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ATTORNEYS FOR THE DEBTORS AND DEBTORS-IN-POSSESSION

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

In re)	Chapter 11 Case
)	
MIRANT CORPORATION, <u>et al.</u> ,)	Case No. 03-46590(DML)11
)	Jointly Administered
Debtors.)	Hearing Date and Time: To be
)	Determined Pursuant to Motion for
)	Expedited Hearing
)	

**DEBTORS' MOTION PURSUANT TO FEDERAL RULE OF BANKRUPTCY
 PROCEDURE 9019 APPROVING SETTLEMENT AGREEMENT
 AND RELEASE BETWEEN MIRANT AMERICAS ENERGY
MARKETING, LP AND EL PASO MERCHANT ENERGY, L.P.**

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 Americas Energy Marketing, LP ("MAEM") to enter into a "Settlement Agreement and Release" (the "Settlement Agreement") with El Paso Merchant Energy, L.P. ("EPME"), attached hereto as Exhibit A. The settlement memorialized by the Settlement Agreement (a) resolves significant disputes between MAEM and EPME (b) requires EPME to dismiss a currently pending adversary proceeding filed against MAEM, and (c) determines that MAEM is entitled to

\$87,500,000 from EPME as a result of EPME's termination of certain contractual relationships with MAEM. The settlement is fair and equitable and in the best interests of the Debtors' estates and should be approved.

I. 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 (collectively, the "Initial Debtors") filed voluntary petitions in this Court for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330, as amended (the "Bankruptcy Code").¹ On August 18, 2003, Mirant EcoElectrica Investments I, Ltd. and Puerto Rico Power Investments, Ltd. (collectively, the "New Debtors") commenced chapter 11 cases under the Bankruptcy Code. On October 3, 2003, the following additional Debtors filed voluntary petitions in this Court for relief under chapter 11: (i) Mirant Wrightsville Management, Inc.; (ii) Mirant Wrightsville Investments, Inc.; (iii) Wrightsville Power Facility, L.L.C.; and (iv) Wrightsville Development Funding, L.L.C. (collectively, the "Wrightsville Debtors"). On November 18, 2003, the following additional Debtors filed voluntary petitions in this Court for relief under chapter 11: (i) Mirant Americas Energy Capital, LP; and (ii) Mirant Americas Energy Capital Assets, LLC (the "MAEC Debtors" and collectively with the Initial Debtors, the New Debtors, and the Wrightsville Debtors, the "Debtors"). The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

2. The Cases are Jointly Administered. On July 15, 2003, this Court granted the motion for an order requesting that the bankruptcy estates of the Initial Debtors be jointly administered. On September 8, 2003, this Court entered an order approving joint administration

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

of the cases of the New Debtors with those of the Initial Debtors. On October 20, 2003, this Court entered an order approving the joint administration of the cases of the Wrightsville Debtors with those of the Initial Debtors. On November 20, 2003, this Court entered an order approving the joint administration of the cases of the MAEC Debtors with those of the Initial Debtors.

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

II. FACTUAL BACKGROUND.

A. The Debtors' Business Operations.

4. 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.

5. 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 Specifically Relevant to the Motion.

(i) The Debtors' Marketing Business.

6. As noted, Mirant comprises one of the largest generators of electricity in the world. Given the massive amounts of (a) energy Mirant produces and (b) fuels it purchases, Mirant is naturally "long" on energy and "short" on fuel. To ensure Mirant's ability to operate its power plants, despite often dramatic swings in energy and fuel markets, Mirant "covers" its otherwise open positions by trading electricity, natural gas, coal, oil and other products in the commodities futures markets.

7. Mirant uses derivative financial instruments primarily to hedge and optimize its generating assets, and also takes proprietary commodity positions. Mirant's merchant energy activities encompass both (a) its core business of electrical power generation, and (b) a traditional commodities, energy and financial product trading business. Mirant follows an integrated business model under which MAEM engages in asset risk management and optimization activities for the core generation business. As asset manager, MAEM, among other things: procures fuel to be consumed, and sells power generated, by Mirant's power generating assets; schedules such purchases and sales; maintains necessary transportation paths; and performs dynamic hedging to reduce the risks associated with market volatility. MAEM also engages in proprietary trading activities for its own account.

(ii) MAEM's Master Agreement With EPME.

8. MAEM and EPME were trading partners in various energy and energy-related products. For example, MAEM and EPME, each as a buyer and a seller, routinely entered into transactions with one another for the purchase and sale of electrical power to be delivered at specific locations and dates in the future. In various instances, EPME would purchase from, or sell to, MAEM electrical power to be sold or delivered in the future. This type of trading activity between the MAEM and EPME encompassed other physical commodities (e.g., natural gas), as well as financial instruments. The aggregate trading position between MAEM and EPME at any one time was extensive and encompassed thousands of individual trades.

9. Prior to the Petition Date, MAEM and EPME entered into a Master Netting, Setoff, and Security Agreement dated as of February 25, 2003, as amended on November 12, 2003 (the "Master Agreement").

10. In connection with the Master Agreement, EPME caused to be delivered to MAEM, as collateral, a letter of credit issued by JP Morgan Chase Bank (No. P-229492) naming MAEM as beneficiary, in the original amount of \$109,750,000 (the "Letter of Credit").

