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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**

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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.

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**MOTION FOR ENTRY OF AN ORDER PURSUANT TO SECTIONS 365 AND 363(b)  
OF THE BANKRUPTCY CODE APPROVING, INTER ALIA, THE DEBTORS' (A)  
ASSUMPTION AND ASSIGNMENT OF AN OPERATING AND MAINTENANCE  
AGREEMENT, (B) ASSUMPTION OF AN OPERATING AND MAINTENANCE  
TRANSFER AGREEMENT AND (C) THE PERFORMANCE OF  
OBLIGATIONS UNDER A GUARANTY AGREEMENT**

**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 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 UNITED STATES BANKRUPTCY JUDGE:

Mirant Corporation (“Mirant”), Mirant Services, LLC (“Mirant Services”), Mirant Americas, Inc. (“Mirant Americas”) and their respective affiliated debtors (collectively, the “Debtors”), as debtors and debtors-in-possession, file this motion (the “Motion”) for entry of an order pursuant to sections 365 and 363(b) of title 11 of the United States Code, 11 U.S.C. sections 101-1330, as amended (the “Bankruptcy Code”), in connection with the sale of joint venture partnership interests of Mirant Birchwood, Inc. (“Mirant Birchwood”) and Greenhost, Inc. (“Greenhost”), each being non-debtor affiliates of Mirant, relating to a power plant located in Virginia to General Electric Capital Corporation (“GECC”), authorizing (a) pursuant to section 365 of the Bankruptcy Code, Mirant Services to (i) assume and assign the O&M Agreement to GEII, and (ii) assume the O&M Transfer Agreement; and (b) pursuant to section 363(b) of the Bankruptcy Code, Mirant Americas to (i) perform its obligations under the Guaranty, and (ii) in its capacity as a shareholder of Mirant Birchwood, cause Mirant Birchwood to enter into and consummate the Transaction (as defined below) and respectfully state as follows:

**JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. sections 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. section 157(b). Venue is proper before this Court pursuant to 28 U.S.C. sections 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 (the “Initial Debtors”) filed a voluntary petition in this Court for relief under chapter 11 of the Bankruptcy Code.<sup>1</sup> On August 18, 2003, Mirant EcoElectrica Investments I, Ltd. and Puerto Rico Power Investments, Ltd. (the “New Debtors”) commenced chapter 11 cases under 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 Initial Debtors’ motion for an order requesting that the Initial Debtors’ bankruptcy estates be jointly administered. On September 8, 2003, this Court granted an order directing that the cases of the New Debtors be consolidated for procedural purposes only and be jointly administered with the Initial Debtors’ cases.

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 (the “Committees”) were filed in their respective chapter 11 cases on July 25, 2003.

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<sup>1</sup> 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.

## **FACTUAL BACKGROUND**

### **A. The Debtors' Business Operations**

5. Mirant and its direct and indirect subsidiaries, including the New Debtors, 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.

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

### **B. Facts relevant to the Motion**

7. Through its indirect wholly owned non-debtor subsidiary, Mirant Birchwood, Mirant Americas owns a 48% limited partnership interest and a 2% general partnership interest in Birchwood Power Partners, L.P. ("Birchwood Power") and a 50%

ownership interest in Greenhost, each being non-debtor joint venture projects co-owned with Cogentrix/Birchwood Two, L.P. (“Cogentrix”), a non-debtor third party. Birchwood Power owns and operates a 242 megawatt coal-fired electric cogeneration (QF) facility in Virginia, referred to herein as the “Birchwood Facility”. The Birchwood Facility sells all of its electricity production to Virginia Electric and Power Company (“Virginia Power”) under a long-term power purchase and operating agreement dated July 13, 1990 (the “Power Purchase and Operating Agreement”) between SEI Birchwood, Inc. (and subsequently assigned to Birchwood Power) and Virginia Power, which terminates in 2021. Greenhost owns and operates a 45-acre greenhouse (built as part of the original construction of the Birchwood Facility) and produces and markets hydroponic tomatoes from the greenhouse. Mirant Services provides operation and maintenance services to the Birchwood Facility under a long-term operation and maintenance agreement dated May 18, 1994 (the “O&M Agreement”) between Southern Electric International Inc. (now known as Mirant Services) and Birchwood Power.

