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ATTORNEYS FOR MOVANT
MODESTO IRRIGATION DISTRICT

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

In re:

MIRANT CORPORATION, et al.,

Debtors.

Case No. 03-46590-DML

Chapter 11

Jointly Administered

Preliminary Hearing: November 12, 2003, at
10:30 a.m. before the Hon. D. Michael Lynn

**MODESTO IRRIGATION DISTRICT'S MOTION FOR
DETERMINATION OF RECOUPMENT RIGHTS OR IN THE
ALTERNATIVE, MOTION FOR RELIEF FROM THE AUTOMATIC STAY**

**A HEARING WILL BE CONDUCTED ON THIS MATTER ON
NOVEMBER 12, 2003 AT 10:30 A.M. BEFORE THE HONORABLE D.
MICHAEL LYNN, UNITED STATES COURTHOUSE, 501 WEST 10TH
STREET, FORT WORTH, TEXAS.**

**IF YOU OBJECT TO THE RELIEF REQUESTED, YOU MUST
RESPOND IN WRITING, SPECIFICALLY ANSWERING EACH
PARAGRAPH OF THIS PLEADING. THE RESPONSE SHALL
INCLUDE A DETAILED AND COMPREHENSIVE STATEMENT AS TO**

HOW THE MOVANT CAN BE “ADEQUATELY PROTECTED” IF THE STAY IS TO BE CONTINUED.

UNLESS OTHERWISE DIRECTED BY THE COURT, THE DEBTOR AND/OR ANY OBJECTING PARTY MUST FILE A RESPONSE WITH THE CLERK OF THE BANKRUPTCY COURT AT 501 WEST 10TH STREET, FORT WORTH, TEXAS, WITHIN TWELVE (12) DAYS FROM THE SERVICE OF THIS MOTION.¹

YOU MUST SERVE A COPY OF YOUR RESPONSE ON THE PERSON WHO SENT YOU THE NOTICE. IF THE DEBTOR DOES NOT FILE A RESPONSE AS REQUIRED, THE ALLEGATIONS IN THE CREDITOR’S MOTION FOR RELIEF FROM THE AUTOMATIC STAY SHALL BE DEEMED ADMITTED, UNLESS GOOD CAUSE IS SHOWN WHY THESE ALLEGATIONS SHOULD NOT BE DEEMED ADMITTED, AND AN ORDER GRANTING THE RELIEF SOUGHT MAY BE ENTERED BY DEFAULT.

¹ Under Bankruptcy Rule 9006(e) service by mail is complete upon mailing; under Bankruptcy Rule 9006(f), 3 days are added to the period for the filing of a response when notice of the period is served by mail. See Local Bankruptcy Rule 4001.1(b).

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

MODESTO IRRIGATION DISTRICT (“MID”), movant, files its Motion For Determination Of Recoupment Rights Or In The Alternative, Motion For Relief From The Automatic Stay (this “Motion”), and as grounds therefor would respectfully show the Court as follows:

I. JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(a) and 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(1)(G). This Motion is made pursuant to 11 U.S.C. § 362(d)(1), 11 U.S.C. § 362(d)(2), Rule 4001 of the Federal Rules of Bankruptcy Procedure, and Local Rule 4001 of the Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas.

II. MOTION

2. MID will, and hereby does, move the above-entitled Court for entry of an order determining that MID’s exercise of its right to recoupment or offset does not implicate the automatic stay, or in the alternative, moves the Court for an order granting relief from the automatic stay provisions of 11 U.S.C. § 362(a), to the extent that such provisions are applicable, in the above-captioned Debtors’ case for the limited purpose of allowing MID to exercise its setoff rights pursuant to the terms of a prepetition power trading agreement between MID and Mirant Americas Energy Marketing, LP (“MAEM”), one of the Debtors herein.

3. This Motion is based upon this notice, the memorandum contained herein, the declaration of Scott Van Vuren filed and served concurrently herewith, the record of this Court and all other evidence or argument as may be properly presented by MID with respect to this motion.

III. FACTS

4. On July 14, 2003 (the “Petition Date”), the Debtors, including MAEM, filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code, commencing the above-captioned bankruptcy cases.