(iii) EPME Terminated the Master Agreement and the Parties Disputed the Proper Final Settlement Amount.

11. As a result of MAEM's bankruptcy filing, EPME declared MAEM to be in default under the Master Agreement. EPME declared an early termination date of July 15, 2003, thereby terminating all of the many hundreds of outstanding transactions between the parties, and then proceeded to calculate the final settlement amount.²

² The Master Agreement and the transactions thereunder are "safe harbor" contracts under Bankruptcy Code section 556.

12. At the time EPME terminated the relevant transactions entered into under the Master Netting Agreement, MAEM was “in the money” as to those transactions; to wit, after all appropriate netting of claims and amounts owing between the parties, a positive net amount was owing by EPME to MAEM as a result of the termination of the various transactions entered into under the Master Netting Agreement. As required pursuant to the terms of the Master Agreement, a “final settlement amount” owing by EPME to MAEM was calculated with respect to the various transactions entered into under the Master Agreement. EPME calculated the final settlement amount owing to MAEM to be \$36,927,405.26, exclusive of interest. According to MAEM’s calculations, the correct final settlement amount owing by EPME to MAEM was \$106,623,941.67, therefore, MAEM disputed EPME’s final settlement amount calculation.

(iv) EPME Commenced Litigation against MAEM in the Bankruptcy Court.

13. On September 2, 2003, EPME filed with the Bankruptcy Court “EPME Merchant Energy, L.P.’s Complaint for Order Compelling Arbitration and for Declaratory and Injunctive Relief” (the “Complaint”) seeking, among other things: (a) an order compelling arbitration of the disputes relating to the calculation of the final settlement amount, (b) a declaratory judgment declaring that no payment is due from EPME until the final settlement amount is determined through arbitration or agreement of the parties, and (c) injunctive relief preventing Mirant from drawing upon the Letter of Credit.

14. Also on September 2, 2003, EPME filed with the Bankruptcy Court a motion for a Temporary Restraining Order and/or Preliminary Injunction (the “TRO Motion”) with respect to the Complaint.

15. On September 3, 2003, the Bankruptcy Court denied the TRO Motion, but ruled that EPME had an interest in the Letter of Credit proceeds in the amount by which any draw under the Letter of Credit by MAEM exceeded EPME’s final settlement amount calculation. Thus, on September 4, 2003, MAEM submitted a draw on the Letter of Credit in the

amount of \$106,623,941.³ MAEM immediately applied \$36,927,405.26 (i.e., EPME's final settlement amount calculation) in partial satisfaction of the amount owing by EPME to MAEM on account of EPME's termination of the Master Agreement. However, pursuant to the Bankruptcy Court's ruling in regard to the TRO Motion, MAEM is holding approximately \$70 million of the remaining amount drawn in a segregated money market account pending resolution of the dispute.

16. EPME also claimed that MAEM fraudulently drew on the Letter of Credit under the Master Agreement. In response to EPME's position, MAEM thereafter alleged that EPME violated the automatic stay by advising JP Morgan Chase Bank that MAEM might try to fraudulently present the Letter of Credit.

(v) *The Parties Commenced Settlement Discussions, Submitted to Mediation, and Reached an Agreement.*

17. After the hearing on the TRO Motion, MAEM and EPME sought to resolve the matter without resort to additional litigation. The parties exchanged settlement offers on September 15, 2003, but the matter was not settled at that time. The parties then agreed to modify the arbitration provisions set forth in the Master Netting Agreement and submit their disputes to mediation.

18. The parties attended mediation on December 3, 2003. As a result of the mediation, the parties have reached a settlement which is memorialized by the Settlement Agreement attached hereto as Exhibit A, and which is subject to Bankruptcy Court approval. The following is a summary of relevant terms of the Settlement Agreement:

- the parties have determined that the final settlement amount owing to MAEM is **\$87,500,000**;
- the final settlement amount will be satisfied from (a) the \$36,927,405.26 already received in connection with MAEM's draw upon the Letter of Credit; and

³ Thus, the letter of credit still has available \$3,126,059 to be drawn thereunder.

(b) \$50,572,594.74 of the unapplied Letter of Credit proceeds held by MAEM in the segregated account;

- the remainder of the cash in the segregated account, after MAEM has applied the foregoing sum, shall be returned to EPME;
- if the Settlement Agreement is not approved by the Court by December 31, 2003, EPME has the option to terminate the Settlement Agreement.
- the Settlement Agreement contains mutual releases of claims arising under, or relating to, the Master Agreement and MAEM's draw upon the Letter of Credit, and the Complaint will be dismissed with prejudice.⁴

III. RELIEF REQUESTED.

19. The Debtors request an order of this Court pursuant to rule 9019(a) of the Federal Rules of Bankruptcy Procedure, in substantially the form of Exhibit B, authorizing MAEM to enter into the Settlement Agreement in substantially the form of Exhibit A hereto, and perform thereunder.

IV. APPLICABLE AUTHORITY.

20. 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).

