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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.)	
)	Hearing Date and Time: January 28,
)	2004; 12:00 p.m. (Expedited Hearing
)	Request Pending)
_____)	

DEBTORS' MOTION REQUESTING AUTHORITY, PURSUANT TO 11 U.S.C. §§ 105, 363, AND 365 AND FEDERAL RULES OF BANKRUPTCY PROCEDURE 6004, 6006, AND 9019, TO (I) ENTER INTO PROPOSED FOURTH AMENDMENT TO THE LEASE AGREEMENT DATED MARCH 24, 1999 BETWEEN MIRANT CORPORATION AND 285 VENTURE, LLC; (II) ASSUME THE LEASE AGREEMENT, AS AMENDED; (III) COMPROMISE 285 VENTURE, LLC'S PREPETITION CLAIM; AND (IV) SELL AND ASSIGN CERTAIN MISCELLANEOUS ASSETS TO 285 VENTURE, LLC FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS

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

Mirant Corporation and its above-captioned affiliated debtors (collectively, the "Debtors"), as debtors and debtors-in-possession, file this motion (the "Motion") requesting authorization, pursuant to 11 U.S.C. §§ 105, 363, and 365 of title 11 of the United States Code (the "Bankruptcy Code") and Rules 6004, 6006, and 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), to: (i) enter into the proposed Fourth Amendment to the

Lease Agreement (the “Lease Agreement”) dated March 24, 1999 between Mirant Corporation, formerly known as The Southern Company¹ (“Mirant”), and 285 Venture, LLC (“285 Venture”); (ii) assume the Lease Agreement, as amended; (iii) compromise 285 Venture’s prepetition claim; and (iv) sell and assign certain miscellaneous assets—consisting of unused office furniture and work stations—to 285 Venture free and clear of liens, claims, encumbrances, and interests. In support of the foregoing, the Debtors respectfully state as follows:

I. JURISDICTION AND VENUE

1. 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.

II. PROCEDURAL BACKGROUND

2. The Cases. Commencing on July 14, 2003, and concluding in the early morning hours of July 15, 2003, (the “Petition Date”), certain of the Debtors (collectively, the “Initial 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.² On August 18, 2003, Mirant EcoElectrica Investments I, Ltd. and Puerto Rico Power Investments, Ltd. (collectively, the “New Debtors”) commenced chapter 11 cases under the Bankruptcy Code. On October 3, 2003, the following additional Debtors filed voluntary petitions in this Court for relief under chapter 11: (i) Mirant Wrightsville Management, Inc.; (ii) Mirant Wrightsville Investments, Inc.; (iii) Wrightsville Power Facility, L.L.C.; and (iv) Wrightsville Development Funding, L.L.C.

¹ Southern Energy Inc. (“SEI”) was a subsidiary of The Southern Company (“Southern”). Effective January 2001, SEI became Mirant Corporation in preparation for the April 2001 spin-off of Mirant Corporation—into a stand-alone, publicly traded company— from Southern. Effective with this spin-off, the right to use the name Southern Energy Inc. reverted back to Southern.

² 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 Canadian Debtors are subject to the sole and exclusive jurisdiction of the Canadian Court.

(collectively, the “Wrightsville Debtors”). On November 18, 2003, the following additional Debtors filed voluntary petitions in this Court for relief under chapter 11: (i) Mirant Americas Energy Capital, LP; and (ii) Mirant Americas Energy Capital Assets, LLC (the “MAEC Debtors” and collectively with the Initial Debtors, the New Debtors, and the Wrightsville Debtors, the “Debtors”). The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

3. The Cases are Jointly Administered. On July 15, 2003, this Court granted the motion for an order requesting that the bankruptcy estates of the Initial Debtors be jointly administered. On September 8, 2003, this Court entered an order approving joint administration of the cases of the New Debtors with those of the Initial Debtors. On October 20, 2003, this Court entered an order approving the joint administration of the cases of the Wrightsville Debtors with those of the Initial Debtors. On November 20, 2003, this Court entered an order approving the joint administration of the cases of the MAEC Debtors with those of the Initial Debtors.

4. The Committees. Three official committees have been appointed by the Office of the United States Trustee for the Northern District of Texas in these administratively consolidated cases. Specifically, an official unsecured creditors’ committee and an official committee of equity security holders have been appointed for Mirant Corporation and an official unsecured creditors’ committee has been appointed for Mirant Americas Generation, LLC (collectively, the “Committees”).

III. FACTUAL BACKGROUND

A. The Debtors’ Business Operations.

5. Mirant and its direct and indirect subsidiaries comprise one of the world’s largest generators and marketers of electricity. 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 in North America, the Philippines and the Caribbean. 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.

