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PROPOSED ATTORNEYS FOR THE DEBTORS AND DEBTORS-IN-POSSESSION

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

_____	)	
In re	)	Chapter 11 Case
	)	
MIRANT CORPORATION, <u>et al.</u> ,	)	Case No. 03-46590(DML)11
	)	Jointly Administered
Debtors.	)	
	)	Emergency hearing requested
	)	for July 23, 2003 at 9:00 a.m.
_____		

**EMERGENCY MOTION OF THE DEBTORS FOR INTERIM AND FINAL ORDER  
 (I) PURSUANT TO 11 U.S.C. § 364(c)(2) AND FEDERAL RULE OF BANKRUPTCY  
 PROCEDURE 4001(C)(2) AUTHORIZING THE DEBTORS TO OBTAIN INTERIM  
 AND FINAL POSTPETITION SECURED CREDIT (II) PURSUANT TO FEDERAL  
 RULE OF BANKRUPTCY PROCEDURE 9019 APPROVING COMPROMISE  
 BETWEEN THE DEBTORS AND GE CAPITAL FINANCIAL, INC.  
(III) SCHEDULING A FINAL HEARING**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

**PRELIMINARY STATEMENT**

1. Prior to the commencement of these bankruptcy cases, Mirant and GE CF were parties to an agreement whereby GE CF provided credit charge accounts, credit cards, and credit card services to the Debtors. Pursuant to such agreement, the Debtors obtained credit cards for approximately 400 employees enabling those employees to charge business expenses,

and which expenses the Debtors repaid to GECF in accordance with its agreement with GECF. Prior to the commencement of these cases, there was no amount past due owed by the Debtors to GECF. Notwithstanding the foregoing, GECF immediately terminated its agreement to provide credit card services to the Debtors. This has forced the Debtors' employees to charge their regularly occurring business expenses on their own, personal credit accounts. This has negatively impacted employee morale, needlessly created additional administrative expense for the Debtors in processing thousands of individual business reimbursement expenses, and cannot be sustained. Simply put, the Debtors' employees cannot continue to finance the Debtors' day-to-day business expenses.

2. The corporate credit cards issued by the Debtors are not "perks" to the employees. Rather, such cards are necessary because of the amount of business expense charges incurred by the Debtors on a monthly basis. For example, on average, the Debtors have incurred \$730,189.70 monthly in such credit expenses over the past six months. The Debtors should not place the burden of financing business expenses upon their employees.

3. It is vital to the continued operations of the Debtors (and the morale of the Debtors' employees who are personally incurring business-related expenses) that a new credit card agreement between the Debtors and GECF is reached so business can return to normal. GECF has also required, as part of a new agreement, resolution of (and approval of a compromise with respect to) any avoidance issues regarding a prepetition payment made by the Debtors to GECF in the amount of \$927,389. This motion, if granted, will accomplish the foregoing and should be granted.

## **JURISDICTION AND VENUE**

4. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

## **PROCEDURAL BACKGROUND**

5. The Cases. By July 15, 2003 (the “Petition Date”), Mirant Corporation (“Mirant”) and its affiliated debtors (collectively, the “Debtors”) had filed voluntary petitions in this court for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330, as amended (the “Bankruptcy Code”).<sup>1</sup> The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

6. The Cases are Jointly Administered. On July 15, 2003, this Court granted the Debtors’ motion for an order requesting that the Debtors’ bankruptcy estates be jointly administered.

7. The Creditors’ Committee. No creditors’ committee has yet been appointed in these cases by the United States Trustee. Further, no trustee or examiner has been requested or appointed in any of the Debtors’ chapter 11 cases.

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<sup>1</sup> Concurrently, Mirant caused two of its Canadian subsidiaries, Mirant Canada Energy Marketing, Ltd and Mirant Canada Energy Marketing Investments, Inc. (collectively, the “Canadian Debtors”) to commence plenary insolvency proceedings (the “Canadian Proceedings”) in the Court of Queen’s Bench of Alberta Judicial District of Calgary (the “Canadian Court”) pursuant to the *Companies’ Creditors Arrangement Act* (the “CCAA”). The Canadian Debtors are subject to the sole and exclusive jurisdiction of the Canadian Court.

