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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)
	)	Jointly Administered
Debtors.	)	
	)	Hearing Date and Time:
	)	February 25, 2004; 12:00 p.m.
_____	)	(expedited hearing request pending)

**MOTION OF THE DEBTORS PURSUANT TO 11 U.S.C. §§ 362, 363 AND 364(d)  
FOR ORDER (I) AUTHORIZING MIRANT SERVICES, LLC TO (a) ENTER  
INTO A WORKERS' COMPENSATION INSURANCE POLICY AND RELATED  
INSURANCE PROGRAM AGREEMENT WITH ACE AMERICAN INSURANCE  
COMPANY, AND (b) (i) PROVIDE A LETTER OF CREDIT TO ACE AND (ii)  
ESTABLISH A PAID LOSS DEPOSIT FUND IN CONNECTION THEREWITH  
AND (II) GRANTING RELATED RELIEF**

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

Mirant Corporation ("Mirant") and its affiliated debtors (collectively, the  
"Debtors"), as debtors-in-possession, file this motion (the "Motion") pursuant to 11 U.S.C. §§

MOTION OF THE DEBTORS PURSUANT TO 11 U.S.C. §§ 362, 363 AND 364(d) FOR ORDER (I) AUTHORIZING  
MIRANT SERVICES, LLC TO (a) ENTER INTO A WORKERS' COMPENSATION INSURANCE POLICY AND  
RELATED INSURANCE PROGRAM AGREEMENT WITH ACE AMERICAN INSURANCE COMPANY, AND  
(b) (i) PROVIDE A LETTER OF CREDIT TO ACE AND (ii) ESTABLISH A PAID LOSS DEPOSIT FUND IN  
CONNECTION THEREWITH AND (II) GRANTING RELATED RELIEF

362, 363, and 364(d) for entry of an order (I) authorizing Mirant Services, LLC<sup>1</sup> to (a) enter into a new workers' compensation insurance policy and the related insurance program agreement with ACE American Insurance Company ("ACE") and (b) (i) to provide a letter of credit and other collateral in connection therewith, and (II) granting related relief. In support of the Motion, the Debtors respectfully state as follows:

### **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.

### **PROCEDURAL BACKGROUND**

2. The Cases. On July 14, 2003 and various dates thereafter (collectively, the "Petition Date"), Mirant Corporation and 82 of its direct and indirect subsidiaries (collectively, the "Debtors") filed voluntary chapter 11 petitions and manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of title 11 of the United States Code (the "Bankruptcy Code").

3. The Cases are Jointly Administered. This Court has entered orders approving the joint administration of the Debtors' chapter 11 cases.

4. The Committees. Three official committees (collectively, the "Committees") have been appointed by the Office of the United States Trustee for the Northern District of Texas in these administratively consolidated cases.

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<sup>1</sup> All of the Debtors' employees are employed by Mirant Services, LLC.

## FACTUAL BACKGROUND

5. In the ordinary course of their businesses and as mandated by state statute, the Debtors maintain workers' compensation insurance. Prior to the Petition Date, the Debtors maintained premium-based workers' compensation deductible insurance policies with The Travelers Insurance Indemnity Company ("Travelers") and The Phoenix Insurance Company (collectively, the "Travelers Policy").<sup>2</sup> The Travelers Policy expired by its own terms on February 1, 2004.

6. Before the Travelers Policy expired, the Debtors entered into negotiations with Travelers regarding the issuance of a renewal policy and anticipated that Travelers would offer such replacement policy in the ordinary course. Shortly before the expiration of the Travelers Policy, however, Travelers informed the Debtors that it was unable to offer a replacement policy on terms acceptable to the Debtors nor an extension of the Travelers Policy.

7. Accordingly, the Debtors promptly sought a policy from alternative insurers, soliciting quotes from four major insurance companies, which the Debtors determined were capable of offering the requisite insurance on terms acceptable to the Debtors. The Debtors were provided with quotes for one-year policies from two of these four insurers. After careful consideration, the Debtors determined that the terms of the Program Agreement<sup>3</sup> (and the policies that will be issued thereunder) offered by ACE (the "ACE Policy"), which are

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<sup>2</sup> The Debtors maintained workers' compensation insurance from Liberty Mutual in regard to workers' compensation risks arising in the District of Columbia and the Debtors participate in the state workers' compensation fund maintained by Washington State with respect to the Debtors' operations in such state.

<sup>3</sup> The Program Agreement between ACE and Mirant Services, LLC is attached as Exhibit A.

substantially similar to those of the expired Travelers Policy, were fair and reasonable and provided substantial benefits as compared with the terms of the policies offered by the other insurers.

8. To prevent a lapse in statutory workers' compensation coverage, the Debtors entered into the ACE Policy with ACE on January 30, 2004. The pertinent terms of the ACE Policy are as follows:

A. Policy Term. The ACE Policy will insure the Debtors for its workers' compensation liabilities from February 1, 2004 through February 1, 2005.

B. Policy Limits. The ACE Policy covers the Debtors' statutory workers' compensation law benefits as determined by each of the states in which the Debtors have employees.<sup>4</sup> Additionally, the ACE Policy provides a maximum of \$1,000,000 limit per employee for each injury, by accident or disease, which is not covered by a relevant state's statutory workers' compensation law.

C. Deductible Limit / Loss Limit. The ACE Policy has a per-accident deductible of \$250,000 or per person disease, with no aggregate annual deductible.

D. Total Initial Pay-In. The Debtors' total Initial Pay-In to obtain coverage under the ACE Policy is \$789,979, which includes the estimated annual premium, the Paid Loss Deposit Fund, and certain administrative expenses and charges. The Debtors paid the Initial Pay-In on January 30, 2004 to receive coverage under the ACE Policy.

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<sup>4</sup> As previously mentioned, the Debtors' employees in the District of Columbia and Washington State are not covered by the ACE Policy.

E. Estimated Premium. Like the Travelers Policy, the ACE Policy requires the Debtors to pay a premium, which is based upon the Debtors' estimated annual payroll. To determine the amount of the premium, the insurer compiled a composite rate based upon the estimated annual payroll by state and job description (job class code). This composite rate is applied to an estimate of the Debtors' total annual payroll, estimated from the prior year's payroll experience and 2004 budget for payroll. As the premium is an estimate, the amount may be retroactively increased by ACE, should the Debtors' actual payroll during the policy period exceed the estimate. The total estimated premium for the ACE Policy, including taxes, assessments, and administration expenses, is \$759,979, which includes payment of the minimum base premium of \$545,324 required to bind the policy.

F. Paid Loss Deposit Fund. In addition to the estimated premium, the ACE Policy also requires the Debtors to deposit \$30,000 into a "Paid Loss Deposit Fund." Under the ACE Policy, ACE acts as the Debtors' claim administrator, paying claims that fall within the policy's deductible (*i.e.*, amounts for which the Debtors are required to pay out of pocket). ACE satisfies these claims by drawing amounts from the \$30,000 held in the Paid Loss Deposit Fund. At the end of each month, the Debtors must replenish the amounts drawn by ACE to pay deductible claims subject to the deductible so that the Paid Loss Deposit Fund remains at \$30,000 until such time ACE adjusts the amount based on an average revised estimate of payments. The ACE Policy, however, reserves the rights to require the Debtors to replenish a single payment within the deductible exceeding \$10,000 immediately.

G. Security. As collateral for its deductible obligations under the ACE Policy, ACE required the Debtors to post a letter of credit in the amount of \$1.2 million. ACE estimates that the Debtors' total deductible workers' compensation obligations arising under the policy, to be approximately \$600,000. ACE has required a 100% surcharge to this estimated amount; accordingly, the collateral necessary to secure the Debtors' deductible obligations is \$1.2 million. This surcharge will be removed 24 months after the inception of the ACE Policy.

H. Bankruptcy Approval. The Debtors believe that entering into the ACE Policy is a transaction within the ordinary course of business. In the interest of caution, however ACE has required as a condition of binding coverage that the Debtors' obtain this Court's approval of the Debtors entry into the ACE Policy, and in connection therewith the Debtors providing the Letter of Credit and Paid Loss Deposit Fund to ACE by no later than February 27, 2004.<sup>5</sup> If the Debtors do not obtain an order of this Court approving the ACE Policy, the Letter of Credit and the Paid Loss Deposit Fund by this date, ACE has the right to cancel the ACE Policy, and the Debtors will be forced to seek new coverage and, in some states, may be left without coverage. ACE has agreed to bind the policy prior to receiving court approval as an accommodation to the Debtors to provide the Debtors an opportunity to seek this Court's approval on appropriate and reasonable notice to parties in interest.

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<sup>5</sup> See Casualty Insurance Proposal, prepared by ACE Risk Management, dated January 27, 2004, a copy of which is attached as Exhibit B.