21. 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*

⁴ Other matters and contractual relationships between MAEM and EPME that are unrelated to the Master Agreement will be carved out from the releases, and will not be affected by the Settlement Agreement.

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).

22. 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:

A. Probability of Success in the Litigation.

23. While MAEM believes strongly in its case, the matter is not completely certain. The Master Netting Agreement is complicated, involves hundreds of transactions, and is subject to varying interpretations. This factor weighs in favor of settlement.

B. Complexity, Likely Duration of the Litigation, and Expense.

24. The Master Agreement requires the parties to submit to arbitration. Because of the complexity of the Master Agreement and the numerous transactions thereunder, arbitration regarding the final settlement amount would undoubtedly be complex and almost

certainly require expert testimony. The cost of arbitration would also be high as the stakes are high for both parties. This factor weighs in favor of settlement.

C. Other Factors Weigh in Favor of Approving the Settlement.

25. As noted, the settlement determines that MAEM is entitled to a final settlement amount of \$87,500,000. This is a significant amount that will obviously benefit the Debtors' estates. The Parties have agreed to a final settlement amount after negotiations and mediation that results in a material payment to MAEM. The settlement was reached only after both parties thoroughly analyzed their respective positions and jointly made significant movements and concessions in an effort to resolve the complex dispute. Moreover, resolution of this matter also resolves the issues raised in the Complaint filed by EPME against MAEM, the alleged fraudulent draw on the Letter of Credit by MAEM, and EPME's alleged violation of the automatic stay. The Debtors and EPME will receive a release of claims arising out of the Master Agreement.

26. The Debtors, in their business judgment, have determined that the Settlement Agreement is an excellent result and should be approved.

IV. 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
December 9, 2003

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By /s/ Jeff P. Prostok
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ATTORNEYS FOR THE DEBTORS AND
DEBTORS-IN-POSSESSION

EXHIBIT A

SETTLEMENT AGREEMENT DATED DECEMBER 9, 2003 BY AND BETWEEN
MIRANT AMERICAS ENERGY MARKETING, L.P. AND
EL PASO MERCHANT ENERGY, L.P.

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the "Settlement Agreement") is entered into as of December 9, 2003 by and between Mirant Americas Energy Marketing, LP ("Mirant") and El Paso Merchant Energy, L.P. ("EPME"). Mirant and EPME are each a "Party" and collectively, the "Parties."

WITNESSETH:

WHEREAS, Mirant and EPME entered into that certain Master Netting, Setoff, and Security Agreement, effective February 25, 2003, as amended on November 12, 2003 ("Master Agreement"), which provides for the respective rights and remedies of the Parties under (i) one or more master agreements and/or trading agreements listed therein (each an "Underlying Master Agreement"), and (ii) the documents and other confirming evidence establishing the terms and conditions of particular transactions not governed by any Underlying Master Agreement (any agreement, whether set forth in (i) or (ii), being hereinafter referred to as a "Transaction");

WHEREAS, the Parties agreed in the Master Agreement, without limitation, that each Transaction was a "forward contract," "commodities contract," and/or a "swap agreement" as defined in Title 11 of the United States Code (the "Code") for the purchase, sale and/or exchange of physical commodities (including, without limitation, natural gas, crude oil, fuel oil, gasoline, petroleum-related products, electric power, electric capacity, natural gas liquids, coal, and emissions), transportation rights, transportation capacity, transmission rights, transmission capacity, goods (as such term is defined in the Uniform Commercial Code), swaps, options, derivatives, or any other security, contract right, instrument or item (whether similar or dissimilar to the foregoing) that are currently bought, sold, and/or exchanged or capable of being bought, sold and/or exchanged in the future;

WHEREAS, the Parties further agreed in the Master Agreement, without limitation, that (i) the Underlying Master Agreements and each Transaction constitute "forward contracts", "commodities contracts" and/or "swap agreements", and (ii) each Party constitutes a "forward contract merchant", "commodity broker" and/or a "swap participant" within the meaning of the Code and any law, rule, regulation, statute, or order applicable to the Parties' rights herein, whether now or hereafter enacted or made applicable, including but not limited to, §§ 101(26), 101(6) and 101(53C) of the Code;

WHEREAS, the Parties agreed in the Master Agreement, without limitation, that (i) the Final Settlement Amount calculated under the Master Agreement, as well as all other netting and setoffs effectuated pursuant to the Master Agreement, would be governed by §§ 362(b)(6) and/or 362(b)(17) of the Code in the event of a bankruptcy filing by either Party, (ii) such setoffs, netting and liquidation contemplated by the Master Agreement arose under swap agreements, forward contracts, and/or commodity contracts and constituted "settlement payments" as set forth in §§ 101 and 741 of the Code; (iii) each payment or transfer of Performance Assurance under the Master Agreement was a "margin payment", a "settlement payment" or a "transfer" within the meaning of §§ 362, 546 and 556 of the Code and/or a "payment amount" within the meaning of § 560 of the Code;

WHEREAS, on July 14, 2003 (the "Petition Date"), Mirant filed a voluntary petition for relief in the United States Bankruptcy Court, Northern District of Texas, Fort Worth Division (the "Bankruptcy Court") (Case No. 03-46590) pursuant to chapter 11 of the Code (the "Chapter 11 Proceeding");

