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 U.S. BANKRUPTCY COURT  
 ALEXANDRIA DIVISION

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)
Debtors.	)	Jointly Administered
	)	Hearing Date and Time: October 1, 2003 at 10:30 a.m.

**MOTION FOR FINAL RELIEF PURSUANT TO SECTION 364 OF THE  
 BANKRUPTCY CODE (A) AUTHORIZING THE DEBTORS TO OBTAIN SECURED  
 DEBTOR-IN-POSSESSION FINANCING; (B) APPROVING AGREEMENTS  
 RELATING TO THE FOREGOING; AND (C) GRANTING RELATED RELIEF**

**TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:**

Mirant Corporation (“Mirant”) and its affiliated debtors (collectively, the “Debtors”), as debtors-in-possession, file this motion (the “Motion”) for entry of an order pursuant to section 364 of title 11 of the United States Code, 11 U.S.C. sections 101-1330, as amended (the “Bankruptcy Code”), (a) authorizing the Debtors to obtain secured debtor-in-possession financing, (b) approving the agreements related to the foregoing, and (c) granting related relief.

In support of this Motion, the Debtors respectfully state as follows:

## **PRELIMINARY STATEMENT**

1. For the duration of these chapter 11 cases, the Debtors intend to fund their ongoing operations principally from cash on hand, cash generated from operations and the proceeds of a proposed \$500 million debtor-in-possession financing facility (the “DIP Facility”) provided by General Electric Capital Corporation (“GE Capital”). Although collectively the Debtors possess approximately \$855 million of unencumbered cash (with non-debtor affiliates possessing approximately \$250 million of additional unencumbered cash), the Debtors have determined that, given the inherent volatility of the commodities industry in which the Debtors’ core businesses operate, the certainty of additional liquidity that can only be provided by a debtor-in-possession financing facility is necessary to the preservation and maximization of the Debtors’ estates as a whole. Importantly, counterparties to a chapter 11 debtor have come to expect that a debtor-in-possession financing facility will be available to fund a debtor’s ongoing obligations in the chapter 11 environment. Absent approval of the DIP Facility, the Debtors’ counterparties may hesitate or otherwise refuse to engage in transactions prospectively with the Debtors. Furthermore, the efficient operation of the Debtors’ businesses requires access to a substantial letter of credit facility and the proposed DIP Facility provides the Debtors with the necessary access to letter of credit capacity.

## **JURISDICTION AND VENUE**

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

## PROCEDURAL BACKGROUND

3. 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 a voluntary petition in this Court for relief under chapter 11 of the Bankruptcy Code.<sup>1</sup> On August 18, 2003, Mirant EcoElectrica Investments I, Ltd. and Puerto Rico Power Investments, Ltd. commenced chapter 11 cases under the Bankruptcy Code. The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

4. 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 chapter 11 cases of Mirant EcoElectrica Investments I, Ltd. and Puerto Rico Power Investments, Ltd. (the “New Debtors”) is currently pending.

5. 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 (the “Committees”) were filed in their respective chapter 11 cases on July 25, 2003.

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<sup>1</sup> Concurrently, Mirant caused two of its Canadian subsidiaries, Mirant Canada Energy Marketing, Ltd and Mirant Canada Energy Marketing Investments, Inc. (collectively, the “Canadian Debtors”) to commence plenary insolvency proceedings in the Court of Queen’s Bench of Alberta Judicial District of Calgary (the “Canadian Court”) pursuant to the *Companies’ Creditors Arrangement Act*. The Canadian Debtors are subject to the sole and exclusive jurisdiction of the Canadian Court.

## **FACTUAL BACKGROUND**

### **A. The Debtors' Business Operations**

6. Mirant and its direct and indirect subsidiaries, including the New Debtors, 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.