9. Maintenance of the ACE Policy is essential to the continued operation of the Debtors' estates. Not only is maintenance of workers' compensation insurance coverage a prudent business practice, but state law requires it. In some states, the applicable state agency may intervene, pay the obligations, and assert a priority claim against the Debtors for reimbursement, penalties and/or assessments. In addition, some state agencies may challenge the Debtors' ability to continue operating in that state and force the Debtors to shutdown their business for failing to maintain workers' compensation insurance. Thus, should the Debtors fail to obtain Court approval of the ACE Policy, the Letter of Credit and the Paid Loss Deposit Fund, the Debtors will be forced to seek and obtain workers' compensation insurance from another insurer.

#### **RELIEF REQUESTED**

10. By this Motion, the Debtors request that this Court enter an order pursuant to section 363 of the Bankruptcy Code authorizing Mirant Services, LLC to enter into and perform the terms of the ACE Policy, cause the Letter of Credit to be delivered to ACE, and grant to ACE a senior lien on the Paid Loss Deposit Fund which lien shall have priority over any other lien. The Debtors specifically request that such authorization be effective *nunc pro tunc* to February 1, 2004 (the effective date of the ACE Policy).

11. The Debtors also request that, in connection with the Motion, ACE be expressly authorized to use and apply all proceeds of the collateral and payments and to cancel the policy early pursuant to the terms of the ACE Policy, without further order of this Court, and for these purposes, to the extent applicable, the Debtors requests that this Court grant ACE relief from the automatic stay imposed by section 362 of the Bankruptcy Code.

## APPLICABLE AUTHORITY

### **A. Debtors' Entry into the ACE Policy is a Transaction in the Ordinary Course of Business**

12. Section 363(c)(1) of the Bankruptcy Code provides explicit statutory authority for a debtor-in-possession to enter into transactions in the ordinary course of business. 11 U.S.C. § 363(c)(1). Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, the debtor-in-possession has the authority to operate the debtor's business without obtaining prior court approval. 11 U.S.C. §§ 1107 & 1108; see also Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303, 1312 (5th Cir. 1985); In re Deluca Distrib. Co., 38 B.R. 588, 592 (Bankr. N.D. Ohio 1984).

13. Although neither the Bankruptcy Code nor the legislative history of section 363(c) offers guidance as to what constitutes "ordinary course of business," courts generally apply the following two tests in determining whether a transaction is in the ordinary course of business: (1) the horizontal dimension test and (2) vertical dimension or creditor's expectation test. See In re Enron Corp., 2003 WL 1552202, at \*17 (Bankr. S.D.N.Y. March 21, 2003); Burlington Northern Railroad Co. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.), 853 F.2d 700, 704-05 (9th Cir. 1988); see also In re Denton County Elec. Coop., Inc., 281 B.R. 876, 883 n.12 (Bankr. N.D. Tex. 2002) (the vertical and horizontal tests are normally used to determine a debtor's ordinary course of business).

14. The horizontal dimension test is an industry-wide perspective where the debtor's business is compared to other similar businesses. Dant & Russell, 853 F.2d at 704 ("The test is whether the postpetition transaction is of a type that other similar businesses would engage in as ordinary business."). A showing that this type of transaction occurs regularly or

often is not necessary. See id. at 705 (holding that execution of a lease satisfied the horizontal dimension test based on the fact that the debtor had executed similar leases which operated in substantially the same manner, even though the debtor had only executed such leases occasionally). In short, the horizontal test requires that the proposed transaction is one that is in the ordinary course of the debtor's business, or of businesses similar to the debtor's. See Enron, 2003 WL 1562202, at \*18.

15. The vertical dimension test views the transaction ““from the vantage point of a creditor and inquires whether the transaction subjects a creditor to economic risks of a nature different from those he accepted when he decided to extend credit.”” Id. (quoting Johns-Manville, 60 B.R. at 616); see also Armstrong World Inds., Inc. v. James A. Phillips, Inc. (In re James A. Phillips, Inc.), 29 B.R. 391, 394 (S.D.N.Y. 1983). As part of the vertical test, courts also compare the debtor's prepetition business activities to its postpetition transactions. Waterfront, 56 B.R. at 35; DeLuca, 38 B.R. at 594 (finding that it was in the debtor's ordinary course of business to enter into new, post-petition collective bargaining agreements where it had entered into similar agreements prepetition).

16. At least one bankruptcy court has determined that obtaining an insurance policy postpetition was within the ordinary course of business of a debtor. See In re United States ex rel Harrison v. Estate of Deutscher, 115 B.R. 592 (Bankr. M.D. Tenn. 1990). In Deutscher, a chapter 11 trustee used estate property to maintain the debtor's business without seeking court approval. Id. at 595. The trustee obtained, among other things, a new insurance policy to replace the debtor's prepetition policy, which had lapsed. Id. at 595. Applying the horizontal test, the court found that “[t]hese actions were not out of the ordinary for a business such as [the debtor's].” Id. at 600. Furthermore, applying the vertical test, the court determined

that these actions did not “diverge so far from the debtor’s prior practices that they subjected the creditors to unexpected risks.” Id. Thus, the court determined that the actions taken by the trustee, including the purchase of the new insurance policy, were not outside of the ordinary course. Id.

17. Similarly, the Debtors’ entry into the ACE Policy qualifies as a transaction performed in the ordinary course of the Debtors’ business under both the vertical and horizontal tests. First, large corporations, such as the Debtors, routinely enter into workers’ compensation insurance policies similar to the ACE Policy. Indeed, the Debtors are required to provide for workers’ compensation coverage under the state laws where they transact business. Second, the ACE Policy is consistent with the industry standard; the types of workers’ compensation programs that the Debtors have maintained historically. Thus, entering into the ACE Policy is an action taken in the ordinary course of the Debtors’ business.

**B. Debtors’ Entry into the ACE Policy is in the Best Interests of the Debtors’ Estates**

18. In deciding whether to approve a requested transaction under section 363, courts have applied a business judgment test to the transaction with respect to which approval is sought. Some courts have described the standard in terms of “good faith,” In re Phoenix Steel Corp., 82 B.R. 334 (Bankr. D. Del. 1987) (a proposed transaction under section 363 must be “fair and equitable” and there must be “a good business reason for completing the . . . transaction in good faith”), or whether the transaction is in the best interest of the estate. In re Apex Oil Co., 92 B.R. 847, 867 (Bankr. E.D. Mo. 1988) (“[T]he best interest of the estate may be met by requiring [that a transaction] be: 1) for a fair and reasonable price, and 2) in good faith.”).

19. In this instance, the terms evidenced by the ACE Policy have been negotiated and reached in good faith. As noted, the Debtors sought and received quotes from major insurers before determining that the ACE Policy was the most competitive option.

20. The Debtors believe that the execution and performance of the ACE Policy, including providing ACE with the Letter of Credit and Paid Loss Deposit Fund is in the best interests of their estates. Without workers' compensation insurance, the Debtors will be required in some states to enter into a state insurance pool or will be subject to fines and sanctions from state authorities. Such costs will be substantially more than the expenses associated with procuring the ACE Policy. Additionally, without the ACE Policy, the Debtors will likely experience a lapse in coverage, as many state insurance pool programs require thirty (30) days' application before they are effective. During such a lapse, the Debtors will be left with no coverage absent the ACE Policy and will be exposed to the full amount of workers' compensation liabilities.

21. Under the circumstances, entering into the ACE Policy certainly passes the "business judgment test" and is in the best interests of the estates.

22. The Debtors submit that it is appropriate to provide the Letter of Credit and Paid Loss Deposit Fund to ACE and to provide ACE with first priority liens in connection therewith under section 364(d) of the Bankruptcy Code.<sup>6</sup> The Debtor would be unable to obtain the ACE Policy or enter into the related program agreement otherwise.

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<sup>6</sup> Pursuant to the terms of the Debtors' Debtor in Possession Financing Facility with General Electric Capital Corporation (the "DIP Lender"), as Agent and Lender, the Debtors are permitted to grant security deposits in connection with contracts entered into in the ordinary course. The Debtors have referenced section 364(d) of the Bankruptcy Code to provide

(continued...)

**CONCLUSION**

WHEREFORE, the Debtors respectfully request entry of an order approving the Motion, and granting such other and further relief as is just and proper.

Dated: Fort Worth, Texas  
February 5, 2004

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ATTORNEYS FOR THE DEBTORS AND  
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\_\_\_\_\_  
(...continued)

assurance to ACE that its interest in the Paid Loss Deposit Fund is senior to all parties including the DIP Lender.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she has authorized BSI as service agent to cause to serve a true and correct copy of the foregoing Motion upon all persons on the Limited Service List on the 5th day of February, 2004 via overnight delivery, fax or email, in accordance with the Federal Rules of Bankruptcy Procedure.

