

Thomas E Lauria  
Texas Bar No. 11998025  
**WHITE & CASE LLP**  
Wachovia Financial Center  
200 South Biscayne Blvd.  
Miami, Florida 33131  
Telephone: 305-371-2700  
Facsimile 305-358-5744

Robin E. Phelan  
State Bar No. 15903000  
Judith Elkin  
State Bar No. 06522200  
**HAYNES AND BOONE, LLP**  
901 Main Street, Suite 3100  
Dallas, Texas 75202-3789  
Telephone: 214-651-5000  
Telecopy: 214-651-5940

**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.	)	
_____	)	

**DEBTORS' EMERGENCY MOTION TO ENFORCE THE AUTOMATIC STAY**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

Mirant Corporation (“Mirant”) and its affiliated debtors (collectively, the “Debtors”), as debtors-in-possession, file this Emergency Motion to Enforce the Automatic Stay (the “Motion”) against the Public Service Commission of Maryland and its General Counsel, Susan Stevens Miller, and the Maryland Office of People’s Counsel and its Acting People’s Counsel, Sandra Minch Guthorn. In support of the relief requested in the Motion, the Debtors respectfully represent as follows:

## **JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the standing order of reference of the district court. 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.

## **BACKGROUND**

2. The Bankruptcy Cases. Commencing on July 14, 2003, and concluding in the early morning hours of July 15, 2003 (the “Petition Date”), certain of the Debtors 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> On August 18, 2003, Mirant EcoElectrica Investments I, Ltd. and Puerto Rico Power Investments, Ltd. commenced Chapter 11 cases under the Bankruptcy Code. The Debtors continue to manage and operate their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. Separate official unsecured creditors’ committees have been appointed for Mirant Corporation and for Mirant Americas Generation, LLC. To successfully reorganize, the Debtors seek to reject certain executory contracts, which are no longer economically feasible or sensible in light of the bankruptcy proceedings.

3. The Back-to-Back Agreement. Among those burdensome executory contracts that the Debtors seek to reject is the letter agreement between Potomac Electric Power Company (“PEPCO”) and Southern Energy, Inc. dated as of December 19, 2000, as amended and modified from time to time (collectively the “Back-to-Back Agreement”), pursuant to which PEPCO

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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.

purported, in effect, to transfer to Mirant its rights and obligations, including onerous payment obligations under certain Power Purchase Agreements (“PPA”).<sup>2</sup> The payment and other obligations which the Debtors must perform under the Back-to-Back Agreement are burdensome and thereby substantially hinder the Debtors’ ability to successfully reorganize. Due to this burden, the Debtors seek to reject the Back-to-Back Agreement.

4. Temporary Restraining Order. On August 28, 2003, this Court entered a temporary restraining order (the “TRO”) against PEPCO and the Federal Energy Regulatory Commission (“FERC”). Pursuant to the TRO:

- a. PEPCO is temporarily enjoined from initiating or continuing, or encouraging any person or entity to initiate or continue, any proceedings before FERC seeking to require the Debtors to continue to perform according to the terms of the Back-to-Back Agreement;
- b. FERC is temporarily enjoined from taking any action to require or coerce the Debtors to abide by the terms of the Back-to-Back Agreement or other agreements of the Debtor;
- c. FERC and PEPCO are temporarily enjoined from taking any action, or encouraging any person or entity to take an action, to require or coerce the Debtors to abide by the terms of the Transition Power Agreements pending completion of the Debtors’ business judgment analysis.

On August 29, 2003, the Court entered an order extending the TRO until the conclusion of the preliminary injunction hearing on September 10, 2003. On September 10, 2003, the Court again extended the TRO until the September 17, 2003 ruling on the preliminary injunction.

5. Petition. On September 8, 2003, the Public Service Commission of Maryland and its General Counsel, Susan Stevens Miller, and the Maryland Office of People’s Counsel and its Acting People’s Counsel, Sandra Minch Guthorn (collectively, the “Petitioners”) commenced an

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<sup>2</sup> The validity of the Back-to-Back Agreement has been called into question by the Maryland courts. Nothing in this Motion should be construed as an admission by the Debtors as to the continuing validity of the Back-to-Back Agreement.

administrative proceeding against the Debtors when they filed a petition against the Debtors before FERC (the “Petition”). By the Petition, the Petitioners sought a declaratory order compelling the Debtors to perform under the Back-to-Back Agreement. At the time of the filing of the Petition, the Petitioners had actual knowledge of the Debtors’ bankruptcy filing and the automatic stay. In fact, the Petitioners attached a copy of a pleading in the bankruptcy case to the Petition.

