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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**

_____ )	Chapter 11 Case
In re )	
MIRANT CORPORATION, <u>et al.</u> , )	Case No. 03-46590(DML)11
)	Jointly Administered
Debtors. )	
)	Hearing Date and Time:
)	June 30, 2004 at 10:30 a.m.
_____ )	

**DEBTORS' MOTION PURSUANT TO BANKRUPTCY CODE SECTION 365 AND  
FEDERAL RULE OF BANKRUPTCY PROCEDURE 9019 APPROVING: (I)  
REJECTION OF CONTRACT BETWEEN MIRANT CORPORATION AND ENERGY  
AND COMMUNICATIONS SOLUTIONS LLC; AND (II) APPROVAL OF  
SETTLEMENT AGREEMENT**

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

Mirant Corporation and its above-captioned affiliated debtors (collectively, the "Debtors"), as debtors and debtors-in-possession, file this motion (the "Motion") pursuant to rule 9019 of the Federal Rules of Bankruptcy Procedure requesting an order allowing Debtor Mirant Corporation ("Mirant Corp.") to: (a) consummate the "Settlement Agreement and Release" (the "Settlement Agreement") with Energy and Communications Solutions LLC ("E&CS"); and (b) reject the "Agreement for Purchase And Sale Of Greenhouse Gas Emissions Reductions

Benefits” between E&CS and Mirant Corp. A copy of the Settlement Agreement is attached hereto as Exhibit A.<sup>1</sup> The Debtors also seek approval to consummate their obligations under the Settlement Agreement.

## **I. JURISDICTION AND VENUE**

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

## **II. PROCEDURAL BACKGROUND**

### **A. The U.S. Bankruptcy Proceedings.**

2. The Cases. On July 14, 2003 and various dates thereafter (collectively, the “Petition Date”), the Debtors filed voluntary chapter 11 petitions. The Debtors continue to 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 (the “UST”) in these administratively consolidated cases.

5. The Examiner. On April 7, 2004, this Court authorized the UST to appoint an examiner in these cases to analyze certain potential causes of action and act as a

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<sup>1</sup> Not all parties were served with a copy of the exhibit attached hereto. Any party interested in obtaining a copy of such exhibits may make a written request therefor of Debtors’ counsel.

referee with respect to certain disputes that arise among the Debtors, the Committees, or other parties in interest. The UST appointed William K. Snyder as the examiner in these cases.

### **III. FACTUAL BACKGROUND**

#### **A. The Contract.**

6. On January 22, 2003, Mirant Corp. and E&CS entered into that certain “Agreement for Purchase And Sale Of Greenhouse Gas Emissions Reductions Benefits” (the “Contract”) pursuant to which Mirant Corp. agreed to purchase certain Tradeable Emissions Reduction Benefits (TERBs) from E&CS.<sup>2</sup> One TERB represents the tradable benefit of the Global Warming Potential of one (1) metric ton of Carbon Dioxide Equivalent emission reduction, as defined by international, national or local laws or regulations, including the Kyoto Protocol. See Contract, ¶ 4.1.3.

7. At the time the Contract was executed, E&CS was in the process of developing projects in Russia and/or the Ukraine that reduce Accepted Greenhouse Gases (the “Projects”).<sup>3</sup> Mirant desired to purchase some of the TERBs associated with such Projects.

8. The Contract specifies that E&CS would designate certain Projects as associated with the Contract, with the intent of using those Projects to produce the TERBs required by the Contract, on or before January 27, 2004. E&CS agreed to deliver a target volume of 400,000 TERBs, but in no event less than 200,000 TERBs. Pursuant to the Contract,

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<sup>2</sup> The Contract contains confidentiality provisions, and for that reason, is not attached to the Motion.

<sup>3</sup> “Accepted Greenhouse Gases” are defined by the Contract as Carbon Dioxide and gases that contain Methane as established by Annex A of the Kyoto Protocol, as amended from time to time.

the TERBs were to be delivered as soon as created and available, but in no event later than April 1, 2008.