6. Mirant employs thousands of employees worldwide, some of whom are based at Mirant's corporate headquarters and most of whom are based at operating facilities. In 2002, Mirant recorded a \$542 million loss in earnings before interest, taxes and depreciation on a consolidated basis. Its 2002 operating revenues were approximately \$6.4 billion.

B. Mirant's Corporate Headquarters.

7. Mirant's corporate headquarters is situated at 1155 Perimeter Center West, Atlanta, Georgia 30338 ("PCW"). Mirant currently occupies all 12 floors of PCW. Mirant's widespread business activities—including its generation capacity and commodity trading operations—are centralized and overseen at its PCW corporate headquarters. Moreover, key employees and the Board of Directors conduct principal decision-making and major operational meetings at PCW.

8. Approximately 700 Mirant employees and 200 contractors are housed at PCW. The lease agreements discussed below involve Mirant's PCW corporate headquarters.

C. The Existing Lease Agreement and the Proposed Amendment.³

³ The Existing Lease Agreement is voluminous and, therefore, not attached. Parties in interest may request a copy of such document by making a written request to Debtors' counsel.

(i) *The Existing Lease Agreement.*

9. Mirant and 285 Venture entered into the Lease Agreement dated March 24, 1999 (the “Lease Agreement”) pursuant to which Mirant leased approximately 239,000 rentable square feet (“RSF”) located at PCW from 285 Venture.

10. On April 6, 2000, Mirant and 285 Venture entered into the “First Amendment to Lease Agreement” (the “First Amendment”) modifying certain terms and conditions of the Lease Agreement to provide for Mirant to lease additional space at PCW. Pursuant to the First Amendment, Mirant leased an additional 124,025 RSF for a total of approximately 363,025 RSF.

11. On August 31, 2000, Mirant and 285 Venture entered into the “Second Amendment to Lease Agreement” (the “Second Amendment”) setting forth the terms and conditions of the expansion of the on-site exercise facility and construction of a basketball facility at PCW.

12. On March 14, 2001, Mirant and 285 Venture entered into the “Third Amendment to Lease Agreement” (the “Third Amendment” and collectively, with the First Amendment, the Second Amendment, and the Lease Agreement, the “Existing Lease Agreement”) that granted Mirant the right to provide security services at PCW.

(ii) *The Proposed Amendment.*

13. Recognizing that there is significant value in the Existing Lease Agreement, after certain beneficial modifications are made thereto, the Debtors commenced negotiations with 285 Venture to modify the Existing Lease Agreement in a manner that would benefit the Debtors’ estates.⁴

⁴ As discussed in greater detail below, the Debtors also investigated other options—such as relocating to an alternative space—that, on balance, are not as favorable as the terms set forth in the Proposed Amendment.

14. The Debtors and 285 Venture have agreed to modify the Existing Lease Agreement by entering into the “Fourth Amendment to Lease Agreement” (the “Proposed Amendment”) and assume the Existing Lease Agreement as amended by the Proposed Amendment. A copy of the Proposed Amendment is attached to the Affidavit of Laurie L. Swift (the “Swift Affidavit”) as Exhibit “A.”

15. The Proposed Amendment provides, *inter alia*, that:

(i) the lease term will be reduced from 11.5 years to three years;

(ii) Mirant is granted a single five-year renewal option⁵ with RSF rates to be calculated at the market rate prevailing at the time of the renewal and, if, at any time from Mirant's delivery of a renewal notice to 285 Venture through the date of commencement of the renewal, Mirant has either: (a) a credit rating assigned by Standard & Poor's Rating Group of “B+” or lower, and/or (b) a credit rating assigned by Moody's Investors Service, Inc. of “B1” or lower, Mirant must deliver to 285 Venture a letter of credit (the “Letter of Credit”)⁶ with a face amount equal to the total amount of rent (and Mirant's anticipated share of common area expenses) that shall become due during the extended term, which Letter of Credit face amount shall be reduced at the end of each year by 20% so long as Mirant is not in default;⁷

(iii) Mirant will vacate floors 7-12 (the “Vacated Space”), thereby reducing the total RSF from 363,025 RSF to 215,541 RSF;

⁵ 285 Venture may elect to void Mirant's exercise of this renewal option if 285 Venture has a hotel transaction in place for PCW as evidenced by a bona fide letter of intent, executed in good faith.

⁶ If Mirant fails to deliver the Letter of Credit on or before the LC Delivery Date (as defined in the Proposed Amendment), 285 Venture can elect to void Mirant's exercise of this renewal option.

