

EXHIBIT B

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

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

IN RE: §
MIRANT CORPORATION, et al., §
DEBTORS. §
CASE NO. 03-46590-DML-11
(Jointly Administered)

MEMORANDUM ORDER

Came on to be considered the Motion for an Order (A) Approving Claims Estimation Procedures and (B) Fixing Notice Procedures and Approving Form and Manner of Notice (the "Motion") filed by Mirant Corporation and its above captioned affiliated debtors (collectively the "Debtors")¹.

Debtors filed the Motion on September 13, 2004. Debtors attached as an exhibit to the Motion their proposed Claims Estimation Procedures including subsequent versions (the "Estimation Procedures"). The court held a status conference regarding the Motion on September 22, 2004. In response to concerns raised by the court at the status conference, Debtors amended the proposed Estimation Procedures and filed the amended version on September 24, 2004. Over 20 parties (the "Responding Parties") objected to or commented on the Motion. The court held hearings on October 6, 2004 and heard arguments concerning the Motion and the objections thereto. On October 13 and 20, the court conducted further proceedings on the Motion. This matter is subject to the court's core jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (B).

¹ The court presumes Debtors shall be the party responsible for contesting claims, but another party, such as a committee, may contest a claim subject to this order with Debtors' permission. Therefore, all references herein to duties and obligations of Debtors shall apply equally to any other party which may assume responsibility for contesting a claim.

Background

These cases involve 83 debtors in the business of producing, selling and trading energy products. Debtors' assets and liabilities total billions of dollars. Debtors' operations are central to the provision of electrical energy to parts of the United States.

At the time of commencement of their cases (the first 75 cases were filed July 14 and 15, 2003) Debtors faced a number of issues resolution of which they considered prerequisite to proposal of a plan or plans of reorganization. Many of those issues – New York ad valorem taxes, rejection of certain contracts with Potomac Electric Power Co. (*see Mirant Corp. v. Potomac Elec. Power Co. (In re Mirant Corp.)*, 378 F.3d 511 (5th Cir. 2004)) – have been resolved or appear on the verge of resolution. Debtors are presently subject to exclusivity limitations that contemplate filing a plan in the next few months.² Debtors' management has incentives to formulate a plan in November, 2004.³

Though under the Order Establishing Procedures for Objections to Proofs of Claim (the "Claim Objection Order") Debtors have disposed of many of the thousands of claims pending in these cases, there remain about 40 claims varying in size from tens of millions to billions of dollars some or all of which Debtors believe may require liquidation in connection with the plan process. It is to that end – the possible need to quickly quantify claims – that Debtors filed the Motion.

² Even the court's extension to year-end of Debtors' exclusivity was contested, however. *See* Official Comm. of Unsecured Creditors of Mirant Ams. Generation, L.L.C. v. Mirant Corp. (In re Mirant Corp.), No. 4-04-CV-476-A, No. 4-04-CV-530-A, 2004 U.S. Dist. LEXIS 19796 (N.D. Tex. Sept. 30, 2004).

³ Management bonuses will depend in part on meeting this schedule. This arrangement was approved by Debtors, the Committees and the Examiner. The court therefore, though not without qualms, has approved it as well.

Discussion

Before discussing the Motion and the objections of the Responding Parties, the court commends the Debtors and the three Committees appointed in these cases by the United States Trustee (the “UST”) for their efforts in developing the Estimation Procedures. Though some of the Responding Parties have questioned Debtors’ motives, the court is fully satisfied that the Estimation Procedures represent Debtors’ and the Committees’ best efforts to develop and present to all interested parties a rational method for dealing with claims requiring quantification before confirmation of a plan. Questions of good faith or proper performance of fiduciary duties are generally not germane (and have no persuasive effect on the court) other than in contests governed by Federal Rule of Bankruptcy Procedure 9011 or appropriate provisions of the Bankruptcy Code (the “Code”).⁴

The Responding Parties have raised numerous concerns with the Estimation Procedures, however, which warrant consideration. The court addresses many of these in the decretal paragraphs below, including expanding procedural safeguards, extending timelines and offering an alternative to estimation. A claimant may also seek modification of the Estimation Procedures, which shall serve as a fair default procedure subject to change in cases where changes are needed.