6. In an effort to resolve this issue by agreement, on September 9, 2003, the Debtors, through their attorney, Wayne Cross, sent the Petitioners the letter attached hereto as *Exhibit A* advising them of the Debtors’ bankruptcy filing and the TRO. Despite the Debtors efforts, the Petitioners would not relent. The Debtors deeply regret being forced to take this action.

#### **RELIEF REQUESTED AND BASIS THEREFOR**

7. By this Motion, the Debtors request that the Court enter an Order pursuant to section 105(a) of the Bankruptcy Code and rule 9020 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”): (1) holding that the Petitioners are in civil contempt for having violated the automatic stay of § 362 of the Bankruptcy Code; (2) allowing the Petitioners to cure the contempt by immediately withdrawing the Petition and terminating all proceedings; and (3) assessing appropriate sanctions for this civil contempt.

8. Stay Violations. By filing the Petition against the Debtors, the Petitioners have violated the automatic stay imposed by section 362. Section 362 operates as a stay, applicable to all entities of:

(1) the commencement or continuation, including the issuance or process, of a judicial, administrative, or other action or proceeding against the debtor that was

or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

...

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

...

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

11 U.S.C. § 362(a)(1), (3), (6).

9. By filing the Petition, the Petitioners have commenced an action or proceeding against the Debtors to recover a claim against the Debtors that arose before the commencement of the case under Chapter 11.<sup>3</sup> The Petitioners, though not parties to the contracts between the Debtors and PEPCO, are in effect seeking to recover for PEPCO the contingent claim that PEPCO would have against the Debtors based on the anticipated rejection of Back-to-Back Agreement (the “PEPCO Claim”). Although the PEPCO Claim is contingent, it arose before the commencement of the Debtors’ bankruptcy cases. Therefore, the Petitioners’ conduct is in violation of section 362(a)(1) of the Bankruptcy Code.

10. In addition, the filing of the Petition is a violation of the automatic stay pursuant to § 362(a)(3). The Debtors’ contract rights under the Back-to-Back Agreement, and the money that the Debtor would have to pay to continue performance under this burdensome Back-to-Back Agreement constitute, property of the estate. By filing the Petition and attempting to compel the

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<sup>3</sup> Section 101(5) Bankruptcy Code defines a “claim” as:

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach or performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

Debtors' performance under the Back-to-Back Agreement, the Petitioners are attempting to exercise control over property of the Debtors' estate.

11. Filing the Petition is also a violation of the automatic stay pursuant to section 362(a)(6), which states that "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title" is enjoined. The filing of the Petition is an act to recover the PEPCO Claim against the Debtor for the anticipated failure to perform according to the Back-to-Back Agreement upon rejection of the executory contract.

12. Contempt. By (i) filing the Petition with knowledge of the automatic stay and knowledge of the Petition's violation of the automatic stay; and (ii) refusing to dismiss the Petition, the Petitioners are in contempt of this Court for their willful violation of the automatic stay. This Court has the power to conduct civil contempt proceedings and issue orders in accordance with those proceedings pursuant to section 105 of the Bankruptcy Code. *Placid Refining Co. v. Terrebonne Fuel & Lube, Inc. (In re Terrebonne Fuel & Lube, Inc.)*, 108 F.3d 609, 613 (5<sup>th</sup> Cir. 1997). The enforcement of the automatic stay by contempt-type proceedings constitutes a core matter over which this Court has jurisdiction to enter a final order. *In re Abercrombie*, 156 B.R. 782, 783 (Bankr. N.D. Tex. 1993).

13. A willful violation of the stay does not require a specific intent to violate the automatic stay. It is sufficient that the creditor knew of the automatic stay and that the creditor's actions were intentional. *Nissan Motor Acceptance Corp. v. Baker*, 239 B.R. 484, 488 (Bankr. N.D. Texas 1999); *see also Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 191 (9<sup>th</sup> Cir. 1995); *Cuffee v. Atl. Bus. & Comty. Dev. Corp. (In re Atl. Bus. & Comty. Dev. Corp.)*, 901 F.2d 325, 329 (3<sup>rd</sup> Cir. 1990). Knowledge of the bankruptcy filing is the legal equivalent of knowledge of the automatic stay because, once a party is informed of a bankruptcy filing, that party is under an

affirmative duty to seek further information, which would reveal the scope and applicability of the automatic stay. *Coats v. Vawter (In re Coats)*, 168 B.R. 159, 166 (Bankr. S.D. Tex. 1993).