WHEREAS, effective July 15, 2003, EPME terminated all Transactions under the Master Agreement as a result of Mirant's Chapter 11 Proceeding;

WHEREAS, on August 21, 2003, EPME provided Mirant with the Notice of Calculation of Final Settlement Amount under the Master Agreement, which calculation asserted the Final Settlement Amount to be \$36,927,405.26;

WHEREAS, Mirant deemed EPME's calculation of the Final Settlement Amount to be commercially unreasonable, and by letter dated August 28, 2003, Mirant declared EPME to be in Default under the Master Agreement;

WHEREAS, Mirant performed its own calculation of the Final Settlement Amount and asserted such amount to be \$106,623,941.67;

WHEREAS, based on its belief that it was not in default of the Master Agreement and that Mirant did not have the ability to properly draw down on that certain JPMorganChase Bank Letter of Credit No. P-229492, Original Issue Date August 29, 2002, as amended numerous times thereafter (the "Letter of Credit"), posted by EPME in accordance with the Master Agreement, EPME notified J.P. Morgan Chase Bank on August 28, 2003 that EPME believed that Mirant would attempt to fraudulently draw on the Letter of Credit;

WHEREAS, EPME filed that certain adversary proceeding styled El Paso Merchant Energy, L.P. v. Mirant Americas Energy Marketing, L.P., Adv. No. 03-4348-DML-11 ("Adversary Proceeding"), in the Bankruptcy Court on September 2, 2003 seeking, without limitation, a Temporary Restraining Order ("TRO") to prevent Mirant from drawing on the Letter of Credit, and after a hearing held on September 3, 2003, the Bankruptcy Court entered an order (the "TRO Order") denying the request for a TRO; however, the TRO Order provided that any and all cash proceeds received by Mirant pursuant to any draw on the Letter of Credit above \$36,927,405.26 would constitute cash collateral subject to § 363 of the Code;

WHEREAS, Mirant subsequently drew down \$106,623,941.00 on the Letter of Credit after the entry of the TRO Order, and in accordance with the TRO Order, was able to freely use \$36,927,405.26; however, the remaining portion of the Letter of Credit proceeds, representing \$69,696,535.74, was placed in an interest bearing, segregated cash collateral bank account (the "Account");

WHEREAS, EPME has alleged that Mirant wrongfully drew on the Letter of Credit, and Mirant has countered that EPME violated the automatic stay by advising JPMorganChase Bank that Mirant was fraudulently drawing on the Letter of Credit;

WHEREAS, due to the various positions of the Parties, a good faith dispute has arisen between the Parties with respect to their respective rights, remedies, duties, obligations and responsibilities under the Master Agreement, necessarily affecting the calculation of the Final Settlement Amount and the corollary issues pertaining thereto;

WHEREAS, the Parties mediated their dispute on December 3, 2003, with the Honorable Layn Phillips of the law firm Irell & Mansilla LLP serving as the mediator (the "Mediation");

WHEREAS, the Parties recognize and appreciate the uncertainties and expense involved in the interpretation and enforcement of their respective positions as they relate to the Master Agreement, any of the Transactions, or any aspect of the Parties' prior business relationship with respect to the Master Agreement or any of the Transactions, including the foregoing described corollary matters regarding the Letter of Credit draw and the alleged automatic stay violation, as well as any and all matters of any nature related to and/or arising out of the same, whether previously asserted or not (collectively the "Dispute"), and further recognize and appreciate that neither Party is entitled to utilize the cash in the Account until such time as the Bankruptcy Court has approved this Settlement Agreement.

WHEREAS, the Parties, jointly, separately, and severally desire to resolve all issues, controversies, contentions and/or litigation or arbitration proceedings that are now pending, or have been pending, or that may or could be brought by or against any of the Parties arising out of the Dispute, except as specifically provided herein;

WHEREAS, each Party acknowledges that it will derive substantial benefit from this Settlement Agreement and that it is receiving fair consideration and reasonably equivalent value for the exchanges and releases contemplated herein; and

WHEREAS, pursuant to this Settlement Agreement and subject to certain conditions set forth herein, each Party will release any and all claims against the other Party related to the Dispute.

NOW, THEREFORE, in consideration of the promises and covenants contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, it is hereby agreed by and among the Parties to this Settlement Agreement as follows:

1. Payment and Return of Letter of Credit. On the first business day following the entry of the Approval Order (as defined below), Mirant shall be permitted to transfer \$50,572,594.74 from the Account to a debtor-in-possession account of its choosing. On the first business day following the entry of the Approval Order, Mirant shall pay EPME all the remaining funds in the Account (which as of December 1, 2003 totaled \$69,787,745.09), said payment by Mirant to EPME to be made by wire transfer to the following account (unless otherwise designated in writing by EPME):

El Paso Merchant Energy, L.P.
Mellon Bank, Pittsburgh, PA
ABA # 043000261
Account #0216813.