⁷ The amount of the Letter of Credit cannot be determined with precision at this time because the amount of rent during the renewal period is based upon market rates at the time, which are now unknown, and the common area expenses are also unknown. However, assuming that Mirant will be required to pay base rent at \$20.00 per RSF and it will be occupying approximately 150,000 RSF, the Debtors have calculated that the Letter of Credit could be as high as \$15 million, subject to 20% yearly reduction of the face amount. While the Debtors recognize that the cost associated with the obligation to post a Letter of Credit could be prohibitive, the Debtors note that the requirement is only relevant if the Debtors have inferior credit ratings at the time of renewal, and they in fact choose to exercise their renewal option.

(iv) the annual net rental rate will be reduced from over \$20.00 per RSF to: (a) \$10.00 per RSF for the first year; (b) \$10.50 per RSF for the second year; and (c) \$11.00 per RSF for the third year;

(v) Mirant will have a one-time right to return the entire 6th floor space at the end of the 24th month of the amended lease term;

(vi) Mirant will have a one-time right to return the entire 5th floor during the 13th to 24th months of the amended lease term and if Mirant elects to exercise its right to return the entire 5th floor, Mirant will return the entire 6th floor at the end of the 24th month of the amended lease term;⁸

(vii) Mirant will transfer ownership of certain unused office furniture and workstations (the "Office Furniture") in the Vacated Space to 285 Venture;⁹

(viii) 285 Venture will: (a) be permitted to file a prepetition, general unsecured claim against Mirant in its bankruptcy case (Case No. 03-46590) in the amount of \$16.725 million (the "Claim") within thirty (30) days after this Court has entered an order granting this Motion,¹⁰ which claim will be an allowed claim not subject to objection or disallowance pursuant to section 502(j) or any other provision of the Bankruptcy Code; and (b) acknowledge that no portion of the Claim will be afforded administrative expense treatment and the Debtors are current on all pre- and postpetition payments under the Existing Lease Agreement;

⁸ Assuming Mirant returns the 5th floor, the total aggregate RSF under the amended lease (including with the return of the 6th floor) will decrease by 50,442 RSF.

⁹ The estimated value of the Office Furniture is \$350,000.00 and was determined by Mirant using 10% of the total purchase price. The parties contemplate that a final list of the Office Furniture will be provided to the Court prior to the hearing on the Motion.

¹⁰ This amount is a compromise that represents what 285 Venture's rejection damage claim (subject to the cap set forth in 11 U.S.C. § 502(b)(6)) would be had the Debtors rejected the Existing Lease and entered into a new lease with 285 Venture which contained the terms of the Proposed Amendment. Mirant calculated such claim to be \$14.8 million and 285 Venture calculated such claim to be \$18.1 million. As discussed below, the law in regard to the proper calculation of rejection damages is unsettled and the Debtors' submit that the proposed compromise amount is a fair and reasonable compromise.

(ix) the Debtors will turnover the Vacated Space to 285 Venture free and clear of all liens, claims, encumbrances, and interests; and

(x) the Debtors will release 285 Venture of claims related to the Vacated Space.¹¹

IV. RELIEF REQUESTED

16. By this Motion, the Debtors hereby request authority, pursuant to sections 105, 363, and 365 of the Bankruptcy Code and Rules 6004, 6006, and 9019 of the Bankruptcy Rules, to:

(i) enter into the Proposed Amendment and perform thereunder;

(ii) assume the Existing Lease Agreement, as amended by the Proposed Amendment;

(iii) settle, determine, and allow 285 Venture's Claim against Mirant;

(iv) sell and assign the Office Furniture free and clear of liens, claims, encumbrances, and interests; and

(v) turnover the Vacated Space to 285 Venture free and clear of all liens, claims, encumbrances, and interests.

17. In addition, the Debtors request a waiver of the automatic ten (10) day stay of orders authorizing sales of property set forth in Bankruptcy Rule 6004(g). Attached hereto as Exhibit "1" is the Debtors' proposed form of order.

V. APPLICABLE AUTHORITY

A. The Court Should Authorize Mirant to Enter Into the Proposed Amendment.

18. The Debtors believe that an amendment to the Existing Lease Agreement is within their ordinary course of business and, thus, request an order from this Court authorizing Mirant to enter into the Proposed Amendment pursuant to section 363 of the Bankruptcy Code.

¹¹ The Debtors have determined that they have no significant claims against 285 Venture that would be covered by the Release. The Release is merely a formality and it is standard commercial practice to include such a release in an amendment as contemplated herein.

19. The Debtors and 285 Venture have executed the Proposed Amendment, that is subject to this Court's approval. The procurement of office space for Mirant's main headquarters, at reasonable rates and with maximum flexibility, is crucial to its continued operations. In this instance, the Debtors have been able to negotiate significantly favorable amendments to the Existing Lease Agreement that will provide immediate monetary benefits to their estates.

