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

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

APPLICATION OF THE PHOENIX ENTITIES FOR ALLOWANCE OF COMPENSATION FOR FEES AND REIMBURSEMENT OF EXPENSES PURSUANT TO SECTION 1129(a)(4) OF THE BANKRUPTCY CODE AND BANKRUPTCY RULE 9019 OR, ALTERNATIVELY, SECTION 503(b) OF THE BANKRUPTCY CODE

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

Phoenix Partners LP, Phoenix Partners II LP, Phoenix Fund III LP and Phaeton International (BVI) Ltd. (collectively **"Phoenix"**), holders of the Trust I Subordinated Trust Preferred Securities (the **"Trust Preferreds"** and the holders of the Trust Preferreds, the **"Trust Preferred Holders"**) issued by Mirant Corporation (**"Mirant"**), by their counsel, Kasowitz, Benson, Torres & Friedman LLP (**"KBTF"**) and co-counsel Hughes & Luce LLP (**"Hughes & Luce"**), submit this application (the **"Application"**) for entry of an order pursuant to (i) Section 1129(a)(4) of title 11 of the United States Code (the **"Bankruptcy Code"**) and (ii) Rule 9019 of the Federal Rules of Bankruptcy Procedure (the **"Bankruptcy Rules"**) or, alternatively, Sections

503(b)(3)(D) and (b)(4) of the Bankruptcy Code and Bankruptcy Rule 2016, for reimbursement of compensation for professional services rendered and for reimbursement of expenses incurred in connection with services performed by KBTF, Hughes & Luce and Phoenix's valuation experts, The Michel-Shaked Group (**"MSG"**) and Muse Stancil & Co. ("**Muse"** and, together with KBTF, Hughes & Luce and MSG, the **"Phoenix Firms"**), from February 18, 2005 (the **"Retention Date"**) through the effective date (the **"Effective Date"**) of the Debtors' Amended and Restated Second Amended Joint Chapter 11 Plan of Reorganization (the **"Plan"**) on January 3, 2006 (the **"Compensation Period"**). In support of their Application, Phoenix respectfully represents as follows[1]:

PRELIMINARY STATEMENT[2]

This Motion seeks reimbursement of the Phoenix Firms' fees and expenses for the pivotal role Phoenix played in successfully litigating valuation and helping to orchestrate the global settlement leading to the confirmed plan of reorganization in this case.

In the beginning of 2005, Mirant contended that its enterprise valuation provided no recovery to Trust Preferred Holders and Mirant's equity security holders (the **"Equity Holders"**) and a substantial discount in the proposed recovery to other Mirant unsecured creditors. Mirant's total consolidated debt exceeded $10 billion, and the Debtors had proposed a plan of reorganization that offered Trust Preferred Holders no recovery and a nominal recovery to equity.

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[1] In further support of this Application, Phoenix submits (i) the Declaration of Michele Whalen in Support of the Application of the Phoenix Entities for Allowance of Compensation for Fees and Reimbursement of Expenses Pursuant to Section 1129(a)(4) of the Bankruptcy Code and Bankruptcy Rule 9019 or, Alternatively, Section 503(b) of the Bankruptcy Code, annexed hereto as Exhibit I, and (ii) the Declaration of David Beard in Support of the Application of the Phoenix Entities for Allowance of Compensation for Fees and Reimbursement of Expenses Pursuant to Section 1129(a)(4) of the Bankruptcy Code and Bankruptcy Rule 9019 or, Alternatively, Section 503(b) of the Bankruptcy Code, annexed hereto as Exhibit J

[2] Capitalized terms used but not defined in this Preliminary Statement are defined in the text of this Application, and unless otherwise defined herein, capitalized terms shall have the meanings ascribed to such terms in the Plan (as defined herein) or the Disclosure Statement (also as defined herein) as applicable.

In February 2005, as a result of various disagreements among Mirant's stakeholders, the Court ordered a valuation trial to determine plan recoveries. Shortly thereafter, the Indenture Trustee for the Trust Preferreds informed Phoenix that it did not intend to take an active role in the Valuation Hearing. Phoenix became involved as a creditor in these cases at this critical juncture when no other party actively represented the Trust Preferred Holders. Had it not done so, the Trust Preferred Holders would have had no meaningful representation at the Valuation Hearing.

In the weeks leading up to the Valuation Hearing -- perhaps the lengthiest, most extensive, and most complex in bankruptcy history -- Phoenix joined with the Official Committee of Equity Security Holders (the **"Equity Committee"**) to prove to the Court that the Debtors had more than sufficient value to provide a full recovery for Trust Preferred Holders. It succeeded by any measure.

Phoenix participated in the Valuation Hearing and related discovery at its own expense. Indeed, it was the only individual creditor at the trial that put on its own expert witnesses. Phoenix conducted key cross-examinations of the Debtors' and Corp. Committee's expert and fact witnesses. Consequently, the letter ruling and subsequent valuation opinion issued by this Court produced substantial increases in the Debtors' valuation above those proposed by the Debtors and Corp. Committee. But Phoenix's efforts did not end there.

Phoenix played a key role in the post-trial settlement negotiations with the Debtors, Committees and the Examiner, which culminated in a consensual agreement with the key constituencies in Mirant's Chapter 11 cases (the **"Mirant Settlement"**). The Mirant Settlement paved the way for confirmation of the Plan on a fully consensual basis, including a recovery to Trust Preferred Holders close to par value. In recognition of the value added by Phoenix to the process and as a result of its agreement to give up value for the benefit of other creditors and

Equity Holders, all stakeholders agreed in the Mirant Settlement that Phoenix's professional fees and expenses would be reimbursed up to $5.5 million (including an incentive fee payable to KBTF that Phoenix had agreed to prior to the Valuation Hearing), subject to a right to review the Phoenix Firms' time records and invoices by the Debtors and the Committees. Creditors and shareholders overwhelmingly approved the Plan and the Mirant Settlement, and the Court approved both the Plan and the Mirant Settlement in its Confirmation Order.

In total, Phoenix incurred $5,280,773.86 in fees and expenses with respect to the Valuation Hearing and Plan matters. As described below, the Phoenix Firms' fees and expenses are reasonable under Section 1129(a)(4) of the Bankruptcy Code and Bankruptcy Rule 9019 under the circumstances and should be approved in their entirety as part of the Mirant Settlement. Alternatively, the Court should allow reimbursement of such fees and expenses under Section 503(b) of the Bankruptcy Code based on Phoenix's undisputed substantial contribution to these Chapter 11 Cases if the Court believes that Bankruptcy Rule 9019 does not apply.

RELEVANT FACTUAL BACKGROUND

A. Phoenix And Its Interests In The Debtors.

1. Phoenix Partners LP, Phoenix Partners II LP, Phoenix Fund III LP and Phaeton International (BVI) Ltd. hold in the aggregate 840,100 (approximately 12%) of the Trust Preferred Shares issued by Mirant. Phoenix also holds Mirant common stock and served on the Equity Committee prior to the Valuation Hearing.

B. The Chapter 11 Cases.

2. Commencing on July 14, 2003 and continuing through July 15, 2003, Mirant and 74 of its wholly owned subsidiaries filed voluntary petitions under Chapter 11 of the Bankruptcy Code in this Court. Thereafter, certain additional affiliates and subsidiaries of Mirant also commenced Chapter 11 cases in this Court.

3. On or about July 25, 2003, the United States Trustee (the **"UST"**) appointed the official committee of unsecured creditors of Mirant Corporation (the **"Corp. Committee"**) and the official committee of unsecured creditors of Mirant Americas Generation, LLC (the **"MAG Committee"** and together with the Corp. Committee and Equity Committee, the **"Committees"**). On September 18, 2003, the UST appointed the Equity Committee.