Also, on the first business day following the entry of the Approval Order, Mirant shall return the Letter of Credit to EPME. The date that Mirant makes the payment to EPME and returns the

Letter of Credit, as required by this Paragraph 1, will be referred to as the "Effective Date." Once the Effective Date occurs, neither Party shall have any further obligations to the other Party under or with respect to the Master Agreement with respect to conduct or Claims, whether known or unknown, occurring, arising or relating to any period of time prior to and including the Effective Date except as expressly set forth in this Settlement Agreement. To the extent the wire transfer required by this Paragraph 1 is not fully satisfied in accordance with the terms herein, EPME shall be entitled to collect from Mirant all remaining funds in the Account, less \$50,572,594.74, plus interest from the first business day following entry of the Approval Order until the full payment date at a rate per annum equal to the Default Rate (as defined in the Master Agreement), calculated on the basis of daily compounding and the actual number of days elapsed until the full and final payment (as set forth in this paragraph) is received by EPME. Further, to the extent that Mirant fails to timely make the payment to EPME as required under Paragraph 1, or if the Letter of Credit is not returned by Mirant, EPME shall be entitled to any and all costs, expenses and/or attorney's fees expended by it in its enforcement of the terms of this Settlement Agreement.

2. Release of EPME.

(a) From and after the Effective Date, Mirant, for itself and for its partners, members, representatives, attorneys, administrators, beneficiaries, successors and assigns, agents, guarantors, predecessors-in-interest, and any and all of its parents, subsidiaries and affiliated entities (hereinafter, individually and collectively, the "Mirant Releasing Parties"), does hereby remise, release and forever discharge EPME, and any and all of its partners, members, representatives, attorneys, administrators, beneficiaries, successors and assigns, agents, guarantors, predecessors-in-interest, and any and all of its parents, subsidiaries and affiliated

entities, and each of them, together with their respective directors, officers, employees, agents, attorneys, insurers, representatives, successors and assigns (hereinafter, individually and collectively, the "EPME Released Parties") from and against any and all past, present, or future claims, actions, causes of action, suits, debts, sums of money, judgments, accounts, agreements, promises, undertakings, demands, fines, damages, liabilities, penalties, sanctions, costs, expenses or attorneys' fees, of any nature whatsoever, whether in law or equity, or any other forum, whether any of the foregoing is known or unknown, asserted or unasserted, foreseen or unforeseen, contingent, actual, liquidated or unliquidated, and irrespective of whether any of the foregoing pertain to actions or omissions (whether intentional, wanton, reckless, malicious, negligent, or inadvertent), dealings or contracts (collectively all of the above being referred to hereinafter as the "Claims"), that are in any way related to, connected to, or arising out of, from or under the Dispute; provided, however, that expressly excluded from this release are (i) any and all claims by Mirant to enforce any of its rights and remedies under the Settlement Agreement and (ii) the obligations of EPME under this Settlement Agreement.

(b) The foregoing release, when pleaded, shall be and constitute a complete defense to any proceeding of any kind that violates its terms.

3. Release of Mirant.

(a) From and after the Effective Date, EPME, for itself and its partners, members, representatives, attorneys, administrators, beneficiaries, successors and assigns, agents, guarantors, predecessors-in-interest, and any and all of their parents, subsidiaries and affiliated entities (hereinafter, individually and collectively, the "EPME Releasing Parties"), do hereby remise, release and forever discharge Mirant, and any and all of its partners, members, representatives, attorneys, administrators, beneficiaries, successors and assigns, agents, guarantors, predecessors-in-interest, and any and all of its parents, subsidiaries and affiliated

entities and each of them, together with their respective directors, officers, employees, agents, attorneys, insurers, representatives, successors and assigns (hereinafter, individually and collectively, the "Mirant Released Parties") from and against any and all of the Claims that are in any way related to, connected to, or arising out of, from or under the Dispute; provided, however, that expressly excluded from this release are (i) any and all claims by EPME to enforce any of its rights and remedies under this Settlement Agreement, and (ii) all obligations of Mirant under this Settlement Agreement.

(b) Within ten (10) business days of the Effective Date, the Parties shall file a stipulation of dismissal with prejudice in the Adversary Proceeding.

(c) The foregoing release, when pleaded, shall be and constitute a complete defense to any proceeding of any kind that violates its terms.

4. General Release. It is intended by each of the Parties that the respective releases set forth in Paragraphs 2 and 3 be full and complete releases that are global in nature and cover every conceivable contingency, whether known or unknown, which could be encompassed by the respective releases, given their broadest and most sweeping interpretation and construction with respect to the Dispute. This full and complete Release shall be a full and complete bar to the urging of any released Claim(s) against the Mirant Released Parties and the EPME Released Parties respectively. To the extent any Mirant Releasing Party or EPME Releasing Party either (a) files a lawsuit based on a released Claim, and a court of competent jurisdiction finds that such an action has been released hereby; or (b) brings an action or other proceeding to enforce the release, then the prevailing party, in addition to any other rights it may possess, shall be entitled to recover costs and expenses, including reasonable attorney's fees, from the party prosecuting such a claim.

5. Return or Destruction of Mediation Materials. Within ten (10) business days of the Effective Date, each Party will either destroy or return to the other Party all documents in its possession, including, but not limited to, briefs, letters, spreadsheets, and charts, that were received from the other Party in preparation of and in contemplation of the Mediation. Each Party shall certify in writing to the other that it has complied with this Paragraph 5. Likewise,

each Party's outside law firm identified below shall certify to the other Party's outside law firm that it has complied with this Paragraph 5.