7. Mirant employs in excess of 7,000 employees worldwide, of which approximately 1,100 employees are based at Mirant's corporate headquarters in Atlanta and approximately 5,900 employees 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 Relevant to the Motion.**

#### *The Debtors' Prepetition Restructuring Efforts*

8. As more fully detailed in the affidavit of John W. Ragan, dated July 14, 2003, filed in support of the Debtors' first day motions, certain of the Debtors are obligated under various prepetition short and long term debt capital markets instruments and bank debt

facilities in the aggregate principal amount of approximately \$8.9 billion (the “Prepetition Financings”). With the limited exception of approximately \$140 million of project finance debt owed by West Georgia Generating Company, LLC, a debtor herein, which is purportedly secured by the assets of the West Georgia generating facility, the obligations owed by the Debtors in respect of the Prepetition Financings are unsecured<sup>2</sup>.

9. Prior to the Petition Date, due to, among other reasons, a general softness in the energy sector, the Debtors began to face a liquidity contraction that jeopardized the Debtors’ ability to meet their near term obligations under the Prepetition Financing. Accordingly, commencing in July 2002 and with the assistance of their professionals, the Debtors began developing and implementing a strategic plan to manage the downturn in the wholesale power industry, improve liquidity and strengthen long-term viability. This strategic plan was designed to restructure the Debtors’ borrowings and enable their respective businesses to successfully compete in growing energy markets over the long term and involved, among other things, the deferment of certain of its debt which would otherwise mature prior to 2006 until 2008 (the “Prepetition Restructuring Plan”).

10. In February 2003, the Debtors began discussions with certain of its key institutional creditors with a view toward restructuring their short and medium term debt. In furtherance of the restructuring effort, on June 2, 2003, Mirant commenced an exchange offer (the “Mirant Exchange Offer”) relating to approximately \$950 million in aggregate principal amount of bond debt pursuant to an Offering Circular and Disclosure Statement and Solicitation

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<sup>2</sup> Nothing herein shall be construed as an admission by the Debtors as to the amount, validity, enforceability or characterization of any claims against the Debtors arising under the Prepetition Financings and all rights relating thereto are expressly reserved.

of Acceptances of a Prepackaged Plan of Reorganization, dated June 2, 2003 (as amended), which also set out details of a proposed prepackaged plan of reorganization (the “Prepackaged Plan”) and sought the acceptance or rejection thereof by the requisite creditors. Concurrently therewith, Mirant Americas Generation, LLC (“MAG”), a debtor herein, made a separate exchange offer (together with the Mirant Exchange Offer, the “Exchange Offers”) in respect of approximately \$500 million in aggregate principal amount of its bond debt. In addition to the bond debt proposed to be restructured pursuant to the Exchange Offers and the Prepackaged Plan, the Prepetition Restructuring Plan also contemplated the restructuring of a substantial portion of the Debtors’ outstanding bank debt.

11. The Debtors’ goal was to implement the Prepetition Restructuring Plan through an out-of-court restructuring, or alternatively, an in-court restructuring, in each case, subject to receiving the necessary consents or minimum levels of acceptances (as the case may be) from the relevant creditors. Importantly, the Debtors’ Prepackaged Plan strategy contemplated only a limited number of the Debtors seeking chapter 11 protection (a “Limited Filing”). Nevertheless, the Debtors recognized that they might not receive the necessary consents or minimum levels of acceptances within the requisite time periods, or even if received, pursuit of the Prepackaged Plan without the support of certain key institutional creditors might not be prudent. Accordingly, the Debtors also recognized that to ensure that the going concern would be adequately protected and given the complexity of their businesses, it might be necessary to implement a traditional chapter 11 restructuring which would require substantially all of the Debtors’ domestic entities seeking chapter 11 protection (a “Full Filing”) and require the Debtors in all likelihood to remain in chapter 11 for an extended duration.

12. The Exchange Offers, the time period for solicitation of votes in respect of the Prepackaged Plan and the out-of-court restructuring expired at midnight on July 14, 2003. As the Debtors did not obtain the support of certain key creditors with respect to the Prepetition Restructuring Plan, after due consideration, the Debtors determined that the most prudent course of action was to commence these cases.