4. On April 7, 2004, the Court authorized the UST to appoint an examiner (the **"Examiner"**) in these cases to analyze certain potential causes of action and to act as a referee with respect to certain disputes that could arise among the Debtors, the Committees, and/or other parties in interest. The UST appointed William K. Snyder as the Examiner.

C. Plan Negotiations And Proposals Prior To The Valuation Hearing.

5. Commencing in early 2004, the Debtors' management, along with their attorneys and financial advisors, began to focus their efforts on assessing the business and its short- and long-term prospects to develop a business plan that could serve as a platform for negotiations with the Debtors' primary constituencies regarding the terms of a Chapter 11 plan of reorganization. In the fall of 2004, after a business plan had been developed, the Debtors initiated preliminary plan discussions with the Corp. Committee and MAG Committee. While both the Corp. Committee and the MAG Committee supported a plan in which Mirant and non-MAG subsidiary claims would be converted into equity and all unsecured claims against MAG and its subsidiaries would be paid in cash and/or debt, the two parties initially disagreed as to

how this should be achieved.

6. Although still facing a stalemate between the MAG Committee and Corp. Committee on key issues, on January 19, 2005, the Debtors filed a plan of reorganization (the "**Initial Plan**") and related disclosure statement. 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. Among other disputes, the Equity Committee and Phoenix vigorously disputed the proposed reorganization value assumed in such plans.

D. Events Leading Up To The Valuation Hearing.

7. On November 22, 2004, the Equity Committee sought to compel Mirant to hold a shareholders' meeting to remove and replace the members of Mirant's Board of Directors. To resolve the predicate valuation issues raised by this motion and 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 discovery deadlines and procedures. Pursuant to this order, the Court required parties to file a notice of intent to participate in the Valuation Hearing by February 18, 2005 and to complete discovery by April 1, 2005 (a period of about six weeks).

8. After Phoenix became aware of the valuation dispute in the Debtors' cases, Phoenix attempted to contact the Indenture Trustee and its counsel to understand what actions the Indenture Trustee had taken, or intended to take, in connection with the valuation dispute and related case matters. After a number of conversations, and a meeting with the Indenture Trustee and its counsel on February 15, 2005, where Phoenix stated it believed the Trust Preferreds were worth par plus accrued interest, Phoenix learned that the Indenture Trustee understood that there was a significant value deficit that would have to be overcome if the Trust Preferreds were to

receive any value, and that it would not be taking an active role in the valuation proceedings. As a result of the lack of assistance and the position taken by the Indenture Trustee and its counsel, Phoenix determined it was necessary to take an active role in the valuation proceedings or the Trust Preferreds would not be adequately represented, which would likely result in a total loss of value to the Trust Preferreds.

9. One day after retaining KBTF, Phoenix timely notified parties in interest of its intent to participate in the Valuation Hearing. Although eighteen parties nominally filed notices of intent to participate in the Valuation Hearing, only five parties actively participated in discovery: (1) the Debtors; (2) the Corp. Committee; (3) the MAG Committee; (4) the Equity Committee; and (5) Phoenix (collectively, the **"Valuation Parties"**).[3] Of these, Phoenix was the only party whose professionals were paid by an individual creditor rather than the estate. The Indenture Trustee for the Trust Preferreds also filed a notice of intent to participate in the Valuation Hearing, but had no intention of submitting (and did not submit) any valuation evidence. The Indenture Trustee did not participate in the Valuation Hearing. Thus, in the absence of Phoenix's participation, no party would have represented the interests of the Trust Preferred Holders.[4]

10. The Valuation Hearing and related discovery were extensive and complex by any measure. The Valuation Parties collectively produced over one million pages of documents and deposed eighteen witnesses, including seven fact witnesses and/or corporate representatives and eleven expert witnesses. The Valuation Parties filed several motions to compel discovery and motions *in limine* to preclude evidence at the Valuation Hearing. The Court held a number of hearings and conferences relating to this motion practice.

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[3] The Examiner attended all depositions and mediated various discovery disputes.

[4] Although the Corp. Committee nominally represents all unsecured creditors of Mirant, the Corp. Committee took the position that the Trust Preferreds were out of the money. Thus, instead of representing the interests of the Trust Preferred Holders, *the Corp. Committee was adverse to them.*

11. The Valuation Parties, except for Phoenix, submitted initial expert reports on February 25, 2005. On March 2, 2005, the Court granted Phoenix's motion to submit its initial expert report on March 7, 2005. Rebuttal expert reports were submitted on March 16, 2005. Because of the voluminous discovery, the Court entered an order extending the discovery deadline through April 8, 2005 and adjourning the hearing until April 18, 2005.

E. The Valuation Hearing.

12. The Court conducted the Valuation Hearing between April 18, 2005 and June 27, 2005. Over the course of twenty-seven days, the Valuation Parties submitted over one thousand trial exhibits and hundreds of demonstrative exhibits. Three fact witnesses testified for the Debtors. The Valuation Parties called a total of eight expert witnesses and submitted ten expert reports for the Court's consideration. The Court heard twenty-five days of live witness testimony, which included three-day cross examinations of certain witnesses. The Court heard closing arguments on June 27, 2005.

13. Phoenix conducted key cross-examinations of Curt Morgan (Mirant's Chief Operating Officer), Timothy Coleman (the Debtors' primary valuation expert), David Ying (the Corp. Committee's primary valuation expert), and Dr. Richard D. Tabors (a valuation and power markets expert proffered by the Debtors). The Equity Committee also conducted key cross-examination testimony of these witnesses, and because of carefully planned coordination, Phoenix and the Equity Committee did not duplicate efforts. Phoenix also proffered the expert testimony of Dr. Israel Shaked.

F. The Court's Letter Ruling On Valuation.

14. On June 30, 2005, the Court issued a letter 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. The Court issued an amended letter ruling on July 26, 2005 (these letters are hereinafter referred to collectively as the **"Valuation Ruling"**). Pursuant to the Court's direction, the Debtors and Blackstone worked together to implement the Valuation Ruling under the supervision of a valuation committee (the **"Valuation Committee"**) comprised of Curt Morgan, Timothy Coleman and the Examiner.

G. Phoenix Seeks A Consensual Resolution Of The Cases And Plays A Key Role In Plan Negotiations.

15. The Debtors, the Committees and Phoenix engaged in extensive settlement negotiations following the Valuation Ruling under the auspices of the Examiner. Not only did Phoenix play a key role in these negotiations, but Phoenix also helped to jump start them.

16. After the Valuation Ruling, the Corp. Committee, on the one hand, and Phoenix and the Equity Committee on the other hand, had reached a stalemate; the parties continued to have significant differences on the impact of the Valuation Ruling and other valuation-related issues. Consequently, Phoenix approached an ad hoc committee of Mirant bondholders (the **"Ad Hoc Mirant Committee**"), who were interested in negotiating a consensual resolution of the case and who held substantially more Mirant bonds than the non-trustee members of the Corp. Committee. Phoenix and the Equity Committee then commenced settlement negotiations with the Ad Hoc Mirant Committee that resulted in a term sheet (the **"Ad Hoc Settlement"**) for a plan of reorganization that the Ad Hoc Mirant Committee, the Equity Committee and Phoenix would support.

