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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)
)	Jointly Administered
Debtors.)	
)	Hearing Date and Time: March 10,
)	2004; 10:30 a.m.

**DEBTORS' MOTION REQUESTING ENTRY OF AN ORDER AUTHORIZING
MIRANT AMERICAS ENERGY MARKETING, LP TO ENTER INTO (I) THE
MASTER COAL PURCHASE AND SALE AGREEMENT WITH CONSOL
ENERGY INC.; AND (II) CERTAIN CONFIRMATIONS WITH
PENNSYLVANIA COAL COMPANY AND EIGHTY FOUR MINING COMPANY**

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

Mirant Corporation (“Mirant”) and its affiliated debtors (collectively, “Mirant” or the “Debtors”), as debtors-in-possession, file this motion (the “Motion”) requesting authority for Debtor Mirant Americas Energy Marketing, LP (“MAEM”) to enter into: (i) a new Master Coal Purchase and Sale Agreement with CONSOL Energy Inc; and (ii) two Coal Transaction Confirmations that provide for coal to be delivered to MAEM from: (a) Mine 84 (the “Mine 84 Confirmation”); and (b) Bailey Enlow Fork mine (the “Bailey

Enlow Confirmation” and with the Mine 84 Confirmation, the “Consol Confirmations”) with certain subsidiaries of CONSOL Energy Inc., Consolidation Pennsylvania Coal Company and Eighty Four Mining Company (collectively, “Consol”). In support of the foregoing, the Debtors respectfully state as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), and (O). Venue of this proceeding is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

II. PROCEDURAL BACKGROUND

2. The Cases. On July 14, 2003 and various dates thereafter (collectively, the “Petition Date”), Mirant Corporation and 82 of its direct and indirect subsidiaries filed voluntary chapter 11 petitions and manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of title 11 of the United States Code (the “Bankruptcy Code”).

3. The Cases are Jointly Administered. This Court has entered orders approving the joint administration of the Debtors’ chapter 11 cases.

4. The Committees. Three official committees have been appointed by the Office of the United States Trustee for the Northern District of Texas in these administratively consolidated cases.

III. FACTUAL BACKGROUND

A. Consol Contracts.¹

(i) *The Existing Consol Master Agreement.*

5. Prior to the Petition Date, on August 6, 2002, MAEM and CONSOL Energy Inc., on behalf of its subsidiary companies Consol Pennsylvania Coal Company, Eighty Four Mining Company, Consolidation Coal Company, McElroy Coal Company, Island Creek Coal Company, and CONSOL of Kentucky Inc. (collectively, “Consol Energy”) entered into the Master Coal Purchase and Sale Agreement (the “Consol Master Agreement”), which governs the coal purchase and sale transactions between the parties.

6. MAEM and Consol Energy also executed a letter agreement, dated July 11, 2003, detailing: (i) the parties’ performance concerning certain outstanding deliveries pursuant to the Consol Master Agreement; and (ii) the parties’ agreement regarding continued performance under the Consol Master Agreement in the event of MAEM’s filing of its chapter 11 case (the “Letter Agreement”).

7. Effective as of January 21, 2004, MAEM, in the ordinary course of business, amended the Consol Master Agreement (“Amended Consol Master Agreement” and, collectively with the Consol Master Agreement and the Letter Agreement, the “Existing Consol Master Agreement”) to incorporate additional industry standard terms. Accordingly, the Amended Consol Master Agreement does not affect any of the terms of the underlying coal purchase and sale transactions between the parties.

8. The Debtors have not made a determination as to whether the Existing Consol Master Agreement should be assumed or rejected under section 365 of the

¹ Parties in interest may request copies of the Existing Consol Master Agreement and the New Consol Master Agreement by making a written request to the Debtors’ counsel.

Bankruptcy Code. The Existing Consol Master Agreement and any coal purchase and sale transaction under this agreement, thus, remain unaffected by this Motion.²

(ii) *The New Consol Master Agreement.*

9. MAEM proposes to enter into a new, separate Master Coal Purchase and Sale Agreement (the “New Consol Master Agreement”) with Consol Energy, effective as of January 21, 2004, that governs the transactions memorialized by the Consol Confirmations.³

(iii) *The Consol Confirmations.*

10. Pursuant to the New Consol Master Agreement, MAEM proposes to enter into the Consol Confirmations: (i) the Mine 84 Confirmation; and (ii) the Bailey Enlow Confirmation.⁴ The coal that will be purchased under the Consol Confirmations will be utilized by the Debtors’ Morgantown, Chalk Point, and Dickerson plants (the “Plants”) in Maryland. Both Consol Confirmations have a four-year contract term, commencing on February 1, 2004 through December 31, 2007.

