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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**

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In re	)	Chapter 11 Case
MIRANT CORPORATION, <u>et al.</u> ,	)	Case No. 03-46590-DML
	)	Jointly Administered
Debtors.	)	Hearing Date and Time:
	)	December 23, 2003 at 10:30 a.m.

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**MOTION OF THE DEBTORS FOR AN ORDER PURSUANT TO 11 U.S.C. §§ 105(a)**  
**AND 363(b) EXTENDING THE EXPIRATION OF THE SEVERANCE PLANS**

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TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

Mirant Corporation (“Mirant”) and its affiliated debtors (collectively, the “Debtors”) file this Motion for an Order Pursuant to 11 U.S.C. §§ 105(a) and 363(b) Extending the Expiration of the Severance Plans (the “Motion”), and respectfully represent as follows:

**PRELIMINARY STATEMENT**

1. The chapter 11 process is a stressful experience for a debtor’s employees, most of whom, despite the debtor’s encouraging words to the contrary, live with day-to-day uncertainty regarding their own job security. Indeed, while perhaps unfamiliar with the nuances

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of bankruptcy law, most employees recognize that reductions in the workforce may be necessary to permit the debtor to achieve its reorganization goals. Certainly, most employees have seen and heard reports of former employees of other chapter 11 debtors who were asked to clear their desks with little or no notice and little or no safety net to protect them. Faced with such uncertainty, even the most loyal of employees are forced to contemplate seeking alternative employment to preserve their own financial well-being and that of their families if otherwise left without appropriate financial down-side protection against sudden loss of employment.

2. To prevent the wholesale loss of employees that would ensue if the Debtors were otherwise unable to provide certainty to their employees that the severance benefits necessary to protect such employees and their families against the risk that the employees' positions may be suddenly terminated would be available, the Debtors sought, and by orders dated July 15, 2003, October 15, 2003 and November 19, 2003 (collectively, the "Approval Orders"), received authority to honor or otherwise implement, with certain limited exceptions, certain severance plans (to the extent approved and modified by the Approval Orders, the "Severance Plans"). As approved, the Severance Plans are scheduled to expire on December 31, 2003.

3. The Debtors are currently evaluating the structure and composition of the Severance Plans as well as developing a key employee retention plan (the "Key Employee Retention Plan" or "KERP"), which the Debtors expect will result in material modifications to the Severance Plans prospectively. Although the Debtors anticipate completing this process shortly, the Debtors believe that the modified severance plans and KERP will be not completed in time to permit the Debtors to present such plans to the Court for consideration prior to the upcoming holiday season.

4. The Debtors are concerned that, although no substantial reductions in force are anticipated to occur over the immediate interim period, the pending expiration of the existing Severance Plans will cause needless and undue stress to their employee base as a whole. Furthermore, the Debtors believe that, absent certainty that only a Court approved severance plan can provide, many valuable employees will utilize the holiday season to reflect upon their own employment security and seek or at least initiate the process of seeking alternative secure employment. Accordingly, the Debtors seek to extend, on an interim basis, pending presentation and approval of modified severance plans and the KERP, the existing Severance Plans, subject to the limitations set forth in the Approval Orders.

5. Importantly, however, the Debtors are not seeking to extend the Severance Plans until the conclusion of their chapter 11 cases. Rather, the Debtors seek an extension that strikes a balance between the Debtors' need to prevent employee attrition and deterioration in employee morale, which at this critical time would have a devastating impact on the Debtors, the value of their assets and businesses, and ultimately, the Debtors' ability to reorganize, and authorizing the Severance Plans, in their current form, indefinitely. The Debtors believe that the requested extension until the Court can approve modified severance plans effectively strikes this balance and is the most effective way of accomplishing these goals. The Debtors anticipate that modified severance plans will be presented to the Court for consideration in the beginning of 2004.