H. The Settlement Negotiations Produce A Fully Consensual Plan.

17. The Ad Hoc Committee Settlement, among other developments, spurred the Debtors and the Corp. Committee to return to the negotiating table under the auspices of the Examiner, who played a pivotal role in directing and mediating settlement negotiations. The

parties -- the Debtors, the Committees, and Phoenix -- used the Ad Hoc Committee Settlement as the starting point for these negotiations. The discussions accelerated and became increasingly intense during the last week of August and the first week of September, culminating in a plan term sheet, dated September 7, 2005, the terms of which ultimately were embodied in the Plan (the **"Mirant Plan Term Sheet"**). As a result, at the Valuation Parties' request, the Court: (1) ordered that the Valuation Committee not complete the work previously directed in the Valuation Ruling, and (2) stated that it would not issue a formal opinion regarding valuation unless required to do so in connection with confirmation of the Plan.[5]

18. The Mirant Plan Term Sheet and the Plan were the product of extensive arm's length, good faith negotiations between the Debtors, the Committees and Phoenix. At the confirmation hearing, the Debtors stated that approval of the Plan was in the best interests of the Debtors, their Estates, their creditors and their Equity Holders. Further, the Debtors' Memorandum of Law in (a) Support of Confirmation of the Debtors' Second Amended Joint Chapter 11 Plan of Reorganization For Mirant Corporation and Its Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code and (B) Response to Certain Objections Thereto (the **"Confirmation Brief"**), explicitly states that:

> The Plan, which is the result of intense arms-length negotiations among the Debtors, their three Committees, certain ad hoc groups and other major constituencies, is fair and equitable, maximizes overall value, [and] optimizes recoveries for creditors and equity interest holders. . . . Without a doubt, the Plan, which is in the best interests of all creditors and equity interest holders, clearly achieves the goals of Chapter 11 and should be confirmed.

Confirmation Brief at 2. The Mirant Plan Term Sheet benefited all parties in interest in these

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[5] By no means does Phoenix suggest that the Debtors, the Corp. Committee and their respective professionals were not integral players in the settlement negotiations. To the contrary, they played a pivotal role and the settlement would not have been consummated without their participation. However, Phoenix -- along with the Equity Committee and the Examiner -- consistently attempted to start negotiations to overcome what had previously been intractable positions of the other estate fiduciaries.

Chapter 11 Cases by facilitating confirmation of a viable and consensual plan, thus reducing the costs and uncertainty of litigation in this litigious case.

I. The Phoenix Firms' Efforts Provided The Trust Preferred Holders With A Significant Recovery Of Equity And Rights To Litigation Proceeds.

19. In addition, the Mirant Plan Term Sheet provided, for the first time in these Chapter 11 Cases, meaningful recoveries to the Trust Preferred Holders and Equity Holders. The Mirant Plan Term Sheet provided that the Trust Preferred Holders were to: (a) receive (i) 3.5% of the New Mirant Common Stock issued under the Plan and (ii) New Mirant Warrants to purchase an additional 5% of New Mirant Common Stock, and (b) share *pari passu* with Mirant's general unsecured creditors in the recoveries under the designated avoidance actions, if any. Similarly, 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.

J. In The Mirant Settlement, The Debtors And Committees Agreed That The Phoenix Firms' Fees And Expenses Should Be Reimbursed.

20. All parties agreed in the Mirant Plan Term Sheet that Phoenix's fees and expenses would be reimbursed. Phoenix and other Trust Preferred Holders agreed to give up substantial value to equity holders to facilitate a global resolution of the case (including an agreement to share litigation trust recoveries 50/50 with Equity Holders). Moreover, the parties recognized that Phoenix had provided substantial value in the Valuation Hearing and in the plan negotiations for the benefit of its class, the Trust Preferred Holders and, thus, its fees should be reimbursed without the need for further

litigation. Accordingly, the parties to the Mirant Plan Term Sheet agreed that Phoenix's professional fees and expenses would be reimbursed in an amount up to $5.5 million, subject to the review of the Debtors, the Committees and this Court.

21. On December 9, 2005, this Court confirmed the Plan. Pursuant to the order (the **"Confirmation Order")** confirming the Plan, the deadline for professionals to file requests for payment of fees and reimbursement of expenses was initially forty-five (45) days after the Effective Date of the Plan. Accordingly, on January 9, 2006 Phoenix timely filed an application (the **"Initial Application"**) for allowance of its fees. On January 17, 2006 Phoenix filed a supplement to the Initial Application.

22. On February 13, 2006, the Court entered the Scheduling and Procedures Order Governing Compensation Applications (the **"Scheduling Order"**). Pursuant to the Scheduling Order, each Professional Person (as defined in the Scheduling Order) is required to file requests for payment by March 1, 2006 in the manner described therein. Accordingly, Phoenix files this Application which supersedes the Initial Application.

K. Phoenix's Investments In Professionals Produced Tangible Benefits.

23. Prior to Phoenix's involvement in these Chapter 11 Cases, the holders of the Trust Preferreds and Equity Holders were to receive no distribution under the Plan. Phoenix's involvement not only contributed to the Mirant Plan Term Sheet, but also assured that the Trust Preferred Holders and Equity Holders would receive a fair distribution under the Plan.

24. During the Compensation Period, the Phoenix Firms provided the following services:

- Prepared for and participated in valuation discovery and pre-trial motion practice.
- Prepared expert valuation reports.
- Prepared expert valuation rebuttal reports.

- Performed extensive analysis of valuation issues.
- Prepared for and participated in the Valuation Hearing.
- Negotiated with the Equity Committee and MAG Committee after the Valuation Hearing concerning terms of a plan of reorganization.
- Engaged in extensive negotiations directly with the Equity Committee with respect to a consensual plan of reorganization.
- Negotiated a plan of reorganization with the Ad Hoc Mirant Committee and introduced them to the Examiner after preliminary negotiations.
- Developed a proposed plan term sheet with the Ad Hoc Mirant Committee, the Equity Committee and other constituencies. This term sheet was used as the starting point in negotiations with the Debtors, the Corp. Committee and the MAG Committee.
- Participated in extensive and time consuming negotiations with the Examiner, Debtors, Corp. Committee, MAG Committee, and Equity Committee that resulted in the Mirant Plan Term Sheet, which is embodied in the Plan.

25. Throughout their engagements, the Phoenix Firms worked on a variety of complex -- yet pivotal -- valuation-related issues in this case, involving the reasonableness of the enterprise values of Mirant. These valuation-related issues required extensive analysis. Through the efforts of the Phoenix Firms, Phoenix litigated and negotiated effectively, which led to a shortened Chapter 11 process, and a fully consensual and confirmed Plan. Through these efforts, the Phoenix Firms' fees and expenses meet the reasonableness standard and should be approved in their entirety.

L. <u>The Terms Of The Phoenix Firms' Engagements</u>.

26. Pursuant to an engagement letter, Phoenix retained KBTF to serve as its lead counsel in matters related to the Valuation Hearing on the following terms and conditions:

- A payment of $100,000 per month.
- A cash payment equivalent to 11.9% of the amount by which (i) the Trust Preferreds would be sold at a price in excess of $18/per share or (ii) for any securities issued in respect of the shares that would not be sold in the first twenty (20) trading days after the effective date of the Mirant plan (the "New Securities"), the average closing price of the New Securities for

such first twenty (20) post-effective date trading days would exceed a value that would correspond to $18/per share (the **"Incentive Fee")**.

- Reimbursement of all related disbursements and out of pocket expenses, including, but not limited to, travel expenses, duplicating charges, facsimile charges, information providers and other similar expenses.

A true and correct copy of the KBTF Engagement Letter is annexed hereto as Exhibit A.[6] Although KBTF had represented affiliates of Phoenix in other matters, such engagements had ended approximately two years before the parties executed the KBTF Engagement Letter.

27. The Trust Preferreds were trading at approximately $18 (or less) prior to the Valuation Hearing. Thus, by the structure of its engagement letter, KBTF took the risk that it would not receive a substantial portion of its compensation *unless the Trust Preferreds increased above the trading value in February of 2002*. Obviously, this would not occur unless KBTF and Phoenix proved to the Court and the capital markets that the Debtors had a value substantially higher than the Debtors and the capital markets had then ascribed.