9. The Debtors' rationale for entering into the Contract is based on the fact that certain States where the Debtors conduct business have, or are developing, CO2 regulations (e.g, Massachusetts, New York, and California). A federal regulatory program is possible in the future. The TERBS, or "credits", could help offset the Debtors' cost of purchasing CO2 emissions allowances in the future which may be necessary to offset the Debtors' emissions.<sup>4</sup> Moreover, the Debtors viewed the Contract as part of the Debtors' commitment to address climate change as outlined in the Debtors' publicly announced Climate Change Action Plan.<sup>5</sup>

10. The Contract requires the establishment of an "escrow account." See Contract, ¶ 3.12. In January, 2003, Mirant Corp. provided E&CS with \$350,000 (the "Funds"), which E&CS deposited in an account with Riggs Bank (the "Account"). It appears that no formal escrow was established and no independent escrow agent was ever appointed.

11. E&CS had expressed its intent to assert claims in the Bankruptcy Court proceedings against the Debtors for any damages it might incur in connection with any rejection of the Contract including retention of the Funds. On the other hand, Mirant has expressed its belief that the Funds should be returned to Mirant in its entirety as property of the Debtors'

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<sup>4</sup> Mirant could register the voluntary reductions under the U.S. Department of Energy's 1605(b) registry program, demonstrating Mirant's support for the federal government's voluntary approach to addressing climate change. This would allow Mirant to "bank" the reductions, which could be applied to future regulatory requirements to limit our CO2 emissions in the United States.

<sup>5</sup> See, [http://www.mirant.com/commitment/environment/climate\\_position.html](http://www.mirant.com/commitment/environment/climate_position.html) for a more detailed discussion of the foregoing.

estate. Mirant has taken the position that E&CS has not completed sufficient work to entitle E&CS to the entire Funds in the Account, and E&CS has taken the contrary position.

**B. The Proposed Settlement.**

12. Mirant and E&CS have reached a settlement, which is memorialized by the Settlement Agreement attached hereto as Exhibit A. Under the Settlement Agreement, Mirant and E&CS have agreed that E&CS will not oppose rejection of the Contract (authorization of which is requested herein). E&CS, in turn has agreed to turn over the Funds remaining in the Account to Mirant Corp., less \$100,000 (the “Settlement Amount”). The Settlement Amount is in full satisfaction of any claims that E&CS would have against Mirant Corp., the Debtors, or their estates.

**IV. RELIEF REQUESTED.**

13. The Debtors request an order of this Court (a) pursuant to rule 9019(a) of the Federal Rules of Bankruptcy Procedure authorizing Mirant to consummate the transaction evidenced by the Settlement Agreement; and (b) authorizing the rejection of the Contract.

**V. APPLICABLE AUTHORITY.**

**A. This Court Should Approve the Settlement Agreement.**

14. Bankruptcy Rule 9019(a) provides, in part, that “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.” Fed. R. Bankr. P. 9019(a).

15. Bankruptcy Rule 9019(a) empowers the Bankruptcy Court to approve compromises and settlements if they are “fair and equitable and in the best interest of the estate.” *In re Cajun Electric Power Cooperative, Inc.*, 119 F.3d 349, 355 (5th Cir. 1997); *see also, In re Zale Corp.*, 62 F.3d 746, 754 (5th Cir. 1995) (stating that “the ‘fair and equitable’ determination

does not give the bankruptcy court jurisdiction over settlement conditions that do not bear on the court's duties to preserve the estate and protect creditors.”). A decision to accept or reject a compromise or settlement is within the sound discretion of the Court. *See 9 Collier on Bankruptcy* ¶ 9019.02 (15th ed. Rev. 2001). “Compromises are favored in bankruptcy” because they minimize the costs of litigation and further the parties’ interest in expediting administration of a bankruptcy estate. *In re Martin*, 91 F.3d 389, 393 (3d Cir. 1996) (citing *9 Collier on Bankruptcy* ¶ 9019.03[1] (15th ed. Rev. 2001)). The settlement need not result in the best possible outcome for the debtor, but must not “fall beneath the lowest point in the range of reasonableness.” *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 499, 505 (Bankr. S.D.N.Y. 1991). Basic to the process of evaluating proposed settlements, then, is “the need to compare the terms of the compromise with the likely rewards of litigation.” *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 425 (1968).

