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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	)	Chapter 11 Case
)	
MIRANT CORPORATION, <u>et al.</u>,	)	Case No. 03-46590 (DML)
	)	Jointly Administered
Debtors.)	
	)	Hearing Date and Time: October 1,
_____	)	2003 at 10:30 a.m.

**MOTION OF THE DEBTORS FOR AN
ORDER ENFORCING THE AUTOMATIC STAY AND
DIRECTING THE TURNOVER OF PROPERTY OF THE ESTATE**

A HEARING WILL BE CONDUCTED ON THIS MATTER ON OCTOBER 1, 2003 AT 10:30 A.M. IN COURTROOM NO. 128, UNITED STATES BANKRUPTCY COURT, 501 WEST 10th STREET, FORT WORTH, TEXAS. 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-THREE 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.

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

Mirant Corporation (“Mirant”) and its affiliated debtors (collectively, the “Debtors”), as debtors-in-possession, hereby apply to this Court for an order, pursuant to sections 362(a) and 542 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330, as amended (the “Bankruptcy Code”), (i) enforcing the automatic stay to prohibit certain parties from effectuating offsets with respect to certain debts and claims incurred by, or owing to, Mirant Americas Energy Marketing, LLP (“MAEM”) in respect of energy spot market purchases and sales made prior to the Petition Date (as defined herein) and (ii) directing the turnover of undisputed amounts owing to MAEM which currently are being withheld by one entity. With respect to the request for a turnover pursuant to section 542(a) of the Bankruptcy Code, the Debtors hereby make this submission in conjunction with their Complaint for Turnover of Property being filed herewith.

JURISDICTION

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). The statutory predicates for the relief requested herein are sections 362(a) and 542 of the Bankruptcy Code.

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 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. commenced chapter 11 cases under

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 “CCAA”). The Canadian Debtors are subject to the sole and exclusive jurisdiction of the Canadian Court.

the Bankruptcy Code. The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

3. The Cases are Jointly Administered. On July 15, 2003, this Court granted the Debtors' motion for an order requesting that the Debtors' bankruptcy estates be jointly administered. A motion for joint administration of the Mirant EcoElectrica Investments I, Ltd. and Puerto Rico Power Investments, Ltd. cases is currently pending.

4. Creditors' Committees. On July 25, 2003, the Office of the United States Trustee for the Northern District of Texas announced the formation of two official unsecured creditors' committees; one for Mirant Corporation and the other for Mirant Americas Generation, LLC. The appointment lists of members of both official unsecured creditors' committees were filed in their respective chapter 11 cases on July 25, 2003.

FACTUAL BACKGROUND

5. As set forth more fully in the Affidavit of Jack Dragoun, sworn to September 4, 2003 ("Dragoun Affidavit"), a copy of which is attached hereto as Exhibit B, MAEM, a leading marketer of energy products, sells and purchases energy through, among other channels, the so-called "spot markets" for electricity. In these markets, energy companies supply electrical power to, and purchase it from, regional grids managed and operated by entities called "independent system operators." These operators, which are neither agents nor instrumentalities of the government, oversee the operations of the energy grids within their respective geographic regions in the United States. The spot markets are governed by published tariffs that set forth the rights and obligations of the purchasers and sellers that participate in the markets. These tariffs entrust the various independent system operators with the responsibility for settling the accounts of the various market participants, on a month-to-month basis, by paying them for energy

supplied to, and invoicing them for energy purchased from, various other market participants. The operators also invoice market participants directly for certain service obligations incurred by the operators during the billing period.

6. In the prepetition period, MAEM conducted business through six independent system operators: (1) the California Independent System Operator Corp. (“CAISO”), (2) Electric Reliability Council of Texas, Inc. (“ERCOT”), (3) ISO New England, Inc. (“NEISO”), (4) the Midwest Independent Transmission System Operator, Inc. (“MISO”), (5) the New York Independent System Operator, Inc. (“NYISO”) and (6) PJM Interconnection, L.L.C. (“PJM”) (collectively, the “ISOs”).

7. As a result of MAEM’s prepetition sales of electricity utilizing the ISOs, MAEM is owed approximately \$134 million by various purchasers of MAEM’s electricity sold into the spot market. Conversely, prior to the Petition Date, MAEM purchased approximately \$36 million of electricity for which it has not yet paid.