20. Cognizant of this Court's previously stated concern regarding the Debtors' assumption of contracts with extended terms that represent a significant ongoing expense, the Debtors submit that the Proposed Amendment is especially advantageous because, not only does it contain significantly more favorable terms than those of the Existing Lease Agreement, but the Proposed Amendment also reduces the Debtors' obligation from 11.5 years to three years with the option to renew for five additional years *at market rates*.

21. Moreover, if the Debtors are permitted to enter into the Proposed Amendment, *their rental obligations for PCW will immediately be reduced by approximately \$524,384.00 per month*, as compared to the Existing Lease Agreement. The sooner the Proposed Amendment is implemented, the sooner the Debtors can begin reaping the benefits of reduced rent payments.

22. Finally, after extensive internal review and analysis by the Debtors' senior management with the assistance of AlixPartners LLC, the Debtors' corporate restructuring advisors ("AlixPartners"), and CB Richard Ellis, Inc., the Debtors' Court-approved real estate broker ("CBRE"), the Debtors have determined that the assumption of the Existing Lease Agreement, as amended by the Proposed Amendment, will conform to—and facilitate—any reasonably conceivable business plan the Debtors are likely to formulate in their cases.

B. The Court Should Approve the Assumption of the Existing Lease Agreement, As Amended By the Proposed Amendment, Pursuant to Section 365.

23. Section 365(a) of the Bankruptcy Code provides:

. . . the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

11 U.S.C. § 365(a).

24. The Debtors' decision to assume or reject an executory contract is an exercise of the Debtors' business judgment. *See, Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985). The business judgment test is not a strict standard, but merely requires a showing that either assumption or rejection of the contract at issues will benefit the Debtors' estate. *See In re Bildisco*, 682 F.2d 72, 79 (3d Cir. 1982), *aff'd sub nom.*, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). As discussed below, assumption of the Existing Lease Agreement, as amended by the Proposed Amendment, is well within the Debtors' business judgment.¹²

(i) *The Modifications to the Existing Lease Agreement Significantly Benefit the Debtors' Estates.*

25. As noted, with the assistance of AlixPartners and CBRE, the Debtors have conducted a detailed analysis of their current needs and their needs going forward. The Proposed Amendment is significantly more suitable to the Debtors' requirements and provides terms that are favorable and beneficial to their estates. A table comparing the material terms under the Existing Lease Agreement and the Proposed Amendment is attached to the Swift Affidavit as Exhibit "B."¹³

26. The Proposed Amendment yields a considerable improvement in the economics of the Existing Lease Agreement. For example, the reduction in both RSF and

¹² Section 365(b)(1) of the Bankruptcy Code governs the treatment of defaults in unexpired leases. However, in this case, the Debtors are current on all pre- and postpetition obligations under the Existing Lease Agreement. The parties have explicitly agreed that there are no defaults under the Existing Lease Agreement. Accordingly, the requirements of section 365(b)(1) do not apply and there are no cure amounts owing as of the assumption of the Existing Lease Agreement, as amended.

¹³ The terms of the Proposed Amendment were negotiated, reviewed, and evaluated by numerous Mirant employees with expertise in commercial leases (such as Laurie L. Swift, Bob Smith, Kevin Boudreaux, Kevin McNamara, and Vance Booker); and professionals, including CBRE (such as John Shelsinger, Sam Holmes, Leigh Martin, Randy Merrill, Anne Lofye, and Wendy McArthur) and AlixPartners (such as Jack Wetzell, Deborah Rieger-Paganis, and Doug Werking).

annual rental rate result in an immediate *monthly* savings of approximately **\$524,384.00** for the Debtors.¹⁴

27. The Proposed Amendment also provides for a reduction in the lease term—from 11.5 years to 3 years—which, together with the reduction in total floor space and net rent, results in a substantial and favorable reduction of the Debtors’ total contractual commitment (the projected gross rent obligation) under the Existing Lease Agreement. This reduction in lease term provides the Debtors with increased flexibility in regard to their future business operations.

28. The Proposed Amendment further increases the Debtors’ flexibility in that Mirant is granted: (i) the right to return two (2) floors of space (50,442 RSF) to 285 Venture during the three-year lease term; and (ii) a five-year renewal option of the lease at then-market rates.

29. In short, the Proposed Amendment provides maximum financial flexibility with an immediate economic benefit and is, therefore, a favorable and beneficial deal that would facilitate any conceivable plan of reorganization or business plan.

¹⁴ This figure does not include the savings from the return of the 5th and 6th floors space.

(ii) *Alternative Market Leases Are Not As Beneficial to the Debtors' Estates As Modifying the Existing Lease Agreement With the Proposed Amendment.*

30. With the assistance of CBRE, the Debtors have evaluated the terms and conditions of alternative market leases. Prior to commencing negotiations with 285 Venture to modify the Existing Lease Agreement, the Debtors surveyed alternative lease terms offered by landlords of comparable office spaces in metropolitan Atlanta. All things considered, the Proposed Amendment is more favorable than the terms offered by other landlords. This is especially true when considering the direct and indirect costs associated with relocating the hundreds of employees and contractors currently located at PCW.