8. Prior to the Petition Date, in May 2003, Mirant Birchwood contracted to sell to GECC<sup>2</sup> its ownership interests in Birchwood Power and Greenhost for a purchase price of approximately \$71 million (the “Purchase Price”)<sup>3</sup> (the “Transaction”). In addition, Mirant Services entered into the O&M Transfer Agreement (defined below) with General Electric

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<sup>2</sup> GECC is a prospective lender to the Debtors of debtor-in-possession financing (“DIP Financing”). However, the Transaction and the relief sought by this Motion is in no way related to the DIP Financing. Furthermore, the individual persons that negotiated the terms of the Transaction Documents (defined above) are separate from the individual persons involved in the negotiations of the DIP Financing, both in the case of the Debtors and GECC.

<sup>3</sup> The purchase price is \$71,295,830, subject to closing price adjustments, set forth in the Acquisition Agreement (defined above).

International, Inc. (“GEII”), an affiliate of GECC, which provides, among other things, for the assignment to GEII of the O&M Agreement and which is a condition precedent to closing of the Transaction. The principal documentation relating to the Transaction (together with all other agreements, documents and instruments relating thereto, the “Transaction Documents”) are as follows:

a. An acquisition agreement dated May 16, 2003 (the “Acquisition Agreement”) between Mirant Birchwood as seller and GECC as buyer, pursuant to which Mirant Birchwood agreed to sell to GECC (i) its 47.5% limited partnership interest and its 2% general partnership interest in Birchwood Power (the remaining 0.5% limited partnership interest being retained by Mirant Birchwood for the purposes of preventing the termination of the partnership for US federal tax purposes and treated in accordance with the Put and Call Agreement (as defined below)) and (ii) its 50% ownership interest in Greenhost. Pursuant to the Acquisition Agreement, Mirant Birchwood agreed to indemnify GECC for (a) breach of certain representations and warranties; (b) breach of covenant, and (c) claims arising after the Closing Date in respect of certain intellectual property and excluded assets being retained by Mirant Birchwood (the “Indemnities”). The Indemnities are limited to (i) 40% of the Purchase Price in respect of a breach of the representations and warranties, (ii) the full amount of the Purchase Price (less any amounts paid for breach of representation and warranty) in respect of a breach of covenant and/or claims arising in respect of the intellectual property and excluded assets. Claims in respect of the Indemnities must be brought within one year of the Closing Date (other than in respect of tax related matters, which are subject to a claim at any time prior to the expiry of the applicable statutory limitation period).

b. An operating and maintenance transfer agreement dated May 16, 2003 (the “O&M Transfer Agreement”) between Mirant Services and GEII (i) relating to the treatment of certain employees of Mirant Services currently working on the Birchwood Facility (the “Birchwood Employees”) and their respective rights and benefits, and (ii) pursuant to which Mirant Services agreed to enter into an assignment, assumption and amendment agreement (the “Assignment Agreement”) with respect to the O&M Agreement with GEII and Birchwood Power on the closing date of the Transaction (the “Closing Date”). The Assignment Agreement provides, among other things, the assignment of substantially all of Mirant Services’ rights, title and interest in and to the O&M Agreement and includes a one-off payment by Mirant Services to GEII (the “Bonus Payment”) of an amount equal to the anticipated annual bonus payments to the Birchwood Employees, being an aggregate amount of \$520,000, pro rated for the period commencing on the first day of the calendar year and ending on the Closing Date, less any bonus payments already made by Mirant Services to such employees prior to the Closing Date;