28. Phoenix retained as its experts Israel Shaked of MSG and Paul Ruwe of Muse. Both experts and their firms charged Phoenix their standard hourly rates and required reimbursement of expenses. Both MSG and Muse provided extensive supporting services to KBTF and Hughes & Luce. Indeed, both MSG and Muse prepared (i) valuation analyses of the Debtors, (ii) analyses illustrating the defects in the Debtors' and the Corp. Committee's valuations and (iii) analyses of the Debtors' business plan.

RELIEF REQUESTED

29. Pursuant to Section 1129(a)(4) of the Bankruptcy Code and Bankruptcy Rule 9019, or alternatively, Sections 503(b)(3)(D) and 503(b)(4) of the Bankruptcy Code, Phoenix

[6] On June 30, 2005, the $100,000 billing rate ceased and KBTF began billing using its normal hourly rates.

seeks full reimbursement of the Phoenix Firms' fees and expenses.[7] Specifically, Phoenix seeks reimbursement for KBTF's compensation in the amount of $746,293.50, reflecting a blended hourly rate for attorneys of $219.89 and reimbursement of expenses incurred in connection therewith in the amount of $200,255.23 for the Compensation Period (the **"KBTF Fees"**).[8] In addition, Phoenix paid KBTF an "Incentive Fee" of $2.8 million with respect to its services during the Compensation Period. Copies of KBTF's time records, a list of disbursements and a summary thereof are annexed hereto as Exhibit B. Had KBTF billed Phoenix using its customary hourly billing rates, the total fees and expenses would have been $2,059,255.23. Thus, Phoenix is seeking approximately $1,600,000 more than it would have requested had KBTF not taken the significant risk of taking a fixed monthly fee and the Incentive Fee.[9]

30. Phoenix seeks reimbursement of Hughes & Luce's compensation in the amount of $408,828.50, reflecting a blended hourly rate for attorneys of $400.49, and reimbursement of expenses incurred in connection therewith in the amount of $29,380.68 for the Compensation Period (the **"Hughes & Luce Fees"**). Hughes & Luce's time records, a list of disbursements and a summary thereof are annexed hereto as Exhibit C.

31. Phoenix seeks reimbursement of Muse's compensation in the amount of $202,935.00,[10] reflecting a blended hourly rate of $215.03, and reimbursement of expenses incurred in connection therewith in the amount of $18,019.99 for the Compensation Period (the **"Muse Fees"**). A summary of Muse's time records and disbursements are annexed hereto as

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[7] In accordance with the Scheduling Order, Phoenix has capped its fees and expenses in preparing this Application at no more than $25,000, which represents a deduction of $51,543.44. Phoenix reserves the right to supplement this Application for any additional fees and expenses incurred prior to the Application hearing.

[8] Phoenix has paid $3,661,304.17 of the fees and expenses for which it seeks reimbursement. An additional $76,154.50 in fees and $9,090.06 in expenses will be paid by Phoenix to KBTF prior to the hearing on this Application.

[9] The resumes of the KBTF paraprofessionals and a summary of the work experience of the Hughes & Luce paraprofessionals who provided services to Phoenix during these Chapter 11 Cases are annexed hereto as Exhibits G and H, respectively.

[10] This amount reflects a deduction of $20,000 for a mobilization fee.

Exhibit D.

32. Phoenix seeks reimbursement of MSG's compensation in the amount of $811,604.00,[11] reflecting a blended hourly rate of $354.52 and reimbursement of expenses incurred in connection therewith in the amount of $63,456.96 for the Compensation Period (the **"MSG Fees")**. MSG's time records and a list of disbursements are annexed hereto as Exhibit E.

33. In addition, Phoenix seeks reimbursement of certain additional, separately identified expenses incurred in connection with the services provided by the Phoenix Firms totaling $4,242.32. Copies of these additional expenses are annexed hereto as Exhibit F.

34. While the Phoenix Firms' fees and expenses are substantial, upon information and belief, they were significantly less than those charged by the Debtors and the Committees' professionals for services rendered in connection with the Valuation Hearing and the plan negotiations. In addition, Phoenix worked diligently with the Equity Committee at all times to ensure that their respective professionals did not duplicate efforts.

JURISDICTION AND VENUE

35. This Court has jurisdiction over these cases and this Application pursuant to 28 U.S.C. §§ 157 and 1334, paragraph 80 of the Confirmation Order and Article XVI, subsection (iv) of the Plan. Venue of these proceedings and this Application is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief sought herein are Sections 105(a), 1123(b)(3), and 1129(a)(4), or, alternatively, Section 503(b), of the Bankruptcy Code and Bankruptcy Rules 2016 and 9019.

[11] This amount reflects an $80,000.00 courtesy deduction.

I.

PHOENIX'S FEES AND EXPENSES SHOULD BE APPROVED UNDER SECTION 1129(a)(4) AND BANKRUPTCY RULE 9019

A. Standard Of Review.

36. The Court already has approved the Mirant Settlement, which provided for the reimbursement of Phoenix's fees and expenses. Section 1129(a)(4) of the Bankruptcy Code requires that certain professional fees and expenses paid by the plan proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, be subject to approval of the court as reasonable. *See In re Briscoe Enters.*, 138 B.R. 795, 816-817 (N.D. Tex. 1992), *aff'd in part, rev'd in part,* 994 F.2d at 1170 (requiring that all payments of professional fees made from estate assets be subject to review and approval by the Court as to their reasonableness); *see also In re Cajun Elec. Power Coop., Inc.*, 119 F.3d 349, 355 (5th Cir. 1997); *In re Anderson Grain Corp.*, 222 B.R. 528 (Bankr. N.D. Tex. 1998).

37. Bankruptcy Rule 9019 settlements -- *and all of the terms and conditions therein* -- should be approved if they fall within the "lowest range of reasonableness." *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 499, 505 (Bankr. S.D.N.Y. 1991). Basic to the process of evaluating settlements is "the need to compare the terms of the compromise with the likely rewards of litigation." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 425 (1968).

38. Rule 9019 empowers a bankruptcy court to approve compromises and settlements if they are "fair and equitable and in the best interest of the estate." *In re Cajun Elec. Power Coop., Inc.*, 119 F.3d at 355; *see also In re Zale Corp.*, 62 F.3d 746, 754 (5th Cir. 1995) (stating that "the 'fair and equitable' determination does not give the bankruptcy court jurisdiction over settlement conditions that do not bear on the court's duties to preserve the estate and protect creditors."). "Compromises are favored in bankruptcy" because they minimize the costs of

litigation and further the parties' interest in expediting administration of a bankruptcy estate. *In re Martin*, 91 F.3d 389, 393 (3d Cir. 1996). Accordingly, if the Court agrees that the Phoenix Firms' fees and expenses are reasonable, they should be reimbursed pursuant to Section 1129(a)(4) of the Bankruptcy Code and Bankruptcy Rule 9019.

B. The Parties To The Mirant Settlement Have Acknowledged That Phoenix's Fees And Expenses Should Be Reimbursed.

39. As part of the overall compromise and settlement set forth in the Mirant Plan Term Sheet, the terms of which are embodied in the Plan, the Debtors, the Committees and Phoenix agreed that Phoenix's professional fees and expenses incurred in these Chapter 11 cases should be reimbursed. Specifically, Section 6.2(d)(i) of the Plan provides:

> Phoenix shall be reimbursed from the Estates with respect to the professional fees and expenses it has incurred in connection with the valuation hearing and otherwise in the Chapter 11 Cases (including expert fees and disbursements and counsel's incentive fee). Subject to a reasonable opportunity to review such professional fees and expenses, each of the Debtors and the Committees shall not object to such professional fees and expenses to the extent they do not exceed $5,500,000 in the aggregate. Notwithstanding anything set forth herein, the approval by the Bankruptcy Court of such professional fees and expenses shall be neither a prerequisite, nor a condition to, confirmation of the Plan.