*Selection of Debtor-In-Possession Financing Lender*

13. During the pendency of the Exchange Offers, the Debtors, with the assistance of their professionals, sought proposals from certain financial institutions in respect of debtor-in-possession financing, both in connection with implementation of the Prepackaged Plan and the commencement of traditional chapter 11 filings. The Debtors actively negotiated and received proposals and ultimately commitments from two debtor-in-possession lending sources (the “Prospective DIP Lenders”), including GE Capital.

14. The uncertainty of whether the Debtors would be able to implement the out-of-court restructuring or otherwise be required to commence a Limited Filing or a Full Filing complicated the Debtors’ ability to negotiate definitive terms of the respective commitments from the Prospective DIP Lenders. In addition to requiring sufficient flexibility to enable the Debtors to pursue either a Limited Filing or a Full Filing, the Debtors recognized that even if they initially pursued a Limited Filing, there could be no assurances that a Limited Filing would ultimately conclude with the successful confirmation of the Prepackaged Plan. Accordingly, prudence necessitated that flexibility be maintained throughout the chapter 11 process. The proposal sought and obtained by the Debtors from GE Capital contemplated a Limited Filing, a Full Filing and a Limited Filing that would become a Full Filing in the event that the Debtors initially chose to pursue the Prepackaged Plan, but later determined to seek a traditional chapter

11 restructuring. The proposal obtained from the other Prospective DIP Lender contemplated only a Full Filing as such lender was not willing to fund a Prepackaged Plan strategy. Given the more flexible approach of GE Capital, the Debtors focused their efforts on GE Capital's proposal for debtor-in-possession financing.

15. Receipt of a formal commitment from GE Capital was delayed by unforeseen administrative matters which arose shortly before the Petition Date. To ensure that the Debtors would enter chapter 11 with a binding commitment from at least one debtor-in-possession financing source, the Debtors reinitiated discussions with the other Prospective DIP Lender. When it became evident that the Debtors would not obtain the requisite creditor support to implement the out-of-court restructuring, the Debtors obtained a binding commitment from the other Prospective DIP Lender immediately prior to the Petition Date. The Debtors subsequently received a formal binding commitment from GE Capital shortly after the commencement of these cases.<sup>3</sup>

16. During the initial weeks of these cases, the Debtors concentrated on stabilizing their operations including dealing with the necessary "first day motions", taking action to minimize disruption caused by the chapter 11 cases on their commodities trading businesses, dealing with concerns of vendors, employees and other creditors and generally familiarizing themselves with their new duties and obligations in the chapter 11 environment. During this period, the Debtors filed a substantial number of motions and pleadings with this Court, some of which were initiated by the Debtors themselves in the pursuit of the above

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<sup>3</sup> The Debtors paid the requisite commitment fee prior to the commencement of these chapter 11 cases, contingent upon receiving the GE Capital formal binding commitment.

objectives, and others in response to pleadings filed by other parties in interest. The Debtors were also involved in the appointment of the Committees and dealt with other administrative matters.

17. Given this intense activity and the Debtors' strong liquidity position during this initial period in the form of unencumbered cash on hand, the Debtors did not require immediate access to or approval of a debtor-in-possession financing facility. Accordingly, the Debtors determined to approach further negotiations with the Prospective DIP Lenders with a view to ensuring that the Debtors received the best terms available in light of the circumstances. Indeed, given increased time to negotiate, a considerably improved liquidity position and, therefore, an enhanced bargaining position, the Debtors were better placed to consider and compare the debtor-in-possession financing terms being provided by each of the Prospective DIP Lenders. After a series of meetings and negotiations with each of the Prospective DIP Lenders, due consideration of the respective terms and the initial drafts of the credit agreements provided by each of the Prospective DIP Lenders, the Debtors determined to proceed with GE Capital.