8. In general, and as set forth more fully in the Dragoun Affidavit, MAEM transacts with the ISOs through three types of arrangements. First, MAEM from time to time enters into bilateral agreements with the ISOs for the purchase and supply of energy in those instances where the ISOs need to balance the supply and demand in their respective markets. Second, MAEM contracts directly with market participants for the purchase and supply of electricity, and the ISOs oversee and administer those purchases and sales. Finally, MAEM contracts directly with the ISOs and agrees to make a certain amount of energy capacity available on which the ISOs may draw in filling spot market requests by market participants in need of power; from time to time MAEM also makes spot market purchases from the ISOs pursuant to this type of arrangement.

9. At present, the ISOs are in the process of settling, on both provisional and final bases, prior months' purchases and sales which, depending on the particular ISO, may reach back several months prior to the Petition Date. Pursuant to the respective tariffs, these settlements will result in a netting of amounts owing by MAEM to the ISOs or other market participants with amounts owing from those entities for any given billing period. Depending on the particular ISO, the netting of prepetition claims and debts could continue for several months. In addition, certain ISOs have, since the Petition Date, exercised certain offsets and either billed MAEM for a net short or paid MAEM for any net amounts owing. One ISO, CAISO, has indicated that it will exercise an offset for the months of June and July 2003 but will not pay MAEM for approximately \$7.85 million in net amounts due to MAEM for those months.

10. With respect to any postpetition transactions conducted with or through the ISOs, the Debtors plan to continue to participate in the spot market in the normal course of business. Accordingly, the Debtors plan to pay any postpetition claims for electricity they purchase and receive payment for the electricity they provide in the spot markets on a net basis after any appropriate netting.

RELIEF REQUESTED

11. With respect to any months prior to the Petition Date for which there remain claims against or payments due to the Debtors as a result of spot market transactions, any attempt by the ISOs to exercise a right of setoff would be subject to the automatic stay of 11 U.S.C. § 362(a). See Citizens Bank of Maryland v. Strumpf, 516 U.S. 16 (1995) (holding that creditor with right of setoff may retain payments to debtor to preserve setoff, but may not exercise that right without court approval).

12. By this application, the Debtors respectfully request the entry of an order enforcing the automatic stay and preventing the ISOs, for any billing period relating back to sales or purchases made by the Debtors prior to the Petition Date, from offsetting the amounts owed to the Debtors with any market participant's claims against the Debtors for each of those respective billing periods pending a lifting of the stay. The Debtors further request an order, pursuant to section 542 of the Bankruptcy Code and as set forth in Debtors' Complaint for Turnover of Property, directing that CAISO turn over to the Debtors any net amounts owing to the Debtors in excess of any claimed right of setoff for any particular month. The relief requested is expressly without prejudice to the rights of the Debtors or any party-in-interest to seek to reverse any purported postpetition setoffs by the ISOs of prepetition debts and claims which have occurred prior to the granting of the relief requested herein.

BASIS FOR RELIEF REQUESTED

13. Section 362(a) of the Bankruptcy Code provides for a stay of all claims against a debtor arising before the commencement of the bankruptcy case. 11 U.S.C. § 362(a). While a creditor, upon the filing of a bankruptcy petition, does not lose any preexisting right to offset its prepetition obligations to a debtor against its prepetition claims against the debtor, the creditor may not exercise such a setoff right without relief from the automatic stay. See 11 U.S.C. § 553(a) (providing that bankruptcy petition does not affect a right to setoff "[e]xcept as otherwise provided in . . . section[] 362"); Strumpf, 516 U.S. at 20 ("[E]xcept as otherwise provided" language in § 553(a) "undoubtedly refers to § 362(a)(7), but we think it is most naturally read as merely recognizing that provision's restriction upon when an actual setoff may be effected – which is to say, not during the automatic stay."); Aetna Life Ins. Co. v. Bram, 179 B.R. 824, 826 (Bankr. E.D. Tex. 1995) ("Setoff is allowed in only very narrow circumstances in bankruptcy

. . . . Setoff is also subject to the automatic stay.”); In re Archer, 34 B.R. 28, 30 (Bankr. N.D. Tex. 1983) (“The [creditor] could not exercise those setoff rights until it obtained relief from the automatic stay.”); In re NTG Indus., Inc., 103 B.R. 195, 197 (Bankr. N.D. Ill. 1989) (“A creditor must obtain relief from the automatic stay or must obtain an order allowing setoff prior to exercising any right of setoff.”) (citations omitted).