11. The Mine 84 Confirmation involves the annual purchase and delivery (the “Mine 84 Quantity”) of: (i) 200,000 tons for the period February through December 2004; and (ii) 400,000 tons for the periods in January 2005 through December 2007.

² The parties have acknowledged that the Amended Consol Master Agreement does not constitute an assumption of the Consol Master Agreement.

³ The New Consol Master Agreement incorporates terms that are included in the Debtors’ updated, normalized forms in compliance with industry standards.

⁴ The primary reason for two separate Consol Confirmations is the difference in the SO₂ value of the coal to be sold to MAEM under each respective Consol Confirmation. Different SO₂ limitations apply to the respective Plants. Thus, the formula utilized to calculate actual SO₂ value and the specifications and rejection limits for the delivered coal differ between the two agreements. The Dickerson plant has a 2.8 lb SO₂ emission limit whereas both Morgantown and Chalk Point have a 3.5 lb SO₂ emission limit.

12. On the other hand, the Bailey Enlow Confirmation provides for the annual purchase and delivery (the “Bailey Enlow Quantity”) of: (i) 1.464 million tons for the period February through December 2004; (ii) 1.4 million tons for the period January through December 2005; and (iii) 2.6 million tons for the periods in January 2006 through December 2007.⁵

IV. **RELIEF REQUESTED**

13. By this Motion, the Debtors respectfully request that the Court enter an order authorizing MAEM, pursuant to section 363 of the Bankruptcy Code, to enter into and perform its obligations under: (i) the New Consol Master Agreement, effective as of January 21, 2004; and (ii) the Consol Confirmations.

V. **BASIS FOR RELIEF**

A. **The Court Should Authorize MAEM’s Entry Into the New Consol Master Agreement and the Consol Confirmations.**

(i) *Entry into the New Consol Master Agreement and the Consol Confirmations Is In the Debtors’ Ordinary Course of Business.*

14. The Debtors believe that entry into the New Consol Master Agreement and the Consol Confirmations is within their ordinary course of business and, thus, the Court should authorize MAEM to enter into the New Consol Master Agreement and the Consol Confirmations pursuant to section 363 of the Bankruptcy Code. Nevertheless, since the Consol Confirmations involve four-year contract terms and the purchase of millions of tons of coal, the Debtors are, out of an abundance of caution, seeking an order authorizing MAEM to enter into the New Consol Master Agreement and the Consol Confirmations.

⁵ Although the detailed pricing information has been provided to the Committees, the pricing information has been excluded from the Motion to protect the commercial integrity of the Debtors’ business.

(a) *Legal Standard.*

15. Section 363 of the Bankruptcy Code provides, in relevant part, that a debtor-in-possession “may enter into transactions . . . in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.” 11 U.S.C. § 363(c)(1).

16. The two tests ordinarily applied by the courts to determine the ordinary course of business are the “horizontal” test and the “vertical” test. *Denton County Elec. Coop., Inc. v. Eldorado Ranch (In re Denton County Elec. Coop., Inc.)*, 281 B.R. 876, 882 and n.12 (Bankr. N.D. Tex. 2002). “The ‘horizontal test’ focuses on the way businesses operate within a given industry. The ‘vertical test’ focuses on the expectations of creditors.” *Denton County Elec. Coop.*, 281 B.R. at 882 n. 12.

17. All asset management and trading activities conducted through the use of trading and other similar contracts are in the ordinary course of the Debtors’ businesses. *See Medical Malpractice Ins. Assoc. v. Hirsch (In re Lavigne)*, 114 F.3d 379, 384 (2d Cir. 1997) (finding that “ordinary course of business” is meant “to embrace the reasonable expectations of interested parties of the nature of transactions that the debtor would likely enter in the course of its normal, daily business”) (*quoting In re Watford*, 159 B.R. 597, 599 (M.D. Ga. 1993)); *In re Roth American, Inc.*, 975 F.2d 949, 952 (3d Cir. 1992) (stating that section 363 of the Bankruptcy Code is designed to allow a debtor-in-possession “flexibility to engage in ordinary transactions without unnecessary . . . oversight”); *In re Coordinated Apparel, Inc.*, 179 B.R. 40, 43 (Bankr. S.D.N.Y. 1995).