16. In order to determine whether a settlement is fair and equitable, this Court should consider and evaluate the following factors:

- (a) the probability of success in the litigation, with due consideration for the uncertainty in fact and law;
- (b) the complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and
- (c) all other factors bearing on the wisdom of the compromise.

*See, Cajun Electric* at 356 (citations omitted). Each of these factors will be discussed below:

(i) *Probability of Success in the Litigation.*

17. Prior to the negotiation of the Settlement Agreement, Mirant Corp. argued that the Funds in the Account were property of its bankruptcy estate pursuant to section 541 of

the Bankruptcy Code. As such, the Account was subject to immediate turnover to Mirant Corp. by E&CS pursuant to Section 542 of the Bankruptcy Code. E&CS argued that the funds in the Account constituted their cash collateral. And as such, E&CS argued that all of the Funds in the Account should be retained by E&CS as a secured creditor, to compensate E&CS for work performed to date. Although Mirant believes strongly in its position that the funds in the Account are property of the estate, it is not clear how the Account would be characterized, or to what extent E&CS would be deemed a secured creditor as to the Funds. The lack of clarity and uncertainty with respect to the resolution of this issue indicates that litigation would be unavoidable. Such factors weigh in favor of a consensual compromise.

(ii) Complexity, Likely Duration of the Litigation, and Expense.

18. As discussed above, the characterization of the Account is uncertain, the issue would undoubtedly be required to be litigated by Mirant and E&CS. While the issues to be litigated seem to be discrete, it is unclear that they would be swiftly resolved. Given the dollars at stake and the fact that a fair settlement has been agreed upon by the parties, the expense of any such litigation would be an unnecessary expense and burden on the Debtors. Beyond any monetary expense, litigation would burden Mirant with respect to the time, which would be required of its representatives in attending to it. As such, this factor also weighs in favor of approving the Settlement Agreement.

(iii) Other Factors Weigh in Favor of Approving the Settlement.

19. As mentioned above, the Settlement Amount is one which Mirant has determined to be fair. In consummating the Settlement Agreement, Mirant would not only avoid the monetary expenses and cost in time associated with litigating the matter, but would avoid an outcome which could potentially require that Mirant forfeit the Funds.

20. Secondly, the Settlement Agreement also provides that E&CS will not oppose the rejection of the Purchase Agreement but rather cooperate with and support Mirant in such application. As noted, approving the Settlement Agreement will enable Mirant to avoid the costs of litigation regarding E&C's entitlement to all of the Funds in the Account, and to focus on their core reorganization issues while still maximizing recovery of the Funds.

**B. This Court Should Authorize the Rejection of the Contract.**

21. Section 365(a) of the Bankruptcy Code provides that a debtor-in-possession, "subject to the court's approval, may assume or reject an executory contract of the debtor." 11 U.S.C. § 365(a). An executory contract is defined as one where material performance is due on both sides such that the failure of either party to complete performance would constitute a material breach of the contract excusing performance of the non-breaching party. *See In re Liljeberg Enterprises, Inc.*, 304 F.3d 410, 436 (5th Cir. 2002); *In re Murexco Petroleum, Inc.*, 15 F.3d 60, 62-63 (5th Cir. 1994).

22. The Contract is an executory contract because it requires (i) E&CS to procure the TERBs and (ii) Mirant Corp. to pay for the TERBs. Moreover, E&CS's failure to comply with the Contract would constitute a material breach of the Contract, excusing the performance of Mirant Corp.

23. Therefore, the Contract is undoubtedly an executory contract that may be rejected under section 365 of the Bankruptcy Code. *See, e.g., In re El Paso Refinery, L.P.*, 220 B.R. 37, 39 n.1 (Bankr. W.D. Tex. 1998) (contract requiring debtor to provide jet fuel to government held to be executory); *In re Cajun Power Cooperative, Inc.*, 230 B.R. 693, 702 (Bankr. D. La. 1999) (supply contracts entered into by debtor electric cooperative held executory).