Michelle C. Campbell

Michelle C. Campbell

**PROGRAM AGREEMENT**  
(Hereinafter this Agreement)  
effective the First day of February, 2004,  
by and among

ACE AMERICAN INSURANCE COMPANY  
, and any affiliated property and casualty insurer that has issued one or more of the Policies as defined in  
this Agreement and such other insurance companies as may be added by Addendum as parties hereto  
(hereinafter , collectively, the "Company")  
and  
MIRANT SERVICES, LLC  
(hereinafter the Insured)

**WHEREAS**, the Insured is the Named Insured under the policies that are issued by the Company and listed on the respective Addenda attached hereto and made a part hereof (including Addenda that may be added after the effective date hereof) (such listed policies are referred to collectively as the "Policies"), and the Policies are the types described as follows: (i) policy(ies) of workers compensation insurance listed as Deductible Policies on such Addenda (which together with all extensions thereof and endorsements thereto, are hereinafter collectively referred to as the Deductible Policies or Workers Compensation Deductible Policies, respectively), and which Policies each include a Deductible Endorsement; and/or under (ii) the policy(ies) of insurance listed as Retrospectively Rated Policies on such Addenda, issued by the Company in accordance with a Retrospective Rating Plan (which together with all extensions thereof and endorsements thereto, are hereinafter referred to as the Retrospectively Rated Policies);

**WHEREAS**, the Company is willing to issue such Policies only if the Insured provides collateral security to the Company; and

**WHEREAS**, the Company will provide claims adjusting and related services for claims arising under the Policies and the Company has entered and may in the future enter into one or more contracts with ESIS, Inc. or another claims adjusting service to provide claims adjusting and related services for claims arising under the applicable Policies (each such contract being hereinafter referred to as a Claims Adjusting Service Agreement); each applicable as indicated on such Addenda hereto.

**NOW, THEREFORE**, in consideration of the mutual promises contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and in accordance with the terms and conditions of the Policies, the Company and the Insured agree as follows:

**ARTICLE I**

**INSUREDS PAYMENTS FOR DEDUCTIBLE POLICIES**

The Insured agrees to pay or reimburse the Company or ESIS, Inc. as indicated on such Addenda hereto for:

- a. all premiums payable to the Company under the Workers Compensation Deductible Policies, including any audit of the Policies and recalculation of Deductible Premium as provided therein, as described in greater detail in the respective Addenda hereto;
- b. Paid Loss Deposit Fund amounts related to the Policies, as provided in Article III of this Agreement;
- c. all other amounts the Insured is or may in the future be required to pay or reimburse in accordance with the terms and conditions of the Policies, this Agreement , including without limitation the Insured's share

of Paid Losses within the applicable Deductible(s) and the Insured's share of Allocated Loss Adjustment Expense;

- d. all amounts the Insured is or may be obligated to pay to other parties but which are paid by the Company; and to provide collateral to the Company to secure the Insured's Obligation as provided in Article IV of this Agreement.

The Company will bill the Insured as per this Agreement or as pursuant to the Deductible Policies for the amounts described above which are payable or reimbursable to the Company.

### **INSUREDS PAYMENTS FOR RETROSPECTIVELY RATED POLICIES**

The Insured agrees to pay or reimburse the Company for the following amounts as they become due:

- a. all amounts payable to the Company pursuant to the Retrospectively Rated Policies, including
  - (i) The portion of the premium for amounts other than Paid Losses and Allocated Loss Adjustment Expense ("Non-Loss Retro Amounts") payable to the Company, including any additional amounts due upon the Company's recalculation as described in greater detail in the respective Addenda hereto; and
  - (ii) all Paid Losses within the respective Retrospectively Rated Policies' Loss Limitations,
  - (iii) the Insured's share of Allocated Loss Adjustment Expense;
- b. Paid Loss Deposit Fund amounts related to the Retrospectively Rated Policies as provided in Article III of this Agreement;
- c. all amounts the Insured is and may be obligated to pay to other parties, but which are paid by the Company;

and to secure its obligation to make such payments with collateral as provided in Article IV of this Agreement.

The Company will bill the Insured as per this Agreement for the amounts described above.

### **INSUREDS PAYMENTS FOR ALLOCATED LOSS ADJUSTMENT EXPENSE**

The charges for Allocated Loss Adjustment Expenses described herein will be subject to restrictions imposed by applicable state law and by the Company's filed rate plans.

The Insured will pay or will reimburse the Company for Allocated Loss Adjustment Expense related to claims under the Policies as specified in respective Addenda by selection of any of the following options. The option(s) selected by the Insured is/are indicated in the respective Addenda:

**ALAE – 100% Insured:** The Insured will pay or reimburse the Company for all Allocated Loss Adjustment Expense related to claims under the Policies.

**ALAE – Pro-Rata:** The Insured shall pay or reimburse the Company for the Insured's pro-rata share of Allocated Loss Adjustment Expense, which shall be apportioned between the Insured and the Company as follows:

- a. If the total amount of a Paid Loss exceeds the amount of the Policy's Deductible Limit or Loss Limitation as applicable, all Allocated Loss Adjustment Expense related thereto shall be payable by the Insured and the Company in the same proportion as their respective pro-rata shares of such Paid Loss.
- b. If the total amount of a Paid Loss does not exceed the amount of the Policy's Deductible Limit or Loss Limitation as applicable, all Allocated Loss Adjustment Expense related thereto shall be payable by the Insured.
- c. If Allocated Loss Adjustment Expense is incurred by the Company in connection with a claim under

the Policies, but no payment indemnifying the claimant (s) is made with respect to such claim, all Allocated Loss Adjustment Expense related to such claim shall be payable by the Insured.

ALAE - Erodes: The Insured shall pay or reimburse the Company for the sum of the amount of each Paid Loss plus related Allocated Loss Adjustment Expense, up to the amount of the applicable Policy's Deductible Limit or Loss Limitation.

### **CLAIMS ADMINISTRATION AND RECOVERY SERVICES**

If claims handling is shown as included for each such Policy in the respective Addendum, then the Company has contracted with ESIS, Inc. or another Claims Adjusting Service also as indicated in the respective Addenda to investigate, adjust, settle and provide for the defense of claims in all states and to collect, calculate and administer the Paid Loss Deposit Fund on the Company's behalf.

Further the Company and/or ESIS, Inc. have contracted with Recovery Services International to pursue recoveries for any appropriate claim. Associated fees for the recovery for Subrogation and for Second Injury Fund, as shown on the respective Addenda, will be subtracted from amounts recovered. Fees are net of expenses incurred. Recoveries will reduce the amount of net losses.

However, if a Claims Adjusting Service other than ESIS, Inc. has been indicated, then following applies:

- a. The Insured and the Claims Adjusting Service will separately contract to effectuate recovery dollars for any appropriate claim.
- b. Should the contractual arrangement between the Company and the Claims Adjusting Service be terminated, the Company shall choose ESIS, Inc. or another Claims Adjusting Service to handle claims and, will pursue recoveries for any appropriate claim utilizing Recovery Services International or another entity. In such a situation, this Agreement will be deemed automatically amended to reflect the new Claims Adjusting Service, and the Company will inform the Insured of the revised Claims Administration Expenses and recovery fees.
- c. In the event of the termination of such contractual arrangement, the Company shall administer, calculate and collect the Paid Loss Deposit Fund itself, or shall assign such responsibility to the replacement Claims Adjusting Service.

#### **Direct Bill Provision**

For the Policies listed on the respective Addenda which have an X in the Direct Bill Provision on such Addenda, and whose claims are handled by a Claims Adjusting Service other than ESIS, Inc., the Company agrees to transfer to the Insured, and the Insured agrees to accept, the Company's obligation to pay all amounts for Paid Losses, Allocated Loss Adjustment Expense and Claim Administration Expense to the Claims Adjusting Service. The Insured will be billed by the Claims Adjusting Service acting on the Company's behalf, in accordance with the terms of this Agreement. The Company hereby acknowledges and represents to the Insured that the Claims Adjusting Service is duly authorized to collect such amounts on the Company's behalf.

### **RECONCILIATION OF CLAIMS ADMINISTRATION EXPENSE**

The initial amount of Claims Administration Expense for Policies for which Claims Handling is indicated as included on the respective Addenda was computed based upon the Company's estimate of the numbers and types of claims, and fees which are set forth in the fee schedule(s) within the respective addenda. Unless otherwise agreed in the respective Addenda or in a Claims Adjusting Service Agreement or Client Agreement, the following terms will apply:

On a date no earlier than eighteen months from the Policy inception and annually thereafter a claim count reconciliation will be performed by the Company and/or the Claims Adjusting Service. The actual numbers and types of claims and claimants as determined by such reconciliation will be determined based on the actual rates set forth in the fee schedule(s) within the respective Addenda, and the result shall be the total Claims Administration Expense payable by the Insured as of the date of each such reconciliation.

If the actual Claims Administration Expense determined pursuant to the first such claim count reconciliation exceeds the amount of the Initial Claims Administration Expense paid to the Company, the Insured will pay the difference to the Company. If less, the Company will promptly return to the Insured the difference between the Initial Claim Administration Expense paid to the Company and the actual Claim Administration Expense.

If the actual Claim Administration Expense determined pursuant to the second and subsequent claim count reconciliations exceed the total amount paid by the Insured to the Company, the Insured will pay the difference to the Company; if less, the Company will promptly return to the Insured the difference between the total amount paid to the Company and such actual Claim Administration Expense; provided, that the Company shall, in any event, be entitled to retain the amount of the Minimum Fee, if a Minimum Fee is indicated in the respective Addenda.