5. The Debtors continue to manage and operate their businesses as debtors-in-possession, pursuant to 11 U.S.C. Section 1107 and 11 U.S.C. Section 1108.

6. MID is a California irrigation district that provides electricity and other services to industrial, commercial and residential customers in the greater Modesto, California area. MID is a “governmental unit” as that term is defined by 11 U.S.C. § 101(27).

7. MID and MAEM, among others, are parties to the Western Systems Power Pool Agreement (the “WSPP Agreement”) made effective originally as of July 27, 1991, and as updated from time to time, as well as parties to the Netting Exhibit to the WSPP Agreement (the “Netting Exhibit”). Pursuant to the terms of the WSPP Agreement, MID and MAEM have engaged in numerous wholesale electric power purchases and sales transactions.

8. On or about July 14, 2003, the Court entered its Interim Order Authorizing The Debtors To (i) Comply With Terms Of Pre-Petition Trading Contracts, (ii) Enter Into Post-Petition Trading Contracts In The Ordinary Course Of Business, (iii) Provide Credit Support Relating To Both Pre- And Post-Petition Trading Contracts, And (iv) Setting A Final Hearing To Consider The Entry Of A Final Order Affirming Interim Order And Authorizing Assumption Of Pre-Petition Trading Contracts (the “Interim Order”) in the Debtors’ chapter 11 cases. Among other provisions, Paragraph 2 of the Interim Order authorizes the Debtors to perform their “Prepetition Trading Contracts,” as that term is defined in the Interim Order, and entitles each “Counterparty” to rely upon such authorization.

9. The term “Counterparty” is defined in Paragraph 1 of the Interim Order as “the non-Debtor party to a Prepetition Trading Contract or a Postpetition Trading Contract, as the case may be.” With respect to the definition of “Counterparty,” the Interim Order makes no

distinction between governmental and non-governmental entities. The Interim Order further defines a “Prepetition Trading Contract” in Paragraph F to broadly include,

various industry standard trading contracts, including, but not limited to, ISDA, EEI, WSPP, GISB and/or NAESB master agreements, and various other master agreements, “long-form confirmations”, netting agreements, master netting agreements, collateral agreements and/or credit support agreements or annexes relating thereto (including all related schedules, exhibits, annexes and confirmations) and any transactions thereunder, as may have been amended, restated or supplemented from time to time

10. Paragraph 18 of the Interim Order states that the provisions of the Interim Order are to remain in effect for 55 days after entry of the Interim Order.

11. With respect to offsetting and netting, the Interim Order contained the following language in Paragraph 2:

The Debtors are hereby authorized (and each Counterparty shall be entitled to rely upon such authorization) to:

a. engage in Trading Activities in the ordinary course of business without further order of the Court, including but not limited to engaging in Trading Activities pursuant to the terms of the Prepetition Trading Contracts . . . *including but not limited to any and all terms relating to offsetting, netting and/or cross-netting;*

(emphasis added). Further, the Interim Order provides in Paragraph 4b that,

Counterparties may net amounts and obligations under Prepetition Trading Contracts against amounts and obligations under other Prepetition Trading Contracts and Postpetition Trading Contracts with the Debtor and vice versa. In this regard, there shall be no distinction between transactions entered into prepetition and postpetition.

12. In June 2003, prior to the Debtors’ petition date, MID and MAEM engaged in numerous one-day sale transactions under the WSPP Agreement, resulting in MID selling power in the aggregate amount of \$226,050.00 to MAEM (the “June Transactions”). During that period, MAEM did not sell power to MID.

13. From July 1, 2003 through July 14, 2003, inclusive, prior to the Debtors’ petition date, MID purchased power in the aggregate amount of \$618,640.00 from MAEM (the “July

Prepetition Transaction”) in a WSPP Agreement transaction.² During that period, MID did not sell power to MAEM.

