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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**

_____)	Chapter 11 Case
In re)	
)	Case No. 03-46590(DML)11
MIRANT CORPORATION, <u>et al.</u> ,)	Jointly Administered
)	
Debtors.)	Requested Hearing Date and Time:
)	June 23, 2004; 10:30 a.m.
_____)	

**DEBTORS' MOTION PURSUANT TO FEDERAL RULE OF BANKRUPTCY
PROCEDURE 9019 APPROVING SETTLEMENT AGREEMENT AND
RELEASE BETWEEN MIRANT AMERICAS ENERGY MARKETING, LP,
MIRANT CORPORATION, MORGAN STANLEY CAPITAL GROUP INC.
AND MORGAN STANLEY**

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 Debtors Mirant Corporation ("Mirant Corp.") and Mirant Americas Energy Marketing, LP ("MAEM") to enter into a "Settlement Agreement and Release" (the "Settlement Agreement") with Morgan Stanley Capital Group, Inc. ("MSCG") and Morgan Stanley ("MS" and, collectively with MSCG,

“Morgan Stanley”).¹ The settlement memorialized by the Settlement Agreement (a) resolves significant disputes between the Debtors and Morgan Stanley and (b) requires MSCG to pay MAEM **\$36,500,000.00** on account of Morgan Stanley’s termination of certain contractual relationships with MAEM and Mirant Corp., in settlement of such disputes. 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. On July 14, 2003 and various dates thereafter (collectively, the “Petition Date”), the Debtors filed voluntary chapter 11 petitions. The Debtors continue to 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”).

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

3. The Committees. Three official committees (collectively, the “Committees”) have been appointed by the Office of the United States Trustee for the Northern District of Texas (“UST”) in these administratively consolidated cases.

4. The Examiner. On April 7, 2004, this Court authorized the UST to appoint an examiner in these cases to analyze certain potential causes of action and act as a referee with respect to certain disputes that arise among the Debtors, the Committees, or other parties in interest. The UST appointed William K. Snyder as the examiner in these cases.

¹ The Settlement Agreement contains confidential information and, therefore, is not attached to this Motion. However, the material, non-confidential terms of the Settlement Agreement are described herein.

II. FACTUAL BACKGROUND.

(i) The Debtors' Marketing Business.

5. The Debtors comprise one of the largest generators of electricity in the world. Given the massive amounts of (a) energy the Debtors produces and (b) fuels the Debtors purchases, the Debtors are naturally “long” on energy and “short” on fuel. To ensure the Debtors' ability to operate their power plants, despite often dramatic swings in energy and fuel markets, the Debtors “cover” their otherwise open positions by trading electricity, natural gas, coal, oil and other products in the commodities futures markets.

6. The Debtors use derivative financial instruments primarily to hedge and optimize their generating assets, and also takes proprietary commodity positions. The Debtors' merchant energy activities encompass both (a) their core business of electrical power generation, and (b) a traditional commodities, energy and financial product trading business. The Debtors follow 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 the other Debtors' 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) The Agreements.

7. On June 1, 1994, MSCG and Vastar Gas Marketing, Inc. (“Vastar”) entered into an ISDA Master Agreement, amended by the Amendment to the ISDA Master Agreement dated October 1, 1998 (as amended, the “ISDA Master Agreement”). Vastar's obligations under the ISDA Master Agreement were assigned to Southern Company Energy

Marketing, L.P., which later became MAEM, pursuant to the Assignment and Assumption Agreement dated September 1, 1997.

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

- On February 1, 1998, MAEM and MSCG entered into the Natural Gas Sale and Purchase Contract (the “Gas Agreement”).
- On June 26, 1998, MAEM and MSCG entered into the Electric Power Service Agreement, amended by the First Amendment to Electric Power Service Agreement dated June 16, 1999 (as amended, the “Electric Agreement”). On April 24, 2002, MAEM and MSCG entered into an amendment to the Electric Agreement to provide for Electronic Confirmation (the “Electric Confirmations Agreement”).
- On July 7, 1998, MAEM and MSCG entered into a Master Monthly Netting and Close-Out Netting Agreement (the “Netting Agreement” and, collectively with the ISDA Master Agreement, the Gas Agreement, the Electric Agreement, the Electronic Confirmations Agreement and the Netting Agreement, the “Agreements”).