c. A guaranty agreement dated May 16, 2003 (the “Guaranty”) made by Mirant Americas in favor of GECC, pursuant to which Mirant Americas agreed to guarantee all payment obligations owing to GECC under the Acquisition Agreement (including those relating to the Indemnities);

d. A consent and agreement dated May 16, 2003 (the “Cogentrix Consent”) between Mirant Birchwood, Cogentrix and GECC, pursuant to which Cogentrix agreed to grant its consent to the Transaction, subject to certain conditions;

e. A put and call agreement to be entered into on or about the Closing Date (the “Put and Call Agreement”) between Mirant Birchwood and GECC pursuant to which GECC

is given the right to call, and Mirant Birchwood is given the right to put, the remaining 0.5% limited partnership interest retained by Mirant Birchwood, such rights to be exercisable more than one year after the Closing Date; and

f. A lender consent agreement (the "Lender Consent") made between Birchwood Power and certain banks and financial institutions (the "Project Lenders") party to an amended and restated loan reimbursement agreement dated July 1, 1998 (the "Project Financing") made between Birchwood Power and the Project Lenders, pursuant to which the Project Lenders agreed to grant their consent to the Transaction, subject to the terms and conditions set out therein.<sup>4</sup>

9. Pursuant to the terms of the Power Purchase and Operating Agreement and a right of first refusal agreement dated May 23, 1994 made between Birchwood Power and Virginia Power, Virginia Power was granted a right of first refusal (the "Right of First Refusal") with respect to, among other things, the transfer by Mirant Birchwood of its ownership interest in Birchwood Power. Pursuant to the terms of the Right of First Refusal, Virginia Power was

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<sup>4</sup> Pursuant to the requirements of the Project Financing, Mirant arranged for a letter of credit (the "Letter of Credit") to be issued in favor of the Project Lenders in respect of the full amount of the debt service reserve requirement under such Project Financing. The Letter of Credit was issued in the aggregate principal amount of \$19.1 million and is due to expire on October 31, 2003. The Letter of Credit may be drawn at any time after October 1, 2003. To the extent that the Letter of Credit is drawn by the Project Lenders, Cogentrix is required, pursuant to the terms of a Reimbursement Agreement dated October 27, 1997 between SEI Holdings, Inc. (now known as Mirant Americas), SEI Birchwood, Inc. (now known as Mirant Birchwood), Cogentrix Energy, Inc., Cogentrix and Birchwood Power, to reimburse Mirant Americas for 50% of the amount drawn (up to a maximum drawn amount of \$17 million). To the extent that the Letter of Credit is drawn, Mirant Americas and Mirant Birchwood anticipate reaching an agreement with GECC prior to the Closing Date to provide for the reimbursement to Mirant Birchwood, of the remaining balance of the drawn amounts.

notified of the Transaction on May 23, 2003 and given 90 days in which to elect whether to exercise the Right of First Refusal.

10. The Right of First Refusal period terminated on August 21, 2003 when Virginia Power notified Mirant Birchwood that it did not intend to enter into the Transaction. Mirant Birchwood requested a written waiver of the Right of First Refusal which Virginia Power has agreed to provide subject to payment of a waiver fee of \$350,000 by Mirant Birchwood. Mirant Birchwood (with the support of the Debtors) now wishes to proceed with GECC to complete the Transaction.

11. As noted above, neither Mirant Birchwood (as the seller) nor Birchwood Power or Greenhost (as the targets) are debtors in these chapter 11 cases. However, both Mirant Americas and Mirant Services are debtors and debtors-in-possession in these chapter 11 cases. Accordingly, by this Motion, Mirant Americas and Mirant Services seek the requisite authority necessary to effectuate the Transaction.

#### **Relief Requested and Basis Therefor**

12. By this Motion, Mirant Americas and Mirant Services seek entry of an order (a) pursuant to section 365 of the Bankruptcy Code, authorizing Mirant Services to (i) assume and assign the O&M Agreement to GEII, and (ii) assume the O&M Transfer Agreement; and (b) pursuant to section 363(b) of the Bankruptcy Code, authorizing Mirant Americas to (i) perform its obligations under the Guaranty, and (ii) in its capacity as a shareholder of Mirant Birchwood, cause Mirant Birchwood to enter into and consummate the Transaction.

13. Section 365 of the Bankruptcy Code provides that a chapter 11 debtor, subject to Bankruptcy Court approval, may assume or reject executory contracts at any time prior

to plan confirmation. 11 U.S.C. § 365(a) and (d)(2). The debtor's decision to assume or reject an executory contract is an exercise of the debtor's business judgment. See Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303, 1309 (5th Cir. 1985). The business judgment test is not a strict standard, but merely requires a showing that either assumption or rejection of the contract at issue will benefit the debtor's estate. See In re Bildisco, 682 F.2d 72, 79 (3d Cir. 1982), aff'd sub nom., NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984).

Section 365(a) of the Bankruptcy Code provides in relevant part:

[T]he [debtor], subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor. 11 U.S.C. § 365(a).

14. Section 363(b) of the Bankruptcy Code provides in pertinent part that a debtor "after notice and hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b). A debtor must demonstrate a sound business justification for a sale or use of assets outside the ordinary course of business. See, e.g., In re Continental Air Lines, Inc., 780 F.2d 1223, 1226 (5th Cir. 1986). Courts look to various factors to determine whether to approve a motion under section 363(b), such as (i) whether a sound business reason exists for the proposed transaction; (ii) whether fair and reasonable consideration is provided; (iii) whether the transaction has been proposed and negotiated in good faith; and (iv) whether adequate and reasonable notice is provided. In re Condere, 228 B.R. 615, 626 (S.D. Miss. 1998).

15. The Debtors have determined in their business judgment, that the consummation of the Transaction, to the extent it relates to the Debtors, would be beneficial to the Debtors' estates. The Transaction resulted from a lengthy negotiation process that began in

February 2002 when Mirant Americas first decided to solicit the interest of potential buyers for its indirect ownership interests in each of Birchwood Power and Greenhost. The decision to divest these assets was initially based on the desire to increase liquidity and divest of non-core assets but was conditional upon the receipt of an acceptable offer. Following a lengthy marketing and negotiation process, described further below, Mirant Birchwood entered into the Acquisition Agreement and related documents on May 16, 2003. Mirant Birchwood then notified Virginia Power and waited for their response on the Right of First Refusal.

16. The conclusion of the sale process was interrupted by the commencement of these chapter 11 cases. Following the filing, Mirant Americas, Mirant Services and Mirant Birchwood decided to re-evaluate the decision to sell Birchwood Power. Exercising their sound business judgment, Mirant Americas and Mirant Services concluded that the consummation of the Transaction would be in the best interests of the Debtors, Mirant Birchwood and their respective stakeholders, and believe they have a sound business justification for entering into the Transaction Documents and the transactions contemplated thereby. This decision was based on the favorable terms of the Acquisition Agreement and the following criteria:

- a. *Mirant Americas considers Birchwood Power to be a non-core asset.*

17. Mirant Americas believes that the Birchwood Facility is a non-core asset and not integral to the business operations of Mirant and its businesses. The reasons are twofold: first, all of the power produced by the Birchwood Facility is sold exclusively to Virginia Power under the Power Purchase and Operating Agreement; and second, Virginia Power dictates the production output at the Birchwood Facility giving the Debtors (through Mirant Birchwood) virtually no ability to optimize the production and sale of the power output in the marketplace.