14. Here, on an aggregate basis, various market participants and the ISOs owe MAEM approximately \$134 million for MAEM’s prepetition sales of electricity settled through the ISOs, without consideration for either the propriety, or extent, of any preexisting postpetition setoffs. Again, the present motion is forward looking and is made without prejudice to any rights to avoid any preexisting prepetition setoffs. Conversely, MAEM owes, on an aggregate basis, approximately \$36 million for prepetition purchases of electricity from various market participants and the ISOs. Consistent with Strumpf, to the extent that the ISOs hold valid setoff rights, either as principal or as agent for its market participants, they may retain certain funds owing to MAEM, but they may not exercise any setoffs of such funds absent this Court’s approval.

15. Irrespective of any right to withhold funds equal to the amount of setoff, the ISOs may not retain the net amount of funds owing to MAEM for any given billing period without violating section 542 of the Bankruptcy Code. See 11 U.S.C. § 542. Section 542 requires that parties holding the property of the bankruptcy estate turn that property over to the estate. Id.; see also United States v. Whiting Pools, Inc., 462 U.S. 198, 212 (1983) (Section 542 “simply requires the [creditor] to seek protection of its interest according to the congressionally established bankruptcy procedures, rather than by withholding the . . . property from the debtor’s efforts to reorganize.”); Nissan Motor Acceptance Corp. v. Baker, 239 B.R. 484, 489-90 (N.D.

Tex. 1999) (affirming Bankruptcy Court order (1) requiring turnover of debtors' property in possession of creditor and (2) holding that creditors' "continued retention of the [property] after knowledge of [debtors'] bankruptcy was a willful violation of the automatic stay"); In re Great Western Oil Co., 146 B.R. 702, 706-07 (Bankr. S.D. Tex. 1992) (holding that funds due for debtors' periodic coal deliveries were property of estate subject to turnover, even where funds were being kept in court registry subject to attachment by creditor); Canon v. Internal Revenue Serv., 130 B.R. 748, 752 (Bankr. N.D. Tex. 1991) (holding that tax refund was subject to turnover to estate and emphasizing that section 542 requires that creditor "'shall deliver' the property to the Trustee") (emphasis in original). Even assuming, therefore, that the applicable tariffs provide for any retention by an ISO of any net amount of funds owing to MAEM for any given billing period (which the Debtors contest), the ISOs, by definition, have no right of setoff in those funds.

16. Here, after accounting for any rights of setoff, the net amount owed to MAEM is approximately \$98 million. As set forth above, this amount is the property of the estate and must be turned over pursuant to section 542. Given the net amounts in question, and the threat by one particular ISO to withhold the net amount indefinitely, an order pursuant to section 542 is appropriate.

CONCLUSION

WHEREFORE, the Debtors respectfully request entry of an order, substantially in the form attached hereto as Exhibit A, (i) enforcing the automatic stay so as to prevent certain setoffs from occurring, (ii) directing that CAISO turn over to the Debtors the net amount owing to the Debtors in excess of the amounts owed by the Debtors for all prepetition energy sales, and (iii) granting such other and further relief as the Court deems just and proper.

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/s/ Robin E. Phelan

EXHIBIT “A”

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

**ORDER ENFORCING THE AUTOMATIC STAY AND
DIRECTING THE TURNOVER OF PROPERTY OF THE ESTATE**

The Court has considered the Debtors' Motion for an Order Enforcing the Automatic Stay and Directing the Turnover of Property of the Estate (the "Motion") and the Affidavit of Jack W. Dragoun, dated September 4, 2003. The Court finds that notice of the Motion was proper under the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure and the Local Rules and orders of this Court. The Court further finds that the relief requested in the Motion is supported by the facts and applicable law, and therefore should be granted.

Accordingly, it is ORDERED that:

1. California Independent System Operator Corp., Electric Reliability Council of Texas, Inc., ISO New England, Inc., Midwest Independent Transmission System Operator, Inc.,

New York Independent System Operator, Inc. and PJM Interconnection, L.L.C. (collectively, the “ISOs”) are prohibited, for any billing period relating back to sales or purchases made by the Debtors prior to the Petition Date (as defined in the Motion), from offsetting the amounts owed to the Debtors with any claims by them or any energy spot market participant against the Debtors for each of those respective billing periods without a lifting of the automatic stay imposed under 11 U.S.C. § 362.

2. California Independent System Operator Corp. is directed to turn over to the Debtors any net amounts owing to the Debtors in excess of any claimed right of setoff for any particular billing period relating back to sales and purchases made by the Debtors prior to the Petition Date.

