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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**

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

**MOTION OF THE DEBTORS FOR AN ORDER PURSUANT TO 11 U.S.C. §
 365(d)(4) EXTENDING TIME WITHIN WHICH THE WRIGHTSVILLE
 DEBTORS MAY ASSUME OR REJECT AN UNEXPIRED LEASE OF
NONRESIDENTIAL REAL PROPERTY**

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

Mirant Corporation (“Mirant”) and its affiliated debtors (the “Debtors”), as debtors and debtors-in-possession, file this motion for entry of an order pursuant to section 365(d)(4) of title 11 of the United States Code, 11 U.S.C. §§ 101-1330, as amended (the “Bankruptcy Code”), extending the time for the Wrightsville Debtors (as defined below) to assume or reject an unexpired lease of nonresidential real property, dated as of July 14, 2000, between Pulaski County, Arkansas, as lessor, and Wrightsville Power Facility, L.L.C., as lessee, to and including March 10, 2004, and respectfully represent as follows:

**MOTION OF THE DEBTORS FOR AN ORDER PURSUANT TO 11 U.S.C.
 § 365(d)(4) EXTENDING TIME WITHIN WHICH THE WRIGHTSVILLE
 DEBTORS MAY ASSUME OR REJECT AN UNEXPIRED LEASE
 OF NONRESIDENTIAL REAL PROPERTY
 D-118908.1**

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.

PROCEDURAL BACKGROUND

2. 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 “Wrightsville Petition Date”), 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 (collectively, the “MAEC Debtors”). The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

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 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.

3. 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 administered. On September 8, 2003, the Court entered an order approving joint administration of the cases of the New Debtors with those of the Initial Debtors. Also, on September 8, 2003, the Court granted the motion for an order directing that orders entered in the cases of the Initial Debtors be made applicable to those of the New Debtors. On October 20, 2003, the Court entered an order approving the joint administration of the cases of the Wrightsville Debtors with those of the Initial Debtors. Also, on November 5, 2003, the Court granted the motion for the entry of an order directing that certain orders entered in the cases of the Initial Debtors be made applicable to the Wrightsville Debtors. On November 18, 2003, the Debtors filed a motion requesting the joint administration of the cases of the MAEC Debtors with those of the Debtors, which is currently pending before the Court.

4. 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").

5. Summary of Relief Requested. Section 365(d)(4) of the Bankruptcy Code fixes a sixty-day period from the Petition Date during which a debtor may assume or reject unexpired leases of nonresidential real property (the "Sixty-Day Period"). The Sixty-Day Period for the Wrightsville Debtors ends December 2, 2003. The Sixty-Day Period may be extended for cause. Any unexpired lease of real property that is not timely assumed or rejected within the

Sixty-Day Period (or such larger period if extended) is automatically rejected under section 365(d)(4) of the Bankruptcy Code and the Debtors must surrender the leased premise to the lessor. The Debtors submit that sufficient cause exists to extend the Sixty-Day Period as requested herein.

FACTUAL BACKGROUND

A. The Debtors' Business Operations

6. 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.

7. As of July 31, 2003, Mirant employs about 6,700 employees worldwide. Approximately 1,000 employees are based at Mirant's corporate headquarters in Atlanta, and approximately 5,700 employees are based at operating facilities. Approximately 1,000 employees are subject to collective bargaining agreements. 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 Relevant to the Motion

8. On July 14, 2000, the County and Wrightsville Development Funding, L.L.C. (“Funding”) entered into a Construction Mortgage (the “Mortgage”) pursuant to which the County issued three series of industrial revenue bonds (the “Bonds”) to Funding and Funding agreed to periodically advance funds into a “project fund” to be drawn by Wrightsville Power Facility, L.L.C. (“Power”) for developing and constructing an electric generating plant located in Wrightsville, Arkansas (the “Wrightsville Plant”). The Wrightsville Plant, which began commercial operation in July 2002, produces electricity for use throughout the southeastern United States. In conjunction with the funding transaction, on July 14, 2000, the County and Power entered into a Lease Agreement (the “Lease”),² pursuant to which Power leases the Wrightsville Plant assets from the County for rent payments equal to the interest rate on the Bonds. The payment obligations of Power under the Lease match the payment obligations of the County under the Mortgage and the Bonds.

