herein by this reference.

this a very novel circumstance, which both the Debtor and the Creditors never failed to observe with an attitude that “Equity never recovers” and “Equity is not in the money”, which were expressed in open Court long before any party had completed its valuations. The valuation hearing of the size and scope conducted in these cases was unprecedented, and involved valuations of diverse foreign and domestic assets, complicated financial analysis of the Debtors and their comparable companies and widely divergent views on valuation and underlying methodologies. The Court recognized the complexity and difficulty in resolving these valuation issues in its lengthy and detailed Memorandum Opinion on valuation. *See* December 9, 2005, Memorandum Opinion at 27, 35. The additional circumstances of the independent power producers being essentially a brand new industry, the Enron corporate fraud and subsequent bankruptcy, the California power crisis investigation, the role of FERC, and the overbuilding in certain ISO’s all made these cases novel. The difficulties of these cases included, but were not limited to the fact, that both the Debtors and the Creditors had adopted a position that ultimately proved to be erroneous, that “Equity was not in the money”, from which they refused to negotiate making settlement discussions impossible at all times prior to the Court’s issuance of its June 30, 2005 and July 26, 2005 Valuation Letters. According to the frequent complaints voiced in open Court, there were no meaningful plan negotiations involving the Equity Committee regarding the Initial Plan, the Debtors and the Creditors made formal discovery very difficult, and both refused to treat the Equity Committee as a meaningful participant in these cases until AFTER the completion of the valuation hearings and the Court’s June 30 and July 26 letters. It was only thereafter that the Phoenix Parties, another former Equity Committee member, were able to initiate direct negotiations as described in their fee application, thus, apparently, leading to the

settlement in favor of existing equity. Therefore, while Creditors may have felt that they were “shooting fish in a barrel”, those parties representing equity in that barrel found these to be exceptionally difficult cases.

**C. The Skill Required To Perform The Legal Services Properly.**

The Wilson Law Firm, P.C. Resume, setting forth the background and relevant experience of its various lawyers and staff is attached to the Fee Application as Exhibit “5.” Affidavits from several prominent and well-known Georgia attorneys are attached to the Fee Application as composite Exhibit “6,” testifying to the reputations, skill, experiences of the lawyers of The Wilson Law Firm, P.C., which are also incorporated herein by this reference. The Court will note that Wilson attended hearings without associates or paralegals, frequently not having prior access to exhibits or depositions, yet was able to make his points by cross examination of highly experienced and skilled expert witnesses, who are trained to resist on cross examination. This required the highest levels of skill in the Courtroom working under adverse circumstances, on the fly, and under pressure without associates in court.

**D. Preclusion From Other Employment.**

The commitment to these Mirant cases required that Wilson refuse to accept many other new projects from approximately March of 2005 for the remainder of that year, and as well delayed a number of other litigation and dispute resolution projects. The attorney and paralegal time spent on these Mirant cases would have otherwise been fully employed by Wilson working on existing and new hourly paying clients or on contingent fee commercial and business litigation, thereby representing direct lost opportunity to Wilson. Wilson has also had to refuse work from one existing

client with an adverse interest to Mirant and a new potential client also with a claim adverse to Mirant.

**E. Customary Fees.**

The Wilson Law Firm, P.C.'s customary hourly billing fee for L. Matt Wilson, the only partner, is \$350 per hour, and for associate attorneys on hourly matters, ranged from \$165 to \$225 per hour, but has subsequently been raised to a uniform \$250.00 per hour consistent with this application.

Two additional factors should be considered by the Court in this specific regard. First, the majority of the hourly work performed by associate attorneys billed at rates below \$250.00 per hour has always been either a) smaller business and commercial trials, which have been handled under the supervision of L. Matt Wilson, with primary staffing and lead counsel service to be performed by the associates, or b) on matters supporting L. Matt Wilson, where there is some reasonable expectation, based upon the fee agreement with the clients, of the firm realizing premium fees as a result of the work, such as awards of attorneys fees and costs under various statutory schemes.

Second, approximately 40% to 50 % of the associate attorney and paralegal time expended by The Wilson Law Firm, P.C. involves contingency fee litigation, where the annual actual realized fees, compared to the time expended, result in realized hourly rates substantially above \$250.00 per hour. Therefore, because The Wilson Law Firm, P.C. expected that the Mirant case could develop (and as it did develop) into a very large project which precluded other employment, L. Matt Wilson was billed at his standard hourly rate of \$350.00 while the associate attorneys were billed at the standard rate of \$250.00 per hour, which is entirely commensurate with the rates of other associate

attorneys, of similar training and levels of experience representing other parties in this case.