31. The Debtors also analyzed terms of 12 different leases executed during the last 12 months for comparable Class A, B, and C office buildings—greater than 100,000 RSF—in metropolitan Atlanta. The average net rent for these 12 leases is \$15.59 per RSF for a 10.73 year lease term¹⁵ as opposed to the average net rent of \$10.50 per RSF for the three-year term provided in the Proposed Amendment. Put simply, the terms of the Proposed Amendment are more favorable than comparable market leases executed during the last 12 months.

32. Moreover, renegotiating the Existing Lease Agreement, rather than physically uprooting the Debtors' corporate headquarters at this time, avoids significant, direct moving costs and inimical effects to the Debtors' ongoing business operations. The relocation of the Debtors' corporate headquarters would be extremely disruptive to their business. First, Mirant's business is an all-day, ongoing operation and its asset dispatch and economic optimization are controlled from its corporate headquarters. These real-time activities cannot be interrupted without risking substantial economic harm to Mirant's operations. The information

¹⁵ The Debtors have determined that a ten-year lease term is unfavorable because it would simply not provide them with the flexibility required now (and going forward).

technology systems and phone system infrastructure that support Mirant's operations and asset optimization, thus, must be seamlessly transitioned. Relocation of the corporate headquarters, thus, would take a minimum of six months; meanwhile, Mirant would be paying rent at the much higher rates set forth in the Existing Lease Agreement. Second, as previously discussed, Mirant's key employees are based in the vicinity of Mirant's current corporate headquarters. If the new office is moved outside the general area of the existing headquarters, such key employees may not transfer due to an unwillingness, or inability, to move.

33. For the reasons stated above, it is clearly an exercise of sound business judgment for the Debtors to assume the Existing Lease Agreement, as amended by the Proposed Amendment. Not only will the Debtors gain substantial improvement in the economics and flexibility in lease terms, they will also avoid the considerable costs and potentially adverse impact on business operations resulting from relocating their corporate headquarters.

C. Calculation of 285 Venture's Prepetition Claim.

34. 285 Venture requested that—rather than Mirant rejecting the Existing Lease Agreement—the parties enter into an amendment thereto and assume the Existing Lease Agreement, as amended by the Proposed Amendment. Since the Existing Lease Agreement consists of approximately 370 pages, executing a new lease agreement would unnecessarily delay the matter given the additional time required to complete such a task. By entering into the Proposed Amendment—as opposed to rejecting the Existing Lease Agreement and entering into a new lease with the same terms as those contained in the Proposed Amendment—the Debtors are able to obtain the favorable terms set forth in the Proposed Amendment sooner, and the administrative documentation costs are significantly reduced.

35. The parties, however, have agreed that neither party should be prejudiced by the structure of the transaction.

36. The Debtors have agreed that 285 Venture is entitled to an allowed, general, unsecured prepetition claim in an amount equal to the claim that *would have arisen* had

the Debtors rejected the Existing Lease Agreement and entered into a new lease agreement which contained the terms set forth in the Proposed Amendment. Under such an alternative scenario, 285 Venture's claim would be subject to the cap set forth in section 502(b)(6) of the Bankruptcy Code.

37. Under section 502(b)(6), a landlord's claim for damages resulting from termination of a real property lease is disallowed to the extent it exceeds (A) the rent reserved by the lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of (i) the petition date and (ii) the date upon which the lessee surrendered the leased property plus (B) unpaid rent due under the lease on the earlier of such dates. *See*, 11 U.S.C. § 502(b)(6).

38. The purpose of the claim limitation in Section 502(b)(6) is "to compensate the landlord for his loss while not permitting a claim so large...as to prevent other general unsecured creditors from recovering a dividend from the estate." *In re Stonebridge Technologies, Inc.*, 291 B.R. 63, 68 (Bankr. N.D. Tex. 2003) (citation omitted).

39. However, courts are split on the limitations of the statutory cap, and whether or not the cap applies to all damage claims the lessor may have against the debtor. *See, e.g., PPI Enterprises (U.S.), Inc.*, 228 B.R. 339, 350 (Bankr. D. Del. 1998), *aff'd*, 324 F.3d 197 (3d Cir. 2003) (lessor must apply any security deposit to reduce his section 502(b)(6) claim); *In re Mr. Gatti's, Inc.*, 162 B.R. 1004, 1011-12 (Bankr. W.D. Tex. 1994) (deferred maintenance payments included in the statutory cap).