40. In addition, paragraph 85 of the Confirmation Order provides that:

> The settlement by the Debtors and the holders of Mirant Debt Claims with respect to the contractual subordination provisions against all holders of Subordinated Note Claims, as set forth in Section 15.4 of the Plan, is approved pursuant to sections 1123(b)(3) and (6) of the Bankruptcy Code and Bankruptcy Rule 9019 and the Debtors are hereby authorized to implement such settlement. Section 15.4 of the Plan and paragraph 85 of the Confirmation Order make clear that the Plan constitutes a motion pursuant to Sections 1123(b)(3) and (6) of the Bankruptcy Code and Bankruptcy Rule 9019 to compromise and settle the rights of the holders of the Mirant Debt Claims to enforce contractual subordination provisions against all holders of Subordinated Note Claims (the Trust Preferred Holders) and other disputed issues in return for, among other things, the reimbursement of the Phoenix Firms' fees and expenses.

The Debtors' agreement to reimburse Phoenix for the Phoenix Firms' fees and expenses was a key part of the heavily-negotiated Mirant Settlement.

41. As the Court found in the Findings of Fact and Conclusions of Law in Support of the Amended and Restated Second Amended Joint Chapter 11 Plan of Reorganization for Mirant Corporation and Its Affiliate Debtors (the **"Findings of Fact and Conclusions of Law"**), dated December 9, 2005:

> The settlement of the right of holders of Subordinated Note Claims provided for in Section 15.4 of the Plan *is fair and equitable and in the best interests of the Debtors, their Estates and all other parties in interest, including all creditors and equity holders*. Such settlement meets the applicable standards of section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019 and should be approved.

Findings of Fact and Conclusions of Law ¶ 52 (emphasis added).

42. Here, parties in interest approved the reimbursement of the Phoenix Firms' fees and expenses -- subject to review for reasonableness -- as being in the best interests of the Debtors, their Estates and all parties in interest. Thus, the Debtors and other parties to the Mirant Settlement recognized that litigation over reimbursement of Phoenix's fees was inappropriate and wasteful because all parties recognized that Phoenix had, in fact, made a substantial contribution. *See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 425 (1968) (holding that court should examine the likelihood of success in litigation concerning matter to be settled). Indeed, no party in interest with a true economic interest in the outcome of the case objected to the payment of Phoenix Firms' Fees as contemplated by the Plan.

C. <u>The Phoenix Firms Fees And Expenses Are Reasonable</u>.

43. No cases define specific "reasonableness" standards for fee reimbursement under Section 1129(a)(4) of the Bankruptcy Code and Bankruptcy Rule 9019. In the substantial contribution analysis under Section 503(b) of the Bankruptcy Code, however, courts generally

analyze the reasonableness of fee reimbursement requests under the following factors:

(1) the time and labor required;

(2) the novelty and difficulty of the questions;

(3) the skill requisite to perform the legal service properly;

(4) the preclusion of other employment by the attorney due to the acceptance of the case;

(5) the customary fee;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;

(8) the amount involved and the results obtained;

(9) the experience, reputation, and ability of the attorneys;

(10) the undesirability of the case;

(11) the nature and length of the professional relationship with the client; and

(12) awards in similar cases.

In re Texaco, 90 B.R. 622, 631-32 (Bankr. S.D.N.Y. 1988). All of the applicable factors militate in favor of reimbursement of all of the fees and expenses sought herein.

44. Throughout the Valuation Hearing, the Phoenix Firms worked together to assure that their services were not duplicative and that they were provided to Phoenix as efficiently as possible. Throughout the Valuation Hearing, KBT&F attorneys took the lead in representing Phoenix, supported only by a single, senior Hughes & Luce bankruptcy litigator. However, on those days when the subject matter of the Valuation Hearing did not warrant the expense of attorneys from KBT&F flying to Fort Worth to attend, one Hughes & Luce attorney represented Phoenix (and the interests of Trust Preferreds) before the Court. Additionally, throughout the Valuation Hearing, the Phoenix Firms relied primarily on Hughes & Luce's locally available paraprofessionals (avoiding substantial travel and lodging expenses).

(i) The Phoenix Firms Expended Substantial Time And Effort On This Case.

45. The Phoenix Firms spent a significant amount of time and effort: (i) preparing for and participating in the Valuation Hearing, (ii) negotiating with the Equity Committee and MAG Committee with respect to a consensual plan of reorganization, (iii) negotiating with the Ad Hoc Mirant Committee, a larger economic constituency than the non-trustee members of the Corp. Committee and introduced them to the Examiner after preliminary negotiations, (iv) developing a proposed plan term sheet with the Ad Hoc Mirant Committee, the Equity Committee and other constituencies, which was used as the starting point in negotiations with the Debtors, the Corp. Committee and the MAG Committee, and (v) participating in lengthy, extensive, arms' length negotiations with the Examiner, Debtors, Corp. Committee, MAG Committee, and Equity Committee that resulted in the Mirant Plan Term Sheet, the terms of which are embodied in the Plan.

46. The time records in Exhibits B, C, D and E of this Application catalog in detail that the Phoenix Firms expended substantial time and effort on this matter, which benefited all of the Trust Preferred Holders and all other constituencies by facilitating a consensual Plan. Moreover, the Court had the opportunity to observe the time and effort Phoenix expended on this matter at the Valuation Hearing. There can be no dispute that the time and effort that the Phoenix Professionals expended warrants reimbursement of the Phoenix Firms' fees and expenses. The estate fiduciaries' agreement to reimburse Phoenix for its fees in the Mirant Settlement also acknowledges this fact.

(ii) This Case Was Novel And Complex.

47. The Valuation Hearing and resulting settlement negotiations involved some of the most novel and complex issues in bankruptcy. First, a valuation trial of the size and scope of that conducted in these cases was unprecedented. It 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 has recognized the complexity and difficulty in resolving these valuation issues in its lengthy and detailed Memorandum Opinion on valuation. *See* Memorandum Opinion at 27, 35,

(iii) The Fees Charged By The Phoenix Firms Were Appropriate.

48. The fees paid to Hughes & Luce, MSG and Muse were based on their customary hourly billings and reasonable expenses incurred. For most of its engagement on this matter, KBTF worked predominantly on a special fee structure. At the outset of KBTF's engagement in February of 2005, Phoenix and KBTF agreed that KBTF would be compensated as follows:

(i) $100,000 per month.

(ii) A cash payment equivalent to 11.9% of the amount by which (i) the Mirant shares issued under the Plan are sold at a price in excess of $18/per Share or (ii) for any securities issued in respect of the Mirant shares that are not sold in the first twenty (20) trading days after the effective date of the Plan (the "New Securities"), the average closing price of the New Securities for such first twenty (20) post-effective date trading days exceeds a value that would correspond to $18/per Share.

(iii) All reasonable expenses would be reimbursed.

See KBTF Engagement Letter, annexed hereto as Exhibit A. KBTF charged Phoenix based on this fee structure until June 30, 2005. Thereafter, Phoenix agreed that KBTF would be paid at its standard hourly rates.