14. During the postpetition period from July 15, 2003 through July 31, 2003, inclusive, MID purchased power in the aggregate amount of \$843,600.00 from MAEM, and MAEM purchased power in the aggregate amount of \$330,000.00 from MID (the “July Postpetition Transactions”), in WSPP Agreement transactions.³

15. The June Transactions, the July Prepetition Transaction, and the July Postpetition Transactions were all transactions made under the terms of the WSPP Agreement.

16. Based on offsetting the June Transactions against the July Prepetition Transaction, under the terms of the WSPP Agreement and the Netting Exhibit, MID owed MAEM the net amount of \$392,590.00 for power purchased from MAEM during those prepetition periods.

17. Based on offsets of power purchases and sales in the July Postpetition Transactions, under the terms of the WSPP Agreement and the Netting Exhibit, MID owed MAEM the net amount of \$513,600.00 for power purchased from MAEM during that period.

18. Based on the provisions of the Interim Order and the netting and set-off provision contained in the WSPP Agreement, on August 20, 2003, MID transferred funds in the amounts of \$392,590.00 (the “Prepetition Payment”) and \$513,600.00 (the “Postpetition Payment”) to an account in the name of MAEM, representing net prepetition and postpetition amounts, respectively, then owing from MID to MAEM. Concurrently with the transfer of the Prepetition

² The July Prepetition Transaction results from an agreement entered into by MID and MAEM on October 19, 2000 pursuant to the terms of the WSPP Agreement, as modified by the February 1, 2000 amendment thereto. By the terms of the October 19, 2000 agreement, MID was to purchase 25 megawatts of power from MAEM during the third quarter of 2003.

³ The July Postpetition Transactions result from an agreement entered into by MID and MAEM on August 9, 2001 pursuant to the terms of the WSPP Agreement, as modified by the July 1, 2001 amendment thereto. By the terms of the August 9, 2001 agreement, MID was to purchase 25 megawatts of power from MAEM during the third quarters of 2003 through 2010. The postpetition purchase by MAEM from MID resulted from a “three-way bookout,” a mechanism to provide for reliable power delivery, whereby a third-party supplier with a similar contract to sell to MAEM was located, in this case, Sempra Energy Trading Corp. (“Sempra”). MID sold back 25 megawatts of power to MAEM, MAEM in turn sold back 25 megawatts of power to Sempra, and Sempra in turn sold 25 megawatts of power to MID.

Payment and the Postpetition Payment, by letter dated August 20, 2003, MID informed MAEM that MID had netted amounts owing between the companies, and provided the calculations supporting that netting. In addition, MID informed MAEM that it had transferred the net amounts pursuant to the terms of the Interim Order, which explicitly authorized such netting procedures, and according to the terms of the netting and recoupment provision of the WSPP Agreement and accompanying Netting Exhibit. A copy of MID's August 20, 2003 letter is attached to the accompanying declaration of Scott Van Vuren, Risk Manager of MID, as Exhibit "A."

19. On August 28, 2003, following MID's transfers of the Prepetition Payment and the Postpetition Payment to the Debtors, the Court entered its Final Order Authorizing The Debtors To (i) Comply With Terms Of Pre-Petition Trading Contracts, (ii) Enter Into Post-Petition Trading Contracts In The Ordinary Course Of Business, (iii) Provide Credit Support Relating To Both Pre- And Post-Petition Trading Contracts, And (iv) Authorizing Assumption Of Pre-Petition Trading Contracts (the "Final Order").

20. In the Final Order, the term "Counterparty" is defined in Paragraph 1 as "the non-Debtor party to a Prepetition Trading Contract of a Postpetition Trading Contract, as the case may be", the same definition that was contained in the Interim Order. However, the Final Order's definition of "Prepetition Trading Contracts" has been changed from that which is contained in the Interim Order, to limit its scope so as to include "only those contracts that, as of the Petition Date (i) are "forward contracts," "commodity contracts" and/or "swap agreements" as such terms are defined in sections 101 or 761 of the Bankruptcy Code; and (ii) had the contractual right to cause liquidation or termination under sections 556 or 560 of the Bankruptcy Code because of a condition of the kind specified in section 365(e)(1) of the Bankruptcy Code."