6. Confidentiality.

(a) Each Party, for itself and for its respective accountants, attorneys, and others acting for it, represents and agrees that they shall keep confidential the terms of the Master Agreement and any and all Transactions, and that they shall not disclose the same to any third persons or in any proceedings, except to the extent such disclosure is required as a result of any legal or administrative rules, regulations, or positions (including compliance with any U.S. Securities and Exchange Commission and/or insurance regulatory reporting obligations), or as ordered by a court or in response to a subpoena, or as required to provide necessary information to accountants, attorneys or financial advisors for the Parties; provided, however, Mirant shall be permitted to disclose the Master Agreement or any of the Transactions, to the official committees of creditors and the official committee of equity holders appointed in its Chapter 11 Proceeding (the "Committees") who have a need to know such information and have agreed in writing to keep such information confidential. In no event, except as required by law, shall either Party disclose the terms of the Master Agreement or any of the Transactions, in response to a subpoena or in any public filing or other non-confidential disclosure, without giving the other Party at least five (5) business days prior written notice during which the other Party may object to such disclosure; provided, further that both Parties will use all reasonable efforts to prevent any such disclosure.

(b) The Parties acknowledge and agree that this Settlement Agreement is subject to approval by the Bankruptcy Court. To obtain said approval, Mirant must file a motion with the Bankruptcy Court under Rule 9019 of the Federal Rules of Bankruptcy Procedure seeking approval of this Settlement Agreement (the "9019 Motion"). At EPME's request, the 9019 Motion may be filed on an expedited basis in order to facilitate both Parties' desire to obtain the free and clear use of the respective monies to be received under this Settlement Agreement by December 31, 2003. A copy of this Settlement Agreement shall be attached as an

exhibit to the 9019 Motion. As such, the Parties acknowledge and agree that this Settlement Agreement shall not remain confidential.

7. Approval Order.

(a) This Settlement Agreement shall be binding on Mirant and EPME as of the date hereof, subject to the entry of the Approval Order. For purposes of this Settlement Agreement, the "Approval Order" shall mean an order that has been entered by the Bankruptcy Court, after notice and hearing, approving this Settlement Agreement. A proposed draft Approval Order is attached hereto as Exhibit A.

(b) Mirant shall use its best efforts to obtain the entry of the Approval Order, and EPME shall use its best efforts to cooperate with and support Mirant's efforts to obtain entry of the Approval Order, on or before December 30, 2003. In the event the Approval Order is not entered by the Bankruptcy Court on or before December 30, 2003, or by such later date that the Parties agree to in writing, EPME can terminate this Settlement Agreement by providing written notice to Mirant. Should the Settlement Agreement be terminated pursuant to the preceding sentence, the Settlement Agreement shall be deemed null and void and neither Party shall have any obligations to the other Party arising out of this Settlement Agreement, except for the obligations and/or provisions set forth in Paragraphs 6, 11 and 16 hereof, which provisions are intended to survive the expiration or termination of this Agreement.

(c) Mirant shall use its best efforts to obtain the approval of the Committees of this Settlement Agreement and the entry of the Approval Order, and EPME shall use its best efforts to cooperate with and support Mirant's efforts to obtain entry of the Approval Order, irrespective of whether the Committees support the entry of the Approval Order. However, if either of the Committees files a substantive objection to the 9019 Motion, EPME can terminate this Settlement Agreement by providing written notice to Mirant. EPME shall be the sole judge in determining what constitutes a substantive objection, but shall use good faith in making such determination. Should the Settlement Agreement be terminated pursuant to the preceding sentence, the Settlement Agreement shall be deemed null and void and neither Party shall have

any obligations to the other Party arising out of this Settlement Agreement, except for the obligations and/or provisions set forth in Paragraphs 6, 11 and 16 hereof, which provisions are intended to survive the expiration or termination of this Agreement. If EPMP does not terminate the Settlement Agreement as a result of Mirant's inability to obtain the approval of the Committee, Mirant shall use its best efforts to obtain the entry of an Approval Order.

8. No Prior Representation. All prior discussions, understandings, representations, conditions, warranties, covenants, negotiations, agreements and all other communications between or among the Parties pertaining to the resolution of the Dispute are hereby superseded and merged herein. The Parties represent and acknowledge that in executing this Settlement Agreement they do not rely and have not relied upon any of the foregoing communications not expressly set forth herein with regard to the subject matter, basis, terms, conditions, or effect of this Settlement Agreement or otherwise.

9. Entire Agreement. This Settlement Agreement, including the recitals, represents the entire agreement of the Parties with respect to the subject matter hereof. This Settlement Agreement may not be modified, changed, amended, supplemented or rescinded except pursuant to a written instrument duly executed by both Parties. Each Party acknowledges and agrees that it shall not make any claim, at any time, that this Settlement Agreement has been orally altered or modified in any respect whatsoever.