9. Other than the Agreements and all transactions consummated or made thereunder (the “Transactions”), the Debtors are not aware of any other contracts between MAEM and MSCG that would be deemed “Pre-Petition Trading Contracts” as defined in the

Final Trading Order.² In connection with the Agreements, MS executed a Guarantee in favor of Vastar on June 1, 1994 (the “Vastar Guarantee”), and the Vastar Guarantee was replaced by a Guarantee executed by MS in favor of MAEM dated March 24, 1998 (the “MS Guarantee”).

10. Mirant Corp. executed that certain Guarantee Agreement in favor of MSCG dated as of April 26, 2001 (as amended from time to time) relating to the ISDA Agreement, and that certain Guarantee Agreement in favor of MSCG dated as of April 26, 2001 (as amended from time to time) relating to agreements for the purchase and sale of natural gas and/or electric power (collectively, the “Mirant Guarantees,” and together with the MS Guarantee, the “Guarantees”).

(iii) MSCG Terminated the Agreements and the Parties Disputed the Proper Final Settlement Amount.

11. Each of the Agreements provides, among other things that upon the filing of a bankruptcy by MAEM or MSCG, the other party may declare an “Early Termination Date” and terminate all Transactions then outstanding under each of the Agreements. Each of the Agreements further provides for the liquidation of all terminated Transactions and the calculation of a net amount due to the parties as a result of such liquidation upon a declaration of an Early Termination Date. Each Transaction consummated or made pursuant to the Agreements is either a “forward contract,” as defined by section 101(25) of the Bankruptcy Code, or a “swap agreement,” as defined in section 101(53B) of the Bankruptcy Code, and MAEM and MSCG each constitutes a “forward contract merchant,” or a “swap participant,” as the case may be, and

² The “Final Trading Order” is more specifically described as the “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” entered on August 27, 2003 in this bankruptcy case.

as those terms are defined in the Bankruptcy Code, in connection with such Transactions, and each Transaction is protected by the “safe harbor” provisions of the Bankruptcy Code, including, without limitation, sections 362(b), 556 and 560 of the Bankruptcy Code.

12. As a result of MAEM’s bankruptcy filing, MSCG declared an Early Termination Date of July 15, 2003, and terminated all Transactions then outstanding under each of the Agreements. MAEM and MSCG then proceeded to calculate the final settlement amount.

13. At the time MSCG terminated the relevant Transactions entered into under the Agreements, 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 MSCG to MAEM as a result of the termination of the various Transactions entered into under the Agreements. As required pursuant to the terms of the Agreements, a “final settlement amount” owing by MSCG to MAEM was calculated with respect to the various Transactions entered into under the Master Agreement.

14. MAEM disputed MSCG’s final settlement amount calculation and the parties sought to resolve the matter without resorting to litigation.

(v) *The Parties Commenced Settlement Discussions And Reached an Agreement.*

15. As a result of the good faith negotiations that Morgan Stanley, Mirant Corp. and MAEM have conducted, the parties have reached a settlement which contains the following material terms:

- the parties have determined that the final settlement amount owing to MAEM is **\$36,500,000.00** (the “Settlement Amount”);

- within five (5) Business Days after the Bankruptcy Court Order Date³ (the “Due Date”), MSCG will pay MAEM the Settlement Amount by wire transfer;
- if the full Settlement Amount is not paid on the Due Date, interest shall accrue on the “outstanding amount” (calculated by subtracting the total amount of the wire transfer(s) actually made, if any, from the Settlement Amount) at the rate per annum equal to the maximum rate allowable by law, although in no event higher than the “Prime Rate” as published in the Wall Street Journal from time to time, plus 2% calculated on the basis of daily compounding and the actual number of days elapsed until the full and final payment of the entire Outstanding Amount is received by MAEM;
- the Settlement Agreement contains mutual global releases of claims arising under, or in any way relating to, the Agreements, the Guarantees and the Transactions under the Agreements, including but not limited to any avoidance or recovery claims or causes of action under sections 506(c), 541, 542, 544, 545, 547, 548, 549, 550, 551 and 553 of the Bankruptcy Code;⁴
- the Bankruptcy Court must approve the Settlement Agreement by June 30, 2004;
- the Settlement Agreement contemplates that the parties may enter into new trading contacts, including but not limited to such trading contracts of the type and with at least the terms such as those described in Exhibit A attached hereto and requires the Debtors to seek a determination from the Bankruptcy Court that such new trading contracts are Postpetition Trading Contracts entered into the ordinary course of business by MAEM and MSCG and, therefore, are entitled to the protections afforded such contracts in the Final Trading Order.⁵