These circumstances should continue until the termination of the Power Purchase and Operating Agreement in 2021. Furthermore, since Mirant Birchwood has no synergies with any of the other Mirant businesses, the Debtors are not able to optimize its investment or extract additional value from this asset through its strategic trading, marketing and risk management activities.

b. *The agreed Purchase Price is considered to be favorable in the current market and exceeds the present value of the Debtors' anticipated discounted aggregate cash flows from the Birchwood Facility.*

18. In the current market environment, assets such as the Birchwood Facility which represent little or no market price risk are considered favorable investments. This is evidenced by the high level of interest received by Mirant Americas in Birchwood Power during the marketing process as well as the favorable Purchase Price agreed with GECC of approximately \$71 million (subject to closing price adjustments). If the Transaction is not consummated, the Debtors may not be able to negotiate a comparable purchase price with any other buyer, whether in these or other market conditions, and whether now or in the future. Furthermore, based on present values, the agreed Purchase Price represents a greater value for Mirant Birchwood than the discounted aggregate projected cash flows due under the Power Purchase and Operating Agreement over its contract term and the projected terminal value of the Birchwood Facility.

c. *The marketing and negotiation process was a costly and time-consuming process which would be wasted if the Transaction were to be aborted at this stage.*

19. The Debtors, through Mirant Birchwood, spent a considerable amount of time and effort developing and negotiating the complex terms and conditions of the Transaction. Prior to entering into the Transaction, the Debtors, through Mirant Americas, undertook an extensive and thorough marketing process before selecting GECC as the preferred bidder.

20. In April 2002, shortly after Mirant Americas determined to sell its interests in Birchwood Power and Greenhost, Mirant Americas issued and distributed a Confidential Information Memorandum to eighteen bidders that had expressed a strong interest in the assets. Following the evaluation of indicative proposals received from such bidders, a shortlist of only seven bidders was selected. Mirant Americas then allowed these bidders to conduct full due diligence of the Birchwood Facility and Greenhost, providing access to a data room, site visits and management presentations. Final bids were submitted by July 26, 2002 and following an evaluation thereof (including the price and other relevant deal terms), Mirant Americas selected a preferred bidder. Mirant Americas negotiated extensively with the preferred bidder over a period of six to eight weeks. However, due to unforeseen circumstances, the preferred bidder was not able to consummate the transaction. Rather than commencing negotiations with one of the other final bidders who had made less favorable bids, Mirant Americas decided to re-initiate the entire marketing process.

21. Accordingly, in November 2002, Mirant hired Credit Suisse First Boston (“CSFB”) to act as its financial advisor for the sale of its interest in Birchwood Power and Greenhost. CSFB contacted a wide group of domestic and international potential buyers for this particular asset, including private equity funds, Independent Power Producers and select electric utilities with a strategic focus on purchasing power plants with an off-take contract. Over a hundred potential parties were contacted for indications of interest, and in December 2002 a revised Confidential Information Memorandum was issued by Mirant Americas, through CSFB, to approximately thirty potential bidders.

22. In late December 2002, Mirant Americas and CSFB received and evaluated more than twenty initial bids and selected a shortlist of six bidders. These bidders were permitted to conduct final due diligence including site visits and management presentations and submitted their final bids on February 19, 2003. With the assistance of CSFB, Mirant Americas selected GECC as the optimal bidder based on numerous evaluation criteria including the purchase price, the creditworthiness of the bidder, the bidder's ability to finance and close the transaction, the deal structure and other terms and conditions.

23. Thereafter, Mirant Americas spent eight weeks negotiating with GECC the detailed terms of the Transaction Documents. During this period, Mirant Americas also needed to take into consideration the various interests of (i) Cogentrix, who as co-owner of Birchwood Power, was required to give its consent to the Transaction, (ii) the Project Lenders, whose consent was required under the Project Financing, and (iii) Virginia Power, under the Right of First Refusal.

24. Overall, a considerable amount of time and effort (spanning over nine months) was spent by the Debtors (through Mirant Americas), their employees and legal counsel in discussing and negotiating the terms of the Transaction Documents and in providing Virginia Power with the necessary information to enable them to make an informed decision as to whether or not to exercise its Right of First Refusal. As at the date hereof, the Transaction Documents are either executed or substantially in the agreed form, each of the Cogentrix Consent and Lender Consent has been obtained and Virginia Power, having conducted its own due diligence on the Transaction, has agreed not to exercise its Right of First Refusal, subject to the receipt of the waiver fee.

25. All of this time, effort and expense would be wasted if the Transaction did not consummate as intended. Moreover, if the Transaction is abandoned, there is no certainty that the Debtors would be able to achieve a comparable sale price with any other buyer, whether now or at any time in the future. The O&M Agreement and the O&M Transfer Agreement are vital for the consummation of the Transaction. The Assignment Agreement is a condition precedent to closing and cannot be delivered without the prior assumption and assignment of the O&M Agreement and the assumption of the O&M Transfer Agreement pursuant to section 365 of the Bankruptcy Code. Similarly, the Guaranty is necessary to the closing of the Transaction and since the giving of the Guaranty in this Transaction is outside the ordinary course of business of Mirant Americas, the performance of the obligations under the Guaranty require approval under section 363(b) of the Bankruptcy Code. If the Debtors are unable to deliver and perform under these contracts as agreed, Mirant Birchwood would be unable to satisfy the conditions to consummation and the Transaction would have to be aborted.

d. *Economic benefit to the Debtors.*

26. In addition to the intangible benefits of completing the Transaction, as outlined above, the Debtors believe that the Debtors' estates will benefit economically from the Transaction.

27. First, Mirant Birchwood intends to make a distribution to Mirant Americas, its direct parent, of substantially all of the net sale proceeds of the Transaction including the net sale proceeds arising upon exercise of the parties' rights under the Put and Call Agreement. In the event that the Guaranty is called before such distribution is made, Mirant Birchwood intends to promptly make a distribution to Mirant Americas, its direct parent, of such

amounts as may be required to settle Mirant Americas' obligations under the Guaranty. Since the aggregate amount of the Indemnities (and therefore, Mirant Americas' liability under the Guaranty) is limited to the amount of the Purchase Price, the Debtors are protected economically from a claim under the Guaranty since the sale proceeds will be available to meet any obligations arising thereunder. Lastly, if the Guaranty is never called, Mirant Americas will benefit from the distributions.

28. The O&M Transfer Agreement and the Assignment Agreement are required to be provided as part of the overall Transaction. In order to ensure that the creditors of Mirant Services are not prejudiced by the transfer of the O&M Agreement, following receipt of the distributions from Mirant Birchwood, Mirant Americas intends to internally allocate an amount equivalent to the estimated net present value of the O&M Agreement to Mirant Services, such allocation to be made upon expiry of Mirant Americas' liability under the Guaranty and to be recorded as a debit/credit in the individual accounts of Mirant Americas and Mirant Services. As noted above, the Assignment Agreement requires Mirant Services to make the Bonus Payment on the Closing Date. By an Order Authorizing Payment of Prepetition Wages, Compensation and Employee Benefits and Granting Related Relief dated July 15, 2003, this Court authorized the payment by the Debtors of "amounts awarded under the Incentive Plan<sup>5</sup> as they become due in the ordinary course of business." Accordingly, the Debtors are already authorized to make bonus payments to its employees and the Bonus Payment is simply a financial settlement between Mirant Services and GEII to ensure that such bonus payments are

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<sup>5</sup> The definition of "Incentive Plan" is set out in a Motion of the Debtors for an Order Authorizing the Debtors to Pay Prepetition Wages, Compensation and Employee Benefits and Granting Related Relief dated July 15, 2003.

made to the Birchwood Employees. Furthermore, since the Debtors intend to make a mid-year payment of bonuses on or about September 14, 2003, and since the Bonus Payment is required by the terms of the Assignment Agreement to be reduced by any such prior payments, the actual amount of the Bonus Payment will be insignificant.