9. Since the Wrightsville Petition Date, the Debtors and their professionals have been working diligently to administer these chapter 11 cases and to address a vast number of administrative and business issues while, at the same time, stabilizing and operating their businesses to maximize asset values. The Debtors are engaged in an ongoing analysis of all of their operations, including with respect to the Lease.

10. The Debtors and their creditors could suffer severe harm if the Wrightsville Debtors are forced to prematurely assume or reject the Lease. For example, if the

² The Wrightsville Debtors are investigating the proper characterization of the Lease. Until completion of this review, the Debtors reserve all rights to recharacterize the Lease as a “financing lease” or otherwise if facts and law support such.

Wrightsville Debtors were forced to assume the Lease, it would become a postpetition obligation of the estates and the lessor would be entitled to administrative priority for any future claims under the Lease without the unsecured damage limitation set forth in section 502(b)(6) of the Bankruptcy Code. If the Wrightsville Debtors determine that the Lease is not needed for their ongoing operations, then an unnecessary and very large administrative liability may be created by the assumption of such Lease.

11. On the other hand, the Wrightsville Debtors believe, based upon a preliminary analysis, that the Lease is of value to their estates and such value is largely intertwined with the plan of reorganization process. Premature rejection of the Lease at this stage in these cases would forfeit that potential value. Furthermore, a rejection could leave the Wrightsville Debtors with significant damage claims related to the rejection of the Lease. Such a result is not in the best interest of the estates or their creditors.

12. The Wrightsville Debtors are performing under the Lease in the ordinary course of their business operations. The Wrightsville Debtors are complying—and are in a position to continue to comply—with their postpetition rent obligations in accordance with the terms of the Lease as provided for in section 365(d)(3) of the Bankruptcy Code.³ The lessor under the Lease will, therefore, not be prejudiced by an extension of the Sixty-Day Period. There is, thus, good cause to grant the extension of the Sixty-Day Period to and including March 10, 2004.

³ The Court has already determined that the Debtors are administratively solvent. See Order Determining That The Debtors Are Administratively Solvent (entered on July 31, 2003 and made applicable to the Wrightsville Debtors on November 5, 2003).

RELIEF REQUESTED

13. By this Motion, the Debtors, pursuant to section 365(d)(4) of the Bankruptcy Code, seek an extension of the time within which the Wrightsville Debtors must assume or reject the Lease through and including March 10, 2004.

BASIS FOR RELIEF

A. Section 365(d) of the Bankruptcy Code Provides that a Court May, For Cause, Extend the Sixty-Day Period.

14. Section 365(d)(4) of the Bankruptcy Code provides, in pertinent part:

...if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is a lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

11 U.S.C. § 365(d)(4) (emphasis added).

15. As the statute indicates, upon a showing of cause by a debtor, this Court may grant extensions of the assumption or rejection time period. See, e.g., Chapman Inv. Assoc. v. American Healthcare Mgmt., Inc. (In re American Healthcare Mgmt., Inc.), 900 F.2d 827 (5th Cir. 1990). The legislative history of section 365(d)(4) indicates that a debtor confronted with the task of analyzing many leases has sufficient cause to extend the statutory sixty-day period. 130 Cong. Rec. S88, 94-95 (1984), reprinted in 1984 U.S.C.C.A.N. 590, 597 (remarks of Sen. Hatch concerning the bill). Construing this legislative history, the bankruptcy court in In re Unit Portions of Delaware, Inc., 53 B.R. 83 (Bankr. E.D.N.Y. 1985), concluded:

Congress recognized that there may be times when it is not possible for the trustee to make a careful and informed assessment of the benefits and burdens of the lease within this 60-day period. Accordingly, it empowered the court to grant a trustee who

demonstrates cause for an extension [of] additional time to make this assessment.