#### **JURISDICTION AND VENUE**

6. 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 in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

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## PROCEDURAL BACKGROUND

7. 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”).<sup>1</sup> 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 (collectively, the “MAEC Debtors”). The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

8. 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, the Court entered an order approving joint administration of the cases of the New Debtors with those of the Initial Debtors. Also, on September 8, 2003, the Court granted the motion for an order directing that orders entered in the cases of the Initial

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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.

Debtors be made applicable to those of the New Debtors. On October 20, 2003, the Court entered an order approving the joint administration of the cases of the Wrightsville Debtors with those of the Initial Debtors. Also, on November 5, 2003, the Court granted the motion for the entry of an order directing that certain orders entered in the cases of the Initial Debtors be made applicable to the Wrightsville Debtors. On November 20, 2003, the Court entered an order approving the joint administration of the cases of the MAEC Debtors with those of the Initial Debtors.

9. 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").

## **FACTUAL BACKGROUND**

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

10. 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.

11. As of July 31, 2003, Mirant employs about 6,700 employees worldwide. Approximately 1,000 employees are based at Mirant's corporate headquarters in Atlanta, and approximately 5,700 employees are based at operating facilities. Approximately 1,000 employees are subject to collective bargaining agreements. 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**

**Summary of Plans**

(1) *Non-Union Severance Plans*

12. Pursuant to the Non-Union Severance Plans (as defined below) approved by the Court, eligible employees (the "Non-Union Employees") who are terminated while the Debtors' Non-Union Basic Severance Plan (the "Non-Union Basic Severance Plan") is in effect will receive certain basic severance benefits as described below. Additionally, eligible Non-Union Employees who agree to sign a waiver and release of claims against the Debtors (except for claims covered by the Debtors' Directors and Officers Insurance Policy and existing claims under non-qualified benefit plans) will receive enhanced severance benefits under an enhanced severance plan, subject to ERISA, along with certain other non-severance benefits (the "Non-

Union Enhanced Severance Plan” and, collectively with the Non-Union Basic Severance Plan, the “Non-Union Severance Plans”).<sup>2 3</sup>

13. Under the Non-Union Basic Severance Plan, eligible Non-Union Employees will receive four weeks straight time pay or salary, as the case may be; one month company-paid medical coverage via COBRA<sup>4</sup> for Non-Union Employees and dependents currently enrolled in the Debtors’ medical plan and who elect COBRA medical coverage; and three months company-paid access to the Employee Assistance Program (“EAP”) via COBRA for Non-Union Employees who elect COBRA EAP coverage and outplacement assistance. Highly compensated employees whose 2003 base compensation and actual bonus under the Debtors’ Incentive Plan for 2002 or the 2002 Trading and Marketing Incentive Plan totaled \$200,000 or more (the “Highly Compensated Employees”) who participate in the Non-Union Basic Severance Plan, however, forfeit, upon severance, all stock awards currently held. The Non-Union Basic Severance Plan also provides for a minimum severance amount of six months’ salary for officers of Mirant not on the Management Council.<sup>5</sup>

14. Under the Non-Union Enhanced Severance Plan, eligible Non-Union Employees receive an additional four weeks straight time pay or salary, as the case may be, plus, additional severance pay based on years of service; the cash equivalent of six months of medical

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<sup>2</sup> The Non-Union Severance Plans, as approved by this Court, were part of a limited window severance plan that is intended to benefit those eligible Non-Union Employees who are terminated on or between September 1, 2003 and December 31, 2003.

<sup>3</sup> The Chief Executive Officer and the senior officers on the Management Council are not eligible to participate in the Non-Union Severance Plans, or receive any severance payment, absent Court approval.

<sup>4</sup> Consolidated Omnibus Budget Reconciliation Act, as amended.

<sup>5</sup> The Debtors must provide to the Committees two weeks’ advance notice of any intended payment of minimum severance.

and life insurance premiums; additional months of access to COBRA coverage, up to a total of 36 months, based on years of service; extended stock option treatment (only “rank and file” non-union employees (the “Rank and File Employees”)); payment of incentive awards and bonuses accrued and/or owed pursuant to the respective employee’s incentive compensation plan,<sup>6</sup> as the case may be; and, with respect to those employees who were relocated in the six months prior to their termination, relocation expenses associated with relocating to their original location.