## **FACTUAL BACKGROUND**

8. Mirant and its direct and indirect subsidiaries comprise a competitive energy concern that generates and sells electricity in North America, the Philippines and the Caribbean. Through its direct and indirect subsidiaries, Mirant produces, sells and delivers reliable energy products and services to utilities, municipal systems, aggregators, electric-cooperative utilities, producers, generators, marketers and large industrial customers. Mirant's core business centers on the production and sale of electricity and electrical capacity (essentially the ability to produce electricity on demand). Mirant currently owns or controls more than 21,800 megawatts of electric generating capacity around the world, of which more than 18,000 megawatts is located in the United States. In 2002, Mirant produced 73 million megawatt-hours of electricity, sold 312 million megawatt-hours of electricity and sold or marketed an aggregate average of 21 billion cubic feet per day of natural gas.

9. Mirant employs in excess of 7,000 employees worldwide, of which approximately 1,100 employees are based at Mirant's corporate headquarters in Atlanta and approximately 5,900 employees are based at operating facilities. In 2002, Mirant recorded \$542 million loss in earnings before interest, taxes and depreciation ("EBITDA") on a consolidated basis. Its 2002 operating revenues were approximately \$6.4 billion.

## **FACTS SPECIFICALLY RELEVANT TO THE MOTION**

### **A. The Prepetition Contractual Relationship Between GECF And Mirant.**

10. On June 15, 2001, Mirant and GECF entered into that certain "Purchasing Card Program Agreement" (the "Agreement"), a copy of which is attached to the concurrently filed Affidavit of Larry Wells (the "Wells Affidavit"), as Exhibit A. According to the Agreement, GECF is authorized by MasterCard International, Inc. ("Mastercard") to establish

charge accounts and to issue credit cards (“Cards”) relating to such accounts for use by the Debtors and approximately 400 of their employees for the purpose of facilitating and expediting the purchase of, and payment for, various goods and services in the ordinary course of the Debtors’ business. *See* Sections 1.2, 1.4, and 2.1 of the Agreement attached to the Wells Affidavit as Exhibit A.

11. The Debtors’ repayment obligations under the Agreement are supported by an unsecured, irrevocable letter of credit (the “LC”) dated May 13, 2003 in the amount of \$1,500,000 issued by Wachovia Bank, National Association (the “Issuing Bank”) for the benefit of GECF. A copy of the LC is attached to the Wells Affidavit as Exhibit B. As of the date hereof, there have been no draws upon the LC.

12. Prior to the Petition Date, approximately 400 employees of substantially all of the Debtors were issued Cards pursuant to the Agreement. The monthly charges incurred with respect to the Cards for the six months prior to the Petition Date were: \$611,077.51 for January, 2003; \$699,838.97 for February, 2003; \$690,559.52 for March, 2003; \$853,045.26 for April, 2003; \$775,786.09 for May, 2003; and \$750,830.83 for June, 2003, respectively.

13. Prior to the Petition Date, Debtor Mirant Services, LLC (Case no. 03-46649 DML) made a payment for the benefit of all the Debtors to GECF in the amount of \$927,389 (the “Payment”) to pay down the then-current amount outstanding (but not yet past due) to GECF under the Agreement. The Payment was made to GECF prior to the due date set forth in the Agreement with the expectation that GECF would continue to provide the crucial credit card services under the Agreement. GECF has expressed concern that the Payment may be avoidable under applicable law.

14. Notwithstanding the Payment, GECF terminated the Agreement pursuant to Section 8.3(c), which permits GECF to immediately terminate the Agreement if a “voluntary petition of bankruptcy is filed . . . by [Mirant Corporation].” Regardless of the enforceability of *ipso facto* termination provision, GECF is under no obligation to provide the Debtors with postpetition credit under the Agreement. Finally, GECF has also taken the position that the Agreement constitutes a financial accommodations contract under Bankruptcy Code sections 365(c)(2) and (e)(2)(B), and therefore cannot be assumed or assigned by the Debtors even if the parties otherwise agreed.

**B. Proposed New Agreement and Compromise with GECF.**

15. GECF is willing to enter into a new Purchasing Card Agreement (the “New Agreement”) to enable the Debtors to incur postpetition credit through the use of credit Cards. Attached to the Wells Affidavit as composite Exhibit C is a draft of the New Agreement which has been red-lined against the terminated prepetition Agreement to enable the reader to note the changes contained in the proposed New Agreement as compared to the original Agreement. Also attached to the Wells Affidavit as composite Exhibit C is a Term Sheet with sets forth the general terms of the agreement between the Debtors and GECF.