18. GE Capital's commitment letter (the "Commitment Letter") provided that if the definitive transaction documents were not entered into, for any reason, on or before 5:00 p.m. (New York City time) on the date falling 30 days after the date of the Commitment Letter (i.e., August 13, 2002) (the "Expiration Date"), their commitment would expire. By a letter dated August 13, 2003 between Mirant and GE Capital, and subsequently, by verbal agreement, GE Capital agreed to extend the Expiration Date to 5:00 p.m. (New York City time) on August 22, 2003. Thereafter, by a letter dated August 22, 2003 between Mirant and GE Capital, GE Capital agreed to further extend the Expiration Date to 5:00 p.m. (New York City time) on August 29, 2003, subject to satisfaction of certain conditions. One such condition was the

requirement that the Debtors seek and receive approval from this Court to pay certain costs and expenses incurred in excess of an initial expense deposit paid to GE Capital. On August 27, 2003, this Court entered an order allowing the payment of such additional costs and expenses subject to the Court's ability to determine the reasonableness of those expenses. Thereafter, on August 29, 2003, GE Capital agreed to further extend the Expiration Date to September 5, 2003 provided that, if by September 5, 2003, the Debtors shall have filed a motion with this Court seeking authorization of the DIP Facility, the Expiration Date shall be further extended to October 1, 2003. A condition to the signing of the DIP Facility Agreement, among other things, is the entry by this Court of a final order (the "Final Order") approving the terms of the DIP Facility. Furthermore, unless the Final Order is entered on or before October 1, 2003, in the absence of a further extension of GE Capital's commitment, the commitment will expire.

19. Following further extensive negotiations with GE Capital, on September 5, 2003, GE Capital and the Debtors reached mutually acceptable documentation for the DIP Facility, including a credit agreement (the "DIP Facility Agreement") and a draft proposed order approving the terms of the DIP Facility and all related transactions. Thereafter, the Debtors filed this Motion.

#### **RELIEF REQUESTED**

20. By this Motion, the Debtors respectfully request an order pursuant to section 364 of the Bankruptcy Code (a) granting authority for the Debtors to obtain secured

debtor-in-possession financing; (b) approving the DIP Facility Agreement and all other documents related thereto; and (c) granting related relief.<sup>4</sup>

### **THE NEED FOR FINANCING**

21. As at the date of this Motion, the Debtors possess approximately \$855 million of unencumbered cash (with non-debtor affiliates possessing approximately \$250 million of additional unencumbered cash). Notwithstanding these cash resources, the working capital and letter of credit facility to be provided pursuant to the DIP Facility Agreement is critical to the Debtors' continued existence as a going concern. Based on past and projected operations, the Debtors require the ability to access a letter of credit facility to support their trading operations and vendor contracts, especially at this critical juncture when the Debtors must continue to service and re-establish the confidence of their trading counterparties, vendors and employees and assure them that the Debtors' businesses will remain viable despite these chapter 11 filings. Consequently, postpetition financing in the form of the DIP Facility Agreement will be necessary to provide such collateral support. Furthermore, the availability of a postpetition credit line gives the Debtors' trading counterparties, vendors and employees confidence that the Debtors will be able to continue operating as a going concern.

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<sup>4</sup> The proposed final order also contains customary waivers of the automatic stay pursuant to Section 362 of the Bankruptcy Code to permit GE Capital to exercise certain rights and remedies under the DIP Facility, subject to certain notice provisions.

## SUMMARY OF THE DIP FACILITY

22. As set forth in more detail in the DIP Facility Agreement,<sup>5</sup> a copy of which is annexed hereto substantially in the form of Exhibit A, the DIP Facility contains the following pertinent terms<sup>6</sup>.