21. Section 556 of the Bankruptcy Code provides that "The contractual right of a commodity broker or forward contract merchant to cause the liquidation of a commodity contract . . . or forward contract because of a condition of the kind specified in section 365(e)(1) . . . shall not be stayed . . ." 11 U.S.C. § 556.

22. A “forward contract merchant” is defined as “*a person whose business consists in whole or in part of entering into forward contracts as or with merchants in a commodity . . .*” 11 U.S.C. § 101(26) (emphasis added).

23. In turn, “person” is defined to include an “individual, partnership, and corporation, *but does not include governmental unit . . .*” 11 U.S.C. § 101(41) (emphasis added).

24. Thus, the effect of the more limited definition of “Prepetition Trading Contracts” in the Final Order was apparently intended to exclude, for the first time, government units such as MID. Notably, that more limited definition is not contained in the Interim Order, under which MID made the Prepetition Payment and the Postpetition Payment to the Debtors.

25. In a letter dated August 25, 2003 from MAEM to MID (the “August 25th Letter”), MAEM acknowledged receipt of the Prepetition Payment of \$392,590.00, but asserted that MID’s netting that resulted in the amount of that payment had constituted a violation of the automatic stay provisions of Section 362(a) of the Bankruptcy Code, in effect in the Debtors’ case. A copy of the August 25th Letter is attached to Mr. Van Vuren’s declaration as Exhibit “B.” Based on the alleged stay violation, MAEM demanded that, “Modesto immediately wire the unpaid portion of Mirant’s July [prepetition] invoice, i.e., \$226,050 by August 27, 2003.”

26. In response, on August 28, 2003, MID’s counsel wrote to MAEM’s counsel to explain the justification of MID’s offsetting of prepetition obligations under the terms of the Interim Order. A copy of that letter is attached to Mr. Van Vuren’s declaration as Exhibit “C.”

27. Subsequent discussions between MID and the Debtors, by and through their counsel, were not successful in resolving the dispute over MID’s netting of prepetition obligations, with MID asserting its right to offset, recoup or administratively freeze the obligations under contracts and the Interim Order, and the Debtors arguing that any such offsets were prohibited, retroactively, by the terms of the Final Order.

28. At the conclusion of those discussions, the Debtors' counsel demanded that MID file a motion for relief from stay in order to resolve the parties' dispute. This Motion, therefore, followed.

29. Notably, there is no apparent dispute as to MID's right to offset postpetition obligations, as underlies the Postpetition Payment. The dispute between MID and the Debtors involves only the offsets underlying the Prepetition Payment.

IV. LEGAL DISCUSSION

30. MID submits that based upon the foregoing facts, and under applicable law as set forth below, the relief requested herein should be granted, and the Court should determine that MID's exercise of its recoupment or setoff rights does not implicate the automatic stay. Alternatively, to the extent that the automatic stay is applicable, MID further submits that pursuant to Section 362(d)(1)–(2) of the Bankruptcy Code, MID should be granted relief from the stay.

A. The Automatic Stay Does Not Apply To MID's Exercise Of Its Recoupment Rights.

31. Recoupment allows a creditor to "offset a claim that arises from the same transaction as the debtor's claim." *In the Matter of United States Abatement Corp.*, 79 F.2d 393, 398 (5th Cir. 1996). Money recouped by creditors from any amount owed to the debtor postpetition is not subject to the automatic stay. *In the Matter of Kosadnar*, 157 F.3d 1011, 1014 (5th Cir. 1998) (citations omitted). Since the debtor has no interest in the funds, the stay is not violated. *Id.* at 1016. Moreover, "No 'express contractual right' to recoupment is required." *In re Abco Industries, Inc.*, 270 B.R. 58, 61-62 (Bankr. N.D. Tex. 2001) (quotations omitted).

32. While recoupment is similar to the legal and equitable principle of setoff as authorized in 11 U.S.C. § 553,

A setoff is asserted for the purpose of reducing or extinguishing a creditor's claim against the debtor when "the mutual debt and claim contemplated are generally

those arising from *different* transactions Recoupment, on the other hand, is the setting up of a demand arising from the *same transaction* as the plaintiff's claim or cause of action, strictly for the purpose of abatement or reduction of such claim."