40. Moreover, there is a split of authority in regard to calculating the "15% limitation" set forth in section 502(b)(6)(A) cap. Some courts have calculated the "15%

limitation” in terms of the *time* remaining on the lease.¹⁶ Other courts have calculated the limitation using the rent remaining.¹⁷

41. In this case, the Debtors have calculated the 15% based upon *time* remaining on the lease and concluded that 285 Venture’s prepetition claim should be no more than \$14.8 million. In contrast, 285 Venture has calculated the 15% based upon the *rent* under the Existing Lease Agreement and concluded that its prepetition claim should be \$18.1 million. Due to the split of authority on the issue, the parties have reached a compromise amount of \$16.725 million. Given the foregoing, and the importance of the Proposed Amendment, the Debtors submit that the settlement of this amount is most beneficial and appropriate.

42. The Debtors respectfully submit that the proposed settlement of 285 Venture’s prepetition, general, unsecured claim satisfies applicable law relating to approval of settlements. *E.g., In re Cajun Electric Power Cooperative, Inc.*, 119 F.3d 349, 355 (5th Cir. 1997); *see also, Feld v. Zale Corporation (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.”). A decision to accept or reject a compromise or settlement is within the sound discretion of the Court. *See 9 Collier on Bankruptcy* ¶ 9019.02 (15th ed. Rev. 2001). “Compromises are favored in bankruptcy” because they minimize the costs of litigation and further the parties’ interest in expediting administration of a bankruptcy estate. *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996) (citing *9 Collier on Bankruptcy* ¶ 9019.03[1] (15th ed. Rev. 2001)). The settlement need not result in the best possible outcome for the debtor,

¹⁶ *E.g., In re Blastein*, 1997 WL 560119 at *14-15 (E.D. Pa. Aug. 26, 1997) (calculating the 15 percent cap in reference to time remaining); *In re Allegheny Int’l, Inc.*, 145 B.R. 823, 828 (W.D. Pa. 1992) (same); *In re Iron-Oak Supply Corp.*, 169 B.R. 414, 419-20 (Bankr. E.D. Ca. 1994) (same).

¹⁷ *E.g., In re New Valley Corp. v. Corporate Property Assocs.*, 2000 WL 1251858 at *11 (D. N.J. Aug. 31, 2000) (calculating the 15 percent cap in reference to total amount of rent remaining); *In re Andover Togs, Inc.*, 231 B.R. 521, 547 (Bankr. S.D.N.Y. 1999) (same); *Today’s Woman of Florida, Inc.*, 195 B.R. 506, 507-08 (Bankr. M.D. Fla. 1996) (same); *In re Gantos, Inc.*, 176 B.R. 793, 794-96 (Bankr. W.D. Mich. 1995) (same).

but must not “fall beneath the lowest point in the range of reasonableness.” *Vaughn v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 134 B.R. 499, 505 (Bankr. S.D.N.Y. 1991). Basic to the process of evaluating proposed settlements, then, 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).

43. Because the favorable terms set forth in the Proposed Amendment, the “rewards of litigation” are not nearly as important as the benefits that will be accorded to the Debtors and their ongoing operations under the Proposed Amendment. Moreover, the compromise is especially reasonable given the split of authority on the calculation of the 15% limitation and the fact that 285 Venture is not obligated to renegotiate the Existing Lease Agreement. The proposed compromise of 285 Venture’s prepetition claim should be approved.

D. The Court Should Approve the Debtors’ Sale and Assignment of the Office Furniture and Turnover of the Vacated Space to 285 Venture Free and Clear of Liens, Claims, Encumbrances, and Interests Pursuant to Sections 363(b) and (f).

(i) *The Office Furniture and Vacated Should Be Sold, Transferred, and Assigned As Requested Herein.*

44. Section 363(b) of the Bankruptcy Code provides, in pertinent part, that a debtor “after notice and hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b). A debtor must demonstrate a sound business justification for a sale or use of assets outside the ordinary course of business. *See, e.g., In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986).

45. Courts look to various factors to determine whether to approve a motion under section 363(b), such as: (i) whether a sound business reason exists for the proposed transaction; (ii) whether fair and reasonable consideration is provided; (iii) whether the transaction has been proposed and negotiated in good faith; and (iv) whether adequate and reasonable notice is provided. *In re Condere*, 228 B.R. 615, 626 (Bankr. S.D. Miss. 1998).

46. The sale and assignment of the Office Furniture was given in partial consideration for the renegotiated terms of the Proposed Amendment. 285 Venture requested that the Debtors sell and assign the Office Furniture—to the extent that the Debtors no longer require such items—in order to facilitate 285 Venture’s ability to re-let the vacated spaces “as is.”