24. A debtor's decision to assume or reject will be approved, provided that it meets the "business judgment" test, pursuant to which rejection of an executory contract is appropriate if such rejection would benefit the estate. *See Richmond Leasing v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985); *In re G.I. Indus., Inc.*, 204 F.3d 1276, 1282 (9th Cir. 2000) ("[A] bankruptcy court applies the business judgment rule to evaluate a trustee's rejection decision..."); *In re Food Barn Stores, Inc.*, 107 F.3d 558, 567 n. 16 (8th Cir. 1997) (debtor's request to assume or reject contract should be approved where not manifestly unreasonable or made in bad faith).

25. The "business judgment" test is satisfied where the assumption or rejection of an executory contract enhances the value of the estate. *See Richmond Leasing*, 762 F.2d at 1309. Upon a finding that a debtor has exercised sound business judgment in determining whether to assume or reject an executory contract, a court should approve the decision pursuant to section 365(a) of the Bankruptcy Code. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984). "The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *Bildisco*, 465 U.S. at 528 (citing H.R.Rep. No. 95-595, p. 220 (1977)).

26. The Debtors' reasonable business judgment is that rejection of the Contract is necessary because applicable law does not require acquisition of the TERBs, but rather, represent a voluntary "environmental stewardship" project. The TERB trading market is a developing market with limited liquidity. Under the circumstances, it is more beneficial to the Debtors to be paid the \$250,000 from the Account and reject the Contract rather than continue with the E&CS Contract and acquire TERBs that may be of little or no use in the near future.

**VI. CONCLUSION**

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

Dated: Fort Worth, Texas  
June 4, 2004

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By           /s/          Ian T. Peck            
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ATTORNEYS FOR THE DEBTORS AND  
DEBTORS-IN-POSSESSION

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 all persons on the Limited Service List (without exhibits) and the addressees set forth below via U.S. mail (with exhibits) on the 4<sup>th</sup> day of June, 2004.

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/s/ Ian T. Peck

# **EXHIBIT “A”**

## SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the "Agreement"), entered into as of May 26, 2004, is by and between Mirant Corporation ("Mirant") and Energy and Communications Solutions LLC ("E&CS"). E&CS and Mirant shall hereinafter sometimes be referred to separately as "Party" or collectively as "Parties."

### RECITALS

WHEREAS, on July 14, 2003 and continuing into the morning of July 15, 2003, Mirant and a number of its affiliates (the "Debtors") filed voluntary petitions in the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court") for relief under chapter 11 of title 11 of the United States Code, Case No. 03-46590 (DML) (the "Proceeding");

WHEREAS, the Debtors have the right, after notice and approval of the Court in the Proceeding, to reject executory contracts under Section 365 of the U.S. Bankruptcy Code;

WHEREAS, E&CS and Mirant are parties to an Agreement for Purchase and Sale of Greenhouse Gas Emissions Reductions Benefits dated January 22, 2003 (the "Purchase Agreement") pursuant to which Mirant agreed to purchase, and E&CS agreed to sell, certain Tradeable Emissions Reduction Benefits associated with projects in Russia and/or the Ukraine;

WHEREAS, pursuant to the Purchase Agreement, Mirant provided E&CS with \$350,000 (the "Funds") which was deposited by E&CS in an account (the "Account") with Riggs Bank, N.A. (the "Bank") and which is presently being held by E&CS;

WHEREAS, Mirant expressed a desire to reject the Purchase Agreement pursuant to section 365 of the Bankruptcy Code and E&CS indicated that it would assert claims in the Proceeding against the Debtors and the Funds for any damages they would incur as a result of the proposed rejection of the Purchase Agreement;

WHEREAS, Mirant has further expressed a desire for E&CS to return the Funds to Mirant;

WHEREAS, the Parties desire to settle any and all claim that any Party would have, or otherwise compromise all disputed or potentially disputed issues, arising from or related to (i) the Purchase Agreement, including performance under the Purchase Agreement, rejection of the Purchase Agreement and assertion of rejection damages arising under the Purchase Agreement and (ii) the Funds (the "Disputed Issues");