16. Essentially, subject to approval by this Court, GECF and Mirant will enter into a New Agreement which (together with the Term Sheet) contains terms substantially similar to those contained in the prepetition Agreement with modifications to reflect the fact that the Debtors are now under bankruptcy protection.<sup>2</sup> Moreover, the parties have agreed that, after

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<sup>2</sup> For example, the Debtors and GECF acknowledge in the New Agreement that any extensions of credit under the New Agreement shall have the priority of an expense of administration under sections 503(b) and 507(a)(1) of the Bankruptcy Code; *see* the New Agreement, section 2.5 which is attached as Exhibit C to the Wells Affidavit.

approval of proposed compromise regarding the Payment, discussed below, has been obtained, the LC will be terminated, to be replaced by a certificate of deposit in the amount of \$1,500,000 (the "CD") which CD shall be obtained immediately upon the Court's approval of this emergency Motion. The CD shall be pledged to (and a security interest granted in favor of) GECF to secure the Debtors' payment obligations under the New Agreement. *See* New Agreement, section 9.4 attached to the Wells Affidavit as Exhibit C, and the form of General Pledge Agreement attached as Exhibit "D" to the New Agreement. Additionally, the Debtors have also agreed that they shall pay no more than 50% of the reasonable and necessary fees and costs incurred by GECF in connection with preparation of the New Agreement (and related exhibits and documents); provided, that Debtors shall reimburse GECF in full for reasonable fees and costs incurred by GECF in connection with a physical court appearance on the Motion. *See* Term Sheet, section 4, which is attached to the Wells Affidavit as Exhibit C.

17. With respect to the proposed compromise regarding the Payment, the Debtors and GECF have agreed (subject to this Court's approval) to the following:

(a) GECF shall deposit an amount equal to the Payment (which is \$927,389) into a segregated trust account maintained by the Debtors' proposed counsel, White & Case, LLP (the "Trust Account"); *see* Term Sheet, section 2, attached as Exhibit C to the Wells Affidavit;

(b) GECF shall then draw upon the LC in an amount equal to (i) the Payment, plus (ii) other amounts owing under the Agreement as of July 14, 2003 (the date the Agreement was terminated) in the amount of \$75,889, for a total draw under the LC of \$1,003,278; *Id.*;

(c) upon receipt of the \$1,003,278 from the Issuing Bank, the \$927,389 held in the Trust Account shall be returned to the Debtors for the benefit of their estates; *Id.*; and

(d) the Debtors shall then terminate the LC. *Id.*

### **RELIEF REQUESTED**

18. By this Motion, the Debtors seek:

(a) the expedited entry of an interim order authorizing the Debtors to:

(i) enter into an agreement on substantially similar terms as those contained in the New Agreement and thereby allow the Debtors to incur (A) on an interim basis, secured credit in an amount not to exceed **\$401,604.33**<sup>3</sup> through the use of corporate credit cards issued by Mastercard and administered by GEFCF; and (B) on a final basis, secured credit under and in connection with the New Agreement for such purposes in an amount not to exceed \$1,500,000.

(ii) on an interim and final basis, allow the Debtors to obtain from unencumbered funds a certificate of deposit in the amount of \$1,500,000 and pledge said certificate of deposit (and grant a security interest therein) to GEFCF to secure the payment obligations under the New Agreement;

(iii) schedule a final hearing on the request to enter into an agreement on substantially similar terms as those contained in the New Agreement and obtain secured credit through the use of corporate credit cards issued by Mastercard and administered by GEFCF as set forth above;

(iv) schedule a hearing on the approval of a compromise between the Debtors and GEFCF whereby GEFCF will return the Payment to the Debtors' proposed counsel (to be held in trust) and draw upon the LC in an amount equal to all unpaid prepetition amounts owing to GEFCF by the Debtors (which equals \$1,003,278) to resolve any potential avoidance liability of GEFCF with respect to the Payment.

(b) the entry of a final order granting the relief requested herein and as set forth in the interim order on a final basis.