### **GENERAL PROVISIONS/ PAYMENTS**

All payments set out in this Agreement, including any Addendum, must be made by the Insured by the Required Payment Date unless otherwise specified.

All payments made by the Insured under this Agreement and the Policies shall be allocated first to collateral security, then to other amounts owed to the Company other than premiums, then finally to premiums for the Policies, regardless of the designation of the payment.

If the Insured does not pay an amount billed by the Required Payment Date:

- (i) the Company shall have the right to bill the Insured for, and to collect, the Interest Charge applied to any such unpaid amount; and
- (ii) the Company shall have the right to increase the required amount of any Paid Loss Deposit Fund to an amount determined by the Company, which amount may exceed the required amount as specified in Article III of this Agreement.

All terms and conditions of each Addendum hereto are part of this Agreement and are herein incorporated by reference in their entirety.

The Insured and the Company agree that this Agreement works in concert with, and is not intended to, amend or alter any of the terms and conditions of any of the Policies, or the Company's filed rating plans or manuals. In the event of any inconsistencies between this Agreement and any Policy or the Company's plans, the terms and conditions of the Policy and such plans shall control.

#### **Taxes and Assessments**

The tax and assessment charges in this pricing are based upon the Company's current knowledge of the state's interpretation of current law. If current law, or a state interpretation thereof, change, then the Insured and the Company agree that the Company shall have the right to amend such prior tax and/or assessment charges to the Insured in order to match the state interpretation, and the Company shall bill the Insured for such retrospective taxes and/or assessments accordingly.

## ARTICLE II

### DEFINITIONS

Allocated Loss Adjustment Expense means such claim expenses, costs and any interest incurred in connection with the investigation, administration, adjustment, settlement or defense of any claim or lawsuit that the Company or ESIS, Inc., under their respective accounting practices, directly allocates to a particular claim, whether or not a payment indemnifying the claimant(s) is made. Such expenses include, but are not limited to, subrogation, all court costs, fees and expenses; fees for service of process; fees and expenses to attorneys for legal services; the cost of services of undercover operations and detectives; fees to obtain medical cost containment services; the cost of employing experts for the purpose of preparing maps, photographs, diagrams, and chemical or physical analysis, or for expert advice or opinion; the cost of obtaining copies of any public records; and the cost of depositions and court reporters or recorded statements, provided, however, that Allocated Loss Adjustment Expense shall not include the salaries and traveling expenses of the Company's employees or the Company's overhead and adjusters' fees.

Claims Adjusting Service means ESIS, Inc. or such other claims adjusting service handling claims under one or more of the Policies.

Claim Administration Expense means the amount the Company and ESIS, Inc. determine[s] are needed to cover expenses of administering claims under the Policies, other than those fees related to recovery services, such expenses to be billed by either the Company or the Claims Adjusting Service.

Client Agreement means the agreement between the Company and the Claims Adjusting Service on behalf of the Insured.

Deductible Credit Factor means the applicable deductible credit factor shown in a policy, and revised as provided in the respective Addenda.

Deductible Premium means the premium after the application of the deductible credit factor, as initially shown on the Workers' Compensation Deductible Policies and as recalculated as described in the respective Addenda hereto. For General Liability Policies and Automobile Liability Policies, the Deductible Premium means the premium shown on the respective Policy, as adjusted based on adjustment terms shown in the respective Policy.

Indemnity means any claim for which benefits may be payable under a Policy to repay all or portion of wages lost due to a compensable injury or disease and/or to compensate for disfigurement or any claim when one of the following occurs:

- (i.) Lost Time exceeds the waiting period
- (ii.) Permanency exposure
- (iii.) Medical treatment exceeds \$2,500
- (iv.) Medical treatment is continuing beyond 3 months
- (v.) Investigation is required
- (vi.) There is potential for subrogation
- (vii.) There is potential for second injury fund
- (viii.) A denial must be issued
- (ix.) Litigation becomes involved

Insured's Obligation means all amounts that the Insured is or may in the future be required to pay or reimburse to the Company or ESIS, Inc. or any Claims Adjusting Service pursuant to this Agreement, any Claims Adjusting Service Agreement or the Policies, including Ultimate Losses as calculated by the Company

Interest Charge means the amount of interest for which the Insured is liable to the Company, payable at the monthly rate of one and one-half percent (1.5%) (or, if such rate is impermissible under applicable law, the maximum lawful, non-usurious rate that may be charged) on any amount payable by the Insured to the Company under this Agreement, but not paid by the Insured by the Required Payment Date, said charge to commence on the day next following the Required Payment Date for any such unpaid amount.

Loss Limitation means the amount shown on the retrospective rating endorsement to the Policy.

Medical Only means any claim other than Indemnity, including claims for which the claimant did not receive lost wage payments from the Company.

Paid Losses means all amounts paid for losses (exclusive of Allocated Loss Adjustment Expense) under the Policies; provided, however, that the amount payable by the Insured for each Paid Loss shall be subject to the

- i) amount of the deductible as provided in the respective Deductible Policies, or
- ii) amount of the loss limitation as provided in the respective Retrospectively Rated Policies.

Policies means collectively, the Deductible Policies and the Retrospectively Rated Policies.

Required Payment Date means a date not later than fifteen (15) calendar days after the date of the Company's invoice for any amount billed by the Company to the Insured under this Agreement.

Retrospective Premium means the premium computed as set forth in the retrospective premium endorsements attached to the respective Retrospectively Rated Policies.

Standard Medical Only means any claim other than Indemnity, including claims for which the claimant did not receive lost wage payments from the Company, for which the total accumulated amount of the medical payments by the Company did not exceed \$1,000.

Ultimate Losses means losses incurred under the Policies within the respective deductibles or loss limitations plus future loss development and the amount of losses incurred but not reported, as estimated by the Company. Ultimate Losses may include Allocated Loss Adjustment Expense to the extent specified in the applicable Addenda, as estimated by the Company pursuant to the applicable Addenda.

### ARTICLE III

#### PAID LOSS DEPOSIT FUND

As of the effective date of this Agreement, and of each Addendum hereto, the Insured will be required to pay the Company the amount specified as Initial Paid Loss Deposit Fund listed in the respective Addenda. Such payments will establish and initially fund, for the Policies listed on each of the respective Addenda, a Paid Loss Deposit Fund. Each of such Initial Paid Loss Deposit Fund amounts shall represent the Company's estimate of the average amount the Company will pay under such Policies listed on the respective Addenda during a seventy five (75) day period or other such period as indicated in the respective Addenda for the amount of the Insured's share of Paid Losses and Allocated Loss Adjustment Expense.

In the event of any single payment of a large Paid Loss and/or Allocated Loss Adjustment Expense under any such Policy in an amount equal to or greater than the amount specified as "Single Payment of Paid Loss and/or Allocated Loss Expense" on the Addendum on which such Policy is listed, the Company shall have the right to require the Insured to pay immediately the amount of such single payment into the Paid Loss Deposit Fund.

The Company may from time to time recalculate the required amount of any Paid Loss Deposit Fund, based upon the Company's revised estimate of the average of the amounts it will pay as described above, and require the Insured to adjust the amount of such Paid Loss Deposit Fund accordingly, provided, that the minimum required amount of each Paid Loss Deposit Fund shall be \$1,000.

## ARTICLE IV

### **SECURITY FOR INSUREDS OBLIGATION**

As security for payment of the Insured's Obligation under this Agreement, and the Insured's Obligation under any other agreement or policy between the Insured and the Company or any of its affiliates, the Insured will provide to the Company, as beneficiary thereof, a clean irrevocable evergreen letter of credit (hereinafter, "LOC") issued by a bank or other financial institution acceptable to the Company, and in an amount and form, acceptable to the Company; and/or such other forms of collateral as the Company may permit in writing from time to time. Any LOC provided by the Insured shall provide by its terms that it will be renewed automatically each year for an additional year unless written notice of non-renewal is sent by the financial institution within sixty (60) days prior to the LOC's anniversary date. If the Company permits the Insured to provide collateral for the Insured's Obligation in a form other than a LOC, the Insured shall provide such other collateral in an amount and form acceptable to the Company. Regardless of the initial amount of the LOC or other such forms of collateral, the Company may require at any time that the amount of collateral security be increased to equal the full amount of the Insured's Obligation.

Not less than thirty days prior to any termination of the LOC, the Insured will deliver to the Company a replacement LOC in an amount and form acceptable to the Company, issued by a bank or other financial institution acceptable to the Company.

The Insured will continue to provide the Company with a LOC (and/or other collateral) as security for payment of the Insured's Obligation, and any other obligations that the Insured has to the Company or to any of its affiliates, until the Company determines that there is no longer any need for such security. If there shall be a material deterioration in the financial condition of the bank or other financial institution which has issued the LOC, or which issued or that is holding other collateral, such that the institution is no longer acceptable to the Company, the Company shall have the right to require the Insured to replace the LOC or other collateral with a new LOC or other collateral issued or held, as approved by Company, by a bank or other financial institution then acceptable to the Company.