WHEREAS, the Parties have agreed to resolve the Disputed Issues, including the rejection of the Purchase Agreement, the amount of rejections damages and the form, timing and payment of such damages; and

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements contained herein, and other good and valuable consideration, E&CS and Mirant, each for itself and its successors and permitted assigns, hereby agree as follows:

1. **Settlement Payment and Prepetition Claim.** In full and final satisfaction of all claims of E&CS arising under or in connection with the Purchase Agreement, including any rejection damages claims that may arise under section 5 hereof, Mirant shall pay E&CS the amount of \$100,000 (the "Settlement Payment"). E&CS and Mirant agree that the payment of the Settlement Payment shall be made and satisfied solely through E&CS's application of \$100,000 of the Funds. Mirant agrees that (i) E&CS is entitled to apply the Settlement Payment as set forth herein and (ii) the Settlement Payment is immediately due and owing on the Effective Date without any notice or grace period. After payment of the Settlement Payment from the Funds, E&CS shall promptly, and in no event later than three (3) days after the Effective Date, return to Mirant the remaining \$250,000 of the Funds and any interest that has accrued thereon to and including the date the Funds are paid to Mirant); provided, however, that Mirant shall reimburse E&CS for any amounts paid by E&CS to the Bank as fees for the maintenance of the Account from the date on which the account was opened to and including the Effective Date (as defined below). Mirant agrees to timely execute any documents necessary to release the Funds. The parties agree that release of the Funds is subject to the Bank releasing the Funds. E&CS is free, as of the Effective Date, to sell the Tradable Emission Reduction Benefits ("TERBs") which are the subject of the Purchase Agreement and Mirant specifically waives any right thereto.

2. **Bankruptcy Court Approval; Effective Date.** The receipt of Bankruptcy Court approval of this Agreement is a condition precedent to the effectiveness of this Agreement. In the event the Parties are unable to obtain such approvals on or before June 30, 2004, this Agreement will be deemed null and void without prejudice to the rights of either Party. The Parties agree to work cooperatively and in good faith to obtain Bankruptcy Court approval promptly. The Effective Date of this Agreement will be the date that the Bankruptcy Court issues an order approving this Agreement, which Order shall specifically provide for the rejection of the Purchase Agreement, provided such order is issued no later than June 30, 2004.

3. **Release of Claims by Mirant.** Upon the Effective Date of this Agreement, Mirant, on behalf of itself and its owners, successors, heirs, assigns, executors, administrators, predecessors, legal representatives, divisions, associates, representatives, principals, agents, servants, employees, shareholders, officers and directors, does hereby release, acquit and forever discharge E&CS, its owners, successors, heirs, assigns, executors, administrators, predecessors, legal representatives, parents, affiliates, subsidiaries, divisions, associates, representatives, principals, agents, servants, employees, shareholders, officers and directors, of and from any and all, joint and/or several claims, charges, demands, damages, actions, causes of action, suits in equity, expenses, executions, judgments, levies, liabilities, losses, attorneys' fees, liquidated or unliquidated, fixed, contingent, direct or indirect or indirect, whatsoever kind or nature, whether heretofore or hereafter accruing, or whether now known or not known to the Parties, relating to or arising out of the Disputed Issues (the "Released Claims").

4. **Release of Claims by E&CS.** Upon the Effective Date of this Agreement, E&CS, on behalf of itself and its owners, successors, heirs, assigns, executors, administrators, predecessors, legal representatives, divisions, associates, representatives, principals, agents, servants, employees, shareholders, officers and directors, does hereby release, acquit and forever discharge Mirant, its owners, successors, heirs, assigns, executors, administrators, predecessors, legal representatives, parents, affiliates, subsidiaries, divisions, associates, representatives,

principals, agents, servants, employees, shareholders, officers and directors, of and from any and all, joint and/or several claims, charges, demands, damages, actions, causes of action, suits in equity, expenses, executions, judgments, levies, liabilities, losses, attorneys' fees, liquidated or unliquidated, fixed, contingent, direct or indirect, whatsoever kind or nature, whether heretofore or hereafter accruing, or whether now known or not known to the Parties, relating to or arising out of the Disputed Issues.