Id. at 85.

16. Various courts have considered what constitutes sufficient cause to extend the time period within which a debtor may assume or reject unexpired nonresidential leases. A list of factors was formulated in In re Wedtech Corp., 72 B.R. 464 (Bankr. S.D.N.Y. 1987). In Wedtech, the bankruptcy court held that the following factors, among others, would tend to indicate that “cause” exists to extend the statutory period:

- (a) the leases are an important asset of the estate such that the decision to assume or reject would be central to any plan of reorganization;
- (b) the case is complex and involves large numbers of leases; or
- (c) the debtor has had insufficient time to intelligently appraise each lease’s value to a plan of reorganization.

Id. at 471-72; see also In re Channel Home Centers, Inc., 989 F.2d 682, 689 (3d Cir. 1993), cert. denied, 510 U.S. 865 (1993) (“[N]othing prevents a bankruptcy court from granting an extension because a particular debtor needs additional time to determine whether the assumption or rejection of particular leases is called for by the plan of reorganization that it is attempting to develop.”); In re Klein Sleep Products, Inc., 78 F.3d 18, 29-30 (2d Cir. 1996) (suggesting that it might be appropriate to extend the debtor’s period to assume or reject until “the moment of confirmation, when the debtor’s chances of rehabilitation would finally be clear.”); In re New York Deli, Ltd., 41 B.R. 198, 200 (Bankr. D. Del. 1984) (approving a nine month extension of time to assume or reject leases); In re Victoria Station, Inc., 88 B.R. 231, 239 n.7 (9th Cir. B.A.P. 1988) (allowing multiple extensions of section 365(d)(4) time period).

C. Cause Exists to Grant the Requested Extension With Respect to the Lease.

(i) The Size and Complexity of these Cases Justify the Requested Extension.

17. Courts regularly have held that the size and complexity of a case, and the inevitable delay which these factors cause in evaluating specific leases and developing a chapter 11 plan warrant an extension of time under section 365(d)(4) of the Bankruptcy Code. See, e.g., Wedtech, 72 B.R. at 471-72; In re Coastal Dry Dock & Repair Corp., 62 B.R. 879, 882 (Bankr. E.D.N.Y. 1987); In re Family Showtime Theatres, Inc., 58 B.R. 679, 684 (Bankr. E.D.N.Y. 1986), aff'd, 72 B.R. 38 (E.D.N.Y. 1987), aff'd, 819 F.2d 1130 (2d Cir. 1987); see also In re Southwest Aircraft Servs., Inc., 831 F.2d 848, 851 (9th Cir. 1987).

18. The Debtors are one of the world's largest generators and marketers of electricity, employing thousands of employees worldwide and generating approximately \$6.4 billion in annual operating revenues. The Debtors' cases are certainly large and complex by any standard. Notably, many publications have represented that the Debtors' cases are among the tenth largest in the history of the United States. The Sixty-Day Period, thus, is an inadequate period of time for the Debtors to make prudent decisions concerning the assumption or rejection of the Lease.

(ii) The Lease is an Important Asset to the Estates.

19. The importance of nonresidential real property leases to a chapter 11 case is a key factor justifying an extension of time within which to assume or reject such leases. See, e.g., In re Babylon Ltd. Partnership, 76 B.R. 270, 274 (Bankr. S.D.N.Y. 1987). In these cases, the Lease is integral to the Wrightsville Debtors' operations because the Wrightsville Plant is at the heart of the Wrightsville Debtors' production and sale of electricity and electrical capacity. Without the Lease of the Wrightsville Plant, the Wrightsville Debtors could not operate their businesses, the Wrightsville Debtors' reorganization efforts would cease, and the going-concern

value of the assets would be lost. Under these circumstances extending the Sixty-Day Period is reasonable and appropriate.

(iii) The Wrightsville Debtors are Current on the Rent Obligations Under the Lease.