The court need not address at this time whether the claim of any given Responding Party is not susceptible to estimation. The court would note, however, that in determining whether a given claim may be estimated, the court must consider not only the size of that claim, but the aggregate uncertainty to be resolved by estimation. Put another way, while it may not be necessary to estimate a given claim standing alone, if

⁴ 11 U.S.C. §§ 101-1330.

that claim and other, similar claims must be litigated, the court must consider the necessity of knowing with a degree of precision Debtors' exposure for that group of claims in deciding whether and for what purposes to estimate that particular claim.⁵

With regard to the Responding Parties that complained that estimation should not be substituted for pending adversary proceedings ("Adversary Proceedings"⁶), the court concurs. Under the procedures adopted, preference is given to resolving Adversary Proceedings on an accelerated, but not summary, basis. Estimation will only occur if (1) appropriate to the plan process and (2) the given Adversary Proceeding cannot be prepared for trial and tried in the time frames established by the court. However, the court must caution the parties that any Adversary Proceedings (or claim objections ("Objections"⁷)) which will require more than three full days of court time may have to be deferred in favor of estimation. The court will consider in those cases, upon motion of the claimant, bifurcating trial of an Adversary Proceeding in order to avoid the need to estimate a claim.

On a related subject, the court agrees with the Responding Parties that, absent consent of the claimant-counter-defendant, the court may not determine the value of counterclaims through estimation. However, if a claimant does not object, the court will

⁵ Where, as here, the court establishes procedures in anticipation of the need for estimation, the court must consider several potentially relevant variables including reorganization plan structure, the need for consistent results and timing requirements. These factors, as well as the number and potential amount of unliquidated claims, will affect how the court ultimately decides a given Estimation Motion – whether it is granted and the purposes for which estimation would be binding.

⁶ The term Adversary Proceedings shall refer both to adversary proceedings filed prior to the hearings conducted by the court on the Motion and also to adversary proceedings filed in accordance with the schedule set forth in this order.

⁷ The term Objections shall refer both to claim objections filed prior to the hearings conducted by the court on the Motion and also to claim objections filed in accordance with the schedule set forth in this order.

consider a counterclaim (to the extent it is compulsory) under the Estimation Procedures. Accordingly, the court will sever any counterclaim asserted by Debtors (or another objecting party) upon motion of the claimant in any estimation proceeding. Excepted from this rule are claims Debtors might assert by way of recoupment or that affect quantification of a claim under Code § 503(b) or Code § 506(a).

Turning to matters pending in this or other courts, the procedures adopted below effectively eliminate most concerns expressed by the Responding Parties. As Debtors are required to join issue on claims more than two months prior to filing an Estimation Motion, claimants have ample time to be heard on jurisdictional disputes in the ordinary course of claim objection procedure.

Finally, the court must address the legal questions raised by the Responding Parties. To the extent they must be considered now, the court understands the remaining issues to be (1) what scope has the court to authorize estimation; (2) what power does the court have to estimate claims; and (3) for what purposes may the court estimate claims.

There is no question that the court may estimate claims under Code § 502(c).⁸ To the extent the Responding Parties question the authority of the court, it is whether establishment (let alone implementation) of the Estimation Procedures is premature. Section 502(c) provides a facial test that, generally, requires a showing that administration of the case will be unduly delayed if a claim is not estimated.⁹ The court

⁸ See *O'Neill v. Cont'l Airlines, Inc. (In re Cont'l Airlines)*, 981 F.2d 1450, 1461 (5th Cir. 1993); *First City Beaumont v. Durkay (In re Ford)*, 967 F.2d 1047, 1049 n.3 (5th Cir. 1992).

⁹ See *In re Ford*, 967 F.2d at 1053 (noting that section 502(c) permits fixing of claims which might interfere with closing of bankruptcy estate); *Carlson v. U.S. (In re Carlson)*, 126 F.3d 915, 926 (7th Cir. 1997) (estimation of a claim is required when necessary to prevent delay in closing of bankruptcy estate); *Ryan v. Loui (In re Corey)*, 892 F.2d 829, 834 (9th Cir. 1989) (approving estimation of claim by district court where failure to estimate would have delayed confirmation of debtor's plan of reorganization to the detriment of other creditors); *In re Nat'l Gypsum Co.*, 139

is of the view that meaningful delay of the plan process, deferral of distributions, or the need for a meaningful creditor franchise are, *inter alia*, reasons running to efficient administration which justify estimation. In the case at bar, Debtors assert they will be in the process of confirming a plan by Spring, 2005. The schedule set below by the court so assumes.¹⁰

As to the character of estimation proceedings, the court has considerable flexibility in fashioning the means for quantifying claims through estimation.¹¹ The Estimation Procedures and the procedures set out below provide most –hopefully all – safeguards of due process to which claimants may be entitled. In fact, the Estimation Procedures will only be triggered if the ordinary course of resolving contested matters and Adversary Proceedings does not result in a timely, full trial. Whether or not a trial can be had is in large part within the control of the claimant.