<u>BORROWERS:</u>	Each of the Debtors in these chapter 11 cases (other than the New Debtors).
<u>AGENT:</u>	GE Capital.
<u>LEAD ARRANGER:</u>	GE Capital Markets Group, Inc. (“GECMG”).
<u>LENDERS:</u>	GE Capital and other lenders acceptable to Agent.
<u>DIP FACILITY:</u>	A non-amortizing revolving credit facility in an aggregate principal amount of up to \$500 million (the “Commitment”) to be available by way of (a) Revolving Credit Advances and (b) the issuance of Letters of Credit up to the amount of the L/C Sublimit (together, the “Revolving Loans”), upon satisfaction of all conditions precedent and up to the Commitment Termination Date.
<u>AVAILABILITY:</u>	The availability of the DIP Facility shall be the lesser of (i) the maximum amount of the Commitment, or (ii) the Borrowing Base, in each case, <i>less</i> the sum of (x) the aggregate amount of the Revolving Credit Advances and (y) the aggregate amount of obligations under Letters of Credit issued on behalf of the Borrowers (such lesser amount being the “Availability”). The Borrowing Base is the aggregate of (a) 100% of the aggregate orderly liquidation value of Eligible Mortgaged Property and (b) 100% of the aggregate Eligible Pledged Value of the Eligible Pledged Entities, in each case, as such liquidation values are determined by criteria set out in the DIP Facility Agreement, <i>less</i> any Reserves (but without duplication).

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<sup>5</sup> Capitalized terms used in this section of the Motion that are not otherwise defined shall have the meanings ascribed to them in the DIP Facility Agreement.

<sup>6</sup> This Motion contains only a summary of the terms of the DIP Facility. Parties in interest are encouraged to review the DIP Facility Agreement in detail.

The Agent has the right to establish, modify or eliminate Reserves against the Eligible Mortgaged Property and Eligible Pledged Entities, in accordance with the terms of the DIP Facility Agreement.

LETTERS OF CREDIT:

Any available portion of the DIP Facility may be used for the issuance of Letters of Credit not to exceed the lesser of: (i) the maximum amount of the Commitment and (ii) the Borrowing Base, in each case, *less* the aggregate outstanding principal balance of the Revolving Loans (such lesser amount being the “L/C Sublimit”).

CLOSING DATE:

The closing date (the “Closing Date”) shall occur upon satisfaction of agreed documentary and other conditions precedent including the entry by the Bankruptcy Court of a final order (the “Final Order”) approving the terms of the DIP Facility.

COMMITMENT

TERMINATION DATE:

The earlier of (i) September [ ] 2005 (the “Stated Maturity Date”), (ii) the termination date of the Lenders’ commitments to make Revolving Credit Advances or to issue Letters of Credit following the exercise by the Lenders of its remedies and/or the acceleration of all outstanding Revolving Loans following the occurrence of an Event of Default, (iii) the date of indefeasible payment in full by the Borrowers of all Revolving Loans, or the return or cash collateralization in full (as applicable) of all Letters of Credit and the permanent reduction of the Commitment to zero dollars (\$0), (iv) the date on which any Liens securing any outstanding obligations or payments to the Agent and Lenders are set aside or avoided or the claims thereunder are disallowed in any manner, and (v) the effective date of a confirmed plan of reorganization (the “Plan”) in the Borrowers’ chapter 11 cases (the “Commitment Termination Date”).

USE OF PROCEEDS:

Proceeds of the Revolving Credit Advances and the issuance of Letters of Credit may be used solely to (i) provide financing for working capital and other general corporate purposes of the Borrowers, including the funding of post-petition operating expenses and restructuring expenses incurred in the administration of these chapter 11 cases and other purposes not in contravention of law or the DIP Facility Agreement and as approved by the Bankruptcy Court and (ii) so long as no Event of Default has occurred, to pay for agreed pre-petition indebtedness and other obligations permitted by the terms of the DIP Facility Agreement.

**INTEREST:**

At the Borrowers' option, at either (i) a floating rate equal to the Index Rate plus the Applicable Revolver Index Margin or (ii) 1, 2, 3 or 6 month reserve-adjusted LIBOR plus the Applicable Revolver LIBOR Margin.

**LETTER OF CREDIT FEES:**

A Letter of Credit Fee equal to the Applicable L/C Margin on the face amount of Letters of Credit, payable to Agent monthly in arrears, plus a fronting fee payable to, and any out-of-pocket charges assessed by, the Issuing Bank.

