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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
Debtors.	)	Jointly Administered
	)	
	)	

**DEBTORS' MOTION PURSUANT TO 11 U.S.C. § 365(A) TO ASSUME TAX  
 ABATEMENT CONTRACT WITH THE CITY OF ZEELAND**

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

Mirant Corporation ("Mirant") and its above-captioned affiliated debtors (collectively, the "Debtors"), as debtors-in-possession, hereby file this Motion to Assume a tax abatement contract, commonly referred to as an Act 198 Contract dated May 15, 2000, as amended (the "Tax Abatement Contract"), a copy of the form of which is attached hereto as Exhibit A between Mirant Zeeland, LLC (formerly known as SEI Michigan, LLC, "Mirant Zeeland") and the City of Zeeland, Michigan ("Zeeland"). In support of the foregoing, the Debtors respectfully state as follows:

## PROCEDURAL BACKGROUND

1.     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 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. On August 18, 2003, Mirant EcoElectrica Investments I, Ltd. and Puerto Rico Power Investments, Ltd. commenced chapter 11 cases under the Bankruptcy Code (collectively, the "New Debtors"). 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. (collectively, the "Wrightsville Debtors"). The Debtors continue to manage and operate their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

2.     The Cases are Jointly Administered. On July 15, 2003, this Court granted the Debtors' motion for an order requesting that the Debtors' bankruptcy estates be jointly administered. A motion for joint administration of the cases of the New Debtors with the Debtors' cases was filed with this Court on August 20, 2003 and an order approving same was entered on September 8, 2003. This Court also entered an order on September 8, 2003 which provides that certain orders entered in the chapter 11 cases of Mirant Corporation, et al. are applicable to the New Debtors' cases and the New Debtors. On October 6, 2003, the Debtors filed a motion requesting the joint administration of the cases of the Wrightsville Debtors with those of the Initial Debtors. Also on October 6, 2003, the Debtors filed a motion for the entry of an order directing that certain orders entered in the cases of the Initial Debtors be made applicable to the Wrightsville Debtors.

3. The Unsecured Creditors' Committees. On July 25, 2003, the Office of the United States Trustee for the Northern District of Texas announced the formation of two official unsecured creditors' committees; one for Mirant Corporation and the other for Mirant Americas Generation, LLC. The appointment lists of members of both official unsecured creditors' committees were filed in their respective chapter 11 cases on July 25, 2003.

4. Mirant Corporation Equity Committee. On September 18, 2003, the Office of the United States Trustee for the Northern District of Texas announced the formation of the official committee of equity security holders for Debtor Mirant (the "Equity Committee"). The appointment list of the members of the Equity Committee was filed in Debtor Mirant's Chapter 11 case on September 18, 2003.

### **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 which are based at Mirant's corporate headquarters in Atlanta and most of which 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. Facts Specifically Relevant to the Motion.**

7. Mirant Zeeland operates a natural gas powered electric generating plant (the "Plant") in Zeeland, Michigan consisting of two (2) simple cycle gas turbines each rated at 150 MW output, and a 2x1 combined cycle generating unit that is rated at a total output of 500 MW. Mirant Zeeland provides electricity for sale to various wholesale purchasers. Mirant Zeeland generated revenues for 2002 of \$168,381,401.

8. Mirant Zeeland is party to the Tax Abatement Contract which provides substantial tax benefits and savings to Mirant Zeeland. Specifically, the Tax Abatement Contract abates certain taxes that otherwise would be payable by Mirant Zeeland to Zeeland. For example, Mirant Zeeland currently owes to Zeeland (a) \$4,184,820.37 in prepetition taxes (plus \$177,854.95 in accrued interest with respect thereto), and (b) \$25,253.01 for prepetition utilities. The taxes were payable by August 15, 2003. But for the tax abatement attributes of the Tax Abatement Contract, Mirant Zeeland would owe approximately double that amount for such taxes. Thus, Mirant Zeeland derives obvious and substantial tax savings and benefits under the Tax Abatement Contract.

9. In its negotiations with Zeeland, Mirant Zeeland obtained a significant concession. Specifically, section 6.E of the original Tax Abatement Contract required that Mirant Zeeland maintain certain employment levels in connection with Mirant Zeeland's

operations in Zeeland. Zeeland could argue that Mirant Zeeland has failed to meet such employment levels; Mirant Zeeland would dispute any such claim. In any event, Zeeland has agreed to delete section 6.E (and related provisions of section 6.D) from the Tax Abatement Contract and waive any claim relating to any alleged breach of section 6.E (and related provisions of section 6.D) of the Tax Abatement Contract. The Tax Abatement Contract attached hereto as Exhibit A contains the amendments negotiated by the parties.