If the Insured fails to provide the Company with a replacement LOC upon any LOC termination, or to provide the Company with any additional amount of LOC required by the Company (and/or to provide any other collateral if requested by the Company), the Company will have the right to draw the full amount of the existing LOC and/or other collateral. The Insured recognizes that the Company may continue to require collateral as security for the payment of the Insured's Obligation after any cancellation, non-renewal, conversion or replacement of the Policies. The Company shall have the right to draw against the LOC and/or other collateral in each instance where the Insured's Obligation, or any portion thereof, for any reason is not fulfilled.

Annually, the Company shall review and redetermine the amount of the Insured's Obligation and the amount of collateral security required pursuant to this Article. At such time, the Insured will provide audited financial statements, interim financial statements, and any other financial information requested by the Company for the purpose of evaluating the financial condition of the Insured. The Insured will provide any needed increases in the amount of the LOC (and/or other collateral permitted by the Company) within thirty days of the Company's request for any additional required amount of the LOC. Any replacement or additional LOC, or other permitted collateral, must meet all requirements for a LOC and collateral set out above. The Company will effect any decreases in the amount of the LOC (and/or other collateral) promptly, provided that the Insured

is not in breach of any of its obligations under this Agreement, any of the Policies, or any agreements with ESIS, Inc. or any other person or entity relating to the handling of claims under the Policies.

All collateral provided hereunder shall be delivered to Company at the following address: ACE American Insurance Company, 1601 Chestnut Street, Philadelphia, PA 19103-0000, Attention: Collateral Manager.

If the Insured fails to provide the Company with a replacement LOC or to provide the Company with any additional required amount of the LOC (and/or other collateral if acceptable to the Company), the Company will have the right to draw the full amount of the existing LOC and/or other collateral. The Insured recognizes that the Company may continue to require collateral as security for the payment of the Insured's Obligation after any cancellation, non-renewal, conversion or replacement of the Policies.

The Insured agrees that the Company shall have no obligation to remit to the Insured or to apply in reduction of the Insured's Obligation any increase or profits (including without limitation any interest or money) received by the Company from the proceeds of any LOC or from any other collateral provided by the Insured.

The Insured and the Company agree that nothing in this Agreement will constitute or be construed as a waiver of any rights the Company may have in each instance in which the Insured's Obligation for any reason is not fulfilled.

## **ARTICLE V**

### **TERMINATION/CANCELLATION OF THE POLICIES**

It is understood that the Insured's Obligations may outlast the term of the Policies and that therefore, cancellation of any Policy by either the Insured or the Company will not terminate this Agreement. The parties' rights, duties and obligations under this Agreement will continue after any cancellation, non-renewal or replacement of the Policies.

This Agreement shall remain in full force and effect until the parties agree that it shall terminate.

### **CONVERSION OF RETROSPECTIVELY RATED POLICIES/TERMINATION OF THIS AGREEMENT**

At the time of the fourth computation of Retrospective Premium under the Retrospectively Rated Policies listed on any Addendum hereto, or if there are fewer than four such computations (by agreement of the parties), at the time of the last such computation, the Company will bill the Insured for, and the Insured will pay to the Company, the difference between the total amount, including the final amount of Retrospective Premium computed, payable by the Insured in order to satisfy the Insured's Obligation with respect to such policies and the amount of all payments previously made by the Insured to the Company with respect to such Policies to satisfy the Insured's Obligation, including payments of Retrospective Premium (the Conversion Amount). The Company's receipt of payment in full of the Conversion Amount so billed shall constitute satisfaction of the Insured's Obligation for Ultimate Losses with respect to such Policies, and the Insured will have no further obligation to provide collateral security with respect to such Policies. The Insured shall have an ongoing obligation to collateralize and pay future retrospective adjustments.

## **ARTICLE VI**

### **GENERAL PROVISIONS/ARBITRATION**

1. **Applicable Law.** This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania. No amendments or modification of this Agreement shall have any force or effect unless in writing and signed by the parties hereto.

2. **Successors and Assigns.** All the terms of this Agreement shall be binding upon and inure to the benefit of and be enforceable by the parties hereto and their respective successors and assigns, whether so expressed or not; provided, however, that no party hereto shall assign or otherwise transfer any of its rights or obligations hereunder without the prior written consent of the other parties hereto.
3. **Severability.** Any provision hereof which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions and without affecting the validity or enforceability of such provision in any other jurisdiction.
4. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, and all of which together shall constitute but one and the same instrument.
5. **Arbitration.** Any controversy, dispute, claim or question arising out of or relating to this Agreement, including without limitation its interpretation, performance or non-performance by any party, or any breach thereof (hereinafter, collectively, Controversy) shall be referred to and resolved exclusively by three arbitrators through private, confidential arbitration conducted in Philadelphia, PA. Such arbitrators shall be disinterested, neutral individuals who have experience and qualifications in the subject matter of the Controversy. One arbitrator shall be chosen by each party and the third by the two so chosen. If either party refuses or neglects to appoint an arbitrator within thirty (30) days after receipt of written notice from the other party requesting it to do so, the requesting party may choose a total of two arbitrators who shall choose the third. If the arbitrators fail to select the third arbitrator within ten (10) days after both have been named, each arbitrator shall name three candidates, of whom the other shall decline two, and the decision shall be made by drawing lots. In the event of the death, disability or incapacity of any arbitrator, a replacement shall be named pursuant to the process, which resulted in the selection of the arbitrator to be replaced. The arbitrators may abstain from following the strict rules of law, and shall make their decision with regard to the custom and usage of insurance business as at the effective date of this Agreement. The majority decision of the panel shall be final and binding upon the parties to this Agreement. Judgment may be entered upon the award of the arbitrators in any court of competent jurisdiction. Except as otherwise specifically provided in this Article, the arbitration of any Controversy shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association.
6. **Notices, etc.** Unless otherwise provided in this Agreement, all notices, directions, requests, demands, acknowledgments and other communications required or permitted to be given or made under the terms hereof made for any reason other than those addressed in Article IV, shall be in writing and shall be deemed to have been duly given or made
  - a. (i) when delivered personally, (ii) when made or given by telecopier or electronic transmission where the receipt thereof is confirmed immediately thereafter by the recipient, (iii) when received when sent, all charges prepaid, by an internationally recognized overnight courier, or (iv) when mailed through the U.S. postal service, and
  - b. when sent to the Company at the address indicated in the signatory below or in the applicable Addendum to the attention of the Underwriting Manager and/or
  - c. when sent to the Insured at the address indicated in the applicable Policy.

Each party may from time to time designate a different address for notices, directions, requests, demands, acknowledgments and other communications by giving written notice of such change to the other parties.

IN WITNESS WHEREOF, this Program Agreement has been executed by the parties hereto, to be effective on the date first written above.

MIRANT SERVICES, LLC

Name: *William Adderott*  
Title: Senior Vice President & Treasurer  
Date: January 30, 2004

ACE AMERICAN INSURANCE COMPANY

Name: *[Signature]*  
Title: SVP  
Date: 2/3/04  
500 Colonial Center Parkway, Suite 200  
Roswell, GA 30076 \_\_\_\_\_

**2004 ADDENDUM TO  
PROGRAM AGREEMENT  
(This Addendum)**

for \_\_\_\_\_  
**MIRANT SERVICES, LLC**  
Effective as of February 1, 2004

The terms and conditions stated in this 2004 Addendum apply only to the Policies listed below. All other terms and conditions of the Agreement are here incorporated by reference in their entirety.

<b>POLICY LISTING</b>				
<b>WORKERS COMPENSATION DEDUCTIBLE POLICIES</b>				
Policy Number	Policy Period	Deductible Limit	Claims Handling	Issuing Company
WLR C43975055	2/1/2004-2/1/2005	\$250,000	INCLUDED	ACE American Insurance Company

<b>POLICY LISTING</b>				
<b>RETROSPECTIVELY RATED POLICIES</b>				
Policy Number	Policy Period	Deductible Limit	Claims Handling	Issuing Company
SCF C43975328	2/1/2004-2/1/2005	\$250,000	INCLUDED	ACE American Insurance Company

**WORKERS COMPENSATION DEDUCTIBLE AND RETROSPECTIVELY RATED POLICIES**

**1. INITIAL PAYMENTS**

- 1.A. Estimated Workers Compensation Premium: Initial estimated deductible premium, and initial estimated non-loss costs – related premium for Retrospectively Rated Policies (if a policy number is listed in the table under Retrospectively Rated Policies) are payable as follows: Commencing on the effective date of this Addendum the Insured will make a payment to the Company in accordance with the Program Installment Schedule related to the above listed Policies. The payment shall be \$649,906 which includes the initial estimated Claims Administration Expense of \$41,696.
- 1.B. Estimated TRIA: Commencing on the effective date of this Addendum, the Insured will make an initial payment of \$67,857 to the Company related to the above listed Policies for estimated TRIA.
- 1.C. Estimated Policyholder Surcharges: Commencing on the effective date of this Addendum, the Insured will make an initial payment of \$42,216 to the Company related to the above listed Policies for estimated Policyholder Surcharges.