B.R. 397, 405 n.19 (N.D. Tex. 1992) (noting that estimation of claims prior to plan confirmation is essential for the court to evaluate plan feasibility and to avoid delay of confirmation); *In re Teigen*, 228 B.R. 720, 723 (Bankr. D.S.D. 1998) (finding estimation of claims appropriate to avoid delay in distributions to other creditors); *In re MacDonald*, 128 B.R. 161, 165 (Bankr. W.D. Tex. 1991) (estimation of post-petition claims appropriate when necessary to avoid delay in administration of case, particularly in plan confirmation process).

¹⁰ Should the Debtors' plan timetable change, the court may reconsider and adjust the schedule accordingly.

¹¹ See *Addison v. Langston (In re Brints Cotton Mktg., Inc.)*, 737 F.2d 1338, 1341 (5th Cir. 1984) (bankruptcy court should use whatever procedures best fit the circumstances of the case to estimate a claim); *Kool, Mann, Coffee & Co. v. Coffey*, 300 F.3d 340, 356 (3rd Cir. 2002) (bankruptcy court has exclusive jurisdiction to determine the procedures and timing for estimation of claims); *McDuffy v. Novak (In re DeGeorge Fin. Corp.)*, No. 3:01CV009(CFD), 2002 U.S. Dist. LEXIS 17621, *35 (D. Conn. July 15, 2002) ("Bankruptcy courts have wide discretion in choosing the process for estimating a claim."); *Nat'l Labor Relations Bd. v. Greyhound Lines, Inc. (In re Eagle Bus Mfg., Inc.)*, 158 B.R. 421, 437 (S.D. Tex. 1993) ("[T]he case law within the Fifth Circuit has established that the bankruptcy court has broad discretion to fashion estimation procedures."); *In re Windsor Plumbing Supply Co., Inc.*, 170 B.R. 503, 520 (Bankr. E.D.N.Y. 1994) ("Bankruptcy courts have wide discretion in choosing the process for estimating a claim."); *In re MacDonald*, 128 B.R. at 165-66 (bankruptcy court is permitted to exercise discretion in choosing proper method for estimation of claims).

The final issue the court must address is the purposes for which estimation may occur. The court unquestionably may estimate a claim for voting purposes. The “estimation of claims or interests for the purposes of confirming a plan” is deemed a core proceeding by 28 U.S.C. § 157(b)(2)(B), and Federal Rule of Bankruptcy Procedure 3018(a) allows the court to “temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.” Read in conjunction with section 502(c), these provisions establish the court’s authority to estimate claims for voting purposes. *See* 4 COLLIER ON BANKRUPTCY ¶ 502.04[3] (15th ed. rev. 2003) (noting that 28 U.S.C. § 157(b)(2)(B) and Bankruptcy Rule 3018(a) provide for allowance of claims for limited purpose of plan consideration, but, unless limited by the court, an estimation order under section 502(c) places the allowed claim “on equal footing with other claims allowed under section 502.”). Estimation for purposes of determining feasibility of a plan (or for other purposes – e.g., Code §§ 1129(a)(7), 1129(b)) is also unquestionably proper.¹²

The issue of effect of estimation is thus really the issue of whether the court may, by estimation, fix the amount of a claim for purposes of distribution. There is substantial