**UNUSED LINE FEES:**

An Unused Line Fee equal to the Applicable Unused Line Fee Margin on the average unused daily balance of the DIP Facility, payable to Agent.

**APPLICABLE MARGINS:**

The following applicable margins shall apply so long as any Revolving Loans remains outstanding under the DIP Facility:

Applicable Revolver Index Margin	2.50%
Applicable Revolver LIBOR Margin	3.50%
Applicable L/C Margin	3.50%
Applicable Unused Line Fee Margin	0.75%

**OTHER FEES AND EXPENSES:**

The Borrowers are obliged to pay (or have in certain cases, already paid) the following fees and expenses:

- (a) An Administrative Fee of \$250,000 per annum for the sole account of GE Capital, payable in advance on the Closing Date and, if applicable, annually in advance thereafter.
- (b) A Commitment Fee (the "Commitment Fee") of \$5,000,000, of which \$625,000 was paid upon execution of the Proposal Letter and the balance was paid upon execution of the Commitment Letter.
- (c) An Expense Deposit (the "Expense Deposit") of \$125,000 to be applied towards payment of the Expenses (as defined below) which was paid on execution of the Proposal Letter. The Expense Deposit was increased to \$500,000 upon execution of the Commitment Letter and \$125,000 of this amount was used to increase the Underwriting Deposit (referred to below). On August 27, 2003, the Bankruptcy Court approved the payment by the Debtors of additional

fees and expenses of the Agent, including field examination fees, in excess of the Expense Deposit.

- (d) An Underwriting Deposit (the "Underwriting Deposit") of \$500,000 which was paid on execution of the Proposal Letter and which was increased to \$625,000 on the execution of the Commitment Letter.
- (e) A Closing Fee of (i) 3.0% of the DIP Facility (i.e., \$15,000,000) (the "Closing Fee") due and payable on the Closing Date. The Borrowers shall receive a credit against the Closing Fee in an amount equal to the sum of the Commitment Fee, any unused Expense Deposit and the Underwriting Deposit.

If the Borrowers (or any successor companies) enter into a credit facility with Agent upon exit from these chapter 11 cases (the "Exit Facility") on or prior to the first anniversary of the date of the filing of these chapter 11 cases, wherein the Agent is the Administrative Agent of the Exit Facility, then 33% of the Closing Fee paid will be credited towards any closing fee payable in respect of the Exit Facility.

Each Borrower shall jointly and severally pay to the Agent and the Lead Arranger (i) the reasonable out-of-pocket legal fees and expenses incurred in connection with the DIP Facility, (ii) a field examination fee of \$750 per-person per-diem and (iii) reasonable documented out-of-pocket expenses in connection with the conduct of GE Capital's field audit and the evaluation and documentation of the DIP Facility (including reasonable fees and expenses pertaining to environmental analysis and reasonable fees and expenses of other consultants) (the "Expenses").

**DEFAULT RATES:**

Interest and the Letter of Credit Fees shall be increased to 2% per annum above the rate or Letter of Credit Fee otherwise set forth above, during the continuance of an Event of Default.

**PRIORITY:**

Pursuant to Section 364(c)(1) of the Bankruptcy Code and the Final Order, the obligations due under the DIP Facility shall at all times, constitute a Superpriority Claim in each of the Borrowers' chapter 11 cases, having priority over all administrative expenses of the kind specified in Sections 503(b) or 507(b) of the Bankruptcy Code, subject only to the Carve Out.

**SECURITY:**

To secure all obligations of Borrowers under the DIP Facility, the Borrowers shall grant in favor of the Agent, on behalf of itself and Lenders, a security interest in all the assets of the Borrowers as follows (the "Collateral"):

- (a) a legal, valid, perfected and enforceable security interest in all right, title and interest of the Borrowers in the Collateral as described in the Collateral Documents;
- (b) pursuant to Section 364(c)(2) of the Bankruptcy Code, a first priority perfected security interest in all of the Collateral that is not encumbered by Liens in favor of any other person, subject only to Permitted Liens and the Carve Out;
- (c) pursuant to Section 364(c)(3) of the Bankruptcy Code, a fully perfected security interest in all of the Collateral encumbered on the Petition Date, subject only to Filing Date Liens, Permitted Liens and the Carve Out.