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<sup>3</sup> This amount is equal to 50% of the six month average prior to the Petition Date, which is \$365,094.85 ( $\$730,189.70/2 = \$365,094.85$ ) plus an additional 10% cushion ( $\$365,094.85 \times .10 = \$36,509.48$ ) for a total of **\$401,604.33** ( $\$365,094.85 + \$36,509.48 = \$401,604.33$ ). Such amount should be sufficient to sustain the Debtors pending a final hearing.

## BASIS FOR RELIEF

### **A. The Relief Requested is Permitted Under Bankruptcy Code Section 364(c)(2).**

19. As noted, the Debtors' repayment obligations under the New Agreement will be secured by a CD in the amount of \$1,500,000 which will be pledged to GECF. The relief requested herein is specifically permitted under Bankruptcy Code section 364, which provides:

(a) If the trustee is authorized to operate the business of the debtor under sections 721, 1108, 1304, 1203, or 1304 of this title, unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense.

(b) The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense.

(c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt ---

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(2) secured by a lien on property of the estate that is not otherwise subject to a lien.

11 U.S.C. § 364.

20. Section 364 of the Bankruptcy Code "provides bankruptcy courts with the power to authorize post-petition financing for a Chapter 11 debtor-in-possession." *See In re Defender Drug Stores, Inc.*, 126 B.R. 76, 81 (Bankr. D. Ariz. 1991). "Having recognized the natural reluctance of lenders to extend credit to a company in bankruptcy, Congress designated [section] 364 to provide 'incentives to the creditor to extend post-petition credit.'" *Id.*

21. Generally, courts apply the following three-part test to determine whether credit obtained may be granted under section 364(c): the Debtors must demonstrate that:

(1) they cannot obtain credit unencumbered or without superpriority status, (2) the credit

transaction is necessary to preserve the assets of the estates, and (3) the terms of the credit agreement are fair, reasonable and adequate under circumstances. *See In re Crouse Group, Inc.*, 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987), *aff'd*, 75 B.R. 553 (E.D. Pa. 1987).

22. Debtors-in-possession are generally permitted to exercise their basic business judgment consistent with their fiduciary duties when evaluating the necessity of proposed protections for a party extending credit under section 364 of the Bankruptcy Code. *See In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990).

23. In this case, under the emergency circumstances presented here, the Debtors are simply unable to obtain unsecured credit through the issuance of corporate credit cards allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense. GECF has already terminated the Agreement and refused to enter into the New Agreement (or any similar arrangement) unless the credit Card obligations are secured by a certificate of deposit. Because of the volume of the credit transactions undertaken historically by the Debtors, the Debtors believe that it is extremely unlikely that any other vendor will provide *unsecured* credit card services on terms as favorable as those provided by GECF prepetition (which GECF has agreed to extend postpetition subject to conditions discussed herein).

24. The ability of the Debtors to preserve their prepetition practice of having employees charge business-related expenses incurred in the ordinary course on corporate credit cards is critical. The business operations of the Debtors are performed by the employees who undertake the day-to-day tasks that enable the Debtors to run their energy enterprise. If the Cards are not "turned back on" immediately, the ability of the Debtors' employees to conduct their business will be severely hampered. Moreover, morale will be eroded.

25. The terms of the New Agreement are fair under the circumstances. GECF required the LC credit enhancement with respect to the prepetition Agreement. In order to secure the performance of the Debtors' payment obligations under any New Agreement GECF requires similar assurances of payment and requests that the Debtors obtain and pledge to GECF a \$1,500,000 CD. Such credit enhancements are standard with respect to customers that are *not* in bankruptcy, and must be expected with respect to customers that are under bankruptcy protection. The Debtors submit that the request to obtain and pledge the CD is reasonable under the circumstances and the Debtors are prepared to do so here.

26. Moreover, the terms of the New Agreement are reasonable when one considers the alternative of engaging a new credit card vendor to provide the credit services provided prepetition by GECF. Obtaining a new vendor would be very cost prohibitive as it would require the issuance of new credit cards to approximately 400 of the Debtors' employees and force the Debtors to establish new procedures with a new company to administer a new credit card program. It will also take time (which the Debtors do not have) to negotiate, draft, and finalize new transaction documents. In contrast, the Debtors have worked with GECF and Mastercard for more than two years and the parties have established necessary and efficient procedures protocols for dealing with the many credit transactions incurred by the Debtors each month. The current practice of requiring the 400 employees to utilize their own charge accounts for business is simply unworkable.

27. The Debtors currently have over \$733 million in unencumbered cash. It is from this unencumbered cash that the CD will be purchased and pledged to GECF. The Debtors fully expect to timely pay their postpetition credit card bills and there shall be no need for GECF to resort to the CD collateral.

28. The foregoing demonstrates that the Debtors have met the standard set forth in Bankruptcy Code section 364(c)(2) and Mirant should be permitted to enter into the New Agreement and incur the postpetition credit secured by the CD as contemplated herein.

**B. The Debtors Have Satisfied the Requirements of Federal Rule of Bankruptcy Procedure 4001(c)(2).**

29. Because the request to enter into a New Agreement with GECF is basically a request to obtain credit, the Debtors must satisfy Rule 4001(c)(2) of the Federal Rules of Bankruptcy Procedure, which provides:

The court may commence a final hearing on a motion for authority to obtain credit no earlier than 15 days after service of the motion. If the motion so requests, the court may conduct a hearing before such 15 day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

FRBP 4001(c)(2).

30. As noted in the accompanying Wells Affidavit, it is crucial that the Cards be reactivated immediately. Based upon the Debtors' historical Card usage and charges immediately prior to the Petition Date, the Debtors submit that the minimum amount that must be authorized pending a final hearing on the Motion is **\$401,604.33**. This amount is equal to 50% of the six month average prior to the Petition Date, which is \$365,094.85 ( $\$730,189.70/2 = \$365,094.85$ ) plus an additional 10% cushion ( $\$365,094.85 \times .10 = \$36,509.48$ ) for a total of **\$401,604.33** ( $\$365,094.85 + \$36,509.48 = \$401,604.33$ ). Accordingly, this amount should be sufficient to sustain the Debtors pending a final hearing and is necessary to avoid immediate and irreparable harm.

31. If the Cards are not reactivated immediately, the Debtors' employees will be forced to continue charging the Debtors' business expenses on their own personal accounts and morale will deteriorate. Moreover, the longer the Cards are not reactivated, the more

personal reimbursement charges and expenses the Debtors will have to process, thus exacerbating the administrative problems presented by GECF's termination of the Agreement. Thus, the interim relief requested is necessary to avoid immediate and irreparable harm to the Debtors' estates pending a final hearing on the Motion.

**C. The Compromise Between GECF and the Debtors Regarding the Payment Should Be Approved.**

32. As noted, the Debtors paid GECF the Payment of \$927,389 on July 14, 2003 on account of the payment obligations under the Agreement. Arguably, the Payment may be avoidable under the Bankruptcy Code.

33. GECF is willing to return the Payment to Debtors' proposed counsel (to be held in trust) and then GECF will draw down upon the LC in the amount of the Payment plus any other prepetition amounts owing under the Agreement (which GECF has informed the Debtors amounts to \$75,889). The return of the Payment will eliminate GECF's potential avoidance liability with respect to the Payment. Had the Payment not been made by the Debtors prior to the Petition Date, GECF would have drawn down on the LC in the amount of the entire prepetition debt owing by the Debtors to GECF. Thus, the proposed compromise benefits the estate and places the parties in essentially the same position they would have been in had the Payment not been made by the Debtors.

34. The settlement of controversies in the context of chapter 11 is governed by Bankruptcy Rule 9019(a) which provides:

*Compromise.* On motion by the trustee and after a hearing on notice to creditors, the United States trustee, the debtor and indenture trustees as provided in Rule 2002 and to such other entities as the court may designate, the court may approve a compromise or settlement.

Fed. R. Bankr. P. 9019(a).<sup>4</sup>

35. Bankruptcy courts reviewing litigation settlements have adopted pre-Bankruptcy Code case law, primarily *Drexel v. Loomis*, 35 F.2d 800 (8th Cir. 1929) and *Protective Comm. For Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968). The five traditional factors used to review a settlement are: (1) the probability of success on the merits in the litigation; (2) the difficulties in collection of any resulting judgment; (3) the complexity and expense of the litigation and the inconvenience and delay likely in attending it; (4) the interests of the creditors; and (5) whether conclusion of the litigation promotes the integrity of the judicial system. *In re Hancock-Nelson Mercantile Co., Inc.*, 95 B.R. 982, 990 (Bankr. D.Minn. 1989); accord *In re Trout*, 108 B.R. 235, 238 (Bankr. D.N.D. 1989); *In re Bell & Beckwith*, 93 B.R. 569, 574 (Bankr. N.D. Ohio 1989).

36. Of paramount importance in the determination of the reasonableness of a settlement in a chapter 11 case is the interests of the creditors. *See In re Krizmanich*, 139 B.R. 456 (Bankr. N.D. Ind. 1992); *Hancock-Nelson*, 95 B.R. at 990; *Trout*, 108 B.R. at 238; *Bell & Beckwith*, 93 B.R. at 574. The trustee or debtor in possession has the burden of persuasion that the settlement is in the best interests of the estate. *Id.*

37. The Debtors satisfy each of the five factors set forth in *In re Hancock-Nelson Mercantile Co., Inc.*, 95 B.R. 982, 990 (Bankr. D.Minn. 1989).

38. The first factor which evaluates the probability of success on the merits in the litigation is not particularly relevant here because GECF has agreed to return the entire Payment without the need to resort to formal avoidance proceedings. Thus, this is not an issue

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<sup>4</sup> This emergency Motion has been noticed in accordance with the notice procedures order entered in this case on July 15, 2003.

that is hotly contested which would justify a discount of the Debtors' potential claim; rather, the Debtors will receive the entire \$927,389 Payment. To the extent the first factor applies, it weighs in favor of approving the proposed compromise.

39. Similarly, the second factor, which evaluates the difficulties in collection of any resulting judgment, is likewise not particularly helpful in evaluating the proposed compromise because there will be no discount of the Payment by GECF: the entire amount will be returned to the Debtors. The proposed settlement should be approved because it resolves any potential avoidance issue with respect to the Payment and returns \$927,389 to the Debtors' estates.

40. The third factor, which evaluates the complexity and expense of the litigation and the inconvenience and delay likely attending it, clearly favors approving the proposed compromise. Indeed, the proposed compromise obviates the need for *any* litigation whatsoever with respect to the Payment. No lawsuits have been filed with respect to the Payment and none will have to be filed if the proposed compromise is approved. Thus, no estate resources will be needlessly diverted to pursue an avoidance action against GECF with respect to the Payment. Moreover, the compromise alleviates any concern by GECF that it will be involved in costly litigation, thus enhancing the harmony of the crucial business relationship between the parties.

41. The fourth factor, which evaluates the interests of the creditors also weighs heavily in favor of approving the proposed compromise because the \$927,389 Payment will be immediately returned to the Debtors' estates for their use and benefit without the necessity of filing a lawsuit.

42. The fifth factor, which evaluates whether conclusion of the litigation promotes the integrity of the judicial system, also weighs in favor of approving the proposed compromise. Although there is no litigation to conclude here, the integrity of the judicial system is promoted when parties reach reasonable, consensual agreements that avoid costly litigation and expedite beneficial results. The proposed compromise meets the foregoing criteria.

**The Proposed Compromise is Fair and Equitable.**

43. In addition to the five factors set forth in *In re Hancock-Nelson Mercantile Co., Inc.*, 95 B.R. 982, 990 (Bankr. D.Minn. 1989), some courts, including the Fifth Circuit, also focus on the "fair and equitable" standard. *In re AWECO, Inc.*, 725 F.2d 293, 298-99 (5th Cir. 1984) (reversing settlement with unsecured litigation claimant due to insufficiency of facts to determine whether settlement was fair and equitable to other creditors); *In re Crowthers McCall Pattern, Inc.*, 120 B.R. 279, 287 (Bankr. S.D. N.Y. 1990). Application of the fair and equitable rule to settlements requires preservation of the same priority of senior claims over junior claims required for confirmation.

44. The proposed compromise satisfies the "fair and equitable" standard. The priority of creditor claims will not be impacted by the proposed compromise. The relief requested is fair and equitable, in the best interest of the estate, and should be approved.



## CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has authorized BSI as service agent to cause to serve a true and correct copy of the foregoing upon all parties on the Limited Service List via United States first class mail, postage prepaid, on the 21st day of July, 2003 in accordance with the Federal Rules of Bankruptcy Procedure. The undersigned further certifies that on the 21st day of July 2003, he served a true and correct copy of the foregoing via email transmission on the party listed below.

/s/ Robin Phelan

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