United States Abatement Corp. at 398, n. 16 (quoting 4 Collier On Bankruptcy ¶ 553.03)(emphasis and quotations in the original).

33. In *Kosadnar*, the Court states that there are two general requirements to characterize a withholding by a creditor as recoupment, "first, some type of overpayment must have been made, and second, both the creditor's claim and the amount owed to the debtor must arise from a single contract or transaction." *Id.* at 1014. (citations omitted). While there is no general standard governing whether events are part of the same or different transactions, "Given the equitable nature of the recoupment doctrine, courts have refrained from precisely defining the same-transaction standard, focusing instead on the facts and the equities of each case." *Id.* at 1015 (alterations, internal quotations, and citations omitted). Applying this standard, the Court in *Kosadnar* determined that prepetition overpayments and postpetition commissions paid by a creditor employer to a debtor employee arose from the same transaction – the employer's compensation plan. *Id.* at 1016. Accordingly, the Court upheld the lower courts' findings that the creditor employer properly recouped amounts from the debtor's postpetition paychecks to recover overpaid commissions paid to the debtor prepetition, and affirmed the district court's order denying the debtor's contempt motion. *Id.*

34. Further, recoupment was found to have been properly exercised by a creditor that had purchased crude oil in a series of transactions with the debtor pursuant to a prepetition oil division order which gave the creditor the right to purchase unspecified amounts of crude oil from the debtor. *In re B&L Oil Co.*, 782 F.2d 155 (10th Cir. 1986). Although the debtor argued in *B&L* that each purchase and delivery of oil should be characterized as a separate transaction, the Court had "no difficulty holding that the oil division order is a single contract." *Id.* at 158. In allowing recoupment, the Court also noted that a debtor-in-possession "may not accept the benefits of an executory contract without its burdens." *Id.* at 159. As such, where the debtor-in-

possession continued to sell to the buyer at the prices and other favorable terms that were conferred by the division order, the Court found it proper to impose the obligation to repay earlier overpayments on the debtor-in-possession. *Id.*

35. Here, MID satisfies the *Kosadnar* two-part recoupment test, and thus, properly exercised its right of recoupment on August 20, 2003 when MID transferred both the Prepetition Payment and the Postpetition Payment to MAEM. First, overpayments in the amount of \$226,050.00 for the prepetition period, and in the amount of \$330,000.00 for the postpetition period, would have been made by MID to MAEM if MAEM's power purchases from MID had not been taken into account. Second, MID's claim against MAEM (based on MAEM's power purchases from MID), and MAEM's claim against MID (based on its power sales to MID), both arose from the same transaction – the WSPP Agreement. While the June Transactions, the July Prepetition Transaction, and the July Postpetition Transactions may arguably be characterized as individual power purchase and sale transactions, all of the transactions were made according to the terms of the WSPP Agreement which, like the oil division order at issue in *B&L*, is a single integrated agreement, albeit updated from time to time. Therefore, the Prepetition Payment and the Postpetition Payment made by MID to MAEM may be characterized as a proper exercise of MID's right of recoupment, and in no way implicates the automatic stay in the Debtors' case.

36. Further, although a contractual provision allowing recoupment is not necessary for a creditor to exercise its right of recoupment, the WSPP Agreement expressly permits netting and recoupment by MID and MAEM. Specifically, Paragraph 28 states,

the Purchaser and the Seller are each required to pay an amount to each other in the same calendar month for transactions under this Agreement, then such amounts with respect to each Party may be aggregated and the Parties may discharge their obligations to pay through netting of the respective amounts due, in which case the Party, if any, owing the greater aggregate amount may pay to the other Party the difference between the amounts owed. Each Party reserves to itself all rights, set-offs, counterclaims, and other remedies and defenses (to the extent not expressly herein waived or denied) which such Party has or may be entitled to arising from or out of this Agreement and any applicable Confirmation Agreements. *All outstanding transactions and the obligations to make payments under this Agreement, any Confirmation Agreement, or any other agreement*

between the Parties may be offset against each other, set off, or recouped therefrom.