Severed Rank and File Employees who are eligible for bonuses under the 2002 Trading and Marketing Incentive Plan, however, would be paid this compensation according to the published guidelines at the same time as active employees.

15. Employees with employment and/or severance agreements have been authorized to participate in the Non-Union Severance Plans by the Court. To the extent such employee receives a payment under the Non-Union Severance Plans, any distribution that such severed employee would otherwise be entitled to receive on account of an allowed claim under any employment and/or severance agreement shall be reduced by the total amount of severance paid under the Non-Union Severance Plans; provided, however, such allowed claims shall be limited by section 502(b)(7) of the Bankruptcy Code. With respect to employees receiving payments under the Non-Union Enhanced Severance Plan in exchange for a waiver of certain

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<sup>6</sup> The Severance Plans, as approved by the Court, included the payment of a prorated portion of amounts owed under Retention Agreements for Rank and File Employees. On the first day of these chapter 11 cases, the Debtors sought and were granted authority to only make payments under the Retention Agreements on an interim basis for fifty days. As a result of the expiration of this initial fifty-day period, the Debtors are currently not paying any employees under their respective Retention Agreements. The Debtors believe that any KERP approved in these cases will replace the function of the Retention Agreements and assist the Debtors in retaining employees entitled to participate in such KERP. Accordingly, for both of these reasons, the Debtors believe that it is appropriate to explicitly exclude from the Non-Union Enhanced Severance Plan the payment of any prorated payments under any Retention Agreements for all severed employees, not simply Highly Compensated Employees, as previously presented to the Court. All severed employees shall be required to explicitly waive any right to a prorated payment under their respective Retention Agreements in order to participate in the Non-Union Enhanced Severance Plan.

claims against the Debtors, the waiver required under such plan shall exclude any contractual claims arising under the employee's respective employment and/or severance agreement.

16. The terms of the Non-Union Severance Plans are capped at two times the amount of the severed employee's 2002 compensation.<sup>7</sup>

(2) *Union Severance Plans*

17. Pursuant to the Union Severance Plans (as defined below) as approved by the Court, employees subject to collective bargaining agreements (the "Union Employees") whose positions are terminated<sup>8</sup> while the Debtors' Union Basic Severance Plan (the "Union Basic Severance Plan") is in effect will receive certain basic severance benefits as described below. Additionally, Union Employees who agree to sign a waiver and release of claims against the Debtors will receive enhanced severance benefits under an enhanced severance plan, subject to ERISA, along with certain other non-severance benefits (the "Union Enhanced Severance Plan" and, collectively with the Union Basic Severance Plan, the "Union Severance Plans").<sup>9</sup>

18. Under the Union Basic Severance Plan, eligible Union Employees will receive four weeks salary; one month company-paid medical coverage via COBRA for Union

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<sup>7</sup> Employees who were beneficiaries of a purchased annuity contract relating to the Debtors' Supplemental Executive Retirement Plan, Supplemental Compensation Plan and Supplemental Benefit Plan shall have withheld from their severance payment an amount equal to the aggregate of eighteen months of annuity payments (the "Holdback") which shall not be paid unless (a) there is a final Order of the Court determining that the amounts paid by the Debtors to purchase the employee's annuity contract are not avoidable; or (b) there is a final Order of the Court approving a settlement relating to amounts paid by the Debtors to purchase the employee's annuity contract.

<sup>8</sup> Only Union Employees who voluntarily agree to be terminated upon request by the Debtors in exchange for receiving payments under the Union Severance Plans or are terminated involuntarily shall be entitled to the payments under the Union Severance Plans.