49. Had KBTF charged its normal hourly rates in this matter rather than the fee arrangement set forth in the engagement letter, the fees would have totaled $2,059,255.23. Thus, KBTF's fees and expenses (including the Incentive Fee) are approximately $1,600,000 more than KBTF would have charged had it not assumed the substantial risk of payment of the Incentive Fee. This risk cannot be overstated given that the Debtors and the Corp. Committee (the party representing the Trust Preferred Holders' interest) proposed valuations that did not

permit any recovery at all to the Trust Preferred Holders.

(iv) The Phoenix Firms Achieved Extraordinary Results Under Very Difficult Circumstances.

50. The Phoenix Firms had to prepare for the Valuation Hearing on an extremely expedited basis and to master a steep learning curve about the Debtors' business and related valuation issues. *Only sixty days elapsed between the date that Phoenix retained KBTF and Hughes & Luce and the commencement of the Valuation Hearing*. In that time, the Phoenix Firms participated in discovery, prepared and submitted expert reports and prepared for a trial in which literally billions of dollars were at stake, but where no other party represented the interests of Trust Preferred Holders.

51. The results -- which inured to the benefit of all Trust Preferred Holders -- were extraordinary. Phoenix and other Trust Preferred Holders stood to receive no recovery whatsoever when Phoenix retained the Phoenix Firms; by the end of the cases, the Trust Preferreds received equity and Litigation Trust distributions valued at approximately the par value (approximately $365 million) of the Trust Preferreds. Phoenix respectfully submits that fees and expenses of less than $5.5 million are appropriate under the circumstances and reasonable when measured by the Trust Preferreds' recovery and the billions of dollars of added value following the Valuation Hearing and the announcement and consummation of the Plan.

52. The Mirant Settlement is the paradigm of a settlement and compromise warranting compensation from the estates: not only did it benefit the Trust Preferred Holders and Equity Holders dramatically by providing a significantly greater distribution, but it also helped the Debtors emerge from Chapter 11 as a viable entity. No party disputes that Phoenix played a key role in negotiating and formulating the Mirant Settlement.

53. The opening statement by the Debtors at the Confirmation Hearing supports Phoenix's assertion that the Mirant Settlement was the single most significant factor leading to

confirmation of the Plan itself, and that Phoenix's participation in the settlement contributed to Mirant's exit from Chapter 11. Specifically, Debtors' counsel stated:

> This case is on the verge of a great success. We have a plan that is ready to be confirmed, pursuant to which we have materially de-leveraged what everybody recognized was an extremely overleveraged business. Approximately $7 billion of debt and obligations are going to be converted into equity under this plan.
>
> We have been nevertheless fighting between and among ourselves over various issues, including, notably, the terms on which certain MAG creditors will be unimpaired, the calculation of postpetition interest, principally at the Corp. level, the amount and nature of Equity's recovery under the plan, and even who gets the privilege of providing the new $2.3 billion of financing that goes with this company's exit from bankruptcy.
>
> Your Honor, these are high class problems, and they are indicia not of failure but of success in the extreme. And I think all of the participants would at this point say that the fight has been worth it. We've all had our moments. We've all said lots of things along the way. But in the end, peace is breaking out.
>
> It started with the Committees. We were able to ultimately, in early September, cut a global deal regarding the terms of a plan with our three statutory committees. And for each -- to each of them and their advisors, on behalf of the Debtors, I express a great deal of thanks for the time and effort and energy that the Committees put into getting that deal done."

Transcript of Proceedings Before The Honorable D. Michael Lynn, United States Bankruptcy Judge: Mirant Confirmation Hearing, December 1, 2005 ("Confirmation Hearing Transcript") at 15:12 *et seq.* No party can deny that Phoenix played a pivotal role in these settlement negotiations.

54. At the Confirmation Hearing, in support of the Mirant Settlement, William Holden, Senior Vice-President and Treasurer of Mirant, testified by proffer, that the Mirant Settlement of the right of the holders of Mirant debt claims to enforce contractual subordination provisions against all holders of subordinated note claims described in Section 15.4 of the Plan was entered into after good faith arm's length negotiations, that it was fair and equitable and in

the best interests of all parties, including the estates, creditors and Equity Holders, that the settlement avoided unnecessary costs of litigation, and furthered the interests of the Debtors and their stakeholders in expediting the administration of the estates, and that the terms of the settlement were reasonable, particularly in light of the likely duration, uncertainty and expense of the litigation, if allowed to proceed. *See* Transcript of Proceedings Before The Honorable D. Michael Lynn, United States Bankruptcy Judge: Mirant Confirmation Hearing, December 1, 2005 at 114:10-25.).

55. Further, as the Court found in its Findings of Fact and Conclusions of Law:

> The settlement of the right of holders of Subordinated Note Claims [the Trust Preferred Holders] provided for in Section 15.4 of the Plan *is fair and equitable and in the best interests of the Debtors, their Estates and all other parties in interest, including all creditors and equity holders*. Such settlement meets the applicable standards of section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019 and should be approved.

Proposed Findings of Fact and Conclusions of Law, ¶ 52.

56. The Phoenix Firms produced an extraordinary result for Phoenix and other Trust Preferred Holders under time pressure. Then, the Phoenix Firms assisted in consummating a settlement that all parties have acknowledged was the pivotal event leading to a fully consensual Plan.

(v) Courts Have Granted Similar Fee Requests In Other Major Chapter 11 Cases.

57. Reimbursements of fees based on hourly rates is standard practice in this case and in other major Chapter 11 cases. Courts also have approved "success" or contingent fees similar to the KBTF Incentive Fee. For example, in the Chapter 11 case of the *Finova Group, Inc*., counsel to the committee of unsecured creditors was awarded a substantial bonus upon successful resolution of the case because counsel charged a reduced hourly rate during the case. *See* Consent Order Pursuant to 11 U.S.C. §§ 1103 (a) and 328(a) Authorizing the Employment

and Retention of Wachtell, Lipton, Rosen & Katz As Counsel for Official Committee of Unsecured Creditors, Finova Group, Inc., (Bankr. D. Del. 2001) (No. 01-0697). Just as creditors' committee counsel in that case was awarded a success fee while agreeing to reduced rates, so too should Phoenix be entitled to reimbursement for the payment to KBTF of the Incentive Fee for its services in these Chapter 11 Cases.

58. For all of the foregoing reasons, Phoenix respectfully submits that the $5,280,773.86 of professional fees and expenses it has reasonably incurred should be reimbursed.

II.

ALTERNATIVELY, THE PHOENIX FIRMS' FEES AND EXPENSES SHOULD BE APPROVED UNDER SECTIONS 503(B)(3) AND (4) OF THE BANKRUPTCY CODE.

59. Even if the Court were to conclude that Section 1129(a)(4) of the Bankruptcy Code and Bankruptcy Rule 9019 do not apply to this Application, the Court should approve the fees and expenses in full under Section 503(b) of the Bankruptcy Code.

A. Applicable Substantial Contribution Standards.

(i) Bankruptcy Policy Favors Reimbursement Of Fees And Expenses Of Active Creditors That Contribute To The Estate.