(emphasis added). Thus, the netting and recoupment provision of the WSPP Agreement, which the Debtors were authorized to perform by the terms of the Interim Order, unambiguously authorized MID to exercise its right of recoupment with respect to the June Transactions, the July Prepetition Transaction, and the July Postpetition Transactions. Like the debtor in *B&L*, the Debtors here should not be permitted to accept the benefits of an executory contract without accepting the burdens of the same.

37. Accordingly, the netted Prepetition Payment resulted from a proper recoupment to which the automatic stay does not apply.

**B. MID's Netting Is Permitted
By The Terms Of The Interim Order.**

38. Additionally, even if MID's netting is not characterized as a recoupment, as an offset it was nonetheless permissible under the Court's Interim Order.

39. The provisions of the Interim Order expressly authorized the Debtors to perform their Prepetition Trading Contracts, which by definition included the WSPP Agreement that MID and the Debtors were parties to, and MID reasonably relied on the Interim Order when exercising its right of recoupment on August 20, 2003, as Paragraph 2 of the Interim Order states,

The Debtors are hereby authorized (and each Counterparty shall be entitled to rely upon such authorization) to:

a. engage in Trading Activities in the ordinary course of business without further order of the Court, including but not limited to engaging in Trading Activities pursuant to the terms of the Prepetition Trading Contracts . . . *including but not limited to any and all terms relating to offsetting, netting and/or cross-netting;*

(emphasis added).

40. Moreover, the Interim Order specifically and expressly contemplates the type of netting calculation performed by MID with respect to the June Transactions, the July Prepetition Transaction, and the July Postpetition Transactions, as the Interim Order provides in Paragraph 4b that,

Counterparties may net amounts and obligations under Prepetition Trading Contracts against amounts and obligations under other Prepetition Trading Contracts and Postpetition Trading Contracts with the Debtor and vice versa. In this regard, there shall be no distinction between transactions entered into prepetition and postpetition.

41. Therefore, as the Interim Order made no distinction between governmental and private entities in its definition of “Counterparty,” or “Prepetition Trading Contracts,” MID’s exercise of its netting rights against the Debtors, well before the entry of the Final Order, was proper.

42. While the provisions of the Final Order may now arguably bar governmental units’ rights of offset after August 28, 2003, due to the more restrictive definition of “Prepetition Trading Contracts,” this cannot alter the fact that the Interim Order explicitly permitted such netting by MID as of August 20, 2003 when MID made its payments. To find the stay applicable to MID’s exercise of its recoupment rights, which occurred while the Interim Order remained in effect, and well in advance of the entry of the Final Order – which contained no retroactivity provision – would be inequitable.

43. Therefore, given the fact that MID netted amounts owing based on the terms of the WSPP Agreement and the Interim Order then in effect, MID’s actions were not subject to the automatic stay in effect in the Debtors’ chapter 11 case.

C. To The Extent That The Stay Is Applicable To MID, The Stay Should Be Lifted.

44. The filing of a voluntary petition under Section 301 of the Bankruptcy Code operates as a stay of proceedings against the debtor. 11 U.S.C. § 362(a). However, Section 362(d)(1) provides that relief from the automatic stay may be granted as follows:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

11 U.S.C. § 362(d)(1).

45. Alternatively, relief from stay may be granted under Section 362(d)(2) if “(A) the debtor does not have equity in such property; and (B) such property is not necessary to an effective reorganization” 11 U.S.C. § 362(d)(2). To the extent that this Court determines that the automatic stay otherwise applies to the June Transactions, the July Prepetition Transaction or the July Postpetition Transactions, MID should be granted relief from the stay under each of those statutes.

1. Cause Exists To Grant MID Relief From The Automatic Stay.

46. Because there is no clear definition of what constitutes "cause" for purposes of Section 362(d)(1), relief from the stay under this section must be determined on a case-by-case basis. *In the Matter of Reitnauer*, 152 F.3d 341 (5th Cir. 1998). “Cause” is an intentionally broad and flexible concept that permits the bankruptcy court, as a court of equity, to respond to inherently fact-sensitive situations. *In re Texas State Optical, Inc.*, 188 B.R. 552 (Bankr. E.D. Tex. 1995).