<sup>9</sup> The Union Severance Plans, as approved by this Court, are part of a limited window severance plan that is intended to benefit those eligible Union Employees who are terminated on or between September 1, 2003 and December 31, 2003.

Employees and dependents currently enrolled in the Debtors' medical plan and who elect COBRA medical coverage; and three months company-paid access to the EAP via COBRA for employees who elect COBRA EAP coverage and outplacement assistance.

19. Under the Union Enhanced Severance Plan, eligible Union Employees will receive an additional four weeks salary, plus additional severance pay based on years of service; the cash equivalent of six months of medical and life insurance premiums; and additional months of access to COBRA coverage, up to a total of 36 months, based on years of service.

Additionally, eligible Union Employees who participate in the Union Enhanced Severance Plan would also receive any incentive bonus payment to which they may be entitled, prorated based on the number of months they worked in 2003.

20. The principal difference between the Union Severance Plans and the Non-Union Severance Plans is that the terms of the Union Severance Plans are capped at the amount of the severed employee's 2002 compensation.

### **RELIEF REQUESTED**

21. By this Motion, the Debtors seek to extend the Severance Plans, subject to the limitations set forth in the Approval Orders, on an interim basis, until the Court approves any proposed modified severance plans.

### **BASIS FOR RELIEF**

22. In an effort to advance the Debtors' postpetition restructuring and in an exercise of the Debtors' sound business judgment, the Debtors have determined that it is in the best interest of their estates, their creditors and all parties in interest for the Debtors to extend the Severance Plans, on an interim basis, until modified severance plans are approved by the Court. Accordingly, the Debtors believe that the proposed extension of the Severance Plans as approved

by the Court constitutes an act of sound business judgment.

23. Such relief is appropriate under the Court's equitable powers under section 105(a) of the Bankruptcy Code and authority to approve transactions out of the ordinary course under section 363(b) of the Bankruptcy Code. Section 105(a) provides that the "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." See 11 U.S.C. § 105(a). The Fifth Circuit has acknowledged that section 105 of the Bankruptcy Code confers broad powers on bankruptcy courts:

[Section] 105 [is] 'an omnibus provision phrased in such general terms as to be the basis for a broad exercise of power in the administration of a bankruptcy case. The basic purpose of § 105 is to assure the bankruptcy courts power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction. . . .'

Davis v. Davis (In re Davis), 170 F.3d 475, 492 (5th Cir. 1999) (citation omitted). The Debtors recognize that section 105(a) of the Bankruptcy Code "may be used only to carry out the provisions of Title 11." In re CoServ, L.L.C., 273 B.R. 487, 494 n. 9 (Bankr. N.D. Tex. 2002). The major premise of chapter 11 is the continued and uninterrupted operation of the debtor in possession to the greatest extent possible. The Debtors' requested relief is consistent with the "furtherance of the provisions of the Bankruptcy Code." Id. See also In re Southmark Corp., 113 B.R. 280, 281 (Bankr. N.D. Tex. 1990) ("the court may use [section] 105(a) to fashion orders that are necessary or appropriate to further a substantive provision of the Code").

24. Section 363(b)(1) of the Bankruptcy Code provides:

The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

11 U.S.C. § 363(b)(1). See also Cajun Electric Power Cooperative, Inc. v. Official Comm. Of Unsecured Creditors (In re Cajun Electric Power Cooperative, Inc.), 119 F.3d 349, 354 (5th Cir.

1997); Institutional Creditors of Continental Airlines, Inc. v. Continental Air Lines, Inc. (In re Continental Air Lines, Inc.), 780 F.2d 1223, 1226 (5th Cir. 1986). Transactions outside the ordinary course of business need to be justified by sound business purpose in order to obtain bankruptcy court approval. See In re Continental Air Lines, 780 F.2d at 1226 (“implicit in § 363(b) is the ... requirement of justifying the proposed transaction...there must be some articulated business justification” for transactions outside the ordinary course of business); see also In re North American Royalties, Inc., 276 B.R. 587, 593 (Bankr. E.D. Tenn. 2002) (Courts can approve transactions outside the ordinary course of business if the debtor proves that it is justified by a sound business purpose.)