### **RELIEF REQUESTED**

10. Based upon the foregoing, the Debtors request, pursuant to Bankruptcy Code section 365(a), that this Court enter an order in the form of Exhibit B attached hereto authorizing Mirant Zeeland to assume the Tax Abatement Contract, as amended.

### **APPLICABLE AUTHORITY**

11. Bankruptcy Code section 365(a) 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).

12. 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 (5<sup>th</sup> 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 (3<sup>rd</sup> Cir. 1982), *aff'd sub nom.*, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

13. The Tax Abatement Contract is clearly an executory contract that is subject to assumption under section 365. For example, the Tax Abatement Contract requires Mirant Zeeland to timely pay the abated taxes and pay utility bills within thirty days (Tax

Abatement Contract, section 6.A), and provide certain information to Zeeland as reasonably requested (Tax Abatement Contract, section 6.D). The Tax Abatement Contract also prohibits Zeeland from collecting taxes in excess of the amounts set forth in the Tax Abatement Contract, notwithstanding other applicable law.

14. The total amount to cure the monetary obligations under the Tax Abatement Contract is \$4,387,928.33 which is broken down as follows: (a) \$4,184,820.37 for prepetition taxes (plus \$177,854.95 in accrued interest with respect thereto); and (b) \$25,253.01 for prepetition utilities. In this case, the Debtors have clearly satisfied the business judgment rule to justify granting the Motion. As noted, the Tax Abatement Contract provides significant tax benefits to Mirant Zeeland. Moreover, Zeeland has recently filed a motion for relief from stay to terminate the Tax Abatement Contract.<sup>1</sup> If such agreement is terminated, then Mirant Zeeland will lose the tax benefits of the Tax Abatement Contract going forward, and will be required to pay taxes nearly two times higher than what would be required under the Tax Abatement Contract. Thus, the Tax Abatement Contract is important to the continued operations of the Plant and is an asset of the estate that must be preserved.

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<sup>1</sup> Under Michigan law, the delinquent taxes will cause the tax abatement to be terminated after the Treasurer files a certificate of non-payment of tax and an affidavit upon the certificate holder with the register of deeds where the property is located. If the delinquent taxes are not paid within sixty (60) days thereafter, the exemption certificate (which is essentially the tax abatement) is automatically revoked the next December 31. M.C.L.A. § 207.563(2). Zeeland cannot take the foregoing steps because of the automatic stay of section 362(a).

**CONCLUSION**

For the foregoing reasons, the Debtors request that this Court grant the Motion and enter an order in the form of Exhibit B hereto.

Dated: Fort Worth, Texas  
October 10, 2003

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-and-

By /s/ Michelle C. Campbell

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ATTORNEYS FOR THE DEBTORS AND  
DEBTORS-IN-POSSESSION

**EXHIBIT A**

## CITY OF ZEELAND

### AMENDED ACT 198 CONTRACT

NOW COMES, the City of Zeeland, a Michigan Municipal Corporation, whose address is 21 South Elm Street, Zeeland, Michigan 49464, and Mirant Zeeland, LLC, a Delaware Limited Liability Company, whose address is 1155 Perimeter Center West, Atlanta, Georgia 30338-5416, and state:

#### Recitals

WHEREAS, the City of Zeeland and SEI Michigan, L.L.C. entered into an Act 198 Contract on May 15, 2000;

AND WHEREAS, the successor to SEI Michigan, L.L.C. is Mirant Zeeland, LLC;

AND WHEREAS, Mirant Zeeland, LLC has filed a voluntary Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Northern District of Texas and is willing to assume the said Act 198 Contract dated May 15, 2000, as it is amended herein, in order to receive the benefits from such contract;

AND WHEREAS, Mirant Zeeland, LLC is also willing to assume the obligations of such contract as they are being amended herein;

AND WHEREAS, it is also necessary to amend the terms of the Exemption Certificates which were granted pursuant to the May 15, 2000 Act 198 Contract since the construction of Phase I and Phase II within the City of Zeeland took less than two years for each phase;

AND WHEREAS, the parties have agreed that this Amended Act 198 Contract shall replace the May 15, 2000 Act 198 Contract in its entirety;

AND WHEREAS, the City of Zeeland continues to be willing to permit Mirant Zeeland, LLC to hold Act 198 Exemption Certificates, pursuant to Michigan Public Act 198 of 1974, as amended;

AND WHEREAS, the exemption certificate holder should be changed from SEI Michigan, L.L.C. to Mirant Zeeland, LLC because of the change in its entity name;

AND WHEREAS, this contract is being entered into since state law requires that an applicant and a local unit of government enter into a contract as a condition to the approval and holding of an Exemption Certificate;

AND WHEREAS, the City of Zeeland has established certain terms and conditions in order for Exemption Certificates to be approved and to be held by an applicant;

AND WHEREAS, the Mirant Zeeland, LLC is willing to accept and to be bound by such terms and conditions in order to receive and hold Exemption Certificates which will grant tax relief to it.