**2. ALLOCATED LOSS ADJUSTMENT EXPENSE**

2.A. Allocated Loss Adjustment Expense will be billed with Paid Losses as indicated by an X for the Workers Compensation Deductible and Retrospectively Rated Policies listed in this Addendum as shown in the table below pursuant to Article I.

Policies	ALAE – 100% Insured	ALAE – Pro-Rata	ALAE – Erodes
Workers Compensation Deductible Policies			X
Retrospectively Rated Policies			X

**3. CLAIMS ADJUSTING SERVICE**

3.A. For Workers Compensation Deductible and Retrospectively Rated Policies listed on this Addendum, the Company has contracted with the Claims Adjusting Service shown below. Direct Bill Provision in Article I applies for the Policies indicated by an X in the table below applicable to a Claims Adjusting Service other than ESIS, Inc.:

Policies	Claims Adjusting Service	Direct Bill Provision Applies
Workers Compensation Policies	X	
Retrospectively Rated Policies	X	

**4. RECALCULATION/ADJUSTMENT**

4.A. The Company will recalculate the Deductible Credit Factor and the Insured will pay Deductible Premium for the Workers Compensation (“WC”) Deductible Policies. At the time of audit, the Company will recalculate and the Insured will pay Deductible Premium based on the following components:

- 4.A.a. Expense Costs: \$511,638 adjusted at the time of the audit adjustment based on a rate of .2677 per \$100 of WC Payroll excluding monopolistic states; plus
- 4.A.b. Premium Tax and Assessment Expense: 6.87% of Workers Compensation Deductible Premium for all states; plus 2.35% of Standard Premium for the States(s) of Florida, Idaho, New York,; such amounts will be recalculated based on state distribution of premiums, applicable state tax rates and any additional tax and/or assessment liability imposed by the states; plus
- 4.A.c. Claims Administration Expense as provided in Article I and based on the Fee Schedule in Item 4.C below.

4.B. Retrospectively Rated Policies: Upon any recalculation of premium for the Retrospectively Rated Policies due to audit, the Company will recalculate and the Insured will pay Non-Loss Retro Costs based on the following components:

- 4.B.a. Expense Costs: \$33,686, adjusted at the time of the audit adjustment based on a rate of .2677 per \$100 of WC payroll excluding monopolistic states; plus
- 4.B.b. Premium Tax and Assessments: Estimated at 4.61% of Retrospective Premium, such amount will be recalculated based on the retrospective rating endorsement and actual assessments will be recalculated based on state distribution of standard premiums and any additional assessment liability imposed by the states; plus
- 4.B.c. Claims Administration Expense as provided in Article I and based on the Fee Schedule in Item 4.D below.

4.C. The following Minimums apply to the Workers Compensation Deductible and Retrospectively Rated Policies combined:

- 4. C. Expense Costs: \$545,324

4.D. Claims Administration Expense:

<b>WORKERS COMPENSATION DEDUCTIBLE AND RETROSPECTIVELY RATED CLAIMS ADMINISTRATION EXPENSE FEE SCHEDULE</b>	
Type of Claim	Fee per Claim
Medical Only	\$150
Indemnity- All Other States	\$1,099
Indemnity – California	\$1,199
Indemnity – Florida	\$1,199
Indemnity – Texas	\$1,199
Managed Medical - All Other States	\$1,099
Managed Medical - California	\$1,199
Managed Medical - Florida	\$1,199
Managed Medical - Texas	\$1,199
Administration Fee	\$2,500
Claim Intake Fee	\$18

4.E. TRIA Adjustments: TRIA will be adjusted at the time of audit and annually thereafter based on state distribution of premiums and filed NCCI rates.

4.F. Policyholder Surcharges Adjustments: Policyholder Surcharges will be adjusted at the time of audit and annually thereafter based on state distribution of premiums and the applicable state charges.

**PAID LOSS DEPOSIT FUND**

For the Policies listed with Claims Handling indicated as Included on this Addendum, the Insured will make payments as provided in Article III.

Initial Paid Loss Deposit Fund: \$ 30,000  
Single Payment of Paid Loss and/or Allocated Loss Adjustment Expense: \$ 10,000

**SUBROGATION AND SECOND INJURY FUND RECOVERY FEES**

Recovery Services International Charges: 20% of the recovery for subrogation and 10% for Second Injury Fund will be subtracted from amounts recovered. Fees are net of expenses incurred. Recoveries will reduce the amount of net losses.

**INSTALLMENT SCHEDULE**

	<b>First Installment</b>
Workers Compensation Premium	\$649,906
Workers Compensation Policyholder Surcharges	\$42,216
Workers Compensation TRIA	\$67,857
Paid Loss Deposit Fund	\$30,000
<b>Total</b>	<b>\$789,979</b>

**COLLATERAL SECURITY**

The required amount of collateral security includes a surcharge of 100% of expected losses and allocated loss adjustment expense within the applicable Deductible Limit or Loss Limitation. The surcharge will be added to the required amount until twenty-four (24) months (per proposal) from the inception date of the Policies.

IN WITNESS WHEREOF, this 2004 Addendum to Program Agreement has been executed by the parties hereto, each of which intends by its execution hereof to be legally bound by the terms of this Addendum and of the Agreement.

**MIRANT SERVICES, LLC**

**ACE AMERICAN INSURANCE COMPANY**

Name: *William Holden*  
 Title: Senior Vice President; Treasurer  
 Date: January 30, 2004

Name: *[Signature]*  
 Title: SVP  
 Date: 2/3/04  
 500 Colonial Center Parkway, Suite 200  
 Roswell, GA 30076



# **Casualty Program Proposal**

For

**Mirant Services, LLC**  
Effective February 1, 2004

Producer:

**McGriff, Seibels & Williams**

Prepared by:

**ACE Risk Management**  
500 Colonial Center Parkway - Suite 200  
Roswell, GA 30076  
Aileen Clark

January 27, 2004

*Unless accepted, this proposal expires automatically sixty days after the above date or by the proposed effective date, whichever is first.*



**Mirant Services, LLC**  
**February 1, 2004**

**ACE USA**

*As a leader in the global insurance and reinsurance industry, we understand the business of risk. Through innovative thinking, global diversification and a strong commitment to customer satisfaction, we expertly manage risk so that our clients are free to embrace new challenges and opportunities.*

**ACE RISK MANAGEMENT**

***Partners in Managing Risk***

*As part of ACE USA, we at ACE Risk Management (ARM) offer risk managers and brokers a wide variety of products and services rarely available from a single insurer. We design creative and flexible programs specifically to help companies in any industry deal with the significant costs of financing casualty risk. We are dedicated to delivering superior client service. We believe that our great service continues to be the differentiator that sets us apart from our competitors.*

We are pleased to present a casualty program to McGriff, Seibels & Williams on behalf of **Mirant Services, LLC**.

Our program is tailored to meet the risk financing, insurance and servicing needs of **Mirant Services, LLC** and offers a program structure for the lines of business below:

<b>Line of Business</b>	<b>Program Structure</b>
Workers Compensation	Combined Deductible/Retrospective Plan

Claim handling services are provided by ESIS, Inc., an ACE INA risk management services provider.



**WORKERS COMPENSATION - Combined Large Deductible and Retro Program**

ACE USA will issue a Workers Compensation and Employers Liability policy with applicable Deductible and Retrospective Rating Endorsements. The deductible or loss limit will apply per accident for bodily injury by accident and per person for bodily injury by disease. The premium for the deductible program is calculated by applying a deductible credit factor for each state to the applicable standard premium. The retrospective rating factors will be shown in the retro endorsements. These factors are negotiated and will be adjusted such that the deductible and basic premiums will equal the total of the audited program costs as outlined below.

Policy Limits - Workers Compensation

Part I	Statutory		
Part II	Bodily Injury by Accident	\$1,000,000	each accident
	Bodily Injury by Disease	\$1,000,000	policy limit
		\$1,000,000	each employee

Deductible Limit/ Loss Limit - Workers Compensation

Per Accident	\$250,000
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Allocated Loss Adjustment Expense

The Deductible / Loss Limit is exhausted by losses and Allocated Loss Adjustment Expense.