Finally, because of the various efficiencies employed by The Wilson Law Firm, P.C., there was virtually no duplication of associate and partner effort reflected in the detailed billing statements. For example, during the 29 days of the Valuation hearings, The Wilson Law Firm, P.C. had only one partner present, no associates, and no paralegals, compared to the other Valuation Parties, who frequently had 2 or 3 partners, plus numerous associates and paralegals, few of whom contributed anything to the record.

**F. Fixed Or Contingent Fees.**

As discussed *supra*, in the section labeled “The Terms of The Wilson Shareholder’s Engagements” the “attorneys fee expectations” are exactly as set forth on Wilson’s website for Mirant Shareholders, where all of the identified clients specifically engaged the firm, accepted, and became obligated to the terms, precisely the fees which this Applicant is now seeking on behalf of Wilson. A lodestar may be adjusted upward to reflect the contingent nature of a suit. *See, e.g., In re Farah*, 141 B.R. at 924 (citing *Copper Liquor Co. v. Adolph Coors Co.*, 684 F.2d 1087, 1092 (5<sup>th</sup> Cir. 1982); *Blum v. Stenson*, 465 U.S.886, 903 (“Congress has clearly indicated that the risk of not prevailing, and therefore the risk of not recovering any attorney’s fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee...”) (Brennan, J., concurring)).

**G. Time Limitations Imposed By Client Or Other Circumstances.**

The Valuation Hearings, originally scheduled for only 3 days, actually required 29 days of hearing, over nearly three months. The Court rightfully refused to consider anyone’s other conflicts

or other professional or personal obligations, insisting that Mirant be given absolute priority, which naturally delayed any number of other pending assignments and projects. These time limitations were particularly acute on The Wilson Shareholders because it was the last of the valuation parties to join the valuation process and was working under the limitation that it could only cross examine witnesses.

**H. Results Achieved.**

The results achieved on behalf of equity should be recognized as entirely rare and extraordinary, as equity is routinely and normally wiped out in cases such as these, while equity here has already recovered well in excess of one-half billion dollars, compared to the zero recovery proposed by the Debtors' Initial Plan and First Amended Plan.

On March 31, 2005, after the Debtor had announced its zero equity plan, and before the start of the valuation hearings, Mirant Common stock closed at \$0.285 per share. There were approximately 405 Million shares reported outstanding. Therefore the total value of Mirant's equity at that time was only \$115,425,000.00.

According to the terms of the Plan, as confirmed by Mirant December 15, 2005 SEC Form 8-K, existing Mirant shareholders received 10,980,000 shares and 35,294,118 Series A Warrants. On February 3, 2006, thirty days after the effective date of the Plan, the new Mirant common stock closed at \$27.50 per share, and the Mirant Series A Warrants closed at \$13.00 per warrant.

Therefore, the value of the recovery for existing equity can be calculated as follows:

<b>10,980,000 shares</b>	<b>X</b>	<b>\$27.50 =</b>	<b>\$301,950,000.00</b>
<b>35,294,118 Series A Warrants</b>	<b>X</b>	<b>\$13.00 =</b>	<b>\$458,822,000.00</b>

**Total Recovery**

**\$760,772,000.00**

Compared to the values represented in the marketplace on March 31, 2005, this represents an increase in value to the existing Mirant shareholders of \$645,527,000.00.

Creditors have been paid 100% of their principal, plus 100% of their accrued interest, plus a very substantial premium. The \$27.50 approximate trading price of new Mirant shares, times the 271,860,000 shares (300,000,000 x 90.62%) awarded to Class 3 creditors, yields a market value of \$7.4 Billion dollars, compared to the \$6.4 Billion total of Class 3 creditors claims (which includes both principal and accrued interest). Therefore, the Creditors have received a \$1 billion premium, naturally at the expense of equity.

Public analysts are now reporting values for New Mirant in the \$12.2 to \$13.6 Billion range, entirely consistent with the predictions of all of the Equity Valuation Parties; for example, attached to the Fee Application as Exhibit "7" is a recent Morgan Stanley report on New Mirant detailing just such a valuation.

**I. Experience, Reputation And Ability.**

The resume of The Wilson Law Firm, P.C., and its partner L. Matt Wilson, and each of its attorneys and paralegals, is attached to the Fee Application as Exhibit "5", and is also incorporated herein by this reference. As the "Representative Cases" section of the firm's resume demonstrates, The Wilson Law Firm, P.C., and L. Matt Wilson have had wide ranging and significant business and commercial litigation experience, having functioned as lead counsel in very significant matters for many years, making them entirely suitable for these cases.

As each of the Affidavits of other counsel attached to the Fee Application as Exhibit "6"

demonstrate, The Wilson Law Firm, P.C., L. Matt Wilson, and each of its associate attorneys enjoy excellent personal and professional reputations, even to the point of actually being the “lawyer’s lawyer” representing both large and small law firms in the Atlanta, Georgia, and Southeast U.S. marketplaces.