(b) *Horizontal Test.*

18. Businesses in substantially the same business as MAEM typically enter into confirmations similar to the Consol Confirmations; suggesting that MAEM's entry into these agreements is within its ordinary course of business. *Creditors' Rights Handbook* (CBC 1993), (quoting *In re Johns-Manville Corp.*, 60 B.R. 612, 618 (Bankr. S.D.N.Y. 1986) (suggesting that "a comparison of this debtor's business to other like businesses" is the appropriate inquiry concerning ordinary course transactions). *See also In re Atlanta Retail, Inc.*, 287 B.R. 849, 856 (Bankr. N.D. Ga. 2002). Companies in the Debtors' industry routinely enter into such transactions. *See, e.g., In re Enron Corp.*, Case No. 01-16034 (AJG) (Bankr. S.D.N.Y. May 14, 2002).

19. The terms of the Consol Confirmations comport with industry standards for coal procurement given the magnitude of the Debtors' business. A majority of coal users—approximately 60%—utilize a portfolio of "spot contracts" (terms of one year or less) or "mid-term contracts" (term lengths of one to five years) to satisfy their coal requirements. In "mid-term contracts," such as the Mine 84 Confirmation and the Bailey Enlow Confirmation, two types of pricing are utilized: (i) a fixed price for the entire contract term; or (ii) an escalating price (either in annual percentage increase or in a known price/ton increase). The annual tonnage term contained in contracts of comparable coal users, moreover, range from 0.5 million to 3.25 million tons. The total annual tonnage in the Consol Confirmations fall within this range by varying from 1.6 million to 3 million tons.

(c) *Vertical Test.*

20. Creditors' reasonable expectations of a debtor's "ordinary course of business" are based on the debtor's specific prepetition business practices and norms, and the expectation that the debtor will conform to those practices and norms while operating as a debtor-in-possession. *Garofalo's*, 186 B.R. at 425. Thus, a fundamental characteristic of an "ordinary" postpetition business transaction is its similarity to a prepetition business practice. *Marshack v. Orange Commercial Credit (In re National Lumber & Supply, Inc.)*, 184 B.R. 74, 79 (9th Cir. B.A.P. 1995); *James A. Phillips*, 29 B.R. at 394.

21. The size, nature and type of business, and the size and nature of the transactions in question, are all relevant to determining whether the transactions at issue are ordinary. *Harrison*, 115 B.R. at 598; *Johns-Manville*, 60 B.R. at 617. "Accordingly, a post-petition transaction undertaken by the debtor that is similar in size and nature to pre-petition transactions undertaken by the debtor would be within the ordinary course of business." *Garofalo's*, 186 B.R. at 426.

22. In the past, MAEM has routinely entered into similar transactions with Consol and other parties. In fact, the Consol Confirmations are substantially in the same form, and for the same reasons, as those confirmations entered into with Consol prepetition.

(ii) *Alternatively, the Court Should Authorize Entry into the New Consol Master Agreement and the Consol Confirmation Outside of the Ordinary Course of Business Under Section 363(b).*

23. Even if the Court does not find that MAEM's entry into the New Consol Master Agreement and the Consol Confirmations is in the ordinary course of business,

MAEM should still be permitted to enter into the New Consol Master Agreement and the Consol Confirmations consistent with past practices and without further order of the Court. Such relief is appropriate under the Court's authority to approve non-ordinary course transactions under section 363(b) of the Bankruptcy Code.

24. Section 363(b) provides in pertinent part that a debtor "after notice and hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b). A debtor must demonstrate a sound business justification for a sale or use of assets outside the ordinary course of business. *See, e.g., In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986).

25. As discussed above, the Debtors are in the business of trading electricity, electric power, natural gas and related commodities, goods and services. The Debtors have derived substantial revenue from their historic trading activities and, accordingly, confirmations—such as the Consol Confirmations—represent a valuable and substantial asset of the estates.

26. The Plants will utilize the coal that will be purchased under the Consol Confirmations. Simply put, the Consol Confirmations will allow MAEM to purchase a sufficient supply of coal, necessary to run the Plants efficiently and economically, at favorable market prices whereby the price and coal supply risk to the Plants is reduced.

27. The Plants sell power to the Pennsylvania-New Jersey-Maryland market (the "PJM" market), the electric power supply market in the Mid-Atlantic region. In the PJM market, the coal that will be purchased under the Consol Confirmations is priced favorably when compared to the market prices and estimated future prices. The Consol Confirmations strategically lock in the coal supply for the Debtors.