³ The “Bankruptcy Court Order Date” is defined in the Settlement Agreement as the date on which the time to appeal the order granting the Motion has expired.

⁴ The Debtors have conducted reasonable due diligence and have determined that no avoidance action claims exist.

⁵ The proposed form of order granting this Motion and approving the Settlement Agreement will specifically provide that (a) such new, postpetition contracts are only entitled to the protections afforded to Postpetition Trading Contracts (as defined in the Final Trading Order) to the extent that (i) such new, postpetition contracts 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) MSCG is a “forward contract merchant,” “commodity broker” and/or “swap participant” as such terms are defined in section 101 of the Bankruptcy Code; and (b) entry into the Settlement Agreement and/or the new, postpetition contracts will not constitute a Waiver Event under the Trading Order, or unwind Morgan Stanley’s termination of the Transactions as of the Petition Date.

III. RELIEF REQUESTED.

16. 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 and Mirant Corp. to enter into the Settlement Agreement, including the material terms described above, and perform thereunder.

IV. APPLICABLE AUTHORITY.

17. 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).

18. 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 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).

19. 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.

20. While MAEM believes strongly in its case, the matter is not completely certain. The Agreements are complicated, involving many transactions, and are subject to varying interpretations. This factor weighs in favor of settlement.

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

21. Because of the complexity of the Agreements, litigation regarding the termination settlement payment would obviously be complex and quite possibly involve expert testimony. Moreover, the attorneys’ fees and costs incurred by the parties would be significant. The Debtors have determined that the immediate payment by MSCG of the \$36,500,000.00 to MAEM significantly outweighs the fees and costs that would be incurred in connection with litigating the matter, especially given the attendant delay in payment of the termination settlement payment amount. Hence, this factor weighs in favor of settlement.

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

22. The settlement determines that MAEM is entitled to a final settlement amount of \$36,500,000.00. This is a significant amount that will obviously benefit the Debtors' estates. The Parties have agreed to a final settlement amount, following considerable negotiation, 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.

23. 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
June 3, 2004

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DEBTORS-IN-POSSESSION

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he provided a true and correct copy of the forgoing to Bankruptcy Services, LLC and directed them to effect service upon all persons on the Limited Service List and the addressees set forth below via email, facsimile or overnight mail on the 3rd day of June, 2004.

Morgan Stanley
Attn: Mary Clare Bohn
750 Seventh Avenue, 29th Floor
New York, New York 10019

Morgan Stanley Capital Group Inc.
Attn: Deborah L. Hart, Vice President
1585 Broadway, 4th Floor – Commodities
New York, New York 10036

Morgan Stanley
Law Division
1221 Avenue of the Americas, 5th Floor
New York, New York 10020

Cleary Gottlieb Steen & Hamilton
Attn: Seth Stuhl, Esq.
One Liberty Plaza
New York, NY 10006-1470

/s/ Ian T. Peck

EXHIBIT A

Master Allowance Purchase and Sale Agreement (the "Master Agreement"):

Parties: Morgan Stanley Capital Group Inc. and Mirant Americas Energy Marketing, L.P. (collectively, the "Parties")

Transactions Governed by Master Agreement: Transactions (each, a "Transaction") for the purchase, sale or exchange of (1) United States Environmental Protection Agency or state authorizations for emissions of sulfur dioxide and/or nitrogen oxide during specified time periods ("Allowances"), and (2) rights, but not the obligation unless exercised, to purchase or sell one or more Allowances pursuant to the terms of certain call options or put options ("Options").