60. The Bankruptcy Code recognizes that active and meaningful creditor participation for companies to achieve the Bankruptcy Code's overarching twin goals of a consensual, expeditious reorganization that preserves to the greatest extent possible the economic value of the restructured company. To this end, the Bankruptcy Code permits -- in fact, requires -- that the restructured company reimburse ad hoc creditor groups and individual creditors, like Phoenix, that have contributed substantially, to a successfully concluded Chapter 11 case. *See In re Consolidated Bancshares, Inc.,* 785 F.2d 1249, 1253 (5th Cir. 1986) (internal quotation marks omitted) (citations omitted); *In re American 3001 Telecomm., Inc.,* 79 B.R. 271 (Bankr. N.D. Tex. 1987) (same); *In re Richton Int'l Corp.,* 15 B.R. 854 (Bankr. S.D.N.Y. 1981) (same). In

fact, courts have repeatedly held out the prospect of Section 503(b) reimbursement to encourage the participation of those denied an official role. *Cf. In re Enron Corp.*, 279 B.R. 671, 685, 694 (Bankr. S.D.N.Y. 2002) (denying motions for additional committees and remarking that the ability to apply for Section 503(b) reimbursement is itself a factor in determining the adequacy of representation); *In re Williams J. Group, Inc.*, 281 B.R. 216, 224 (Bankr. S.D.N.Y. 2002) (denying motion for appointment of an equity committee but suggesting that "[s]hould the Shareholders' efforts result in a substantial contribution to the estate, they may be reimbursed pursuant to §503(b)(3)(D)"); *In re Johns-Manville Corp.*, 68 B.R. 155, 163 (Bankr. S.D.N.Y. 1986) (denying motion for committee creation but reminding that a party who makes a substantial contribution may be reimbursed as provided in Section 503(b)(3)). Moreover, payment of professional fees of a creditor supports the Bankruptcy Code's goal of attracting quality professionals to assist creditors. *See In re Nine Assocs., 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 . . . .").

61. Here, Phoenix submits that its pivotal, constructive, cost-effective, successful, and substantial contribution to these cases presents, quite literally, the paradigm for the award of reimbursement under Section 503(b)(3) of the Bankruptcy Code.

(ii) Legal Requirements For Reimbursement Of Professional Fees And Expenses As A Substantial Contribution.

62. Section 503(b)(3)(D) of the Bankruptcy Code provides for the payment of allowed administrative expenses, including the actual and necessary expenses of a creditor in making a substantial contribution in a Chapter 11 case. Similarly Section 503(b)(4) of the Bankruptcy Code provides for the payment of allowed administrative expenses, including reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expenses are allowable under Section 503(b)(3). 11 U.S.C. § 503(b)(4). Thus, a

creditor is entitled to reimbursement of fees and expenses of its professionals to the extent that the creditor has made a substantial contribution to the Chapter 11 case. *See In re Datavon, Inc.*, 303 B.R. 119 (Bankr. D. Tex. 2003)

63. To secure administrative expense priority for reimbursement of fees and expenses under Section 503(b)(3), the claimant must be a creditor; and notice and a hearing are required. 11 U.S.C. §§ 101(4), 101(9), 102(1) and 503(b). Only a creditor has standing to make the application; its professionals do not. *See In re American Preferred Prescription, Inc.*, 194 B.R. 721, 726 (Bankr. S.D.N.Y. 1996).

64. The applicant carries the burden of proof by a preponderance of the evidence. *Id. at* 727; *In re Johnson*, 72 Bankr. 115 (Bankr. E.D.N.C. 1987); *In re 1 Potato 2, Inc.*, 71 Bankr. 615 (Bankr. D. Minn. 1987); *In re S&T Indus.*, 63 Bankr. 656 (Bankr. W.D. Ky. 1986). The determination of whether a creditor'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. *See In re Hooker Invs., Inc.*, 188 B.R. 117, 120 (S.D.N.Y. 1995) (*citing In re Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1253 (5th Cir. 1986)); *In re Baldwin-United Corp.*, 70 Bankr. 321 (Bankr. S.D. Ohio 1987).

(iii) <u>Factors Considered By Courts In Determining Substantial Contribution</u>.

65. A creditor makes a substantial contribution when its actions foster and enhance, rather than retard or interrupt the progress of the reorganization. *See In re DP Partners, Ltd. P'shp.*, 106 F.3d at 672 (quoting *In re Consolidated Bancshares, Inc.*, 785 F. 2d at 1253 (5th Cir, 1986)); *see also Crane v. Commissioner*, 331 U.S. 1, 6, 67 S. Ct. 1047, 1050-51, 91 L. Ed. 1301 (1947) (the phrase "substantial contribution" in Section 503 means a contribution that is

"considerable in amount, value or worth.").[12]

66. A creditor makes a substantial contribution when its actions contribute to a result benefiting the estate. *See In re Richton Int'l Corp*., 15 B.R. 854 (Bankr. S.D.N.Y. 1981). The creditor's services that help move the case forward and aid the formulation and confirmation of a plan of reorganization merit compensation from the estate. *See In re Richton Int'l Corp*., 15 B.R. 856; In *re 9085 E. Mineral Office Bldg., Ltd*., 119 B.R. 246 (Bankr. D Colo. 1990); *In re Perdido Motel Group, Inc*., 115 B.R. 340 (Bankr. N.D. Ala. 1990); *see also In re Granite Partners* L.P., 213 B.R. 440, 446 (Bankr. S.D.N.Y. 1997) (substantial contribution is appropriate when, *inter alia*, "the creditor took an active role in facilitating the negotiation and successful confirmation of the plan.").

67. To prove a substantial contribution, the applicant must demonstrate that the contribution has provided a tangible benefit to the estate and to unsecured creditors. Among the factors to be considered in determining whether services benefited all parties in the case, include: (1) whether the services provided a significant demonstrable benefit to the estate and creditors, and (2) whether the services were duplicative of services rendered by a committee, the debtor, or the attorneys for a committee or the debtor. *See Buttes*, 112 B.R. at 194.

68. Courts also consider whether the allowance of the application will result in the impairment of other creditors. *See In re Richton Int'l Corp*., 15 B.R. at 856 ("This Court emphasizes that the Debtor's estate is well-able to pay the allowances granted with no impairment of other creditors."). Another factor courts consider is the speed with which a successful result has been achieved. *See In re Penn-Dixie Indus.,* 18 B.R. 834, 836 (Bankr. S.D.N.Y. 1982) (awarding fees to creditor bank and noting "time compression is reflective of the

[12] Legislative history, albeit scant, also supports this construction: The phrase "substantial contribution in the case" is derived from Bankruptcy Act §§ 242 and 243. It does not require a contribution that leads to confirmation of a plan, for in many cases, it will be a substantial contribution if the person involved uncovers facts that would lead to a denial of confirmation, such as fraud in connection with the case. H.R. Rep. No. 595, 95th Cong., 1st Sess. 355 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6311.

intensity of efforts exerted by all concerned"). In addition, a creditor who mediates disputes that facilitate a consensual plan has made a substantial contribution. *See In re Baldwin United Corp.*, 79 B.R. 321, 341 (Bankr. S.D. Ohio 1987) ("[O]ngoing efforts to mediate disputes among the Debtors' potential adversaries and to develop a consensual plan provided a substantial benefit to all involved").

69. A creditor'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); *see also In re W.G.S.C. Enters.*, 47 B.R. 53 (Bankr. N.D. Ga. 1985) (finding trade creditors who increased recovery of unsecured creditors from fifty percent 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 products liability action may provide substantial contribution to the estate by increasing recovery to the sub-class of similarly situated claimants). A creditor who compromises his own claim and thereby increases the payout to other constituents also has made a substantial contribution to the estate. *In re 9085 E. Mineral Office Bldg., Ltd.*, 119 B.R. at 252.

B. <u>Phoenix Made A Substantial Contribution In These Cases</u>.

(i) <u>Phoenix's Contributions To This Case</u>.

70. Phoenix's role in the Valuation Hearing and in plan negotiations resulted in a substantial contribution by any standard. Phoenix, among other things described in this Motion:

- Protected the interests of Trust Preferred Holders in valuation and plan matters where no other party in interest effectively had done so.
- Participated in Valuation Hearing and in related discovery on behalf of Trust Preferred Holders, including the review of hundreds of thousands of documents and participation in numerous depositions.
- Successfully litigated valuation issues at the Valuation Hearing by cross-examining the Debtors' and Corp. Committee's experts and presenting the

valuation testimony of Dr. Israel Shaked.