14. In this case, the actions of the Petitioners were even more egregious than a standard stay violation. The Petitioners had more than just an actual knowledge of the filing of the bankruptcy cases and the operation of the automatic stay. The Petitioners had actual knowledge of the TRO against FERC and PEPCO and actual knowledge that this Court had taken jurisdiction over the Back-to-Back Agreements. The Petitioners, in filing the Petition, not only intentionally violated the automatic stay, but did an end-run around an order of this Court, seeking to have those bound by the TRO, in effect, violate it.

15. In addition to violating the automatic stay, the Petitioners actions may constitute a violation of the TRO.

16. Cure. The Debtors request that the Court enter an Order that provides that the Petitioners may cure this civil contempt by immediately dismissing the Petition.

17. Sanctions. The Debtors may seek costs and attorneys' fees in connection with bringing this Motion. *See In re Abacus Broadcasting Corp.*, 150 B.R. 925 (Bankr. W.D. Tex. 1993) (corporate debtor may seek costs and attorneys' fees pursuant to the court's contempt powers under 11 U.S.C. § 105(a)). Pursuant to this Court's equitable powers under section 105(a), the Court should order the Petitioners to pay all of the Debtors' costs and reasonable attorneys' fees incurred in connection with this Motion. The Petitioners had actual knowledge of the Debtors' bankruptcy filings and the automatic stay, filed the Petition against the Debtors before FERC, and have refused to dismiss the Petition. Accordingly, the Court should order the Petitioners to bear the economic consequences of forcing the Debtors to pursue this Motion, including payment of the Debtors' costs and reasonable attorneys' fees.

## **NOTICE**

18. Notice of the Motion has been provided to the Petitioners and the Debtors' Standard Service List as attached.

## **CONCLUSION**

Based on the foregoing, the Petitioners have violated the automatic stay, and therefore, are in contempt of this Court.

WHEREFORE, the Debtors respectfully request that this Court enter an order

1. Holding the Petitioners in civil contempt for having violated and disregarded the automatic stay;
2. Directing the Petitioners to remedy their violations of the automatic stay by immediately dismissing the Petition;
3. Assessing sanctions for their willful violation of the automatic stay including reimbursing the Debtors for their reasonable attorneys' fees and costs in connection with the enforcement of the automatic stay; and
4. Granting the Debtors such other and further relief as may be just and proper.

RESPECTFULLY SUBMITTED THIS 15<sup>TH</sup> DAY OF SEPTEMBER, 2003.

HAYNES AND BOONE, LLP  
901 Main Street  
Suite 3100  
Dallas, TX 75202  
(214) 651-5000

By /s/ Robin E. Phelan  
Robin Phelan  
State Bar No. 15903000  
Judith Elkin  
State Bar No. 06522200  
Ian Peck  
State Bar No. 24013306

-and-

Thomas E Lauria  
State Bar No. 11998025  
Gerard Uzzi  
Linda M. Leali  
WHITE & CASE LLP  
Wachovia Financial Center  
200 South Biscayne Blvd.  
Miami, Florida 33131  
(305) 371-2700

ATTORNEYS FOR THE DEBTORS AND  
DEBTORS-IN-POSSESSION

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that he provided true and correct copies of the forgoing to Bankruptcy Services, LLC and directed them to effect service upon the parties listed below via email and/or facsimile, as indicated, on the 15<sup>th</sup> day of September, 2003:

Susan Stevens Miller  
General Counsel  
Maryland Public Service Commission  
6 Saint Paul Street  
Baltimore, MD 21202  
smiller@psc.state.md.us

Sandra Minch Guthorn  
Acting People's Counsel  
William F. Fields  
Assistant People's Counsel  
Office of People's Counsel  
21<sup>st</sup> Floor  
6 Saint Paul Street  
Baltimore, MD 21202  
Fax: 410.333.3616

Office of the United States Trustee  
1100 Commerce Street  
Room 9C60  
Dallas, Texas 75242  
Fax: 214.767.8971  
E-mail: george.f.mcelreath@usdoj.gov

Thomas Rice  
Cox & Smith Inc.  
112 East Pecan Street, Suite 1800  
San Antonio, TX 78205  
Fax: 210.226.8395  
Email: trice@coxsmith.com  
Attorney for MAGI Committee

Bruce R. Zirinsky  
Cadwalader, Wickersham and Taft  
100 Maiden Lane  
New York, NY 10038  
Fax: 212.504.6666  
Email: bruce.zirinsky@cwt.com  
Attorney for MAGI Committee

