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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.)	Hearing Date and Time: January 21,
)	2004 at 10:30 a.m.
_____)	

**DEBTORS' MOTION PURSUANT
TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 9019 FOR APPROVAL OF
COMPROMISE OF CONTROVERSY BETWEEN MIRANT MID-ATLANTIC, LLC
AND OAK MOUNTAIN PRODUCTS, LLC**

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

Mirant Corporation and its above-captioned affiliated debtors (collectively, the “Debtors”), as debtors and debtors-in-possession, file this motion (the “Motion”) pursuant to rule 9019 of the Federal Rules of Bankruptcy Procedure requesting an order allowing Debtor Mirant Mid-Atlantic, LLC (“Mirant Mid-Atlantic”) to enter into a compromise (the “Settlement”) with Oak Mountain Products, LLC (“Oak Mountain”). The Settlement resolves certain disputes between Mirant Mid-Atlantic and Oak Mountain arising from the adversary proceeding, styled *Oak Mountain Products, LLC v. Mirant Mid-Atlantic, LLC*, adversary proceeding number 03-

4350 (the "Adversary"). The Settlement is fair and equitable and in the best interests of the Debtors' estates and should be approved.

I. PROCEDURAL BACKGROUND

1. The Cases. Commencing on July 14, 2003, and concluding in the early morning hours of July 15, 2003, (the "Petition Date"), certain of the Debtors (collectively, the "Initial Debtors") filed voluntary petitions in this Court for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330, as amended (the "Bankruptcy Code").¹ On August 18, 2003, Mirant EcoElectrica Investments I, Ltd. and Puerto Rico Power Investments, Ltd. (collectively, the "New Debtors") commenced chapter 11 cases under the Bankruptcy Code. On October 3, 2003, the following additional Debtors filed voluntary petitions in this Court for relief under chapter 11: (i) Mirant Wrightsville Management, Inc.; (ii) Mirant Wrightsville Investments, Inc.; (iii) Wrightsville Power Facility, L.L.C.; and (iv) Wrightsville Development Funding, L.L.C. (collectively, the "Wrightsville Debtors"). On November 18, 2003, the following additional Debtors filed voluntary petitions in this Court for relief under chapter 11: (i) Mirant Americas Energy Capital, LP; and (ii) Mirant Americas Energy Capital Assets, LLC (the "MAEC Debtors" and collectively with the Initial Debtors, the New Debtors, and the Wrightsville Debtors, the "Debtors"). The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

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

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

administered. On September 8, 2003, this Court entered an order approving joint administration of the cases of the New Debtors with those of the Initial Debtors. On October 20, 2003, this Court entered an order approving the joint administration of the cases of the Wrightsville Debtors with those of the Initial Debtors. On November 20, 2003, this Court entered an order approving the joint administration of the cases of the MAEC Debtors with those of the Initial Debtors.

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

II. FACTUAL BACKGROUND.

A. The Debtors' Business Operations.

4. Mirant and its direct and indirect subsidiaries comprise one of the world's largest generators and marketers of electricity. Through its direct and indirect subsidiaries, Mirant produces, sells and delivers reliable energy products and services to utilities, municipal systems, aggregators, electric-cooperative utilities, producers, generators, marketers and large industrial customers in North America, the Philippines and the Caribbean. Mirant's core business centers on the production and sale of electricity and electrical capacity (essentially the ability to produce electricity on demand). Mirant currently owns or controls more than 21,800 megawatts of electric generating capacity around the world, of which more than 18,000 megawatts is located in the United States. In 2002, Mirant produced 73 million megawatt-hours

of electricity, sold 312 million megawatt-hours of electricity and sold or marketed an aggregate average of 21 billion cubic feet per day of natural gas.

5. Mirant employs in excess of 7,000 employees worldwide, of which approximately 1,100 employees are based at Mirant's corporate headquarters in Atlanta and approximately 5,900 employees are based at operating facilities. In 2002, Mirant recorded a \$542 million loss in earnings before interest, taxes and depreciation on a consolidated basis. Its 2002 operating revenues were approximately \$6.4 billion.

B. Facts Specifically Relevant to the Motion.

Mirant Mid-Atlantic's Agreement with Oak Mountain

6. Prior to the Petition Date, Mirant Mid-Atlantic and Oak Mountain entered into the following agreement:

- On April 15, 2002, the Solid Synthetic Fuel Sales Agreement (the "Sales Agreement"), as amended; and
- On July 11, 2003, the First Amendment to the Solid Synthetic Fuel Sales Agreement Between Mirant Mid-Atlantic, LLC and Oak Mountain Products, LLC (the "First Amendment") (collectively with the Sales Agreement, the "Agreements").

7. Under the Agreements, Oak Mountain sold and Mirant Mid-Atlantic purchased synthetic fuel to be used at the Debtors' generating facilities including the Morgantown Facility. Pursuant to the First Amendment, Mirant Mid-Atlantic delivered by wire transfer to Oak Mountain two million dollars (\$2,000,000) (the "Collateral") to an Oak Mountain account. However, Mirant Mid-Atlantic erroneously transferred the Collateral to Cinergy Marketing and Trading, an affiliate of Oak Mountain. Despite the erroneous transfer, Mirant Mid-Atlantic posted the Collateral as security for purchases to be made under the Agreements, and Oak Mountain intended to draw down on the collateral as payment for the product delivered to the Morgantown Facility. During the period of July 7, 2003 through July 14, 2003, Oak

Mountain delivered 53,538.83 tons of synthetic fuel (the "Goods") to the Debtors' Morgantown Facility. On or about July 17, 2003, Oak Mountain made a written demand for reclamation of the Goods (the "Reclamation Demand"). In the Reclamation Demand, Oak Mountain asserted its rights to reclaim the Goods pursuant to 11 U.S.C. § 546(c)(2).

8. As the Debtors continue to use synthetic fuel at the Morgantown Facility, the Debtors have consumed the Goods in the regular production of power. Throughout the pendency of this dispute, Oak Mountain and the Debtors have continued to maintain a postpetition business relationship, and the Debtors believe that maintaining this relationship is an important asset of the Bankruptcy Estates, an asset necessary for an effective reorganization.

The Adversary Proceeding.

9. On September 4, 2003, Oak Mountain initiated the Adversary by filing its Complaint for Reclamation under 11 U.S.C. § 546(c) (the "Complaint"). Through its Complaint, Oak Mountain sought to reclaim the Goods, which Oak Mountain alleged had a value of \$2,081,438.42, or receive an administrative claim in the amount of \$2,081,438.42.

10. On October 6, 2003, Mirant Mid-Atlantic filed its Defendant's Answer to Complaint for Reclamation Under 11 U.S.C. § 546(c) (the "Answer"). In its Answer, Mirant Mid-Atlantic denied that Oak Mountain had a right to reclaim the Goods and asserted certain affirmative defenses. Additionally, Mirant Mid-Atlantic argued that the value of the Goods was \$2,031,127.31. The discrepancy in the value of the Goods is due to price adjustments made pursuant to the Agreements.

11. Soon thereafter, Oak Mountain and Mirant Mid-Atlantic entered into settlement negotiations in order to reach a consensual resolution of the Adversary that would efficiently resolve the issues asserted in the Complaint. To better facilitate negotiations, Mirant Mid-Atlantic researched its records to assess the assertions made in the Complaint, including the

facts necessary to prove up the elements of a reclamation claim. Additionally, while researching its accounting records, Mirant Mid-Atlantic determined that the transfer of Collateral had occurred according to the terms of the First Amendment and that Oak Mountain had not applied the Collateral to any outstanding invoices. During the settlement discussions, Oak Mountain and Mirant Mid-Atlantic exchanged invoices and billing statements in order to reconcile the value of the Goods. After careful examination of these invoices, the parties have determined that the correct value of the Goods was \$2,031,127.31.

The Parties Have Reached an Agreement in Settlement of the Adversary

12. As a result of the good faith, arms-length negotiations conducted by Mirant Mid-Atlantic and Oak Mountain, Mirant Mid-Atlantic and Oak Mountain have agreed to enter into the following Settlement, which is subject to Bankruptcy Court approval:

- No later than ten days following Bankruptcy Court approval of the Settlement, Oak Mountain may apply the Collateral to any outstanding balances resulting from the delivery of the Goods (the "Settlement Payment");
- Oak Mountain shall be entitled to an administrative claim in the amount of \$31,127.31 to be paid upon the effective date of the Debtors' plan of reorganization in complete satisfaction for any deficiency remaining after application of the Settlement Payment to the outstanding balances;
- Upon entry of an order approving this settlement and application of the Settlement Payment, Oak Mountain shall dismiss the Adversary with prejudice against Mirant Mid-Atlantic, LLC; and
- The Settlement shall resolve any and all prepetition claims between Oak Mountain and Mirant Mid-Atlantic arising from the delivery of the Goods;

III. RELIEF REQUESTED.

13. 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 the attached order, approving this Motion and authorizing Mirant Mid-Atlantic to enter into this Settlement, as evidenced by this Motion.

IV. APPLICABLE AUTHORITY.

14. 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).

15. 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 Elec. Power Coop., 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).

16. 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, In re Cajun Elec. Power Coop., Inc., 119 F.3d at 356 (citations omitted). Each of these factors will be discussed below.

A. Probability of Success in the Litigation.

17. After examining the facts and circumstances surrounding the Adversary, the Debtors have concluded that there is a significant risk that Oak Mountain could make a credible case for establishing the required elements of reclamation pursuant to 11 U.S.C. § 546(c)(2). Upon examining their books and records, the Debtors have determined that the Goods were delivered during the time period alleged in the Complaint, and at the time of the Reclamation Demand, Mirant Mid-Atlantic still possessed the Goods. A determination has yet to be made regarding Mirant Mid-Atlantic's solvency. Unless Mirant Mid-Atlantic were to prevail on an affirmative defense, Oak Mountain might be entitled to an administrative expense in the amount of the value of the Goods. The significant risk of not prevailing in the Adversary warrants entering into the Settlement.

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

18. Because of the facts surrounding Oak Mountain's reclamation claim and the additional complexity of the prepetition posting of Collateral, the Debtors have determined that litigating the Adversary would generate substantial costs to the Bankruptcy Estates. The costs associated with putting on expert testimony to refute the elements of Oak Mountain's reclamation claim would be prohibitive, especially in light of the likelihood of Oak Mountain's success in establishing the prima facie case for reclamation. Beyond costs associated with expert testimony, Mirant Mid-Atlantic would additionally incur substantial attorneys' fees preparing for

the Adversary further taxing the Bankruptcy Estates. With Oak Mountain's agreement to dismiss the Adversary with prejudice and the associated savings to the Bankruptcy Estates resulting from eliminating the need to litigate the issues, the Debtors have concluded that entering into the Settlement is in the best interests of the Bankruptcy Estates.

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

19. Entering into the Settlement will provide substantial benefits to the Bankruptcy Estates beyond the resolution of the Adversary. Oak Mountain provides a valuable service to the Debtors, and the Debtors wish to maintain the relationship on a going forward basis. To that end, the Settlement maintains the Debtors' goodwill with Oak Mountain as the parties contemplate future business transactions. If the Debtors were unable to maintain the relationship with Oak Mountain, the Debtors would be forced to secure an additional source of synthetic fuel products for the Morgantown Facility. Having a constant, reliable source of synthetic fuel products is critical to the Debtors' operations and the logistical complications involved with securing an alternate source of synthetic fuel products would be prohibitive. As Oak Mountain has an established relationship with the Debtors, the Debtors have determined that continuing to work with Oak Mountain is the most efficient result for the Bankruptcy Estates. The Debtors, in their business judgment, have determined that the Settlement produces the best results for the Bankruptcy Estates and should be approved.

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.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he provided a true and correct copy of the foregoing to Bankruptcy Services, LLC on December 23, 2003 and directed them to effect service upon all persons on the Limited Service List (and the addressees below) via U.S. first class mail.

/s/ Mark Elmore

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**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)
)	Jointly Administered
Debtors.)	
)	

**ORDER GRANTING DEBTORS' MOTION PURSUANT
TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 9019 FOR APPROVAL OF
COMPROMISE OF CONTROVERSY BETWEEN MIRANT MID-ATLANTIC, LLC
AND OAK MOUNTAIN PRODUCTS, LLC**

Upon the motion, dated December 22, 2003 (the "Motion"), of Mirant Corporation ("Mirant") and its affiliated debtors, as debtors-in-possession (collectively, the "Debtors"), for an order allowing Debtor Mirant Mid-Atlantic, LLC to enter into a compromise (the "Settlement") with Oak Mountain Products, LLC; and it appearing that the Court has jurisdiction over this matter; and it appearing that due notice of the Motion has been provided, and that no other or further notice need be provided; upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor,

It is hereby:

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

ORDERED, that the Settlement, as evidenced by the Motion, is approved and Mirant Mid-Atlantic, LLC is authorized to perform as required thereunder; it is further

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

ORDERED, that the automatic stay of Section 362 of the Bankruptcy Code is hereby modified to the extent necessary to enable the parties to effectuate the terms of the Settlement; it is further

ORDERED, that not later than ten (10) days after entry of this Order, Oak Mountain Products, LLC may apply the Collateral to any outstanding balances resulting from the delivery of the Goods (the "Settlement Payment"); it is further

ORDERED, that Oak Mountain Products, LLC shall be entitled to an administrative claim in the amount of \$31,127.31 to be paid upon the effective date of the Debtors' plan of reorganization in complete satisfaction for any deficiency remaining after application of the Settlement Payment to the outstanding balances; it is further

ORDERED, that, upon application of the Settlement Payment as provided above, Oak Mountain Products, LLC shall take immediate steps to dismiss the Adversary with prejudice; it is further

ORDERED, that the Settlement shall resolve any and all prepetition claims between Oak Mountain Products, LLC and Mirant Mid-Atlantic, LLC arising from the delivery of the Goods.

Dated: January ____, 2003

D. Michael Lynn,
United States Bankruptcy Judge

AGREED TO AS FORM AND CONTENT:

OAK MOUNTAIN PRODUCTS, LLP

By: /s/ Steven Holmes (wpm) Mark Elmore

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