47. An alternative would be for the Debtors to sell the Office Furniture to a third party. However, as the Debtors have previously informed this Court, there is truly no market for used office furniture and workstations. Such items are typically sold at 8-10% of the original purchase price. Mirant expects that a sale of the Office Furniture would yield, at most, approximately \$350,000.00 in gross sales.

48. Given the relatively low value of the miscellaneous the Office Furniture, the Debtors believe that conducting auctions and hearings for a proposed sale transaction will result in costs that are disproportionate to the anticipated sale proceeds. Since the Debtors estimate that the sale of the Office Furniture may take approximately three to four weeks, the storage costs of \$15,000.00 per day would almost certainly outweigh the actual value of the Office Furniture; meanwhile, the value of the Office Furniture continues to diminish. The sale and assignment of such assets to 285 Venture will eliminate the expenses attendant upon retaining and separately storing such property.

49. Moreover, because much of the Office Furniture is built in and difficult to dismantle, it could cost approximately \$90,000.00 to have the Office Furniture removed, thereby reducing the net sales proceeds.

50. Put simply, the sale and assignment of such assets satisfies section 363(b) in that a sound business justification exists to sell such assets. This is because: (i) the Debtors have no use for such assets; (ii) the unnecessary costs to store, move, and sell the assets will be avoided; and (iii) the sale and assignment will benefit the Debtors’ estates given the economic benefits of the Proposed Amendment.

- (ii) *The Court Should Authorize the Sale and Assignment of the Office Furniture and the Vacated Space Free and Clear of Liens, Claims, Encumbrances, and Interests.*

51. Under the circumstances, the Office Furniture and Vacated Space may be sold, transferred, and assigned free and clear of liens, claims, encumbrances, and interests.

52. When a sound business justification exists for the sale transaction (as in this case), the court may, pursuant to section 363(f) of the Bankruptcy Code, authorize the sale of the assets that are the subject of the transaction free and clear of existing liens, claims, encumbrances, and interests if: (1) applicable non-bankruptcy law permits the sale of such property free and clear of such interests; (2) any entity a holding lien, claim, encumbrance or interest consents to the proposed sale; (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in bona fide dispute; or (5) such entity will be compelled in a legal or equitable proceeding to accept a money satisfaction of such interest. 11 U.S.C. § 363(f). If any one of the aforementioned conditions is satisfied, the property may be sold free and clear of interests. *See, e.g., In re C-Power Products, Inc.*, 230 B.R. 800 (Bankr. N.D. Tex. 1998); *In re In re WBQ P'ship*, 189 B.R. 97 (Bankr. E.D. Va 1995).

53. Section 363(f) is satisfied if the entity holding a lien, claim, encumbrance, or interest consents to the sale. If no parties object (or any objection is resolved), section 363(f)(2) is satisfied and the sale may be free and clear of all such interests. *Citicorp Homeowners Services, Inc. v. Elliot (In re Elliot)*, 94 B.R. 343 (E.D. Penn. 1988); *In re Porras*, 2001 Bankr. Lexis 888 (Bankr. W.D. Tex. July 9, 2001).

54. Other than the lien granted to the DIP Lender, the Office Furniture is not encumbered or otherwise subject to any lien, claim, or interest.¹⁸ 285 Venture has required that

¹⁸ The Debtors have confirmed with counsel for the DIP Lender that the DIP Lender is preparing a consent to the transaction described herein.

the Office Furniture and the Vacated Space be sold, transferred, and assigned free and clear under section 363(f).

E. Bankruptcy Rule 6004(g) Should Be Waived.

55. Rule 6004(g) of the Bankruptcy Rules automatically stays an order authorizing an asset sale as follows:

An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, *unless the court orders otherwise.*

F.R.B.P. 6004(g) (emphasis added).

56. As the italicized portion quoted above demonstrates, this Court can waive the ten-day stay requirement set forth in Rule 6004(g). The Debtors request that the ten-day stay requirement be waived with respect to the sale and assignment of the Office Furniture and the Vacated Space to 285 Venture.

VI. CONCLUSION

WHEREFORE, based upon the foregoing, the Debtors request that the Court grant the relief requested herein, and any other relief that is necessary and proper.

Dated: January 16, 2004

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-and-

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**ATTORNEYS FOR THE DEBTORS AND
DEBTORS-IN-POSSESSION**

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 document upon all parties listed below and upon all persons on the Limited Service List via email, facsimile or overnight courier on the 16th day of January 2004 in accordance with the Federal Rules of Bankruptcy Procedure:

285 Venture, LLC
c/o Cousins Properties Incorporated
2500 Windy Ridge Parkway
Suite 1600
Atlanta, Georgia 30339-5683
Attn: Corporate Secretary

285 Venture, LLC
c/o JP Morgan Investment Management, Inc.
522 Fifth Avenue, 9th Floor
New York, New York 10036

Strook & Strook & Lavan LLP
180 Maiden Lane
New York, New York 10038
Attn: Steven Moskowitz, Esq.