10. Severability. The provisions of this Settlement Agreement are severable, and if any provision or any portion of any provision of this Settlement Agreement is at any time deemed, found or declared to be invalid or unenforceable, then such provision, or any portion of any such provision, if severed from the remainder of the Settlement Agreement without substantially affecting the consideration to be received by either Party hereto, shall be deemed to be deleted. Such an invalid or unenforceable provision, or any portion of such a provision, shall not affect the validity of the remainder of this Settlement Agreement, and the remaining provisions shall continue in full force and effect.

11. No Admission of Liability. This Settlement Agreement is not an admission of any liability but is a compromise and settlement and this Settlement Agreement shall not be treated as an admission of liability. All communications (whether oral or in writing) between and/or among the Parties, their counsel and/or their respective representatives relating to, concerning or in connection with this Settlement Agreement, or the matters covered hereby and thereby (save and except for (i) any matters or communications made the subject of the Dispute prior to the date of the Mediation which were not previously designated as confidential and/or settlement discussions, or (ii) any discussions or communications made during the Mediation, which have been afforded the unqualified protections of confidentiality agreed to by the Parties at such Mediation) shall be governed and protected in accordance with the Federal Rule of Evidence 408, and any applicable state evidentiary rule or law, to the fullest extent permitted by law.

12. No Party Deemed Drafter. The Parties shall jointly be deemed to be the drafters of this Settlement Agreement and the rule that any ambiguity in a document shall be construed against the party drafting the document shall not apply to this Settlement Agreement.

13. Headings. The paragraph headings in this Settlement Agreement are included for convenience only, and do not in any way define, limit, alter, affect or control the matters contained in this Settlement Agreement, or the paragraphs that they encaption.

14. No Waiver. No waiver or indulgence of any breach or series of breaches of this Settlement Agreement shall be deemed a waiver of any other breach of this Settlement Agreement or any of its provisions or affect the enforceability of the remainder of this Settlement Agreement.

15. Notice. Notice by a Party to any other Party shall be delivered in writing and shall be deemed to have been duly given if delivered personally, delivered by courier, sent by facsimile transmission during normal business hours to the facsimile transmission numbers set forth below, or sent by mail in a registered or certified envelope, postage prepaid, return receipt requested, addressed as follows:

To Mirant:

Mirant Americas Energy Marketing, LP
1155 Perimeter Center West
Atlanta, GA 30338-5416
Attn: Legal Department
Facsimile No.: 678-579-5001

With a copy to:

Eric N. Macey, Esq.
Novack and Macey LLP
303 West Madison Street, Suite 1500
Chicago, Illinois 60606-3308
Facsimile No.: 312-419-6928

To EPME:

El Paso Merchant Energy, L.P.
1001 Louisiana, Suite 1900
Houston, Texas 77002
Facsimile No.: 713-420-4486
Attn: Legal Department

With a copy to:

Richard Wilson, Esq.
Fulbright & Jaworski L.L.P.
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Facsimile No.: 713-651-5246

or to such other address for notice of which the Parties have advised or may advise each other in writing in accordance with the provisions of this paragraph. Notice shall be deemed to have been delivered only upon actual delivery to the foregoing addresses (by hand delivery, courier or facsimile transmission with written confirmation of receipt), or two (2) business days after deposit in the United States mail, by registered or certified mail, postage prepaid, addressed to the foregoing addresses.

16. Choice of Law. This Settlement Agreement shall be governed by, subject to, and construed in accordance with the laws of the State of New York without regard to its internal conflicts of law principles.

17. Counterparts. This Settlement Agreement may be executed in two or more counterparts and/or by facsimile, each of which shall be deemed an original and any set of which, when taken together, shall constitute one and the same instrument and be sufficient proof of the instrument so constituted. Notwithstanding the foregoing, if a signature page is transmitted by facsimile, the Party so transmitting shall deliver the original signature page to the other Party as soon as reasonably possible after facsimile transmission.

18. Benefit of Successors. This Settlement Agreement shall be binding on and inure to the benefit of the Parties hereto and their respective successors, partners, members, assigns, divisions, parents, affiliates and subsidiaries.

19. Representations and Warranties. Each Party signing this Settlement Agreement represents and warrants that (i) it has read and understands the terms of the Settlement Agreement and that such Party is duly authorized to execute and deliver this Settlement Agreement and to perform its obligations hereunder, and has taken all necessary actions to authorize such execution, delivery, and performance; (ii) such Party has not assigned, pledged, hypothecated or otherwise in any manner whatsoever sold, or transferred or abandoned, either by instrument or writing, operation of law or otherwise, any right, title, or interest in any Claim of any kind subject to the releases contained herein; (iii) the person signing this Settlement Agreement was duly authorized to do so on the date this Settlement Agreement was executed by such person; (iv) this Settlement Agreement constitutes its legal, valid, and binding obligation, enforceable against it in accordance with its terms; and (v) its execution and delivery of this Settlement Agreement does not contravene, or constitute a default under, any provision of applicable law or regulation (including any order, decree, judgment, injunction, or other judicial or governmental restriction applicable to such Party or any portion of its assets) or the formation agreements or governing instruments of such Party or of any other material agreement,

judgment, injunction, order, decree or other instrument binding upon such Party; provided, however that the Parties acknowledge that the enforceability of this Settlement Agreement is subject to the entry of the Approval Order. Mirant further represents to EPME that Mirant has not used, spent or disbursed any funds from the Account since the Letter of Credit proceeds were deposited therein, and that the funds in the Account totaled \$69,787,745.09 as of December 1, 2003.