20. The Wrightsville Debtors are current on their postpetition rental obligations and have adequate cash flow to meet future rent obligations as those obligations come due. See In re Bon Ton Restaurant & Pastry Shop, Inc., 52 B.R. 850, 855 (Bankr. N.D. Ill. 1985) (observing that lessors who receive continuing monthly rent payments generally are not prejudiced by an extension of the section 365(d)(4) deadline). As noted, the Court has already found that the Debtors are administratively solvent, and this order was made applicable to the Wrightsville Debtors on November 5, 2003. The Wrightsville Debtors' ability and commitment to currently meet their postpetition rental obligations underscores their good faith desire to make informed and reasoned decisions regarding assumption or rejection for the benefit of their estates and creditors.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court grant the relief requested herein and such other and further relief as is just and proper.

Dated: Fort Worth, Texas
November 19, 2003

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By /s/ Meredyth A. Purdy
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ATTORNEYS FOR THE DEBTORS AND
DEBTORS-IN-POSSESSION

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has authorized BSI as service agent to cause to serve a true and correct copy of the foregoing document upon all persons on the Limited Service List, and upon all parties listed below, via email, facsimile and/or overnight courier on the 19th day of November, 2003 in accordance with the Federal Rules of Bankruptcy Procedure.

/s/ Meredyth A. Purdy _____

Pulaski County, Arkansas
Pulaski County Administration Building
201 South Broadway
Little Rock, Arkansas 72201
Attention: County Judge

**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. 03-46590-DML
)	Jointly Administered
Debtors.)	Hearing Date and Time:
)	
)	

**ORDER PURSUANT TO 11 U.S.C. § 365(d)(4) EXTENDING TIME
WITHIN WHICH THE WRIGHTSVILLE DEBTORS MAY ASSUME OR REJECT
AN UNEXPIRED LEASE OF NONRESIDENTIAL REAL PROPERTY**

Upon the motion dated November 19, 2003 (the “Motion”) of Mirant Corporation and its affiliated debtors (collectively, the “Debtors”), as debtors and debtors-in-possession, for the entry of an Order, pursuant to section 365(d)(4) of the Bankruptcy Code¹ extending the time within which the Wrightsville Debtors may assume or reject an unexpired lease of nonresidential real property; and it appearing that this Court has jurisdiction to consider this Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334; and it appearing that this matter is a core proceeding within the meaning of 28 U.S.C. § 157(b); and it appearing that venue of this proceeding and this Motion is proper in this district in accordance with 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been given as set forth on the certificate of service annexed to the Motion and the affidavit filed by Bankruptcy Services LLC; and it appearing that no other or further notice is necessary; and it further appearing that the relief requested in the Motion is in the best interests of the Debtors, their estates and their creditors; and after due consideration and sufficient cause appearing therefor, it is hereby:

¹ Capitalized terms not otherwise defined herein shall have those meanings ascribed to such terms in the Motion.

ORDERED that the Motion is granted; and it is further

ORDERED that this Order applies to the unexpired lease of nonresidential real property described in the Motion, dated as of July 14, 2000, between Pulaski County, Arkansas, as lessor, and Wrightsville Power Facility, L.L.C., as lessee (the "Lease"); and it is further

ORDERED that the Wrightsville Debtors' time to elect to assume or reject the Lease is extended pursuant to section 365(d)(4) of the Bankruptcy Code through and including March 10, 2004; and it is further

ORDERED that nothing contained herein will be construed to characterize the Lease as a "true" lease and not a financing lease. Nothing contained herein will affect the ability of the Debtors to seek to recharacterize the Lease if facts and law support such; and it is further

ORDERED that the nothing contained herein will affect the ability of non-Debtor parties to the Lease to seek appropriate relief, including an order of this Court, for payment of post-petition rent or the shortening of the Debtors' time to elect to assume or reject the Lease; and it is further

ORDERED that the extension granted by this Order is without prejudice to: (i) the Debtors' right to seek a further extension(s) of their time to assume or reject the Lease; and (ii) the Debtors' right to seek further or different relief regarding the Lease.

Dated: November ____, 2003

HONORABLE D. MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE

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