25. Here, the Debtors have exercised their sound business judgment in evaluating the need to extend the Severance Plans until such time as the modified severance plans and KERP are completed and submitted to the Court for approval. As noted above, the Debtors believe that extending the Severance Plans as proposed herein will allow the Debtors’ management and professionals to focus their attention on the reorganization and rehabilitation of the Debtors’ businesses. Any deterioration in employee morale at this critical time would have a devastating impact on the Debtors, the value of their assets and businesses, and ultimately, the Debtors’ ability to reorganize. Not securing an extension of the Severance Plans at this time would have an especially negative impact on employee morale because of the approach of both the end of 2003 and the holiday season. The Debtors fear that the employees may be susceptible to increased anxiety over the holiday season if they are not assured that severance protection will be in place at the start of the New Year. Furthermore, as many employees have an increased amount of time off from work during the holiday season, they may be plagued by concerns regarding their job and financial security, which would distract them from their work

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responsibilities and/or may lead them to pursue other employment opportunities, with an ultimately negative impact on the Debtors' reorganization efforts. For these reasons, among others, the Debtors believe that extending the Severance Plans is in the best interest of the Debtors, their estates and their creditors, and will allow the Debtors to continue to operate their businesses with minimal disruption and proceed with the important task of stabilizing their operations and furthering their reorganization efforts. Accordingly, authorizing the Debtors to extend the Severance Plans is clearly an appropriate use of this Court's powers under sections 105(a) and 363(b) of the Bankruptcy Code.

**CONCLUSION**

WHEREFORE, the Debtors respectfully request that the Court enter an Order granting the Motion in full and in all respects and granting such other and further relief as is just and proper.

Dated: Fort Worth, Texas  
November 25, 2003

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ATTORNEYS FOR THE DEBTORS AND  
DEBTORS-IN-POSSESSION

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she has authorized BSI as service agent to cause to serve a true and correct copy of the foregoing document upon all persons on the Limited Service List via United States first class mail, postage prepaid, on the 25th day of November, 2003 in accordance with the Federal Rules of Bankruptcy Procedure:

/s/ Meredyth A. Purdy

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

In re	)	
	)	Chapter 11 Case
MIRANT CORPORATION, <u>et al.</u> ,	)	Case No. 03-46590-DML
	)	Jointly Administered
Debtors.	)	
	)	

**ORDER PURSUANT TO 11 U.S.C. §§ 105(a) AND 363(b)  
EXTENDING THE EXPIRATION OF THE SEVERANCE PLANS**

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Upon consideration of the motion dated November 25, 2003 (the "Motion") of Mirant Corporation and its affiliated debtors, as debtors and debtors-in-possession (collectively, the "Debtors"), for the entry of an order pursuant to sections 105(a) and 363(b) of chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330, as amended (the "Bankruptcy Code"), extending the expiration of the Severance Plans,<sup>1</sup> and it appearing that the Court has jurisdiction over this matter and the relief requested in accordance with 28 U.S.C. sections 157 and 1334; and it appearing that due notice of the Motion has been provided as set forth in the Motion, and that no other or further notice need be provided; and it further appearing that the relief requested in the Motion is in the best interests of the Debtors and their estates and creditors; and upon all of the proceedings heard before the Court; and after due deliberation and sufficient cause appearing therefor, it is

**ORDERED** that the Motion is GRANTED in full and in all respects; and it is further

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

**ORDERED** that the Debtors are authorized, but not required, to continue the Severance Plans pending presentation and approval of modified severance plans and the KERP; and it is further

**ORDERED** that the Court shall retain jurisdiction to hear and determine all matters relating to implementation and enforcement of this Order.

Dated: \_\_\_\_\_, 2003.

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HONORABLE D. MICHAEL LYNN  
UNITED STATES BANKRUPTCY JUDGE