**J. The Undesirability Of These Cases.**

It is interesting to note that both L. Matt Wilson and Phaeton International/Phoenix Partners were both initial members of the Equity Committee appointed by the UST on September 18, 2003. L. Matt Wilson served until February 10, 2004, and Phaeton International/Phoenix Partners served until July 26, 2004. Both ultimately determined that their direct participation was appropriate in the valuation hearings and later proceedings, in addition to the representation provided to both constituencies by the Equity Committee; L. Matt Wilson on behalf of public common stock shareholders and Phaeton International/Phoenix Partners on behalf of the Trust Preferred and Trust Preferred Holders.

No other parties volunteered to represent these constituencies, particularly after the announcement by the Debtors of their Initial Plan, which proposed to eliminate existing equity. Wilson, who suffered significant public criticism by virtue of its representation of the public shareholders in these cases, advanced 100% of the time and expenses necessary to provide its representation of the public shareholders in these cases.

No other party or law firm was willing to provide the services provided by Wilson.

**K. The Nature And Length Of Professional Relationship With Client.**

The public website based representation of all interested shareholders, responding to suggestions, comments, ideas, and criticisms, from both shareholders who had committed by becoming clients and shareholders who failed to commit as clients, represents a unique method of encouraging public participation and transparency in the United States Bankruptcy Court. There were few prior relationships with the shareholder clients who ultimately signed up and agreed to be clients of The Wilson Law Firm, P.C. and there is little opportunity or likelihood for future client relations.

**L. Awards In Similar Cases.**

The hourly fees, contingent success fee, fee enhancement, costs sought in these cases by the Applicant, on behalf of Wilson, are among the smallest total fees to be awarded to any of the valuation parties, and smaller than those sought by similar parties in other cases.

Applicant respectfully submits that the total time expended by Wilson on behalf of all public shareholders was reasonable for its participation in the Valuation Hearing, the hearings on objections to the disclosure statement and confirmation, and for the other work performed; that the rates charged are actually much lower than would be appropriate for lawyers of similar experience and expertise; and that the total fee sought as compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in non-bankruptcy cases.

Applicant further respectfully submits that the services were reasonable and necessary to the administration of the estate and beneficial towards the completion of these cases at the time they were rendered and that the services were performed within a reasonable time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed.

## **PART SEVEN: WILSON SHOULD BE AWARDED A FEE ENHANCEMENT**

“While the lodestar calculation may reflect the difficulty of the resolution of the issues involved in a case...the lodestar figure alone does not differentiate between the case taken on a full retainer and a case in which an attorney spends many hours over a period of months or years with no assurance of any pay if the suit is successful.” *In re Elmendorf Board Corp.*, 57 B.R. 580, 587 (D. N.H. 1986). Granting a fee enhancement is entirely in the Court’s discretion, “primarily because the bankruptcy judge is in the best position to determine the reasonableness of a proposed fee.” *In re Farah*, 141 B.R. 920, 923 (Bankr.W.D.Tex.1992).

The Fifth Circuit has “recognized the need for an adjustment to a fee for extraordinary circumstances when the lodestar analysis simply will not fairly compensate the professional, given all the surrounding circumstances.” *In re Nucentrix Broadband Networks, Inc.*, 314 B.R. 574, 578 (Bankr. N.D.Tex. 2004). “[U]pward adjustments of the lodestar are permissible, but are reserved for those few cases which are ‘rare and exceptional’.” *Id.* citing *Transamerican Natural Gas Corp. v. Zapata P’ship, Ltd.*, 12 F.3d 480, 488 (5<sup>th</sup> Cir. 1994); *Lawler v. Teofan (In re Lawler)*, 807 F.2d 1207, 1213-14 (5<sup>th</sup> Cir. 1987).

The factors considered in whether a case is “rare and exceptional” vary among circuits. Compare *in re Manoa Finance Co., Inc.*, 853 F.2d 687 (9<sup>th</sup> Cir. 1988) (requiring an applicant “come forward with specific evidence showing why the results obtained were not reflected in either his standard hourly rate or the number of hours allowed. He must also show that the bonus is necessary to make the award commensurate with compensation for comparable nonbankruptcy services...”); with *in re Public Service Co. Of New Hampshire*, 160 B.R. 404, 420 (D. N.H. 1993) (requiring a

“specific showing of exceptional activity *without which* the estate likely would not have achieved the results obtained by other specialists of like background and rates, or exceptional activity *beyond that* reasonably contemplated at the time of the original retention...”)