¹² *See* *Pizza of Haw., Inc. v. Shakey’s, Inc. (In re Pizza of Haw., Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985) (affirming district court’s remand and instruction to bankruptcy court to consider estimate of claim to determine feasibility of plan); *Nat’l Gypsum*, 139 B.R. at 405 n.19 (stating that estimation of claims may serve several purposes and is essential for the court to evaluate feasibility of a plan); *In re Hoffinger Indus., Inc.*, 307 B.R. 112, 118 (Bankr. E.D. Ark. 2004) (bankruptcy court may estimate personal injury or wrongful death claims for purpose of determining feasibility of a plan); *In re Pac. Gas & Elec. Co.*, 295 B.R. 635, 642 (Bankr. N.D. Cal. 2003) (stating that estimation of claims may be for broad or narrow purposes, including for the purpose of determining feasibility of a plan); *In re C. F. Smith & Assocs., Inc.*, 235 B.R. 153, 159 (Bankr. D. Mass. 1999) (stating that estimation of claims is often employed to determine feasibility of a plan); *In re Farley, Inc.*, 146 B.R. 748, 753 (Bankr. N.D. Ill. 1992) (finding estimation of personal injury claims for purposes of voting and determination of plan feasibility appropriate).

support for Debtors' position that the court may do so.¹³ The court finds this authority persuasive. As Debtors argue, section 502(c) does not limit, as to purpose, the court's authority to estimate claims. On the contrary, section 502(c) provides for "allowance" of claims based on estimation. Not only voting of (section 1126(c)), but also distribution for a claim turns on allowance.¹⁴ Thus the court concludes it has the power to estimate a claim for purposes of distribution.

Whether an estimate should bind a creditor (subject to reconsideration under the standards of section 502(j) of the Code and Federal Rule of Bankruptcy Procedure 3008) is another matter. The court will need to decide whether an estimation should be binding for purposes of distribution on a case by case basis. While the court believes the procedures it adopts (including the Estimation Procedures) assure that no claimant will be shortchanged, the court will limit the effect of estimation to those purposes necessary to evaluate confirmability of any plan.

For the foregoing reasons, the court concludes that, subject to the procedures established below, the Claim Objection Order and making changes directed by the court

¹³ See *In re Brints Cotton*, 737 F.2d at 1342 (affirming bankruptcy court's fixing of value of creditors' claims by estimating the claims as of the petition date); *In re Wallace's Bookstores, Inc.*, No. 01-50545, 2004 Bankr. LEXIS 737, *10 (Bankr. E.D. Ky. May 25, 2004) ("The implication from [28 U.S.C. § 157(b)(2)(B)] . . . is that the estimation of claims other *than* personal injury and wrongful death claims for purposes of distribution . . . must . . . be within the scope of § 502(c)."); *In re Trident Shipworks, Inc.*, 247 B.R. 513, 514 (Bankr. M.D. Fla. 2000) ("It is also well established that the estimation proceeding may be used . . . to determine the allowed amount for distribution purposes."); *In re C. F. Smith*, 235 B.R. at 160 (stating that the merits of a claim may be fully adjudicated through an estimation proceeding and finding estimation of claim for purposes of distribution appropriate); *In re Poole Funeral Chapel, Inc.*, 63 B.R. 527, 532 (Bankr. N.D. Ala. 1986) (stating that bankruptcy court has the right and duty to estimate non-tort claims for purposes of distribution).

¹⁴ See *Browning v. Navarro*, 887 F.2d 553, 559 (5th Cir. 1989) ("In order to share in the distribution of the assets of an estate, a claim must be allowed."); 9 COLLIER ON BANKRUPTCY ¶ 3021.01 (15th ed. rev. 2004) (Rule 3021 of the Federal Rules of Bankruptcy Procedure "permits distribution only to creditors whose claims have been allowed.").

on October 20, 2004, the Estimation Procedures are APPROVED and ADOPTED.

Debtors shall prepare and submit to the court and interested parties revised Estimation Procedures that conform to this ruling.

In order to facilitate implementation of the Estimation Procedures and consideration of Objections and Adversary Proceedings, the court has cleared its calendar from January 18, 2005, through March 4, 2005¹⁵ in order to try the Objections, the Adversary Proceedings and Estimation Motions (as described below). The court has also determined that it is appropriate to establish the following procedures and deadlines in connection with litigation of the Objections, Adversary Proceedings and Estimation Motions:

1. In order for a claim to be subject to these procedures, it must be contested by Debtors by the filing of (1) an Objection, (2) a Notice of Objection (as defined below) or (3) an Adversary Proceeding before the latest of (1) October 18, 2004; (2) ten days after the claim is filed; or (3) such other date to which the objecting party and the claimant agree; provided, however, that no Notice of Objection may be filed after October 18, 2004. A Notice of Objection shall plainly state the basis or bases for contesting the claim. Notices of Objection shall be served upon affected claimants and shall be filed with the court in bulk appended to a single Report of Notices of Objection. A Notice of Objection must be superceded by the filing of an Objection or Adversary Proceeding by November 1, 2004.
2. Any claim not contested as provided by ¶ 1 shall be estimated, if at all, on motion of the claimant for voting purposes only; provided, however, that, on motion of the claimant, the court may direct that these or similar procedures may be used to estimate the claim for other purposes.
3. On or before November 1, 2004, Debtors shall serve upon each claimant whose claim is contested Debtors' list of witnesses expected to testify at trial.
4. On or before November 5, 2004, Debtors shall give notice to every claimant whose claim Debtors may seek to estimate, in the event that litigation of the claim is not timely completed. The notice provided

¹⁵ The court intends to reserve Fridays, noon hours and, as necessary, time prior to 9:00 a.m., in order to ensure that other matters before it are not neglected.

pursuant to this paragraph shall be limited in content to Debtors' intent to estimate.

5. Each claimant subject to these procedures shall, by November 12, 2004, serve upon Debtors a list of Debtors' witnesses such claimant expects to depose. Debtors may satisfy any requirement to make a person available as a witness by multiplying the number of claimants seeking to depose such person by one-third and making such person available for deposition at least for that number of days. If Debtors elect to use this procedure, Debtors will give each claimant seeking to depose such person and the Committees at least 20 days notice of such person's availability. Debtors may conduct document productions in the same fashion by providing for on-location availability of at least one week.
6. The court will conduct general status conferences respecting the progress of discovery and other matters prerequisite to trial of Objections and Adversary Proceedings subject to these procedures on November 10, December 1 and December 20, 2004.
7. The court will consider by telephone hearing, usually within 24 hours, any discovery dispute raised by the filing (with chambers) of a motion.
8. The court favors resolution of disputes through mediation. Upon a showing of cause by a claimant pursuant to a motion filed by December 1, 2004, and upon recommendation of the Examiner, the court will direct Debtors to mediate all or part of any dispute subject to these procedures, but only if such mediation will not delay administration of these Chapter 11 cases.
9. Debtors shall file on January 3, 2005, an Estimation Motion as to any claim subject to these procedures which they contend cannot be resolved through full trial and which they therefore intend to deal with pursuant to the Estimation Procedures.
10. Beginning on January 11, 2005, the court will hold status conferences / pretrial conferences beginning with Adversary Proceedings and Objections and finishing with Estimation Motions. The court will consider at that time trial time, trial procedure, summary disposition of matters and motions directed to the applicability or modification of the Estimation Procedures. The status conference / pretrial conference, by agreement of the parties, may be substituted for that provided by the Claim Objection Order, Exhibit A, Tier IV, ¶ (d) and the conference provided for in ¶ (e) postponed accordingly.
11. Not later than three business days before the conference described in ¶ 10, there shall be filed any motion to be heard, supporting papers and, by each

of them, a concise description (not to exceed five double-spaced pages) of the factual and legal issues pertaining to the allowance or disallowance of the claim, as viewed by the objecting party and the claimant respectively.

12. Counsel for Debtors shall serve as lead counsel in matters governed by these procedures. All discovery by or to Debtors shall be conducted through such counsel. Other parties may participate in trial of Objections (or, if permitted pursuant to Federal Rule of Bankruptcy Procedure 7024, Adversary Proceedings) and may file trial briefs.
13. All parties are cautioned to minimize trial times. Parties are cautioned against duplicative arguments and evidence. Parties are directed to make every effort to stipulate to facts, exhibits and curriculum vitae of witnesses, if possible, by the time of the status conference / pretrial conference described in ¶ 10.
14. Parties may seek summary disposition of all or part of an Adversary Proceeding or Objection at any time in 2004.
15. No discovery shall occur in connection with any Objection or Adversary Proceeding subject to these procedures after December 31, 2004 except as authorized by court order.
16. In the event all parties to an Objection or Adversary Proceeding subject to these provisions agree, any times or deadlines (except as provided in ¶ 15) set for discovery herein may be adjusted.
17. The court may vary these procedures (and the Estimation Procedures) as necessary upon motion or, after notice and a hearing, *sua sponte*.

It is so ORDERED.

Signed this 21st day of October, 2004.



DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE