

Thomas E Lauria
State Bar No. 11998025
Craig H. Averch
State Bar No. 01451020
WHITE & CASE LLP
Wachovia Financial Center
200 South Biscayne Blvd.
Miami, FL 33131
Telephone: (305) 371-2700
Facsimile: (305) 358-5744

Robin Phelan
State Bar No. 15903000
Judith Elkin
State Bar No. 06522200
HAYNES AND BOONE, LLP
901 Main Street
Suite 3100
Dallas, TX 75202
Telephone: (214) 651-5000
Facsimile: (214) 651-5940

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, <i>et al.</i> ,)	Case No. 03-46590 (DML)
)	Jointly Administered
Debtors.)	
)	Date and Time:
)	June 2, 2004 @ 10:30 a.m.

**DEBTORS' MOTION FOR APPROVAL OF STIPULATION REGARDING
ALLOWANCE OF CLAIM AND FOR RELIEF FROM STAY TO ALLOW SET OFF
OF GAS CLAIM BETWEEN PACIFIC GAS & ELECTRIC COMPANY
AND MIRANT AMERICAS ENERGY MARKETING, LP**

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

Mirant Corporation (“Mirant”) and its affiliated debtors (collectively, the “Debtors”), as debtors and debtors-in-possession, file this Motion (the “Motion”) for approval of the Stipulation Regarding Allowance of Claim and for Relief From Stay to Allow Set Off of Gas Claim Between Pacific Gas & Electric Company and Mirant Americas Energy Marketing, LP (the “Stipulation”), pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure (the

“Bankruptcy Rules”). The Stipulation is attached hereto as Exhibit A. In support thereof the Debtors represent as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court 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 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”).

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

5. The Examiner. On April 7, 2004, the Court authorized the Office of the United States Trustee (“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.

III. FACTUAL BACKGROUND

A. Factual Background

6. Prior to the Petition Date, Pacific Gas & Electric Company (“PG&E”) and

Mirant Americas Energy Marketing, LP (“MAEM”) were parties to a Master Gas Purchase and Sales Agreement dated as of September 1, 1997 (the “Master Gas Agreement”). The Master Gas Agreement was terminated by the parties well in advance of the Petition Date.

7. Prior to the Petition Date, PG&E and MAEM entered into various natural gas purchase transactions under the Master Gas Agreement (the “Gas Transactions”). PG&E filed for bankruptcy protection in the United States Bankruptcy Court for the Northern District of California on April 6, 2001, and its reorganization plan was confirmed on December 22, 2003 and became effective on April 12, 2004. Under PG&E’s confirmed and effective reorganization plan, general unsecured claims are entitled to be paid in full, in cash, with applicable interest.

8. On September 5, 2001, MAEM filed a proof of claim against PG&E in the PG&E bankruptcy proceedings in the amount of \$8,876,214.25 for amounts due MAEM by PG&E on account of the Gas Transactions (the “MAEM Gas Claim”). PG&E filed a proof of claim on December 15, 2003 against MAEM in these proceedings in the amount of \$5,486,600.00 for amounts allegedly due to PG&E by MAEM on account of the Gas Transactions (the “PG&E Gas Claim”; and collectively with the MAEM Gas Claim, the “Gas Claims”).

9. PG&E and MAEM have agreed to enter the Stipulation in order to resolve all matters relating to the Gas Claims; provided, however, no other claims of the Debtors, MAEM, or PG&E are affected by the Stipulation.

10. MAEM believes that the Stipulation is in the best interests of the estate, because it will result in a prompt cash payment of \$3,389,614.25, plus applicable interest by PG&E to MAEM and resolves all matters concerning the MAEM Gas Claim and the PG&E Gas Claim without the need for further litigation.

B. Summary of Settlement Agreement.

11. The principal terms of the Stipulation are as follows:

- The MAEM Gas Claim will constitute an allowed claim against PG&E in the PG&E bankruptcy proceedings in its filed amount of \$8,876,214.25;
- The PG&E Gas Claim will constitute an allowed against MAEM in these proceedings in the MAEM chapter 11 case in its filed amount of \$5,486,600.00;
- PG&E shall be entitled to setoff the PG&E Gas Claim against the MAEM Gas Claim to the extent of the PG&E Gas Claim. The resulting balance of \$3,389,614.25 (the “Deficiency Claim”) shall be an allowed general unsecured claim against PG&E in the PG&E bankruptcy proceedings, and shall be satisfied as any other general unsecured claim against PG&E;
- PG&E agrees that it shall not assert any further setoffs against the Deficiency Claim of any kind or nature whatsoever;
- PG&E reserves all of its rights with respect to any claims filed against the Debtors other than the PG&E Gas Claim and the Debtors reserve all of their rights with respect to any claims filed against PG&E other than the MAEM Gas Claim. The Debtors also reserve the right to object to any claim filed by PG&E in the Debtors’ bankruptcy proceedings other than the PG&E Gas Claim and PG&E reserves the right to object to any claim filed by the Debtors in the PG&E bankruptcy proceedings other than the MAEM Gas Claim.

IV. RELIEF REQUESTED

12. By this Motion, the Debtors hereby request approval of the Stipulation under Bankruptcy Rule 9019 and further request that the automatic stay set forth in Section 362(a) of the Bankruptcy Code be modified to permit the parties to implement the setoffs provided for in the Stipulation.

V. BASIS FOR RELIEF

A. The Court Should Authorize the Debtors to Enter Into the Settlement Agreement Under Rule 9019.

13. Rule 9019(a) of the Bankruptcy Rules 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). Rule 9019(a) empowers a 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.”).

14. 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. *See In re Martin*, 91 F.3d 389, 393 (3d Cir. 1996) (*citing 9 Collier on Bankruptcy* ¶ 9019.03[1] (15th ed. Rev. 2001)).

15. Furthermore, a 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 settlements 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: (i) the probability of success in the litigation, with due consideration for the uncertainty in fact and law; (ii) the complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and (iii) all other factors bearing on the wisdom of the compromise. *See Cajun Electric*, 119 F.3d at 356 (citations

omitted).

B. The Rule 9019 Factors Are Satisfied.

(i) *Probability of Success in the Litigation and the Complexity, Duration and Cost Thereof.*

17. The Debtors believe that the “litigation-based” prongs of the 9019 test are satisfied, because the Stipulation closely approximates the likely outcome of any potential litigation between the parties concerning the Gas Claims. Section 553 of the Bankruptcy Code preserves a creditor’s State law right to offset a debt owed to the debtor against a debt owed by the debtor, provided that the offsetting debts are mutual debts and arose prior to the commencement of the case. *See Braniff Airways, Inc. v. Exxon Company USA*, 814 F.2d 1030, 1036 (5th Cir. 1987) (debts must be both “mutual” and “prepetition” in order for setoff to be proper under Section 553 of the Bankruptcy Code); *see also Barnhill v. Robert Saunders & Co.*, 177 Cal.Rptr. 803, 804 (Cal. Ct. App. 1st Dist. 1981) (under California law, mutual debts and credits may be offset under generally accepted principles of equity).

18. Here, the setoff test under both Section 553 of the Bankruptcy Code and California law appears to be satisfied. The Master Gas Agreement is a bilateral agreement between PG&E and MAEM, and both parties are entitled to assert their respective rights thereunder against the opposing party; therefore, the PG&E Gas Claim and the MAEM Gas Claim constitute mutual debts. *See Braniff Airways*, 814 F.2d at 1036 (“For mutuality to exist ‘each party must own his own claim in his own right severally, with the right to collect in his own name against the debtor in his own right and severally.’”). In addition, both the PG&E Gas Claim and the MAEM Gas Claim arose prior to the Petition Date, thereby satisfying the

requirement that both debts arise prior to the commencement of the case.¹

(ii) *Other Factors Favoring Settlement.*

19. The Stipulation is also in the best interests of the Debtors' estate, because PG&E has agreed not to assert any setoffs against the MAEM Gas Claim other than the PG&E Gas Claim, despite having filed other claims against MAEM in these proceedings. PG&E's agreement not to assert further setoffs will result in MAEM being paid the Deficiency Claim in full and in cash, plus applicable interest accrued thereon, pursuant to PG&E's confirmed plan of reorganization promptly upon the approval of the Stipulation.²

20. Finally, the Debtors note that the Stipulation is limited to resolving the Gas Claims and will not affect the Debtors' other claims against PG&E, or any defenses that the Debtors may have against any other claims filed by PG&E, all of which are expressly reserved.

C. The Automatic Stay Should be Lifted to the Extent Required to Implement the Stipulation

21. Section 362(a)(6) of the Bankruptcy Code prohibits a creditor from exercising a setoff right without first obtaining relief from stay. Section 362(d)(1) allows the bankruptcy court to lift or modify the automatic stay for "cause". The term "cause" is not defined in the Bankruptcy Code; accordingly courts should determine whether cause exists on a case by case basis. *See Claughton v. Mixton*, 33 F.3d 4, 5 (4th Cir. 1994). Here, for the reasons set forth above, the Stipulation is in the best interests of the estate, but cannot be implemented

¹ The Master Gas Terminated was terminated well in advance of the Petition Date.

² Based on procedures established in the PG&E bankruptcy case, if MAEM's Deficiency Claim becomes allowed (pursuant to this Court's order approving the Stipulation) on or prior to the 24th day of a month (and appropriate documentation is provided to PG&E and the escrow agent for disputed claims in the PG&E bankruptcy proceedings), MAEM's Deficiency Claim will be paid on the first business day of the following month; if the Deficiency Claim becomes allowed after the 24th day of a month, it will be paid on the first business day of the succeeding month.

without modifying the stay to effectuate the setoffs contemplated thereby. Cause, therefore, exists to modify the stay as required to implement the Stipulation.

VI. 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: May 10, 2004

HAYNES AND BOONE, LLP
901 Main Street
Suite 3100
Dallas, TX 75202
(214) 651-5000

-and-

By /s/ Ian T. Peck
Robin E. Phelan
State Bar No. 15903000
Judith Elkin
State Bar No. 06522200
Frances A. Smith
State Bar No. 24033084

Thomas E Lauria
State Bar No. 11998025
Michelle C. Campbell
State Bar No. 24001828
WHITE & CASE LLP
Wachovia Financial Center
200 South Biscayne Blvd.
Miami, Florida 33131
(305) 371-2700

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she 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 via first class mail, postage prepaid on the 10th day of May, 2004.

/s/ Frances A. Smith

EXHIBIT “A”

1 GARY M. KAPLAN (No. 155530)
KIMBERLY A. BLISS (No. 207857)
2 HOWARD, RICE, NEMEROVSKI, CANADY,
FALK & RABKIN
3 A Professional Corporation
Three Embarcadero Center, 7th Floor
4 San Francisco, California 94111-4024
Telephone: 415/434-1600
5 Facsimile: 415/217-5910

6 Attorneys for Reorganized Debtor
PACIFIC GAS AND ELECTRIC COMPANY
7

8 KEVIN B. FISHER (No. 124713)
ROBERTO J. KAMPFNER (No. 179026)
9 WHITE & CASE LLP
Three Embarcadero Center, Suite 2210
10 San Francisco, CA 94111-3162
Telephone: 415/544-1100
11 Facsimile: 415/44-0202

12 Attorneys for Claimant MIRANT AMERICAS
ENERGY MARKETING, LP
13

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN
A Professional Corporation

14 UNITED STATES BANKRUPTCY COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

17 In re
18 PACIFIC GAS AND ELECTRIC
19 COMPANY, a California corporation,
20 Debtor.
21

Case No. 01-30923 DM
[NO HEARING REQUESTED]

22 Federal I.D. No. 94-074260

23 STIPULATION REGARDING ALLOWANCE OF CLAIM AND FOR RELIEF FROM
24 STAY TO ALLOW SET OFF WITH RESPECT TO CLAIM NO. 8872 BY MIRANT
25 AMERICAS ENERGY MARKETING, LP
26
27
28

1 This Stipulation (the "Stipulation") is entered into by and between Pacific Gas and
2 Electric Company, the debtor and debtor in possession in the above-captioned bankruptcy
3 case ("PG&E" or the "Debtor"), and Mirant Americas Energy Marketing, LP ("Mirant"), by
4 and through their respective counsel, as follows:

5
6 **RECITALS**

7 A. On April 6, 2001, PG&E filed a voluntary petition for relief under Chapter 11 of
8 the Bankruptcy Code in the above-captioned Court commencing the above-captioned case
9 (the "PG&E Bankruptcy Case"). PG&E is a debtor in possession and is operating its
10 business pursuant to 11 U.S.C. §§ 1107 and 1108.

11 B. On September 5, 2001, Mirant filed a claim in PG&E's bankruptcy case, assigned
12 Claim No. 8872 (the "Claim"). The Claim seeks, *inter alia*, \$8,876,214.25 allegedly due for
13 gas deliveries made by Mirant to PG&E (the "Mirant Gas Claim") pursuant to a certain
14 Master Gas Purchase and Sale Agreement, dated as of September 1, 1997 (the "Master Gas
15 Agreement").

16 C. On July 14, 2003, Mirant and certain of its affiliated entities commenced
17 proceedings under Chapter 11 of the Bankruptcy Code (the "Mirant Bankruptcy Case") in
18 the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division
19 (the "Mirant Bankruptcy Court"). Mirant and its affiliates are debtors in possession and are
20 operating their business pursuant to 11 U.S.C. §§ 1107 and 1108.

21 D. On December 15, 2003, PG&E filed a claim in Mirant's bankruptcy case in the
22 amount of \$5,486,600.00 for amounts allegedly due to PG&E from Mirant under the Master
23 Gas Agreement (the "PG&E Gas Claim").

24 E. On December 22, 2003, the above-captioned Court entered its order confirming
25 the Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for Pacific Gas and
26 Electric Company Dated July 31, 2003, As Modified by Modifications Dated November 6,
27 2003 and December 19, 2003 (the "Plan"). The Effective Date of the Plan occurred on April
28 12, 2004.

STIP RE ALLOWANCE CLAIM AND FOR RELIEF FROM STAY TO ALLOW SET OFF BY MIRANT RE CLAIM 8872

1 F. By this Stipulation, PG&E and Mirant seek to resolve such claims and to modify
2 the automatic stay of Section 362 of the Bankruptcy Code to allow the set off of the Mirant
3 Gas Claim and the PG&E Gas Claim, without further litigation, under the terms set forth
4 below.

5 PG&E and Mirant now agree as follows:
6

7 **STIPULATION**

8 1. The Mirant Gas Claim shall be allowed in the amount of \$8,876,214.25 in the
9 PG&E Bankruptcy Case (the "Allowed Mirant Gas Claim").

10 2. The PG&E Gas Claim shall be allowed in the amount of \$5,486,600.00 in the
11 Mirant Bankruptcy Case (the "Allowed PG&E Gas Claim").

12 3. The automatic stay of Section 362 of the Bankruptcy Code is modified in the
13 Mirant Bankruptcy Case for the purpose of allowing the parties to set off the Allowed PG&E
14 Gas Claim against the Allowed Mirant Gas Claim.

15 4. Upon the effectiveness of this Stipulation: (i) the Allowed Mirant Gas Claim
16 shall be deemed satisfied to the extent of \$5,486,600.00 pursuant to the setoff set forth in
17 paragraph three above, leaving a balance in the amount of \$3,389,614.25 (the "Deficiency
18 Claim"); (ii) the Deficiency Claim shall be satisfied like other allowed general unsecured
19 claims in the PG&E Bankruptcy Case; and (iii) the Allowed PG&E Gas Claim in the Mirant
20 Bankruptcy Case shall be considered fully satisfied pursuant to the setoff set forth in
21 paragraph three above. PG&E shall assert no further setoff rights against the Deficiency
22 Claim, but reserves its rights to assert other setoffs against any other claim of Mirant or its
23 affiliates.

24 5. Mirant represents and warrants that it has neither assigned nor transferred all or
25 any portion of the Mirant Gas Claim.

26 6. PG&E represents and warrants that it has neither assigned nor transferred all or
27 any portion of the PG&E Gas Claim.
28

1 7. This Stipulation shall not affect any portion of the Claim filed by Mirant other
2 than the Mirant Gas Claim and Mirant reserves all of its rights with respect thereto and with
3 respect to any other claims filed by Mirant in the PG&E Bankruptcy Case. PG&E reserves
4 all rights it has to object to any component of the Claim other than the Mirant Gas Claim and
5 to assert any defenses with respect thereto. Mirant reserves all of its rights to object to any
6 and all claims filed by PG&E in the Mirant Bankruptcy Case other than the PG&E Gas
7 Claim, including, without limitation, any secured claims.


8 8. Each person executing this Stipulation represents that it has full authority and
9 capacity to make the commitments contained in this Stipulation.

10 9. Each party shall bear its own costs and attorneys' fees in this matter.

11 10. This Stipulation shall become effective upon the later of its filing in the PG&E
12 Bankruptcy Court and the entry of an order approving its terms by the Mirant Bankruptcy
13 Court.

14 DATED: 5/5/04

HOWARD, RICE, NEMEROVSKI, CANADY,
FALK & RABKIN
A Professional Corporation

17 By:  for
18 KIMBERLY A. BLISS
19 Reorganized
Attorneys for Debtor and Debtor In Possession
PACIFIC GAS AND ELECTRIC COMPANY

21 DATED: 5/5/04
22 2K

WHITE & CASE LLP

23 By: 
24 KEVIN B. FISHER

Attorneys for MIRANT AMERICAS ENERGY
MARKETING, LP

25 WD 042004/1-1419961/kab/1138489/v5

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

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

**ORDER GRANTING DEBTORS' MOTION FOR APPROVAL OF STIPULATION
REGARDING ALLOWANCE OF CLAIM AND FOR RELIEF FROM STAY TO
ALLOW SET OFF OF GAS CLAIM BETWEEN PACIFIC GAS & ELECTRIC
COMPANY AND MIRANT AMERICAS ENERGY MARKETING, LP**

Upon motion dated May 10, 2004 (the "Motion"),¹ Mirant Corporation and its affiliated debtors, as debtors and debtors in possession (collectively, the "Debtors"), requested pursuant to Rule 9019(a) of the Federal Rules of Bankruptcy Procedure, the entry of an order authorizing Mirant Americas Energy Marketing, LP ("MAEM") to enter into that certain Stipulation Regarding Allowance of Claim and for Relief from the Automatic Stay to Allow Setoff of Gas Claim Between Pacific Gas & Electric Company ("PG&E") and Mirant Americas Energy Marketing, LP (the "Stipulation"); and it appearing that the Court has jurisdiction over this matter; and it appearing that due and proper notice of the Motion has been provided and that no other or further notice need be provided; and the Court having held a hearing on May __,

¹ Capitalized terms used herein but not otherwise defined shall the same meanings ascribed to them in the Motion.

2004 to consider the Motion, the relief requested therein, and any responses thereto; and after due deliberation and sufficient cause appearing therefore, it is hereby

ORDERED that the Motion is granted; and it is further

ORDERED that pursuant to Rule 9019(a) of the Federal Rules of Bankruptcy Procedure, the Debtors are authorized to enter into the Stipulation; and it is further

ORDERED that the automatic stay in the MAEM bankruptcy case shall be modified but only to the extent required for the parties to setoff the Allowed PG&E Gas Claim against the Allowed Mirant Gas Claim; and it is further

ORDERED that nothing in the Stipulation shall affect any of the Debtors' rights or remedies against PG&E in connection with any claims of the Debtors against PG&E other than the Allowed Mirant Gas Claim; and it is further

ORDERED that the Court shall retain jurisdiction with respect to any matters, claims, rights, or disputes arising from or related to the Stipulation or the implementation of this Order.

Dated: _____, 2004

HONERABLE D. MICHAEL LYNN,
UNITED STATES BANKRUPTCY JUDGE

PREPARED BY:

Thomas E Lauria
State Bar No. 11998025
Craig H. Averch
State Bar No. 01451020
WHITE & CASE LLP
Wachovia Financial Center
200 South Biscayne Blvd.
Miami, FL 33131
Telephone: (305) 371-2700
Facsimile: (305) 358-5744

- and -

Robin Phelan
State Bar No. 15903000
Judith Elkin
State Bar No. 06522200
HAYNES AND BOONE, LLP
901 Main Street
Suite 3100
Dallas, TX 75202
Telephone: (214) 651-5000
Facsimile: (214) 651-5940