Purchase Price and Quantity: The purchase price for and quantity of Allowances and Options purchased, sold or exchanged under each Transaction shall be as agreed to by the Parties or their respective representatives and as listed in the written notice confirming the specific terms of each such Transaction (each, a "Confirmation").

Credit Assurance: A Party (the "Posting Party") shall provide the other Party (the "Requesting Party") with a cash prepayment, an irrevocable standby letter of credit, a guarantee by third party, and/or other security, in a form and amount acceptable to the Requesting Party in its sole discretion, in the event the Requesting Party has reasonable grounds for insecurity concerning the Posting Party's ability to perform any of its obligations under the Master Agreement or under any Transaction.

EXHIBIT “B”

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 GRANTED; it is further

ORDERED, that the Settlement Agreement is approved (including the releases set forth therein), and MAEM and Mirant Corp. are authorized to perform thereunder; it is further

ORDERED, that MSCG shall pay **\$36,500,000.00** to MAEM within five Business Days after the Bankruptcy Court Order Date (as defined in the Settlement Agreement) on account of MSCG's termination of certain contractual relationships with MAEM, and the settlement of such amounts, as described in the Motion; it is further

ORDERED, that all new, industry standard trading contracts entered into between MAEM and MSCG, including, but not limited to, ISDA, EEI, WSPP, GISB and/or NAESB master agreements, and specifically including, but not limited to, such master agreements of the type and with at least terms such as those described in Exhibit A attached hereto, 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 be amended, restated or supplemented from time to time, entered into between MAEM and MSCG (collectively, the "New Postpetition Trading Contracts") shall be deemed Postpetition Trading Contracts (as defined in the Final Trading Order,² and as such

² The "Final Trading Order" is more specifically described as the "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, (II) Provide Credit Support Relating To Both Pre- And Post-Petition Trading Contracts, And (IV) Authorizing Assumption

(continued...)

definition may be modified by the Court) entered into in the ordinary course of business by MAEM and MSCG, to the extent that (a) such New Postpetition Trading Contracts are “forward contracts,” “commodity contracts” and/or “swap agreements” as such terms are defined in sections 101 or 761 of the Bankruptcy Code; and (b) MSCG is a “forward contract merchant,” “commodity broker” and/or “swap participant” as such terms are defined in section 101 of the Bankruptcy Code in connection with such New Postpetition Trading Contracts; it is further

ORDERED, that such New Postpetition Trading Contracts shall be entitled to all protections for Postpetition Trading Contracts provided in the Final Trading Order; provided, however, that entry into any New Postpetition Trading Contracts and/or any transactions thereunder shall not constitute a Waiver Event (as defined in the Final Trading Order) with respect to any of the Prepetition Trading Contracts (as defined in the Final Trading Order) by and among the Parties (including but not limited to the Agreements, the Guarantees and the Transactions), or otherwise adversely affect MSCG's right to cause or have caused the liquidation or termination of any such Prepetition Trading Contracts.

Dated: June ____, 2004

D. Michael Lynn,
United States Bankruptcy Judge

(...continued)

Of Pre-Petition Trading Contracts” entered on August 27, 2003 by this Court in this bankruptcy case.

EXHIBIT A

Master Allowance Purchase and Sale Agreement (the "Master Agreement"):

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Transactions Governed by Master Agreement: Transactions (each, a "Transaction") for the purchase, sale or exchange of (1) United States Environmental Protection Agency or state authorizations for emissions of sulfur dioxide and/or nitrogen oxide during specified time periods ("Allowances"), and (2) rights, but not the obligation unless exercised, to purchase or sell one or more Allowances pursuant to the terms of certain call options or put options ("Options").

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Credit Assurance: A Party (the "Posting Party") shall provide the other Party (the "Requesting Party") with a cash prepayment, an irrevocable standby letter of credit, a guarantee by third party, and/or other security, in a form and amount acceptable to the Requesting Party in its sole discretion, in the event the Requesting Party has reasonable grounds for insecurity concerning the Posting Party's ability to perform any of its obligations under the Master Agreement or under any Transaction.