**ACE USA retains the right to select counsel. We will use either the Preferred Defense Counsel Network or our panel attorneys. The insured may select from the list of our panel attorneys, if so desired.**



<b>Financial Summary</b>		<b>Mirant Services, LLC</b>
<b>Workers Compensation</b>		
Estimated Standard Premium (not including Policyholder Surcharges) for Deductible Program	\$1,420,459	Applicable to all states except MA. Premium estimated per the information provided in the submission.
Estimated Standard Premium (not including Policyholder Surcharges) Retrospectively Rated Policy	\$79,354	Applicable to the states of MA. Premium estimated per the information provided in the submission.
Estimated Exposure - All States	\$203,689,099	WC payroll excluding Monopolistic States
Estimated Deductible Premium	\$610,103	

<b>WC Program</b>	<b>Initial Amount Payable to ACE</b>	<b>Adjustment Basis</b>	<b>Payment Terms</b>
Program Expenses and Excess Premium	\$545,324	.2677 per \$100 of exposure Subject to a minimum of \$545,324	
Taxes and Assessments	\$62,886	6.87% of Deductible Premium 2.35% of Standard Premium for the states of FL, ID, NY 4.61% of Retro Premium	
Initial Claims Administration Expense	\$41,696	Refer to Claims Administration Section	
<b>Total Initial Deductible Expenses/ Retro Non-Loss Costs</b>	<b>\$649,906</b>		<b>Due prior to binding</b>
Policyholder Surcharges/ Expense Constants	\$42,216	Adjusted based on state distribution of premiums and applicable state surcharges.	<b>Due prior to binding</b>
TRIA Charge	\$67,857	Adjusted by state	<b>Due prior to</b>



		based on filed rates	<b>binding</b>
Paid Loss Deposit Fund	\$30,000	2.5 months average paid losses and paid ALAE	<b>Due prior to binding</b>
<b>Total Initial Pay-In</b>	<b>\$789,979</b>		
<b>Collateral Requirement</b>	\$1,200,000	<b>Letter Of Credit</b>	<b>Due prior to binding</b>



## Security Requirements

### Program Agreements

A Program Agreement for the Deductible programs will be executed between Mirant Services, LLC and us. **This agreement must be returned to ACE USA prior to binding.**

### Collateral Security

Collateral security will be provided with a clean irrevocable evergreen Letter of Credit in a form acceptable to us and in the required amount. (LOC Format Attached.) **This Letter of Credit must be obtained from a bank acceptable prior to binding.**

All payments made by the insured are allocated first to collateral security, then to other amounts owed to us other than premiums, then finally to premiums for the policies, regardless of the designation of the payment. Failure to provide collateral security within the required timeframe may result in cancellation of the policies.

Annually, the insured will provide audited financial statements, interim financial statements, and any other financial information requested by the Company for the purpose of evaluating the financial condition of the insured. Prior to the anniversary of the inception of this program, the security requirements will be reviewed.

The collateral security requirement includes a surcharge of 200% of expected losses and ALAE. This amount will be adjusted on renewal to be the greater of 200% of the original expected losses less actual paid losses and ALAE to date or ultimate losses less paid to date. After 24 months following inception, the collateral security requirement will be based upon ultimate losses less paid losses and ALAE to date.

## Program Terms and Conditions

### Bankruptcy

This quote (or binder) is contingent upon:

the United States Bankruptcy Court approving the Workers Compensation Deductible/Retrospective Insurance Program with Mirant Services LLC for the policy year commencing on 2/1/2004 and ending on 2/1/2005 pursuant to an order satisfactory to ACE American Insurance Company on or before 2/27/2004.

The Insured agrees that failure to obtain this approval of the Workers' Compensation Deductible/Retrospective Insurance Program on or before 2/27/2004 are grounds for cancellation of the Insurance Program policies.

### Material Change

If the underlying exposures change significantly due to any material change, including but not limited to acquisition, divestiture, plant closings or layoffs, increasing or decreasing the payroll by greater than 25%, then ACE USA retains the right to re-determine the initial rates. The premium taxes and assessments are estimated as an average



and are subject to changes in premium, applicable state tax or assessment and any other additional tax or assessment liability imposed by the states.

#### Payment Terms

The Initial Pay In is due to the Company prior to binding. All subsequent payments due under this program are payable prior not later than fifteen (15) days after the date of the Company's invoice to ACE USA's account. If the Insured does not pay such amounts when due, then we have the right to bill the insured an interest charge at a rate of 1.5% per month on the amounts due or increase the required amount of the Paid Loss Deposit Fund to an amount determined by us. If any portion of a billed amount is disputed by the insured, the insured will pay that amount of the bill that is not in dispute and provide written explanation to us of the disputed issues by the required payment date.

Upon acceptance of this proposal, policy numbers, issuing carriers and the name of our bank and our account number will be provided. A wire transfer arrangement will be made to facilitate the payment process.

#### Monthly Loss Billing

Retained paid losses and billable allocated loss adjustment expense will be billed monthly to Mirant Services, LLC.

#### Paid Loss Deposit Fund

The Paid Loss Deposit Fund is established and maintained to pay claims prior to reimbursement by the Insured. From time to time, the Paid Loss Deposit Fund may be adjusted based on actual paid losses and ALAE. In the event of a single paid loss or ALAE of \$10,000 or more, the insured will immediately reimburse ACE USA for such amount.

#### Loss Control Services

This proposal includes Risk Control Services as per the requirements of the states of Texas and Arkansas as well as mandatory Loss Control Services required in any other states.

#### USL&H Assessment

The Federal WC Special Fund Assessment will be collected via a separate multiplier of 1.283 to be applied to all USL&H paid loss and allocated loss adjustment expense.

#### Commission

If any commission indicated in the Financial Summary of this proposal, such commission is payable to the McGriff, Seibels & Williams as cash payments are received from the Insured.

#### Countersignature

All countersignature fees will be payable by McGriff, Seibels & Williams.



**Coverages**

The proposal includes the following coverages and endorsements:

Coverage/Endorsement	ACE Form Number	NCCI Form Number	Comment
April 1, 1992 NCCI Policy Form			
Deductible Endorsement	CKE-3W15 or state applicable form	WC990661 or state applicable form	
Employers Liability Endorsement - Stop Gap Coverage	CKE-5N32c WV:CKE-8H87	WC990303C WV:WC990306	This endorsement will be attached to the master policy only.
Earlier Notice of Cancellation and Non Renewal	CKE-10290		30 Day Notice of Cancellation with 10 Days notice for non-payment
Other States Coverage	Included in policy		Excludes all monopolistic states
Alternate Employer	CKE-3N29a	WC000301A	Excluding AK and Employee Leasing Arrangements
Waiver of Our Right to Recover	CKE-3N13 CA:CKE-6N80 TX:CKE-7N76b UT:CKE-9Z07	WC000313	Not applicable in NJ, KY, PA
Voluntary Compensation and Employers Liability Coverage	CKE-3N12b CA: CKE-6N78 OH:CKE-4964b WV:CKE:8H87	WC000311A CA: WC040305 OH:WC340301B WV:WC990306	This endorsement will be attached to the master policy only.
Voluntary Compensation Endorsement - Foreign	CKE-5E84b	WC990302B	\$25,000 Repatriation Expense
Longshoremen's and Harbor Workers Compensation Act Coverage Endorsement	CKE-3N11a	WC000106A	
Maritime Coverage	CKE-2N94a	WC000201A	Limit: \$1,000,000 This endorsement will be attached to the master policy only.
Defense Base Act	CKE-2N97a	WC000101A	
Retrospective Premium Endt. - LRARO		WC999999	Retro factors will be shown in this endt.

**The following endorsements requested in the broker specifications are not included:**

- \$1,000,000 Repatriation Expense
- 90-Day Notice of Cancellation
- Unintentional Errors & Omissions



Knowledge and Notice of Occurrence



**Risk Management Services**

**ESIS Claims Administration**

Claims Administration is included in the program and will be provided by **ACE ESIS**.

The initial Claims Service Fee Fund is equal to estimated claims expenses calculated by multiplying the expected volume of claims by the fees below (plus the applicable ESIS Administration Fee.) As claims are reported, the fee per claim is deducted from the Service Fee Fund. Any combination of claims may exhaust the deposit.

If the fund is exceeded at any time, you will be billed monthly in an amount equal to the additional amount collectable under the Fee Per Claim Schedule. If the fund amount is greater than the amount needed for claims administration expenses, the excess will be returned after thirty (30) months.

	Est. Number of Claims	Fee Per Claim	Est. Claims Admin Expense
All Other States: Indemnity including Enhanced Medical	25	\$1,099	\$27,475
CA, FL, TX: Indemnity including Enhanced Medical	3	\$1199	\$3,597
Medical Only	45	\$150	\$6,750
Employers Liability			
USL&H			
ESIS Administration Fee			\$2,500
Claim Intake Fees	73	\$18	\$1,314
Total			\$41,696

The Claim Intake Charge applies for each claim reported, whether by 1-800, internet or fax.

Please see the ESIS proposal for complete pricing details.

**Risk Management Information Services Fees (RMIS Fees):**

**Access Service Fees**

**ESIS has included:**

- One full RiskAdvantage Access for MCGRIF
- One full RiskAdvantage Access for Mirant.

**Additional RiskAdvantage Accesses are priced as follows:**

For the term of this Agreement, **service fees** are payable, based upon the number of **users**, and the level of access ESIS has authorized to **Mirant's users**. The **service fees** are payable in full on the effective date of this Agreement and include access to the system and data storage and maintenance.