5. **Rejection of the Purchase Agreement.** E&CS hereby agrees not to oppose the rejection of the Purchase Agreement. Mirant shall promptly move for the approval of this Agreement by the Bankruptcy Court, and E&CS shall cooperate with and support Mirant in such application.

6. **Surviving Claims.** Except as expressly provided herein, nothing in this Agreement compromises, discharges or otherwise affects any other matters between the Debtors and E&CS.

7. **Settlement Not an Admission.** Nothing contained in this Agreement shall be deemed an admission of any kind, whether of guilt, liability, or fact, by or against the Parties or their directors, officers, shareholders, agents, employees, representatives, principals, successors, predecessors, assigns and heirs. Whether or not this Agreement is consummated or approved, neither this Agreement nor evidence regarding any of the events or negotiations leading up to it shall be admissible in any action or proceeding for any purpose other than enforcement of this Agreement.

8. **Representations, Warranties and Covenants.** Each Party represents and warrants to each other and agrees with each other as follows:

- a. Each Party to this Agreement has received independent legal advice from attorneys of its own choosing with respect to the advisability of executing this Agreement, and prior to the execution of this Agreement by each Party, that Party's attorneys reviewed this Agreement at length, and made all desired changes.
- b. Except as expressly stated in this Agreement, no Party to this Agreement has made any statement or representation to any other Party to this Agreement regarding any fact relied upon by such other Party in entering into this Agreement, and each Party specifically does not rely upon any statement, representation or promise of the other Party in executing this Agreement, except as expressly stated in this Agreement.
- c. There are no other agreements or understandings related to the Disputed Issues between the Parties except as stated in this Agreement.
- d. Each Party to this Agreement, together with its attorneys, has made such investigation of the facts pertaining to this Agreement, and of all the matters pertaining thereto, as it deems necessary.

- e. The terms of this Agreement are contractual, not a mere recital, and this Agreement is the result of negotiations between the Parties to this Agreement, each of which has participated in the drafting of this Agreement through its respective attorneys. No Party shall be deemed the drafter of this Agreement, and this Agreement shall not be construed against any Party as the drafter.
- f. This Agreement has been carefully read by, the contents hereof are known and understood by, and it is signed freely by each person executing this Agreement.
- g. Each Party to this Agreement has the power and authority to enter into and perform this Agreement, and the execution and performance of this Agreement has been duly authorized by all requisite corporate action.
- h. Each Party to this Agreement agrees that such Party will not take any action that would interfere with the performance of this Agreement by any other Party to this Agreement or that would adversely affect any of the rights provided for in this Agreement.
- i. In entering into this Agreement, each Party recognizes that no facts or representations are ever absolutely certain; accordingly, except as specifically provided in this Agreement, each Party to this Agreement assumes the risk of any mistake, and if any Party should subsequently discover that any fact it relied upon in entering into this Agreement was untrue, or that any understanding of the facts or of the law was incorrect, such Party shall not be entitled to set aside this Agreement by reason thereof. This Agreement is intended to be final and binding between and among the Parties, regardless of any mistake of fact, mistake of law, or any other circumstances whatsoever. Each Party relies on the said finality of this Agreement as a material factor inducing that Party's execution of this Agreement.
- j. No Party to this Agreement has heretofore assigned or transferred or purported to assign or transfer to any person, firm, or corporation whatsoever any actions, causes of action, debts, dues, liabilities, controversies, claims, or demands herein released. Each Party hereto agrees to indemnify and hold harmless the other Party hereto against any actions, causes of action, debts, dues, liabilities, controversies, claims, counterclaims, crossclaims, third-party claims or demands based on, arising out of, or in connection with any such transfer or assignment or purported transfer or assignment, including all attorneys' fees and costs incurred in connection therewith.

9. **Integration.** This Agreement constitutes a single, integrated, written contract expressing the entire agreement of the Parties to this Agreement relative to the subject matter hereof. No covenants, agreements, representations, or warranties of any kind whatsoever have been made by any Party to this Agreement, except as specifically set forth in this Agreement. All prior discussions and negotiations have been and are merged and integrated into, and are superseded by, this Agreement. This Agreement may not be supplemented or changed orally.