NOW, THEREFORE, the City of Zeeland and Mirant Zeeland, LLC agree as follows:

1     Exemption Certificate.     The City of Zeeland hereby approves of the granting and continuation of three Exemption Certificates by the State of Michigan in accordance with its resolutions approving the same for an application received on May 5, 2000. As a result thereof, Exemption Certificates may be held in accordance with the following provisions:

- A. Exemption Certificate No. 2000-154 for Phase I of the application for the amount of \$90,573,161 may continue to be held and to be enforceable. Such Exemption Certificate shall expire on December 30, 2013, unless otherwise reduced pursuant to the terms of this Act 198 Contract;
- B. Exemption Certificate No. 2000-155 for Phase II of the application for the amount of \$216,754,350 may continue to be held and to be enforceable. Such Exemption Certificate shall expire on or before December 30, 2014, unless otherwise reduced pursuant to the terms of this Act 198 Contract; and,
- C. Exemption Certificate No. 2000-156 for Phase III of the application for the amount of \$121,859,777 may continue to be held and to be enforceable. Such Exemption Certificate shall be for a period of up to fourteen years, but for a period of no more than twelve years following the completion of the facility for Phase III, and with such Exemption certificate to go into effect on December 31, 2004 and to expire on or before December 30, 2018, unless otherwise reduced pursuant to the terms of this Act 198 Contract.
- D. The holder and beneficiary of such three Exemption Certificates shall be Mirant Zeeland, LLC.

2. Length of Exemption Certificates. The parties hereby acknowledge that as the result of the completion of Phase I and Phase II, that the total project costs have

resulted in a state equalized value of \$150,000,000 or more, and that therefore, that Mirant Zeeland, LLC is entitled to have Exemption Certificates with terms of more than twelve years and for up to fourteen years, provided that no term is to be for a period of more than twelve years following the completion of a phase.

3. Stipulations to the Adjustment to the Term of an Exemption Certificate and Petition. The parties hereby agree that this Amended Act 198 Contract shall constitute a stipulation for and to the State Tax Commission as to the length of Exemption Certificate No. 2000-154 and of Exemption Certificate No. 2000-155. In addition, the parties agree that they shall stipulate as to the term of Exemption Certificate No. 2000-156 so that this phase does not receive tax abatement for more than twelve years after this phase has been completed. In the event that Mirant Zeeland, LLC fails to enter into a stipulation as to the facts by which an Exemption Certificate's term may be reduced, then the City shall have the right to petition to the State Tax Commission that the term of an Exemption Certificate be decreased for the applicable term reduction amount.

4. Definition. The phrase "completion of the facility" in this contract shall mean that point in time at which a Certificate of Occupancy has been issued for a phase of the application. For purposes of this contract, it is hereby acknowledged that a Certificate of Occupancy shall be granted by the City of Zeeland following the satisfactory completion of all construction and site inspections by the City of Zeeland.

5. State Tax Commission Exemption Certificate Term Adjustment and/or Revocation. The parties hereby acknowledge that the State Tax Commission is authorized to reduce the term of or to revoke an Exemption Certificate pursuant to the

terms of this Act 198 Contract and/or the provisions of Michigan Public Act 198 of 1974, as amended.

6. Terms and Conditions. Mirant Zeeland, LLC hereby agrees that in exchange for receiving such tax benefits as are permitted to holders of an Exemption Certificate that it shall be bound by the following terms and conditions during the time periods the Exemption Certificates are in effect:

- A. That all utility bills to the City of Zeeland are paid within thirty (30) days of billing;
- B. That all property tax bills are paid prior to such dates after which interest would accrue;
- C. That all assessments, fees, and/or charges which may be incurred or levied in the development of the property are paid without protest or challenge;
- D. That Mirant Zeeland, LLC provide information periodically as requested by the City of Zeeland and permit the City of Zeeland and its agents to inspect the property and records of Mirant Zeeland, LLC during the term of the Exemption Certificate so as to verify property values; and,
- E. That Mirant Zeeland, LLC abide by all ordinances and regulations of the City of Zeeland, including but not limited to, not using the public right-of-way for storage or the unloading of vehicles, and complying with all setback requirements, site plan review restrictions, and other Zoning ordinance requirements, subject, however, to such exceptions as may be

granted by the Board of Zoning Appeals or by a public body empowered to grant a legal exception to an ordinance or regulation of the City of Zeeland.