In this circuit, after the lodestar analysis is complete, “the Court then adjusts the lodestar upward or downward depending upon the respective weights of the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5<sup>th</sup> Cir. 1974).” *Fender v. Transamerican Natural Gas Corp.*, 12 F.3d 480, 487 (5<sup>th</sup> Cir. 1994). Although the lodestar may be adjusted according to a *Johnson* factor only if that factor is not already taken into account by the lodestar, *Fender*, 12 F.3d at 487, a consistent consideration is the concept that the results obtained are out of the ordinary, unusual, or rare, and that the quality of representation was superior to that which one would reasonably expect in light of the fees claimed. *See, e.g., In re Farah*, 141 B.R. at 924-5 (analyzing prior Fifth Circuit fee enhancement authority). Stated differently, “whether the circumstances of a case are so ‘exceptional and rare’ as to warrant a fee enhancement, the ‘results obtained’ factor in the lodestar analysis is one of the more significant factors.” *In re Nucentrix Broadband Networks, Inc.*, 314 B.R. at 578; *In re Anderson*, 936 F.2d 199, 204 (5<sup>th</sup> Cir. 1991); *Rose Pass Mines, Inc. v. Howard*, 615 F.2d 1088, 1090 (5<sup>th</sup> Cir. 1980); *Wolf v. Frank*, 555 F.2d 1213, 1218 (5<sup>th</sup> Cir. 1977). Further, “[t]he lodestar may be increased based on the contingent nature of the case after evaluation of the following factors: 1) analysis of the plaintiff’s burden; 2) risks assumed in developing the case; and 3) the delay in receipt of payment for services rendered.” *In re Farah*, 141 B.R. at 926 (citing *Graves v. Barnes*, 700 F.2d 220, 222 (5<sup>th</sup> Cir. 1983)).

Courts have considered applications for fee enhancements based both upon a “multiple of

the lodestar” method as well as upon a contingency or success fee. In regard to the former, it has been held that “[t]he lodestar may be increased based on the contingent nature of the case after evaluation of the following factors: 1) analysis of the plaintiff’s burden; 2) risks assumed in developing the case; and 3) the delay in receipt of payment for services rendered.” *In re Farah*, 141 B.R. at 926 (citing *Graves v. Barnes*, 700 F.2d 220, 222 (5<sup>th</sup> Cir. 1983)). With regard to the latter, Fifth Circuit bankruptcy courts have only recently considered applications for fee enhancements based upon a “contingency” or “success” fee. *See, e.g., in re Intelogic Trace, Inc.*, 188 B.R. 557 (W.D. Tex. 1995) (noting no prior cases construing the award of success fees since the enactment of the 1994 amendments to The Code). Although the applicant in that case was an M&A consultant, the court considered “whether, in retrospect, the services rendered were both reasonable and necessary, and whether the services in fact conferred a benefit on the estate commensurate with the success fee.” *In re Intelogic Trace, Inc.*, 188 B.R. at 560.

Most applicable to this fee enhancement application is the case of *In re Nucentrix Broadband Networks Inc.*, 314 B.R. 574, 578 (Bankr. N.D.Tex. 2004). In that case, the Court awarded a fee enhancement to a law firm for its rare and exceptional results in assisting debtors in selling assets for three times the original asset purchase bid of \$15,000,000, resulting in a 100% payout to unsecured creditors and a significant equity return. *In re Nucentrix Broadband Networks, Inc.*, 314 B.R. at 578.

As discussed herein, *supra* at Parts 3 - 6, and in the Fee Applications, Wilson’s efforts made a substantial contribution towards the final result achieved in this case, 100% + payment to all creditors, and a \$645,000,000 recovery by equity. Such a result must simply be recognized as being

rare and exceptional under any standard, far in excess of those obtained by the firm in *in re Nucentrix*.

In addition, these cases have generated approximately \$400 Million of total fees. The Wilson Shareholders' request for fees, expenses, and upwards enhancement, which only constitute a "drop in the bucket" in comparison, should be considered entirely reasonable.

Fundamentally, as stated by the court in *in re Elmendorf Board Corp.*, where counsel involved in the case could have proceeded with the minimal plan first proposed, under which their administrative fees and expenses at least would have been paid, but "chose instead to wage a vigorous battle against various parties to force negotiation of a plan that ultimately resulted in payout of all general creditors [and, in this case, resulted in a win for equity]...[i]f the bankruptcy court is going to have the services of attorneys who will perform in that fashion it must recognize in those cases...that such attorneys should be rewarded commensurate with the type of compensation they would seek in the nonbankruptcy world for similar services." *Id.*, at 586. The type of enhancement sought by the Applicant - a mere 1% - is such compensation, and should be awarded for the efforts made in this case by Wilson.

### CONCLUSION

Applicant respectfully submits that all of Wilson's actions were actual, necessary and non-duplicative and that Wilson satisfies each of the tests and factors set forth above that warrant reimbursement of professional fees and expenses as a substantial contribution. A fee award to Wilson will achieve the policy objective of promoting meaningful equity holder participation in the reorganization process.



## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served upon the persons listed below via electronic mail on the 28th day of February, 2006.

/s/ L. Matt Wilson \_\_\_\_\_

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