/s/ Ian T. Peck

EXHIBIT 1

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)
)	Jointly Administered
Debtors.)	
)	
)	
)	

ORDER GRANTING DEBTORS’ MOTION REQUESTING AUTHORITY, PURSUANT TO 11 U.S.C. §§ 105, 363, AND 365 AND FEDERAL RULES OF BANKRUPTCY PROCEDURE 6004, 6006, AND 9019, TO (I) ENTER INTO PROPOSED FOURTH AMENDMENT TO THE LEASE AGREEMENT DATED MARCH 24, 1999 BETWEEN MIRANT CORPORATION AND 285 VENTURE, LLC; (II) ASSUME THE LEASE AGREEMENT, AS AMENDED; (III) COMPROMISE 285 VENTURE, LLC’S PREPETITION CLAIM; AND (IV) SELL AND ASSIGN CERTAIN MISCELLANEOUS ASSETS TO 285 VENTURE, LLC FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS

Upon the motion, dated January 16, 2004 (the “Motion”),¹ filed by Mirant Corporation and its affiliated debtors (collectively, the “Debtors”) for the entry of an order for authorization, pursuant to 11 U.S.C. §§ 105, 363, and 365 of title 11 of the United States Code (the “Bankruptcy Code”) and Rules 6004, 6006, and 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), to: (i) enter into the proposed Fourth Amendment to the Lease Agreement (the “Lease Agreement”) dated March 24, 1999 between Mirant Corporation, formerly known as The Southern Company (“Mirant”), and 285 Venture, LLC (“285 Venture”); (ii) assume the Lease Agreement, as amended; (iii) compromise 285 Venture’s prepetition claim; and (iv) sell and assign certain miscellaneous assets to 285 Venture free and clear of liens, claims, encumbrances, and interests; and it appearing that the Court has jurisdiction over this matter; and it appearing that due notice of the Motion has been provided, and that no other or

further notice need be provided; upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor,

It is hereby:

ORDERED that the Motion is hereby GRANTED as set forth herein; it is further

ORDERED that Mirant Corporation is authorized to enter into the Proposed Amendment and perform thereunder; it is further

ORDERED that the Existing Lease Agreement, as amended by the Proposed Amendment, is assumed by Mirant Corporation; it is further

ORDERED that no cure amount is owing by the Debtors under section 365(b) of the Bankruptcy Code, or otherwise; it is further

ORDERED that, pursuant to sections 105 and 363(b) of the Bankruptcy Code, the Debtors are authorized to transfer, sell and/or assign to 285 Venture (a) the Office Furniture; and (b) the Vacated Space; it is further

ORDERED that, pursuant to section 363(f) of the Bankruptcy Code, the Vacated Space and the Office Furniture shall be transferred, sold and/or assigned to 285 Venture free and clear of any and all liens, claims, encumbrances, and interests, including that of the Debtors' DIP Lender; it is further

ORDERED that the automatic ten (10) day stay of orders authorizing sales of property set forth in Bankruptcy Rule 6004(g) is waived; it is further

ORDERED that, in full and final satisfaction of any and all claims (including, without limitation, any claims arising under section 365(b) of the Bankruptcy Code) that 285 Venture may have against Mirant arising prior to the Petition Date or as a result of

¹ Any capitalized term not otherwise defined in this order will have the meaning ascribed to such term in the Motion.

consummating the Proposed Amendment on the “Effective Date” thereof (as defined in the Proposed Amendment) with respect to the Vacated Space, or otherwise (collectively, the “Claim”), 285 Venture is granted an allowed, prepetition general unsecured claim against Mirant in its bankruptcy case (Case No. 03-46590) in the amount of \$16,725,000.00 (the “Allowed Claim”), which Allowed Claim shall not be subject to objection or disallowance pursuant to section 502(j) of the Bankruptcy Code or any other provision of the Bankruptcy Code; provided that, 285 Venture shall file a proof of claim evidencing the Allowed Claim no later than thirty (30) days after the date hereof. No portion of the Allowed Claim (or any proof of claim filed with respect thereto) shall be entitled to administrative priority in these administratively consolidated bankruptcy cases, but shall be treated as a prepetition, general unsecured claim; it is further;

ORDERED that nothing herein shall be construed as improving 285 Venture’s position or the Allowed Claim (or the priority or treatment thereof) when compared to what 285 Venture would have been entitled to had Mirant Corporation rejected the Lease Agreement and entered into a new lease agreement containing the terms set forth in the Proposed Amendment with respect to the Vacated Space.

Dated: January ____, 2004

D. Michael Lynn,
United States Bankruptcy Judge