The Collateral shall include liens on the Eligible Mortgaged Properties and the Eligible Pledged Entities and shall be free and clear of other liens, claims, and encumbrances, except as provided above.

**CARVE OUT:**

Includes:

- (a) allowed unpaid fees and expenses payable under Sections 330 and 331 of the Bankruptcy Code to professional persons retained pursuant to orders of the Bankruptcy Court by the Borrowers and the Creditors' Committees;
- (b) reimbursement of expenses incurred by the members of the Creditors' Committees in the performance of their duties that are allowed by the Bankruptcy Court; and
- (c) payment of fees pursuant to 28 U.S.C. sections 1930 and to the clerk of the Bankruptcy Court, subject to certain limitations,

(the "Carve-Out").

Provided that no Event of Default has occurred or is continuing, the Borrowers shall be permitted to pay compensation and reimbursement of expenses allowed and payable under Sections

330 and 331 of the Bankruptcy Court or any order of the Bankruptcy Court governing procedures for interim compensation and reimbursement of expenses of professionals and the payment of the same shall not reduce the Carve Out. The Carve Out is limited to \$10,000,000 in aggregate.

**INDEMNIFICATION:**

Each Borrower agrees to indemnify and hold harmless, and provide limitations of liability to the Agent, the Lead Arranger, the Lenders, each of their respective affiliates and each of their respective officers, directors, employees, attorneys, agents and representatives (each, an “Indemnified Person”), in connection with these chapter 11 cases, the extension, suspension, termination and administration of the DIP Facility, other than to the extent such liability arises by reason of the Indemnified Person’s gross negligence or willful misconduct.

**BASIS FOR RELIEF**

**The Necessary Showings Under Section 364**

23. Section 364 of the Bankruptcy Code provides, in pertinent part, as

follows:

(a) unless the court orders otherwise, the trustee<sup>7</sup> may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense.

(b) The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense.

(c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt --

(1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;

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<sup>7</sup> Under section 1107(a) of the Bankruptcy Code, a debtor-in-possession has substantially all the rights and powers of a trustee in a chapter 11 case.

(2) secured by a lien on property of the estate that is not otherwise subject to a lien; or

(3) secured by a junior lien on property of the estate that is subject to a lien.

11 U.S.C. § 364(a) through (c).

24. Section 364 of the Bankruptcy Code provides bankruptcy courts with the power to authorize post-petition financing for a Chapter 11 debtor-in-possession. *See In the Matter of Vineyard Bay Develop. Co., Inc.*, 132 F.3d 269, 272 (5<sup>th</sup> Cir. 1998); *See also In re Pro Set, Inc.*, 193 B.R. 812, 814 (Bankr. N.D. Tex. 1996) (court's prior order authorized debtor to incur post-petition indebtedness under section 364); *See also In re Defender Drug Stores, Inc.*, 126 B.R. 76, 81 (Bankr. D. Ariz. 1991) "Having recognized the natural reluctance of lenders to extend credit to a company in bankruptcy, Congress designed [section] 364 to provide 'incentives to the creditor to extend post-petition credit.'" *Defender* at 81. The incentives enumerated in section 364 are not intended to be an exhaustive list of the inducements that a court may grant. *Id.* In fact, it is not uncommon for a court to approve a lending arrangement containing terms that far exceed those authorized by section 364. *Id.*

25. Generally, courts apply a three-part test to determine whether credit obtained may be granted under section 364(c). The three-part test includes demonstrating that (1) the debtor cannot obtain credit unencumbered or without superpriority status, (2) the credit transaction is necessary to preserve the assets of the estates, and (3) the terms of the credit agreement are fair, reasonable and adequate given the circumstances of the debtor-borrower and the proposed lender. *See In re Crouse Group, Inc.*, 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987), *aff'd*, 75 B.R. 553 (E.D. Pa. 1987).