Richard W. Douglas  
Simpson Thacher & Bartlett  
425 Lexington Avenue  
New York, NY 10017  
Fax: 212.455.2502  
Email: rdouglas@stblaw.com  
Attorney for Mirant Committee

Jason S. Brookner  
Andrews & Kurth L.L.P.  
1717 Main Street, Suite 3700  
Dallas, TX 75201  
Fax: 214.659.4401  
Email: jasonbrookner@andrewskurth.com  
Attorney for Mirant Committee

/s/ Robin E. Phelan

LOS ANGELES  
MIAMI  
NEW YORK  
PALO ALTO  
SAN FRANCISCO  
WASHINGTON, D. C.

BERLIN  
BRATISLAVA  
BRUSSELS  
BUDAPEST  
DRESDEN  
DÜSSELDORF  
FRANKFURT  
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HELSINKI  
ISTANBUL  
LONDON  
MILAN  
MOSCOW  
PARIS  
PRAGUE  
ROME  
STOCKHOLM  
WARSAW

**WHITE & CASE**  
LIMITED LIABILITY PARTNERSHIP

1155 AVENUE OF THE AMERICAS  
NEW YORK, NEW YORK 10036-2787

TELEPHONE: (1-212) 819-8200  
FACSIMILE: (1-212) 354-8113

DIRECT DIAL: 212-819-8797

E-MAIL: [wcross@whitecase.com](mailto:wcross@whitecase.com)

ALMATY  
ANKARA  
BANGKOK  
BOMBAY/MUMBAI  
HO CHI MINH CITY  
HONG KONG  
JAKARTA  
SHANGHAI  
SINGAPORE  
TOKYO

JEDDAH  
RIYADH

MEXICO CITY  
SÃO PAULO

JOHANNESBURG

September 9, 2003

Susan Stevens Miller, Esq.  
Maryland Public Service Commission  
6 Saint Paul Street  
Baltimore, Maryland 21202

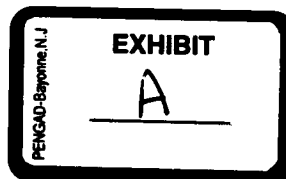
-and-

Sandra Minch Guthorn, Esq.  
Office of People's Counsel  
6 Saint Paul Street, 21st Floor  
Baltimore, Maryland 21202

Dear Counsel:

We represent Mirant Americas Energy Marketing, LP ("MAEM") in connection with MAEM's ongoing bankruptcy proceedings, docketed at Case No. 03-46590 (DML) (the "Case"), pending before the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court"). We write in respect of a (i) notice of filing, (ii) a petition for exemption from fees and (iii) a "Petition of the Public Service Commission of Maryland and the Maryland Office of People's Counsel for Declaratory Order Compelling Performance of Wholesale Power Contract," dated September 5, 2003 (the "FERC Pleadings"), which purport to concern MAEM's performance of an energy purchase and sale agreement between Mirant Corporation f/k/a Southern Energy, Inc. and Potomac Electric Power Company ("Pepco"), dated as of December 19, 2000, as amended from time to time (the "Back-to-Back Agreement").

Please take notice that, on July 15, 2003 (the "Petition Date"), MAEM filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101, et seq. (the "Bankruptcy Code"). Section 362(a) of the Bankruptcy Code operates as a stay, as against all entities, of, inter alia, "the commencement . . . of a judicial, administrative, or other action or proceeding against [MAEM] that was or could have been commenced before the [Petition Date] "as well as "any act . . . to exercise control over property of [MAEM's] estate." Please take further notice that, on August 29, 2003, the Bankruptcy Court entered an "Ex Parte Temporary Restraining Order Against Potomac Electric Power Company and the Federal Energy



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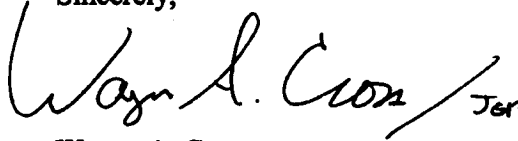
Susan Stevens Miller, Esq.  
Sandra Minch Guthorn, Esq.  
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Regulatory Commission” (the “Restraining Order”). (A copy of the Restraining Order is enclosed herewith.) Paragraph B of the Restraining Order provides that “FERC is temporarily enjoined from taking any action to require or coerce the Debtors to abide by the terms of the Back-to-Back Agreement or other agreements of Debtors.”