Access Level	Access Fee per user
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Adjuster Notes and Inquiry	<b>\$2,999</b>
Adjuster Notes, Inquiry and Reports	<b>\$3,499</b>
Telephonic training	<b>\$750 per day</b>

The fee per claim is a one-time charge for the life of the claim. Each claim will be reviewed, adjusted, evaluated and supervised to ultimate conclusion. The above pricing includes the following:

- Adherence to Claims Best Practices
  - o Immediate completion and filing of mandated state forms
  - o Automatic notification to the appropriate ESIS claims office
  - o Copy of the first report of injury provided to the reporting location
- Quarterly Claim File Reviews - one at Mirant, two at ESIS and one telephonic.
- The use of Intracorp for all managed care activities. Associated fees will apply.
- The use of Recovery Services International. Associated fees of 20% of the recovery for Subrogation and 10% for Second Injury Fund will be subtracted from amounts recovered. Fees are net of expenses incurred. Recoveries will reduce the amount of net losses.
- \$20,000 settlement consultation
- \$25,000 Reserve consultation

Allocated loss adjustment expenses, including but not limited to index bureau, investigation, legal expenses and medical bill review are not part of the fees set forth. They are billed monthly and charged against the respective file. Accumulated expenses are allocated loss adjustment expense and are charged to the account accordingly.

**ACE USA retains the right to select counsel. We will use either the Preferred Defense Counsel Network or our panel attorneys. The insured may select from the list of our panel attorneys, if so desired.**

#### Claim Type Definitions

##### **Medical Only Claims**

Medical Only Claims are defined as those claims that are simple in nature, clearly work related, automatically close in 3 months from the date the claim is reported and do not have any lost time or subrogation potential involved for which the total accumulated amount of medical payments did not exceed \$2,500. Claims exceeding the 3-month timeframe will be converted to Managed Medical. (The exception to the rule is if medical bills are received after the closing date with treatment dates prior to electronic closing, no conversion is necessary.)

A claim will be converted to an Indemnity claim when any one of the following situations occurs:

- Lost Time exceeding the waiting period



- Permanency exposure
- Medical treatment exceeds \$2500
- Medical treatment is continuing beyond 3 months with no immediate discharge date provided
- The claim requires investigation
- There is a potential for subrogation or second injury fund recovery
- A denial must be issued
- Litigation becomes involved

#### **Indemnity Claims**

Indemnity claims are defined as reserved claims with any one of the following conditions;

- Lost time claims exceeding the waiting period
- A potential for permanency exposure
- Any complex cases which may require unlimited inside or outside investigation
- Contested denials
- Complex recovery such as subrogation and/or second injury fund involvement
- Any litigated claim

All claims are initially reviewed by the ACE Team Leader for specific adjuster instructions and are managed holistically by the designated claim professional. The holistic case management philosophy empowers the claim professional to make certain that the injured worker returns to the job at the earliest possible time, having received all necessary medical care at the most reasonable cost. The process involves the dynamic management of employers, injured workers and families, physicians and medical providers, rehabilitation specialists and attorneys in an orchestrated and integrated fashion. The roles each play in the case management process is managed skillfully at each stage by the claim professional.



**Standard LC** (To be typed on bank letterhead or Letter of credit form)

(Date)

(List Policy Issuing Companies by Full Legal Name)  
1601 Chestnut Street,  
Philadelphia, Pennsylvania 19103-0000

Attention: Collateral Manager

Irrevocable Letter of Credit No.

Beneficiaries:

By order of our client, \_\_\_\_\_, we hereby establish this Irrevocable Letter of Credit No. in your favor for an amount up to but not exceeding the aggregate sum of U.S. Dollars (U.S. \$ \_\_\_\_\_), effective immediately, and expiring at the offices of the bank on unless renewed as hereinafter provided.

The term "Beneficiary" includes any successor by operation of law of the named Beneficiary including, without limitation, any liquidator, rehabilitator, receiver or conservator.

Funds under this Letter of Credit are available to you against your sight draft(s), drawn on us, bearing the clause "Drawn under Credit No. \_\_\_\_\_".

This Letter of Credit will be automatically renewed for a one year period upon the expiration date set forth above and upon each anniversary of such date, unless at least sixty (60) days prior to such expiration date, or prior to any anniversary of such date, we notify both you and your client in writing by registered mail that we elect not to so renew this Letter of Credit.

Upon receipt by you of our notice of election not to renew this Letter of Credit, you may draw hereunder by your sight draft(s) drawn on us and bearing the clause "Drawn under Credit No. \_\_\_\_\_".

This Letter of Credit sets forth in full the terms of our undertaking. Such undertaking shall not in any way be modified, amended or amplified by reference to any document or instrument referred to herein or in which this Letter of Credit is referred to or to which this Letter of Credit relates and any such reference shall not be deemed to incorporate herein by reference any document or instrument.

All bank charges and commissions incurred in this transaction are for the applicant's account.

We hereby agree with the drawers, endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this credit that such drafts will be duly honored upon presentation to the drawee. The obligation of \_\_\_\_\_ (issuing bank) under this Letter of Credit is the individual obligation of \_\_\_\_\_ (issuing bank), and is in no way contingent upon reimbursement with respect thereto.

Except as otherwise expressly stated herein, this credit is subject to and governed by the Laws of the State of New York and the 1993 revision of the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce (Publication 500) and, in the event of any conflict, the Laws of the State of New York will control. If this credit expires during an interruption of business as described in Article 17 of said I.C.C. publication, we agree to effect payment if this Credit is drawn against within 30 days after the resumption of business.

Very truly yours,

Authorized Signature



**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 PURSUANT TO 11 U.S.C. §§ 362, 363 AND 364(d)  
FOR ORDER (I) AUTHORIZING MIRANT SERVICES, LLC TO (a) ENTER  
INTO A WORKERS' COMPENSATION INSURANCE POLICY AND RELATED  
INSURANCE PROGRAM AGREEMENT WITH ACE AMERICAN INSURANCE  
COMPANY, AND (b) (i) PROVIDE A LETTER OF CREDIT TO ACE AND (ii)  
ESTABLISH A PAID LOSS DEPOSIT FUND IN CONNECTION THEREWITH  
AND (II) GRANTING RELATED RELIEF**

Upon the Motion, dated February 6, 2004, of Mirant Corporation (“Mirant”) and its affiliated debtors, as debtors and debtors-in-possession (collectively, the “Debtors”),<sup>1</sup> pursuant to 11 U.S.C. §§ 362, 363, and 364(d) for entry of an order (I) authorizing Mirant Services, LLC<sup>2</sup> to (a) enter into a new workers’ compensation insurance policy and the related insurance program agreement with ACE American Insurance Company (“ACE”) and (b) (i) to provide a letter of credit and other collateral in connection therewith, and (II) granting related relief; and it appearing that due and proper notice of the Motion and the hearing thereon having been provided; and the Court having held a hearing to consider the Motion, the relief requested therein, and any responses thereto; and the Court having rendered its decisions on the record at the hearing; and after due deliberation and sufficient cause appearing therefor, it is hereby

<sup>1</sup> Capitalized terms not otherwise defined herein shall bear the same meanings ascribed to them in the Motion.

<sup>2</sup> All of the Debtors’ employees are employed by Mirant Services, LLC.

**ORDERED** that the Motion is granted upon the terms and conditions specified herein; and it is further

**ORDERED** that the Debtors are authorized to enter into the ACE Policy and Program Agreement *nunc pro tunc* to February 1, 2004; and it is further

**ORDERED** that the Debtors are authorized to perform their obligations under the ACE Policy, including without limitation, (a) to secure the Debtors' obligations under the ACE Policy, posting a letter of credit in favor of ACE in the amount of \$1.2 million under the Debtors' Debtor in Possession Credit Agreement with General Electric Capital Corp., as Agent and Lender, dated November 5, 2003; (b) establishing the Paid Loss Deposit Fund upon which ACE shall have a first priority lien and security interest, *nunc pro tunc* to February 1, 2004; and (c) to deliver additional letters of credit to ACE or otherwise deposit additional funds in the Paid Loss Deposit Fund; and it is further

**ORDERED** that (a) ACE is hereby granted a valid and perfected, senior lien, with priority over any other liens, pursuant to Section 364(d) of the Bankruptcy Code, upon the Paid Loss Deposit Fund and (b) ACE may (but shall not be required to) take any actions as may be necessary or desirable, from time to time, to perfect such security interests and liens, and it is further

**ORDERED** that ACE may (a) use and apply the (i) Paid Loss Deposit Fund and (ii) Letter of Credit, and (b) otherwise cancel the ACE Policy, each pursuant to the terms of the ACE Policy without further order of the Court and, ACE is hereby granted relief from the automatic stay imposed by section 362 of the Bankruptcy Code provided, however, that nothing contained herein shall be construed to impair the Debtors' rights under the ACE Policy,

including but not limited to the right to assert that ACE may not cancel the ACE Policy pursuant to its terms; and it is further

**ORDERED** that the Court shall retain jurisdiction with respect to any matters, claims, rights or disputes arising from or related to the implementation of this Order.

Dated: Fort Worth, Texas  
February \_\_, 2004.

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HONORABLE D. MICHAEL LYNN  
UNITED STATES BANKRUPTCY JUDGE