3. The relief granted herein is without prejudice to the rights of the Debtors or any party-in-interest to seek to reverse any postpetition setoffs by the ISOs of prepetition debts and claims which occurred prior to this Order.

Dated: September ____, 2003

D. MICHAEL LYNN
UNITED STATES BANKRUPTCY COURT

EXHIBIT “B”

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

**AFFIDAVIT OF JACK W. DRAGON IN SUPPORT OF
MOTION OF THE DEBTORS FOR AN ORDER
ENFORCING THE AUTOMATIC STAY**

STATE OF GEORGIA)
) ss.:
COUNTY OF FULTON)

JACK W. DRAGON, being duly sworn, deposes and says:

1. On July 14, 2003 and concluding in the early morning hours of July 15, 2003 (the "Petition Date"), Mirant Corporation ("Mirant") and certain of its direct and indirect subsidiaries (collectively, the "Debtors"), as debtors-in-possession, each commenced a case under chapter 11 of title 11, United States Code (11 U.S.C. §§ 101 et seq.) (the "Bankruptcy Code") in this Court. I am Director of Asset Accounting for Mirant Corporation, and as such am authorized to submit this affidavit in behalf of each of the Debtors. My day-to-day

responsibilities relate to the settlement of transactions involving Mirant's assets. In my capacity as Director of Asset Accounting, I have personal knowledge concerning the Debtors' transactions in the energy spot markets and relationships with the independent system operators that oversee and administer electric transmissions systems around the country.

2. I submit this affidavit in support of the Motion of the Debtors for an Order enforcing the automatic stay, and directing a turnover of property, to prevent the setoff of certain of the Debtors' prepetition payables and receivables. Except as otherwise indicated, all facts set forth in this affidavit are based upon my personal knowledge, my review of relevant documents or my opinion based upon my experience, knowledge and information concerning the operations of the Debtors and my general understanding of the industry. If I were called upon to testify, I would testify competently to the facts set forth in this affidavit.

I. The Debtors' Operations in the Energy Spot Markets and Relationships with Independent System Operators

3. Mirant's core business centers on the production and sale of electricity and electrical capacity. Mirant currently owns or controls more than 21,800 megawatts of electric generating capacity around the world, of which more than 18,000 megawatts are located in the United States. In 2002, Mirant produced 73 million megawatt-hours of electricity and sold 312 million megawatt-hours of electricity.

4. Mirant operates a significant portion of its energy marketing business through Mirant Americas Energy Marketing, LLP ("MAEM"). MAEM operates twenty-four hours a day and is one of the leading electricity and gas marketers in the United States. MAEM is responsible for, among other things, procuring and scheduling deliveries of fuel consumed by Mirant's domestic power generating assets, bidding and scheduling the operations of Mirant's plants in local market segments and selling energy, energy capacity and related products

produced by the plants.

5. MAEM sells and purchases energy through, among other channels, the so-called "spot markets" for energy. In these markets, energy companies supply electrical power through and to, and purchase it from, regional electric transmission systems managed and operated by quasi-governmental entities called independent system operators. These operators oversee the operations of the energy grids within their respective geographic regions in the United States.

6. An energy marketer must become a member of one of the markets administered by the independent system operators in order to provide services to or receive services from the operators or engage in any transactions within these markets. Such marketers must also agree to be bound by the terms and conditions of the operators' respective tariffs, schedules and protocols ("Tariffs"). The Tariffs have the force of law and dictate the terms and conditions under which the operators must conduct their systems.

7. In the prepetition period, MAEM conducted business through six independent system operators: (1) California Independent System Operator Corp. ("CAISO"), (2) Electric Reliability Council of Texas, Inc. ("ERCOT"), (3) ISO New England, Inc. ("NEISO"), (4) Midwest Independent Transmission System Operator, Inc. ("MISO"), (5) New York Independent System Operator, Inc. ("NYISO") and (6) PJM Interconnection, L.L.C. ("PJM") (collectively, the "ISOs").

8. Each of these ISOs, except MISO, balances the supply and demand of electricity within its transmission system and operates a bid-based competitive wholesale electricity market in which participants purchase and sell energy, capacity, ancillary services and transmission rights. In its region, MISO generally focuses on maintaining system reliability,

processing transmission service and generator interconnection requests and ensuring nondiscriminatory access to its local transmission systems. MISO recently filed an application for permission to operate a competitive wholesale market similar to those operated by the other ISOs.