26. Against this statutory backdrop, courts will evaluate the facts and circumstances of a debtor's case and accord significant weight to the necessity for obtaining the financing. *See In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990). Debtors-in-possession are generally permitted to exercise their basic business judgment consistent with their fiduciary duties when evaluating the necessity of proposed protections for a party extending credit under section 364 of the Bankruptcy Code. *Id.* at 38.

27. It was not possible for the Debtors to obtain their postpetition working capital financing on an unsecured basis pursuant to section 364(a) or 364(b) of the Bankruptcy Code. Based upon the experience of their professional advisors, the Debtors determined that they would not be able to obtain financing other than by offering the relevant debtor-in-possession lender liens over the Debtors' property. Accordingly, the circumstances of these cases required the Debtors to obtain their financing under section 364(c) of the Bankruptcy Code. Each of the proposals received by the Debtors required a granting of security as a condition precedent to extending new postpetition credit. Indeed, obtaining \$500 million of debtor-in-possession financing on an unsecured basis could be contrary to industry standards.

28. The Debtors discussed at length with their professional advisors, the opportunity to obtain debtor-in-possession financing from a lender other than the GE Capital. As discussed above, the Debtors engaged in discussions with alternative lenders and ultimately received a binding commitment to provide debtor-in-possession financing from one other source. The Debtors engaged in substantial negotiations with both Prospective DIP lenders over a period of weeks to ensure that the best possible terms were obtained. Ultimately, the proposal provided by GE Capital offered more flexibility and overall more favorable terms. Importantly, since GE

Capital is not a prepetition lender to the Debtors, GE Capital's role in these cases will be substantially limited to protecting its interests as a debtor-in-possession lender.

29. The Debtors believe that the terms and conditions of the DIP Facility are fair and reasonable. The DIP Facility is necessary to support the ongoing trading operations of the Debtors which requires in most part, the provision of collateral support including letters of credit and will signal the Debtors' continued strength to the marketplace pending consummation of a plan of reorganization. In the absence of the DIP Facility, the Debtors may lose the support of their trading counterparties, customers and critical suppliers, which will make it significantly more difficult for the Debtors to maintain the operation of their businesses. Furthermore, based upon the Debtors' evaluation of comparable debtor-in-possession loans, the interest rates and fees appear to be consistent with or better than the existing market for debtor-in-possession loans. The Debtors are reasonably comfortable that the proposed DIP Facility is the best financing available and well within the exercise of sound business judgment. Based on the foregoing, this Court should authorize the Debtors to enter into the DIP Facility Agreement and related documents and to obtain postpetition financing pursuant to the terms contained therein.

30. Moreover, as stated above, the terms of the DIP Facility and the Final Order, were negotiated in good faith and at arm's length over the course of several weeks. Accordingly, GE Capital should be provided with the benefit of section 364(e) of the Bankruptcy Code.

31. No prior request for the relief sought in this Motion has been made to this or any other court.

**CONCLUSION**

WHEREFORE, the Debtors respectfully request entry of an order pursuant to section 364 of the Bankruptcy Code in the form of the draft attached hereto (a) granting authority for the Debtors to obtain secured debtor-in-possession financing; (b) approving the DIP Facility Agreement and all other documents related thereto; and (c) granting related relief.

Dated: Fort Worth, Texas  
September 5, 2003

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ATTORNEYS FOR THE DEBTORS AND  
DEBTORS-IN-POSSESSION

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

**ADDITIONAL EXHIBITS OR ATTACHMENTS  
NOT SUBMITTED IN ELECTRONIC FORMAT**

Additional exhibits or attachments in reference to this document were filed, but not in electronic format. Pursuant to our Administrative Procedures for CM/ECF, such documentation will not be scanned into the Court's Electronic Filing System except as summarized or excerpted, unless the Court orders otherwise. The exhibits have been filed in conventional paper form. The party filing the exhibits shall serve the exhibits on opposing counsel.