28. The Debtors are cognizant of this Court's previously stated concern regarding contracts with extended terms that represent a significant ongoing expense. The Debtors submit that the New Consol Master Agreement and the Consol Confirmations are advantageous because they will permit MAEM to purchase sufficient amounts of coal necessary to run the Plants efficiently and economically at favorable market prices and, thus, allow MAEM to hedge the price and supply risk.

29. The Debtors have determined that entry into the New Consol Master Agreement and the Consol Confirmations will conform to—and facilitate—any reasonably conceivable business plan that the Debtors are likely to formulate in their cases. In short, the Consol Confirmations are favorable and beneficial deals that would facilitate any conceivable plan of reorganization or business plan.

30. For the reasons stated above, it is clearly an exercise of sound business judgment for the Debtors to enter into the Consol Confirmations.

VI. CONCLUSION

WHEREFORE, the Debtors respectfully request that this Court enter an Order granting the relief requested herein.

Dated: February 9, 2004

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**ATTORNEYS FOR THE DEBTORS AND
DEBTORS-IN-POSSESSION**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has authorized BSI as service agent to cause to serve a true and correct copy of the foregoing Motion upon: (i) all persons identified on the Limited Service List; and (ii) all parties listed below via first class mail, postage prepaid, on the 9th day of February 2004 in accordance with the Federal Rules of Bankruptcy Procedure.

CONSOL Energy Inc.
1800 Washington Road
Pittsburgh, PA 15241
Fax: (412) 831-4594
Attn: Vice President, Sales

CONSOL Energy Inc.
501 Village Trace
Building 9A, Suite 204
Marietta, GA 30067
Attn: General Sales Manager
Fax: (770) 951-0601

CONSOL Energy Inc.
3330 Cumberland Boulevard
Atlanta, GA 30339
Attn: General Sales Manager

/s/ Ian T. Peck

**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. 03-46591(DML)
Debtors.)	Jointly Administered
)	
))	

**ORDER GRANTING DEBTORS' MOTION REQUESTING ENTRY OF AN ORDER
AUTHORIZING MIRANT AMERICAS ENERGY MARKETING, LP TO ENTER INTO
(I) THE MASTER COAL PURCHASE AND SALE AGREEMENT WITH CONSOL
ENERGY INC.; AND (II) CERTAIN CONFIRMATIONS WITH PENNSYLVANIA
COAL COMPANY AND EIGHTY FOUR MINING COMPANY**

Upon the Motion, dated February 9, 2004, filed by Mirant Corporation and its affiliated debtors (collectively, the "Debtors") for the entry of an order for authorizing Debtor Mirant Americas Energy Marketing, LP ("MAEM") to enter into: (i) a new Master Coal Purchase and Sale Agreement with CONSOL Energy Inc; and (ii) two Coal Transaction Confirmations that provide for coal to be delivered to MAEM from: (a) Mine 84 (the "Mine 84 Confirmation"); and (b) Bailey Enlow Fork mine (the "Bailey Enlow Confirmation" and with the Mine 84 Confirmation, the "Consol Confirmations") with certain subsidiaries of CONSOL Energy Inc., Consolidation Pennsylvania Coal Company and Eighty Four Mining Company (collectively, "Consol"); and it appearing that this Court has jurisdiction to consider this Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334; and it appearing that this matter is a core proceeding within the meaning of 28 U.S.C. § 157(b); and it appearing that venue of this proceeding and this Motion is proper in this district in accordance with 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been given as set forth on the certificate of service annexed to the Motion and the affidavit filed by Bankruptcy

Services LLC; and it appearing that no other or further notice is necessary; and it further appearing that the relief requested in the Motion is in the best interests of the Debtors, their estates and their creditors; and after due consideration and sufficient cause appearing therefor, it is hereby:

ORDERED that the Motion is hereby GRANTED as set forth herein; it is further

ORDERED that the Debtors are authorized to enter into the new Master Coal Purchase and Sale Agreement with CONSOL Energy Inc., effective as of January 21, 2004, and perform their obligations thereunder; it is further

ORDERED that the Debtors are authorized to enter into the Consol Confirmations with Consol and perform their obligations thereunder; and it is further

ORDERED that the nothing herein will affect the Existing Consol Master Agreement¹ and all rights are reserved as to the Existing Consol Master Agreement.

Dated: March ____, 2004

D. Michael Lynn,
United States Bankruptcy Judge

¹ Any capitalized term not defined in this order will have the meaning ascribed to such term in the Motion.