9. Various Tariffs governing the ISOs specify the billing and payment arrangements by which an individual ISO invoices participants for services provided and/or received and for any other market transactions. Each ISO invoices participants after engaging in some form of netting of their monthly charges against their monthly credits. In the event a participant fails to pay all or a part of a given invoice, the ISO may setoff the amount owed to the participant against any amount owed to the ISO for a given month. The ISOs also invoice market participants directly for any additional service obligations incurred during the billing period.

10. In general, MAEM deals with the ISOs by means of three types of arrangements. First, MAEM from time to time enters into bilateral agreements with the ISOs for the purchase and supply of energy in those instances where the ISOs need to balance their respective markets. Second, MAEM contracts directly with market participants for the purchase and supply of electricity, and the ISOs oversee and administer those purchases and sales. Finally, MAEM contracts directly with the ISOs and agrees to make a certain amount of energy capacity available on which the ISOs may draw in filling spot market requests by market participants in need of power; from time to time MAEM also makes spot market purchases from the ISOs pursuant to this type of arrangement.

II. Summary of Outstanding Claims and Obligations for Spot Market Transactions

11. As a result of MAEM's prepetition sales of electricity utilizing the ISOs, the Debtors are owed approximately \$134 million by various purchasers of MAEM's electricity. Conversely, prior to the Petition Date, MAEM purchased approximately \$36 million of electricity for which it has not yet paid.

12. As of the Petition Date, with respect to CAISO for the month of June 2003, MAEM was owed approximately \$6.1 million, had obligations of approximately \$671,000 and was due a net payment of \$5.43 million.

13. As of the Petition Date, with respect to CAISO for the month of July 2003, MAEM was owed approximately \$2.59 million, had obligations of approximately \$169,000 and was due a net payment of \$2.42 million.

14. As of the Petition Date, with respect to ERCOT, MAEM was owed approximately \$3.1 million, had obligations of approximately \$9.6 million and owed a net obligation of \$6.5 million.

15. In addition, the Debtors have posted cash collateral in the amount of \$15.6 million as security on any obligations to ERCOT.

16. As of the Petition Date, with respect to NEISO, MAEM was owed approximately \$16.58 million, had obligations of approximately \$18.18 million and owed a net obligation of \$1.6 million.

17. In addition, the Debtors have posted collateral in the form of an \$18 million letter of credit and \$4.2 million in cash as security on any obligations to NEISO.

18. As of the Petition Date, with respect to MISO, MAEM had obligations of approximately \$329,000.

19. In addition, the Debtors have posted collateral in the form of a \$500,000 letter of credit as security on any obligations to MISO.

20. As of the Petition Date, with respect to NYISO for the month of June 2003, MAEM was owed approximately \$14.76 million, had obligations of approximately \$2.5 million and was due a net payment of \$12.26 million.

21. As of the Petition Date, with respect to NYISO for the month of July 2003, MAEM was owed approximately \$13.68 million, had obligations of approximately \$2.1 million, and was due a net payment of \$11.5 million.

22. In addition, the Debtors have posted collateral in the form of a \$4.7 million letter of credit as security on any obligations to NYISO.

23. As of the Petition Date, with respect to PJM, MAEM was owed approximately \$77 million, had obligations of approximately \$2 million and was due a net payment of \$75 million.

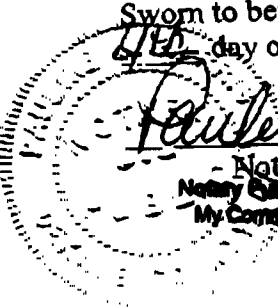
24. Following the Petition Date, certain ISOs have netted certain of the foregoing debts and credits, resulting in net payments or invoices for prepetition billing periods. Other debts and credits have not yet been netted but are subject to future netting procedures.

25. One ISO, CAISO, is in the process of netting the amounts described in paragraphs 12 and 13, supra, but has refused to turn over to the Debtors the net amount owing of approximately \$7.85 million. The Debtors have demanded that CAISO pay the net amount to

them, but CAISO has refused to do so. A copy of the CAISO's letter refusing to turn over the net amount due is attached hereto as Exhibit A.

By: *[Signature]*
Name:
Title: *Director Asset accounting*

Sworn to before me on this
4th day of September, 2003



Paulene M. Harris
Notary Public
Notary Public, DeKalb County, Georgia
My Commission Expires Oct. 14, 2008