10. **Choice of Law.** THIS AGREEMENT SHALL BE GOVERNED BY, CONSTRUED AND ENFORCED IN ACCORDANCE WITH, AND SUBJECT TO, THE LAWS OF THE STATE OF GEORGIA, EXCLUDING ANY LAWS WHICH RESULT IN THE APPLICATION OF THE LAWS OF ANOTHER JURISDICTION.

11. **Severability.** It is understood and agreed that if any one or more of the provision contained within this Agreement shall later be found to be void, voidable, ineffective or unenforceable, that finding shall have no affect on the remainder of the Parties' agreements undertakings or considerations which shall remain in full force and effect.

12. **Written Amendment.** No modification of the terms and provisions of this Agreement shall be made except by the execution by all Parties of a written agreement.

13. **Execution in Counterparts.** This Agreement may be executed in as many counterparts as deemed necessary and when so executed shall have the same effect as if the Parties had executed the same instrument.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed in duplicate originals by their duly authorized officers as of the date first written above.

ENERGY AND COMMUNICATIONS SOLUTIONS LLC

By: Robert C. McFarlane  
Name: Robert C. McFarlane  
Title: Chairman, CEO

MIRANT CORPORATION

By: VN Booker  
Name: Vance N. Booker  
Title: Senior Vice President, Administration

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

	)		Chapter 11 Case
	)		
In re	)		
MIRANT CORPORATION, <u>et al.</u> ,	)		Case No. 03-46590(DML)11
	)		Jointly Administered
	)		
Debtors.	)		Hearing Date and Time:
	)		June 30, 2004; 10:30 a.m.
	)		

**ORDER GRANTING DEBTORS' MOTION PURSUANT TO BANKRUPTCY  
CODE SECTION 365 AND FEDERAL RULE OF BANKRUPTCY PROCEDURE  
9019 APPROVING: (I) REJECTION OF CONTRACT BETWEEN MIRANT  
CORPORATION AND ENERGY AND COMMUNICATIONS SOLUTIONS LLC;  
AND (II) APPROVAL OF SETTLEMENT AGREEMENT**

Upon the Motion dated June 4, 2004 filed by Mirant Corporation and its above-captioned affiliated debtors (collectively, the "Debtors"), as debtors and debtors-in-possession, pursuant to Bankruptcy Code section 365 and rule 9019 of the Federal Rules of Bankruptcy Procedure requesting an order allowing (i) Debtor Mirant Corporation ("Mirant Corp.") to reject the "Agreement for Purchase And Sale Of Greenhouse Gas Emissions Reductions Benefit" between Mirant Corp. and Energy and Communications Solutions LLC ("E&CS") (the "Contract") and (ii) Mirant Corp. to enter into a "Settlement Agreement and Release" (the "Settlement Agreement") with E&CS with respect to the Contract;<sup>1</sup> and this Court finding that the Settlement Agreement is fair and equitable and in the best interests of creditors and satisfies the standard for approval of settlement agreements set forth in *In re Cajun Electric Power Cooperative, Inc.*, 119 F.3d 349, 355 (5th Cir. 1997); *see also, In re Zale Corp.*, 62 F.3d 746, 754 (5th Cir. 1995) for the reasons stated in the Motion; and it appearing that the Court has jurisdiction over this matter; and

<sup>1</sup> Unless otherwise defined herein, capitalized terms have the same meaning set forth in the Motion.

it appearing that due notice of the Motion has been provided, and that no other or further notice need be provided; upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor,

It is hereby:

**ORDERED**, that the motion is GRANTED; it is further

**ORDERED**, that rejection of the Contract is approved; it is further

**ORDERED**, that the Settlement Agreement is approved (including the releases set forth therein), and Mirant Corp. is authorized to perform thereunder; it is further

**ORDERED**, that E&CS shall pay \$250,000.00 (plus accrued interest) to Mirant Corp. within three Business Days after the date hereof, as required in the Settlement Agreement.

Dated: June \_\_\_\_, 2004

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D. Michael Lynn,  
United States Bankruptcy Judge