7. Revocation Reservation. The City of Zeeland hereby reserves the right to revoke its approval of the said Act 198 Exemption Certificates upon the filing of any property tax appeal by Mirant Zeeland, LLC with the Michigan Tax Tribunal, with any other court of law, or with any other administrative agency, board, or commission other than the Zeeland Board of Review during the said periods of exemption, or for any periods within the said exemption periods. The fulfillment of the conditions of this agreement is a purpose for which the Certificate of Exemption was approved by the City of Zeeland, in addition to the purposes established by law. Failure to uphold these conditions will be considered to be operating the facility in bad faith in a manner not consistent with the purposes of Act 198 of the Public Acts of Michigan, 1974 as amended, and will be considered to be circumstances within the control of the holder of the Exemption Certificate justifying the revocation of the Exemption Certificate.

8. Superseding Contract. This Amended Act 198 Contract shall supersede the Act 198 Contract of the parties dated May 15, 2000.

9. Attorney Fees to Date. The parties agree that Mirant Zeeland, LLC shall not owe the City of Zeeland reimbursement for any of the City of Zeeland's attorney fees as the result of the violation of the terms of the Act 198 Contract dated May 15, 2000 and for which the violations occurred prior to the date of this agreement. Neither shall the City of Zeeland be reimbursed for any of its attorney fees which it may incur as the result of the filing of the voluntary Chapter 11 Bankruptcy Petition. Such attorney fees shall

only not be owing, however, on the condition that the taxes and the water charges which were billed by the City of Zeeland prior to October 1, 2003, and all interest and penalties thereon, are paid in full and in their entirety by November 30, 2003. It is hereby also acknowledged that the City of Zeeland does not owe Mirant Zeeland, LLC any attorney fees since the City of Zeeland was not in violation of any term or provision of the Act 198 Contract dated May 15, 2000.

10. Effect. This agreement shall be binding upon the City of Zeeland and Mirant Zeeland, LLC, and upon their successors and assigns. This agreement shall be interpreted in accordance with the laws of the state of Michigan. Upon default, the other party shall be liable to the nondefaulting party for the reasonable attorney fees and court costs which may be incurred in enforcing a term or condition of this contract. This agreement represents the entire agreement of the parties, and replaces any prior oral, written, or implied agreement of the parties. This agreement shall not affect the liability or responsibilities of either party in regard to the past presence or future presence of fog on any public roadway or on private property, and such issue is a matter which is not within the subject matter of this agreement. This agreement may only be amended upon the mutual written agreement of the parties.

In witness thereof on the dates hereafter indicated:

Mirant Zeeland, LLC

Dated: October \_\_\_\_, 2003

By: \_\_\_\_\_

Its

City of Zeeland

Dated: October \_\_\_\_, 2003

By: \_\_\_\_\_  
Lester Hoogland  
Its Mayor

Dated: October \_\_\_\_, 2003

By: \_\_\_\_\_  
Nancy Tuls  
Its City Clerk

**EXHIBIT B**



**ORDERED**, that Mirant Zeeland shall assume the Contract, as amended, effective as of the date hereof; it is further

**ORDERED**, that by no later than three (3) business days after entry of this Order, the Debtors shall pay to Zeeland the sum of \$4,387,928.33, which is broken down as follows:

(a) \$4,184,820.37 for prepetition taxes (plus \$177,854.95 in accrued interest with respect thereto); and (b) \$25,253.01 for prepetition utilities, which amounts equal the total amount outstanding under the Tax Abatement Contract, and applicable law, as of the date hereof; it is further

**ORDERED**, that other than payment of the \$4,387,928.30 as required herein, there are no defaults under the Contract that must be cured pursuant to 365(b).

Dated: October \_\_\_\_, 2003

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D. Michael Lynn,  
United States Bankruptcy Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she provided a true and correct copy of the forgoing to Bankruptcy Services, LLC and directed them to effect service upon the addressee set forth below via first class United States mail, on the 10<sup>th</sup> day of October, 2003.

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