47. If the automatic stay applied at all to MID’s netting, cause exists to grant MID relief from the automatic stay, given MID’s reasonable reliance on the provisions of the Interim Order in implementing the netting. That order expressly permitted “offsetting, netting and/or cross-netting.” Interim Order, Paragraph 2a. As discussed hereinabove, the definition of “Prepetition Trading Contracts” in the Interim Order, unlike the Final Order, does not limit the term to include “forward contracts,” “commodity contracts” and/or “swap agreements,” as those terms are defined in the Bankruptcy Code, and therefore did not exclude MID as a governmental unit. Given the unambiguous language of the Interim Order and MID’s reasonable reliance upon the same, cause exists to grant MID relief from the automatic stay to permit its August 20, 2003 netting, even if the automatic stay otherwise applied.

**2. The Debtors Have No Equity
In The Property And It Is Not Necessary
To An Effective Reorganization.**

48. Relief from stay of an act against property of the debtor is appropriate where the debtor has no equity in the property and the property is not necessary for an effective reorganization. 11 U.S.C. § 362(d)(2). A debtor has no equity in the property for purposes of Section 362(d) when the debts secured by liens on the property exceed the value of the property. *Sutton v. Bank One, Texas N.A.*, 904 F.2d 327 (5th Cir. 1990).

49. Under Section 506(a) of the Bankruptcy Code, the claim of a creditor that is subject to setoff pursuant to Section 553 is a secured claim to the extent of the amount subject to setoff. 11 U.S.C. § 506(a). “Like any secured claim . . . an entity with a right to setoff is assured that the automatic stay will be lifted to permit the creditor to setoff unless ‘adequate protection’ is furnished.” *In re Braniff Airways, Inc.*, 42 B.R. 443, 448 (Bankr. N.D. Tex. 1984). The requirements for setoff are: (a) the creditor holds a claim against the debtor; (b) the creditor owes a debt to the debtor; (c) the claim and the debt are mutual; and (d) the claim and debt are each valid and enforceable. *See* 5 Collier on Bankruptcy, ¶ 553.01[1] (15th ed. 2003). A postpetition claim may be offset against a postpetition debt so long as the claim and debt constitute valid, mutual obligations. *See id.* at ¶ 553.03[6].

50. MID held valid recoupment or setoff rights against the Debtors with respect to the June Transactions, the July Prepetition Transaction, and the July Postpetition Transactions. For the June Transactions, MID as a creditor, held a claim in the amount of \$226,050.00 against the Debtors, which resulted from the sale of power to MAEM. With respect to the July Prepetition Transaction, MID owed a debt to the Debtors in the amount of \$618,640.00, based on the purchase of power from MAEM. The June Transactions and the July Prepetition Transaction were thus, mutual debts as both debts were incurred prepetition, and constitute valid obligations pursuant to the WSPP Agreement.

51. Similarly, for the July Postpetition Transactions, MID was a creditor that held a claim in the amount of \$330,000.00 against the Debtors, and MID owed a debt to the Debtors in the amount of \$843,600.00 based on the sale and purchase of power, respectively. The July Postpetition Transactions also satisfied the mutuality requirement given that the claim and the debt arose after the Petition Date, and were valid, enforceable obligations which arose out of the WSPP Agreement.

52. Therefore, based on MID's valid setoff rights pursuant to Section 553, MID was a secured creditor with a prepetition secured claim against the Debtors in the amount of \$226,050.00, and a postpetition secured claim against the Debtors in the amount of \$330,000.00. Thus, to the extent that MID's claim was secured, the Debtors maintained no equity in such property, and such property was not necessary for the effective reorganization of the Debtors. Accordingly, the automatic stay, to the extent the stay was otherwise applicable, should be lifted to permit MID to exercise its setoff rights.