In light of the foregoing, we request that you withdraw the FERC Pleadings immediately and desist in any attempt to coerce the performance by MAEM (or any of its affiliates) of its or their contracts with Pepco. Your failure to do so may be considered a violation of both Section 362 of the Bankruptcy Code and the Restraining Order and may subject you to sanctions from the Bankruptcy Court. In that regard, the mere fact that your clients might be considered a “governmental unit” for certain purposes under the Bankruptcy Code does not necessarily permit them to petition another governmental unit to exercise what might be its police powers. Indeed, the bankruptcy judge overseeing the NRG bankruptcy proceedings (which are mentioned repeatedly in the FERC Pleadings) made this point abundantly clear in a recent hearing regarding a rejection of a contract subject to FERC’s jurisdiction. *See In re NRG Energy, Inc.*, Case No. 03-13024, Hearing Tr. at 25 (Aug. 6, 2003) (“[T]he automatic stay only exempts actions by governmental units to enforce *their own* governmental police and regulatory powers.”). Please be advised accordingly.

Should you have any questions regarding the foregoing, please do not hesitate to call me. Thank you.

Sincerely,

A handwritten signature in black ink that reads "Wayne A. Cross" followed by a slanted line and the letters "JER".

Wayne A. Cross

WAC;jm

Enclosure

cc: Counsel for Potomac Electric Power Company  
Counsel for Federal Energy Regulatory Commission  
Office of the U.S. Trustee  
Counsel for MAGI Committee  
Counsel for Mirant Committee

**WHITE & CASE**  
LIMITED LIABILITY PARTNERSHIP

Susan Stevens Miller, Esq.  
Sandra Minch Guthorn, Esq.  
Page 3

bcc: Douglas Miller, Esq.  
Zack Starbird, Esq.  
Debra Bolton, Esq.  
Thomas E Lauria, Esq.

**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
Debtors.	)	Jointly Administered
	)	

**ORDER GRANTING DEBTORS' EMERGENCY  
MOTION TO ENFORCE THE AUTOMATIC STAY**

Upon the motion, dated September 15, 2003 (the "Motion"), of Mirant Corporation and its affiliated debtors (collectively, the "Debtors"), as debtors-in-possession, for an order (i) holding the Public Service Commission of Maryland and its General Counsel, Susan Stevens Miller, and the Maryland Office of People's Counsel and its Acting People's Counsel, Sandra Minch Guthorn, (collectively, the "Petitioners") in civil contempt for having violated and disregarded the automatic stay; (ii) directing the Petitioners to remedy their violations of the automatic stay by immediately dismissing the Petition (as defined by the Motion); (iii) assessing appropriate sanctions for their willful violation of the automatic stay, including reimbursing the Debtors for their reasonable attorneys' fees and costs in connection with the enforcement of the automatic stay; and (iv) granting the Debtors such other and further relief as may be just and proper; and it appearing that the Court has jurisdiction over this matter; and it appearing that due notice of the Motion has been provided as set forth in the Motion, and that no other or further notice need be provided; and it further appearing that the relief requested in the Motion is in the best interests of the Debtors and their estates and creditors; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefore, it is

**ORDERED** capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion; and it is further

**ORDERED** that, the Motion is **GRANTED**; and it is further

**ORDERED** that Petitioners are held in civil contempt for having violated and disregarded the automatic stay; and it is further

**ORDERED** that the Petitioners are directed to remedy their violations of the automatic stay by immediately taking all actions necessary to dismiss the Petition and ceasing all of their actions in the prosecution of such claims; and it is further

**ORDERED** that the Petitioners are assessed sanctions, including reimbursement of the Debtors' costs and reasonable attorneys fees incurred in connection with this Motion, in the amount of \_\_\_\_\_.

DATED: \_\_\_\_\_

---

HONORABLE D. MICHAEL LYNN  
UNITED STATES BANKRUPTCY JUDGE

**PREPARED BY:**

Robin Phelan  
State Bar No. 15903000  
Judith Elkin  
State Bar No. 06522200  
Ian Peck  
State Bar No. 24013306  
HAYNES AND BOONE, LLP  
901 Main Street  
Suite 3100  
Dallas, TX 75202  
(214) 651-5000

-and-

Thomas E. Lauria  
State Bar No. 11998025  
Gerard Uzzi  
Linda M. Leali  
WHITE & CASE LLP  
Wachovia Financial Center  
200 South Biscayne Blvd.  
Miami, Florida 33131  
(305) 371-2700

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DEBTORS IN POSSESSION