20. Proof of Claim. A proof of claim deadline has been established in the Chapter 11 Proceeding as December 16, 2003. In order to preserve its rights to the extent that this Settlement Agreement is not approved by the Bankruptcy Court, EPME will file a proof of claim pertaining to its rights and interest in the money being held in the Account. To the extent that the Approval Order is subsequently obtained, EPME will use reasonable efforts to withdraw its proof of claim within ten (10) business days of the Effective Date.

21. Costs of Settlement. All costs of settlement shall be borne by each respective Party, including but not limited to, any attorneys' fees or other professional fees and court costs, if any.

22. Non-Frustration. The Parties shall execute all such documents and take all such actions as may be necessary to effect the consummation of this Settlement Agreement. Each Party agrees to take no action to hinder, delay, frustrate or avoid the consummation of this Settlement Agreement.

23. Disclaimer of Warranties. The Parties, expressly represent that they have had full access to all information made the subject of this Settlement Agreement and that each Party's decision to consummate this Settlement Agreement is expressly predicated upon its own investigation of such material and is not predicated upon any representations, warranties or covenants of the other Party except as expressly set forth in this Settlement Agreement.



THE PARTIES FURTHER STATE THAT THEY HAVE CAREFULLY READ THIS SETTLEMENT AGREEMENT, WHICH INCLUDES A RELEASE BY THEM OF CLAIMS, THAT THEY HAVE HAD SUFFICIENT TIME TO REVIEW THE SETTLEMENT

AGREEMENT AND CONSULT WITH SUCH ADVISORS AS THEY DEEM APPROPRIATE, THAT THEY FULLY UNDERSTAND THE FINAL AND BINDING EFFECT OF THE SETTLEMENT AGREEMENT IF APPROVED BY THE BANKRUPTCY COURT, THAT THE ONLY PROMISES MADE ARE THOSE STATED HEREIN AND THAT THEY ARE SIGNING THIS AGREEMENT KNOWINGLY AND VOLUNTARILY AND WITH THE FULL INTENT OF RELEASING THE OTHER PARTY AND ITS AFFILIATED PERSONS AND ENTITIES IN THE MANNER DESCRIBED HEREIN.

IN WITNESS WHEREOF, the Parties have executed this Settlement Agreement as of the date written above.

**MIRANT AMERICAS ENERGY
MARKETING, LP**

By: **MIRANT AMERICAS DEVELOPMENT,
INC., Its General Partner**

By:  

Its: EXECUTIVE VICE PRESIDENT - NORTH AMERICA

EL PASO MERCHANT ENERGY, L.P.

By: 

Its: Senior Vice President, C.F.O. & Treasurer

**MIRANT CORPORATION, ET AL.
OFFICIAL SHORTENED SERVICE LIST
November 24, 2003**

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

In re

MIRANT CORPORATION, et al.,

Debtors.

)
) Chapter 11 Case
)
)

) Case No. 03-46591(DML)

) Jointly Administered
)
)

**ORDER GRANTING DEBTORS' MOTION PURSUANT TO FEDERAL RULE OF
BANKRUPTCY PROCEDURE 9019 APPROVING SETTLEMENT AGREEMENT
AND RELEASE BETWEEN MIRANT AMERICAS ENERGY
MARKETING, LP AND EL PASO MERCHANT ENERGY, L.P.**

Upon the motion, dated December 9, 2003 (the "Motion") of Mirant Corporation ("Mirant") and its affiliated debtors, as debtors-in-possession (collectively, the "Debtors"), for an order approving the "Settlement Agreement and Release" (the "Settlement Agreement") between Mirant Americas Energy Marketing, LP ("MAEM") and El Paso Energy Merchant, L.P. ("EPME"); and it appearing that the Court has jurisdiction over this matter; and it appearing that due notice of the Motion has been provided, and that no other or further notice need be provided; upon all of the proceedings had before the Court; and after due deliberation and sufficient cause

appearing therefor,

It is hereby:

ORDERED, that the Motion is hereby GRANTED;¹ it is further

ORDERED, that the Settlement Agreement attached to the Motion is approved and MAEM is authorized to perform as required thereunder; it is further

ORDERED, that not later than one (1) business day after entry of this Order, MAEM shall pay by wire transfer to EPME all funds in that certain segregated cash collateral account maintained by MAEM as required by this Court's Order entered on September 3, 2003 in Adversary Proceeding No. 03-4348 less \$50,572,594.74; it is further

ORDERED, that not later than one (1) business day after entry of this Order, MAEM shall surrender to EPME that certain Letter of Credit No. P-229492 originally issued by JPMorganChase Bank on August 29, 2002, as amended.

IT IS SO ORDERED.

Dated: December ___, 2003

D. Michael Lynn,
United States Bankruptcy Judge

¹ Unless otherwise defined herein, capitalized terms have the same meaning ascribed to them in the Motion.