D. MID's Administrative Hold Of Any Prepetition Or Postpetition Amounts Is Proper.

53. The United States Supreme Court has held that a creditor's temporary withholding of a payment of a debt owed to a debtor in order for the creditor to protect its setoff rights is not a violation of the automatic stay. *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 116 S.Ct. 286, 133 L.Ed.2d 258 (1995). The Court found that the creditor bank's "administrative hold" on the debtor's account was not a setoff within the meaning of 11 U.S.C. § 362(a)(7). *Citizens Bank*, 116 S.Ct. 286, 289. Further, the Court determined that the creditor bank's temporary refusal to pay its debt in itself was not a setoff as the bank did not possess the requisite intent to permanently reduce the debtor's account balance by the amount of the debtor's defaulted loan. *Id.*

54. To the extent that the automatic stay is applicable, MID has properly placed any amount(s) allegedly owing to the Debtors for the June Transactions, the July Prepetition

Transaction, and the July Postpetition Transactions on an administrative hold, and has not effected a setoff. MID, by way of this Motion, seeks relief from the automatic stay (to the extent that it is applicable) in order to protect its setoff rights, and any resulting withholding of amounts allegedly owed to the Debtors can only be found to be temporary in nature.

V. CONCLUSION

55. Based upon each of the foregoing alternative grounds, MID respectfully requests that this Court grant this Motion, and determine that the automatic stay is inapplicable to MID's exercise of its right of recoupment against the Debtors, either under the foregoing decisional law or the terms of the Interim Order. In the alternative, to the extent that this Court determines that the automatic stay is in effect, MID respectfully requests that this Court grant MID relief from the automatic stay to exercise its setoff rights against the Debtors, and for any other such further relief that the Court deems proper.

Respectfully submitted this 17th day of October, 2003

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CERTIFICATE OF CONFERENCE

I hereby certify that I conferred with Linda M. Leali, Esq., counsel for the Debtors, on September 15, 2003 regarding the relief requested in this Motion; however, we were unable to reach an agreement and the Motion is opposed.

Dated: October 15, 2003

/s/ Merle C. Meyers
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CERTIFICATE OF SERVICE BY FIRST CLASS MAIL

This will certify that a true and correct copy of the foregoing document was forwarded by first class United States mail, postage prepaid, on the 17th of October, 2003, to all parties listed on the attached Exhibit "1."

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MODESTO IRRIGATION DISTRICT

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

In re:

MIRANT CORPORATION, et al.,
Debtors.

Case No. 03-46590-DML

Chapter 11

Jointly Administered

**ORDER GRANTING MODESTO IRRIGATION DISTRICT'S MOTION FOR
DETERMINATION OF RECOUPMENT RIGHTS OR IN THE
ALTERNATIVE, MOTION FOR RELIEF FROM THE AUTOMATIC STAY**

Came on for hearing on November 12, 2003, the Motion For Determination Of Recoupment Rights Or In The Alternative, Motion For Relief From The Automatic Stay (this "Motion") filed by Modesto Irrigation District ("MID"), and after considering the motion, the responses, and the arguments of counsel, the Court finds that the automatic stay is inapplicable to MID's exercise of its right of recoupment against the Debtors, under the terms of the Interim Order Authorizing The Debtors To (i) Comply With Terms Of Pre-Petition Trading Contracts, (ii) Enter Into Post-Petition Trading Contracts In The

Ordinary Course Of Business, (iii) Provide Credit Support Relating To Both Pre- And Post-Petition Trading Contracts, And (iv) Setting A Final Hearing To Consider The Entry Of A Final Order Affirming Interim Order And Authorizing Assumption Of Pre-Petition Trading Contracts (the "Interim Order") entered on July 14, 2003, that all objections should be overruled, and the Motion should be granted. Therefore, it is

ORDERED that MID's Motion For Determination Of Recoupment Rights Or In The Alternative, Motion For Relief From The Automatic Stay is hereby granted. The automatic stay is inapplicable to MID's exercise of its right of recoupment against the Debtors under the Interim Order; it is further

ORDERED that MID is entitled to exercise its right of recoupment against the Debtors with respect to the June Transactions, the July Prepetition Transactions and the July Postpetition Transactions (all as defined in the Motion) without further order of the Court.

SIGNED this ____ day of _____, 2003.

D. MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE