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PARTNERS LLC

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

In Re:

Mirant Corporation, *et al.*,  
  
Debtors.

§  
§  
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§  
§

Case No 03-46590  
(Jointly Administered)

Chapter No. 11

Hearing: August 11, 2004, 10:30 a.m.

**MOTION OF PERRYVILLE ENERGY PARTNERS  
LLC FOR RELIEF FROM THE AUTOMATIC STAY TO  
INITIATE ARBITRATION AND BRIEF IN SUPPORT THEREOF**

**A HEARING WILL BE CONDUCTED ON THIS MATTER ON AUGUST 11, 2004 AT 10:30 A.M. IN THE COURTROOM OF THE HONORABLE D. MICHAEL LYNN, ELDON B. MAHON U.S. COURTHOUSE, 501 W. TENTH STREET, FORT WORTH, TX 76102-3643. IF YOU OBJECT TO THE RELIEF REQUESTED, YOU MUST RESPOND IN WRITING, SPECIFICALLY ANSWERING EACH PARAGRAPH OF THIS PLEADING. UNLESS OTHERWISE DIRECTED BY THE COURT, YOU MUST FILE YOUR RESPONSE WITH THE CLERK OF THE BANKRUPTCY COURT WITHIN TWENTY DAYS FROM THE DATE YOU WERE SERVED WITH THIS PLEADING. YOU MUST SERVE A COPY OF YOUR RESPONSE ON THE PERSON WHO SENT YOU THE NOTICE; OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF REQUESTED.**

**MOTION OF PERRYVILLE ENERGY PARTNERS LLC FOR RELIEF FROM THE AUTOMATIC STAY  
TO INITIATE ARBITRATION AND BRIEF IN SUPPORT THEREOF - Page 1 of 12**

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

COMES NOW, Perryville Energy Partners, LLC (“PEP”) and files this, its Motion for Relief from the Automatic Stay to Initiate Arbitration and Brief in Support Thereof (this “Motion”) and, in support thereof, would respectfully show this Court the following:

**PRELIMINARY STATEMENT**

1. Agreements to arbitrate must be enforced by bankruptcy courts in the Fifth Circuit unless the party opposing arbitration meets its burden on two conditions, showing both that (a) the dispute to be arbitrated arises exclusively from Title 11 of the United States Code (the “Bankruptcy Code”) and (b) the underlying purpose of the Bankruptcy Code would be adversely affected if the arbitration agreement were to be enforced. If the dispute to be arbitrated does not derive exclusively from rights afforded by the Bankruptcy Code, bankruptcy courts in the Fifth Circuit do not need to consider the second factor. In this matter, the right arises from contract, not from the Bankruptcy Code, and therefore, no party can oppose the enforcement of this arbitration provision.

2. In this situation, under the agreement that was executed between PEP and Mirant Americas Energy Marketing, LP (“MAEM”), the parties agreed to arbitration as the means to determine and calculate any financial loss that PEP suffers as a result of MAEM’s breach of this long term, pre-petition contract. This dispute is governed by New York law and will turn substantially, if not exclusively, on expert testimony concerning the value of this long-term contract. Disputes relating to the assessment of damages from the breach or rejection of a pre-petition contract do not arise from the Bankruptcy Code. Furthermore, the enforcement of the arbitration provision will not adversely affect the underlying purpose of the Bankruptcy Code.

## **BACKGROUND FACTS**

3. On July 14, 2003 (the “Petition Date”), MAEM and other affiliated entities (collectively, the “Mirant Debtors”) filed for bankruptcy protection under Chapter 11 of Title 11 of the Bankruptcy Code.

4. On April 30, 2001, prior to the Petition Date, PEP and MAEM entered into a long-term Tolling Agreement, a true and correct copy of which is attached hereto as Exhibit “A.” The Tolling Agreement was negotiated at arms-length by sophisticated parties, who were represented by highly competent counsel, and contains provisions that are customary in the parties’ industry.

5. The Tolling Agreement conferred on MAEM “tolling rights” to PEP’s 725 MW power facility located near Perryville, Louisiana (the “Plant”). Tolling rights provided MAEM the right to dispatch up to the full generation capacity available from the Plant in exchange for certain fixed and variable payments (“Tolling Fees”). The Tolling Agreement gave MAEM the exclusive right to use and deliver natural gas to the Plant through December 31, 2022, and such natural gas would be converted into electricity for MAEM, to sell in the wholesale electric energy market at its own financial gain or loss. The Tolling Fees under the Tolling Agreement were PEP’s sole source of revenue.

6. As is customary in the wholesale electric generation industry, the parties agreed to resolve any disputes under the Tolling Agreement through arbitration. Section 20.1 of the Tolling Agreement (the “Arbitration Clause”) provides:

Any dispute that may arise in connection with this Agreement which cannot be resolved within thirty (30) days following submission to senior officers shall be settled by arbitration in accordance with Section 20.2.

7. The Tolling Agreement contains specific provisions relating to the procedures for

various aspects of an arbitration proceeding, including discovery, pre-hearing briefing, and the hearing. See Tolling Agreement, Section 20.2 (a) through (j). PEP and MAEM understood that an assessment of damages for a breach of the long-term agreement would require substantial economic and financial energy forecasting analyses, taking into account many technical energy factors, including estimates concerning future energy and fuel prices, energy demand, plant constructions and retirements in the relevant markets, environmental costs, operation and maintenance costs, reserve margins, discount rates, and federal and state energy regulations. Accordingly, the arbitration agreement requires the arbitrator to be knowledgeable or experienced in the industry. See id. at Section 20.2(b).

8. On August 28, 2003, MAEM filed a motion in its Bankruptcy Court to reject the Tolling Agreement (the “Rejection Motion”). In support of its Rejection Motion, MAEM stated that the wholesale energy market in the region where the Plant is located suffers from an overabundance of supply (with correspondingly low energy prices), making performance under the Tolling Agreement uneconomical, at least through 2012 or 2013. Pursuant to the Rejection Motion, the Tolling Agreement was subsequently deemed rejected as of September 15, 2003.

9. It is undisputed that the rejection of the Tolling Agreement has caused PEP to be damaged.<sup>1</sup> PEP has filed Proof of Claim Number 6261 (the “Rejection Claim”). As set forth in the Rejection Claim, the expected future revenues under the Tolling Agreement for the life of the contract is \$1.01 billion, before discounting to present value. Upon discounting the expected Tolling Fees to present value, PEP estimates that the Rejection Claim will be slightly less than half of this \$1.01 billion amount.

10. The Mirant Debtors have objected to the Rejection Claim. Because the Rejection

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<sup>1</sup> Internal documents of the Mirant Debtors, which were produced in the bankruptcy cases, show the Mirant Debtors’ assessment that the rejection damages could be as high as \$435 million.

Claim relates to damages arising out of the Tolling Agreement, PEP requests that this dispute about the amount of the Rejection Claim be resolved through arbitration, as provided by the Arbitration Clause.

### **JURISDICTION AND VENUE**

11. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §1334, and this Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (G), and (O). Venue is proper before this Court pursuant to 28 U.S.C. § 1409.

### **RELIEF REQUESTED**

12. PEP requests that this Court modify the stay pursuant to Section 362 of the Bankruptcy Code and allow the parties to resolve the dispute about the amount of the Rejection Claim through arbitration, as provided by the Arbitration Clause.

### **ARGUMENTS AND AUTHORITY**

13. Section 362(d)(1) of the Bankruptcy Code allows this Court to terminate, annul, modify, or condition the automatic stay “for cause.” A court may find cause for granting relief under Section 362(d)(1) to permit litigation to be conducted in another forum. See Collier on Bankruptcy, 15<sup>th</sup> ed., ¶ 362.07[3]. PEP requests that the automatic stay be modified to enable the parties to resolve the dispute about the amount of the Rejection Claim through arbitration, given the fact that federal policy, as well as the language of the Arbitration Clause, favor arbitration as the manner for resolving this dispute.

14. Title 9 of the United States Code (the “Federal Arbitration Act”) codifies a “liberal federal policy favoring arbitration.” Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). This policy is so strong that, as the Supreme Court announced forty years ago in language that is still controlling today, arbitration should be ordered “unless it may

be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of [arbitration].” United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960).

15. Consistent with the strong policy in favor of arbitration, section 2 of the Federal Arbitration Act provides that agreements to arbitrate are presumptively “valid, irrevocable, and enforceable.” The Supreme Court also stated that “[b]y its terms, the [Federal Arbitration Act] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985) (emphasis in original).

16. Given this strong policy in favor of arbitration, MAEM cannot dispute that the Arbitration Clause is valid and enforceable. Moreover, MAEM cannot deny that any dispute about the amount of the Rejection Claim should be resolved through arbitration, for the Arbitration Clause contains broad language that “[a]ny dispute that may arise in connection with this Agreement” shall be resolved by arbitration.

17. The fact that MAEM has sought relief under the protection of the Bankruptcy Code does not prevent this Court from enforcing the Arbitration Clause. If a party contests the enforcement of an arbitration provision on the ground that enforcement is overridden by another federal mandate, the party opposing arbitration has the burden of overcoming the strong policy that favors arbitration. The Supreme Court has stated that “[t]he burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such intent ‘will be deducible from [the statute’s] text or legislative

history,’ or from an inherent conflict between arbitration and the statute’s underlying purpose.” Shearson/American Express v. McMahon, 482 U.S. 220, 227 (1987). MAEM cannot satisfy such a burden, and the Arbitration Clause should therefore be enforced.

18. The Fifth Circuit instructs that enforcement of an arbitration agreement may not be denied merely because one of the parties has sought relief under the Bankruptcy Code; rather, a party opposing arbitration in a bankruptcy case must demonstrate that:

- (a) the matter derives exclusively from the provisions of the Bankruptcy Code; and
- (b) arbitration of the dispute would conflict with the purposes of the Bankruptcy Code.

In re National Gypsum Co. 118 F.3d 1056, 1067 (5<sup>th</sup> Cir. 1977).

19. Both elements must be satisfied. If the dispute does not derive exclusively from the Bankruptcy Code, the court does not reach the second prong of the query. See Trefny v. Bear Stearns et al., 243 B.R. 300, 314 (Bankr. S.D. Tx. 1999) (compelling arbitration of Texas state law claims, the court stated: “[t]he Fifth Circuit directed the use of a two-part test for determining whether to enforce an arbitration provision. The court must first determine ‘whether the proceeding derives exclusively from the Bankruptcy Code.’ If the proceeding does derive exclusively from the Code, the court must determine ‘whether arbitration of the proceeding would conflict with the purpose of the Code’”).<sup>2</sup> In this case, MAEM cannot satisfy either, let alone both, of the requisite elements.

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<sup>2</sup> In applying the National Gypsum test, courts have found that a bankruptcy court does not have discretion to deny enforcement of an arbitration agreement when the dispute does not arise exclusively from the Bankruptcy Code. In re Bailey, 217 B.R. 523, 526 (Bankr. E.D. Tex. 1997) (“[P]ursuant to National Gypsum, a bankruptcy court possessed discretion to refuse to enforce an otherwise applicable arbitration provision only insofar as enforcement would conflict with the purpose or provision of the Bankruptcy Code.”); Cibro Petroleum Prods., Inc. v. City of Albany (In re Winimo Realty Corp.), 270 B.R. 108, 124 (S.D.N.Y. 2001) (“Under the Fifth Circuit’s framework, when the underlying dispute is premised on rights created by the Bankruptcy Code, the Bankruptcy Court has discretion to assess whether arbitration would actually conflict with the purposes of the Bankruptcy Code. Where the underlying dispute concerns non-Bankruptcy Code issues derivative of debtor’s pre-petition business activities, no such discretion exists.”); In re Transport Assoc., Inc., 263 B.R.531, 535 (Bankr. W.D. Ky. 2001) (same).

20. First, this dispute concerns a calculation of damages stemming from MAEM's breach (through rejection) of a pre-petition contract between the parties (i.e. the Tolling Agreement), and contract disputes do not derive exclusively from the Bankruptcy Code. See, e.g., In re Bailey, 217 B.R. at 526 (requiring arbitration of a contract dispute and holding that the contract claim was based on a pre-petition legal right, not derived from the Bankruptcy Code); Slipped Disc, Inc. v. CD Warehouse, Inc. (In re Slipped Disc), 245 B.R. 342, 345 (Bankr. N.D. Iowa 2000) (compelling arbitration concerning breach of pre-petition contract, stating "because Debtor's claim against the Defendant arises out of a franchise contract and does not implicate substantive rights created exclusively by the federal bankruptcy law, this is a proceeding suitable for arbitration"); In re Winimo Realty Corp, 270 B.R. at 124 (ordering arbitration to proceed, the court stated: "[n]one of these claims was created by the Bankruptcy Code; they are simply contractual claims derivative of pre-bankruptcy agreements." ).<sup>3</sup>

21. MAEM cannot demonstrate that this dispute derives exclusively from the Bankruptcy Code—because it does not. Thus, PEP respectfully requests that the Court lift the automatic stay and allow the parties to proceed to arbitration as they agreed they would.

22. Second, calculating the the amount of the Rejection Claim through an arbitration process would not conflict with the purposes of the Bankruptcy Code. The Fifth Circuit has elaborated on this element by holding that a bankruptcy court should consider:

- (a) the goal of centralized resolution of pure bankruptcy issues;
- (b) the need to protect creditors and reorganizing debtors from piecemeal litigation; and
- (c) the undisputed power of a bankruptcy court to enforce its own orders.

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<sup>3</sup> The issue in National Gypsum related to the effect of a debtor's discharge under Section 524 of the Bankruptcy Code. The court refused to compel arbitration, stating that the dispute "implicated contractual issues only in the most peripheral manner (if at all)." National Gypsum, 118 F.3d at 1067. The instant dispute between PEP and MAEM, implicates contractual issues substantially (if not exclusively).

Id. at 1069.

23. Because the dispute about the amount of the rejection claim will be based entirely on state law issues, enforcement of the Arbitration Clause will not contravene the goal of resolving pure bankruptcy issues in a centralized forum. The fact that Section 20.2(b) of the Tolling Agreement requires an arbitrator to be knowledgeable or experienced in the industry supports the conclusion that no pure bankruptcy issues will arise in the determination of the amount of the Rejection Claim. In fact, this matter will turn substantially, if not exclusively, on expert testimony concerning the value of this long-term contract and will revolve on issues that are unique to the wholesale electric energy market, including estimates concerning future energy and fuel prices, energy demand, plant constructions and retirements in the relevant markets, environmental costs, operation and maintenance costs, reserve margins, discount rates, and federal and state energy regulations.

24. In addition, enforcement of the Arbitration Clause will not subject these estates to piecemeal litigation. This matter relates to one specific claim against MAEM, and the continued administration of these estates will in no way be delayed up by the resolution of the dispute about the amount of the Rejection Claim in a forum other than the bankruptcy court. Because the resolution of this claim is a discrete issue, PEP and MAEM can easily initiate an independent arbitration without disrupting any other matters that will arise before this Court.

25. Finally, enforcement of the Arbitration Clause will not affect this Court's power to enforce its own orders. Unlike the dispute in National Gypsum, which related in part to the provisions of a confirmation order, the resolution of the Rejection Claim will not affect the enforcement of this Court's orders. See id. at 1070. Thus, based on these facts, MAEM will also be unable to satisfy its burden of demonstrating that the enforcement of the Arbitration Clause

would conflict with the purposes of the Bankruptcy Code, and neither of the National Gypsum elements can be satisfied.

### **CONCLUSION**

26. Given the fact that the Arbitration Clause broadly covers “any dispute” that may arise under the Tolling Agreement, and considering also the strong federal policy in favor of arbitration, MAEM cannot dispute that this matter concerning the amount of the Rejection Claim falls within the parties’ agreement to arbitrate. The fact that MAEM sought bankruptcy protection does not change this analysis. The calculation of damages suffered by PEP from MAEM’s rejection of the Tolling Agreement is not a matter that arises exclusively from the Bankruptcy Code, and enforcement of the arbitration agreement does not conflict with the purposes of the Bankruptcy Code.

WHEREFORE, PREMISES CONSIDERED, PEP respectfully requests that this Court modify the stay pursuant to Section 362 of the Bankruptcy Code, allow the parties to resolve the dispute about the amount of the Rejection Claim through arbitration, and grant such other and further relief as is just and equitable.

Dated: July 14, 2004

Respectfully submitted,

/s/ John N. Schwartz

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### **CERTIFICATE OF SERVICE**

This certifies that, on the 14<sup>th</sup> day of July, 2004, a true and correct copy of the foregoing was served (without exhibit), via regular mail, on those parties on the attached service list. Any party that wishes to receive a copy of the exhibit may contact John N. Schwartz at 214/855-7173 or jschwartz@fulbright.com.

/s/ John N. Schwartz

John N. Schwartz

## CERTIFICATE OF CONFERENCE

This confirms that the attorneys for PEP and MAEM have had numerous conversations about this dispute, and this Motion will be opposed.

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