- Benefited Trust Preferred Holders and all other constituencies by successfully challenging the Debtor's enterprise valuation thus ensuring that the Trust Preferred Holders received almost a full recovery under the Plan, rather than the nominal distribution that the Debtors had proposed.

- Negotiated the terms of the Plan for the benefit of Trust Preferred Holders.

All of these activities satisfy the substantial contribution standards described above, which is clearly why the Debtors and Committees agreed that Phoenix's fees and expenses should be reimbursed without further litigation. In addition, Phoenix worked with the Equity Committee to ensure close coordination and non-duplication of their respective efforts.

(ii) No Plan Distributions Will Be Impaired By This Application.

71. The now reorganized Debtors are worth in excess of $11 billion and they have ample cash and liquidity to support their operations. There will be no impairment of other creditors' recoveries if this Court awards the Phoenix Firms' compensation pursuant to Section 503(b) of the Bankruptcy Code. Moreover, since all constituencies voted overwhelmingly in favor of the Plan, they also have approved reimbursement of the Phoenix Firms' fees as a key part of the Mirant Settlement.

(iii) Phoenix's Self-Interest In The Cases Do Not Preclude Reimbursement Of Its Fees And Expenses Under Section 503(b).

72. That Phoenix acted to protect its self interest in the case rather is irrelevant to a Section 503(b) analysis. As explained by the Fifth Circuit:

> 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.

Hall Fin. Group, Inc. v. DP Partners, L.P. (*In re DP Partners, L.P.*), 106 F.3d 667, 673 (5th Cir.) (internal citations omitted), *cert. denied*, 522 U.S. 815 (1997).

73. Likewise, in *Speights & Runyan v. Celotex Corp. (In re Celotex Corp.)*, 227 F.3d 1336, 1338 (11th Cir. 2000), 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." 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 as to creditors.

Id. at 1339.

74. 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 1 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 In re Richton Int'l Corp.,* 15 B.R. 854, 856 (Bankr. S.D.N.Y. 1981). Thus, any self-interest by Phoenix is irrelevant to the substantial contribution analysis under Section 503(b). Here, however, Phoenix's actions benefited all creditors.

75. Once a substantial contribution is found, fees are reviewed under Section 503(b)(4) and general fee analysis factors applicable to retained professionals. *See In re Texaco,*

Inc., 90 B.R. 622 (Bankr. S.D.N.Y. 1988); *In re 9085 E. Mineral Office Bldg., Ltd.,* 119 B.R. 246 (Bankr. D. Colo. 1990). In *In re Texaco,* the court imported a previously enunciated fee analysis structure into the process of evaluating the reasonableness of expenses enumerated in a Section 503(b) application. 90 R.R. 622, 631-32 (Bankr. S.D.N.Y. 1988). Specifically, the Court stated:

> All post petition fees which are compensable pursuant to 11 U.S.C. § 503(b) must be scrutinized in accordance with the factors expressed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which holds that in assessing the reasonableness of attorney fees the court must consider: '(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other of employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; (12) awards in similar cases.'

90 B.R. 622, 631-32 (Bankr. S.D.N.Y. 1988). Reasonableness of fees under Sections 503(b)(4) and 330(a) is based on time, nature, extent and value of services and whether expenses are actual and necessary. *See Zolfo, Cooper & Co. v. Sunbeam-Oster Co., Inc.,* 50 F.3d 253 (3d Cir. 1995); *In re Busy Beaver Building Centers,* 19 F.3d 833 (3d Cir. 1994).

76. As more fully discussed *supra,* Phoenix respectfully submits that all its actions were actual, necessary and non-duplicative. Phoenix satisfies each of the tests and factors set forth above that warrant reimbursement of professional fees and expenses as a substantial contribution. Accordingly, Phoenix is entitled to full reimbursement for the Phoenix Firms' fees and expenses because the Phoenix Firms' services benefited all parties in the case.

DISBURSEMENTS

77. In accordance with Local Rule 2016 and the Standing Order and Guidelines for Compensation and Expense Reimbursement of Professionals dated January, 1, 2001 United States Bankruptcy Court Northern District of Texas (together, the "**Guidelines**"), Phoenix only

seeks reimbursement at actual cost for disbursements incurred both in-house and from third-party vendors by the Phoenix Firms. With respect to photocopying expenses, Phoenix seeks reimbursement at the rate of $.20 per page, which was the rate charged by the Phoenix Firms. With respect to facsimile expenses, the Phoenix Firms excluded charges for incoming facsimile and include charges for outgoing facsimiles at applicable toll charge rates. These charges are intended to cover the Phoenix Firms' direct operating costs for photocopying and facsimile facilities, which costs are not incorporated into the Phoenix Firms' hourly billing rates. The amount of the standard photocopying charge is intended to allow the Phoenix Firms to cover the related expenses of their photocopying services.

78. The time constraints and the travel requirements frequently imposed by the circumstances of these cases required the Phoenix Firms to devote substantial amounts of time during the evenings and on weekends to the performance of legal services in these cases. While not frequent, these extraordinary services were essential in order to meet deadlines in these cases.

79. Consistent with the Phoenix Firms' policies, attorneys, analysts and other employees of the Phoenix Firms who worked late into the evenings were reimbursed for their reasonable meal costs and their cost for transportation home. The Phoenix Firms' regular practices do not include components for those charges in overhead when establishing billing rates and to charge their clients for these and all other out-of-pocket disbursements incurred during the regular course of the rendition of services. The reimbursement of these requested disbursements is consistent with the provisions set forth in the Guidelines.

80. In addition, due to the composition of Phoenix and the dispersion of parties in interest throughout the country, frequent conference calls and long distance telephone calls have been required. On several occasions, overnight delivery of documents and other materials was required as a result of emergencies necessitating the use of such express services. The actual

expenses incurred in providing professional services were necessary, reasonable, and justified under the circumstances. [13]

CONCLUSION

81. No agreement or understanding exists between the Phoenix Firms and any other person for a sharing of compensation received or to be received from Phoenix for services rendered in or in connection with these cases, nor shall the Phoenix Firms share or agree to share the compensation paid or allowed from the estates for such services with any other person. Phoenix has paid the Phoenix Firms for their services. Accordingly, the award of compensation pursuant to this Application will constitute a reimbursement to Phoenix.

82. No agreement or understanding prohibited by 18 U.S.C. § 155 has been or will be made by the Phoenix Firms.

83. No prior application has been made to this or any other Court for the relief requested herein.

84. Phoenix respectfully requests that, because this Application includes the legal support upon which it is based, the Court waive the requirement that a separate memorandum of law be filed in support of this Application.

WHEREFORE, Phoenix respectfully requests (i) approval of the Phoenix Firms' fees and expenses as being reasonable under the Plan and Confirmation Order, (ii) approval of the Phoenix Firms' fees and expenses based on the substantial contribution provided by Phoenix to these Chapter 11 Cases, and (iii) such other and further relief as is just and proper under the circumstances.

[13] To the best of Phoenix's knowledge, information and belief, formed after reasonable inquiry, the compensation and expense reimbursement it is seeking payment of is in conformity with the Guidelines and the compensation and expense reimbursement requested were billed at rates, in accordance with practices, no less favorable than those customarily employed by the Phoenix Firms and accepted by their clients.

Dated: Dallas, Texas
March 1, 2006

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was mailed by first class mail, postage prepaid, to the parties listed below on March 1, 2006. Also on March 1, 2006, in compliance with the Court's Scheduling and Procedures Order Governing Compensation Applications, entered on February 13, 2006, the foregoing was served in electronic form on Dean Nancy Rapoport.

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