29. Accordingly, based on the foregoing matters, the Debtors submit that, in their business judgment, the consummation of the Transaction will benefit the Debtors' estates.

30. Upon assumption of an executory contract or unexpired lease, the debtor is required, pursuant to section 365(b)(1) of the Bankruptcy Code, to (a) cure any default, or provide adequate assurance of the prompt cure of any default, and (b) provide adequate assurance of future performance under the contract. Neither Mirant Services nor Mirant Birchwood are aware of any defaults existing under the O&M Agreement, which would, pursuant to the provisions of section 365(b)(1) of the Bankruptcy Code, need to be cured (nor have any default notices been received). Similarly, no defaults exist under the O&M Transfer Agreement that would need to be cured for that contract to be assumed under section 365 of the Bankruptcy Code.

31. The relief requested in this Motion is without prejudice to any rights, interests, claims, or causes of action belonging to the Debtors' estates, and it does not constitute any waiver of rights, interests, claims, or causes of action belonging to the Debtors' estates. The Debtors expressly reserve the right to further amend or supplement this Motion to assert additional matters, both technical and substantive, as well as to reject or assume additional unexpired leases or executory contracts.

32. Based on the foregoing, the Debtors' request that (a) pursuant to section 365 of the Bankruptcy Code, Mirant Services be authorized to (i) assume and assign the O&M Agreement to GEII, and (ii) assume the O&M Transfer Agreement; and (b) pursuant to section 363(b) of the Bankruptcy Code, Mirant Americas be authorized to (i) perform its obligations under the Guaranty, and (ii) in its capacity as a shareholder of Mirant Birchwood, cause Mirant Birchwood to enter into and consummate the Transaction.

33. No prior request for the relief sought in this Motion has been made to this or any other court.

**CONCLUSION**

WHEREFORE, the Debtors respectfully request that the Court enter an order (a) pursuant to section 365 of the Bankruptcy Code, authorizing Mirant Services to (i) assume and assign the O&M Agreement to GEII, and (ii) assume the O&M Transfer Agreement; and (b) pursuant to section 363(b) of the Bankruptcy Code, authorizing Mirant Americas to (i) perform its obligations under the Guaranty, and (ii) in its capacity as a shareholder of Mirant Birchwood, cause Mirant Birchwood to enter into and consummate the Transaction.

Dated: Fort Worth, Texas  
September 10, 2003

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ATTORNEYS TO THE DEBTORS  
AND DEBTORS-IN-POSSESSION

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
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	)	Hearing Date and Time: To Be Set

**ORDER PURSUANT TO SECTIONS 365 AND 363(b) OF THE BANKRUPTCY CODE APPROVING, INTER ALIA, THE DEBTORS’ (A) ASSUMPTION AND ASSIGNMENT OF AN OPERATING AND MAINTENANCE AGREEMENT, (B) ASSUMPTION OF AN OPERATING AND MAINTENANCE TRANSFER AGREEMENT AND (C) PERFORMANCE OF OBLIGATIONS UNDER A GUARANTY AGREEMENT**

Upon consideration of the motion dated September \_\_\_\_, 2003 (the “Motion”)<sup>1</sup> of Mirant Corporation, Mirant Services, LLC (“Mirant Services”), Mirant Americas, Inc. (“Mirant Americas”) and its affiliated debtors (collectively, the “Debtors”), as debtors and debtors-in-possession, for the entry of an order (a) pursuant to section 365 of the Bankruptcy Code, authorizing Mirant Services to (i) assume and assign the O&M Agreement to GEII, and (ii) assume the O&M Transfer Agreement; and (b) pursuant to section 363(b) of the Bankruptcy Code, authorizing Mirant Americas to (i) perform its obligations under the Guaranty, and (ii) in its capacity as a shareholder of Mirant Birchwood, cause Mirant Birchwood to enter into and consummate the Transaction; and the Court having considered the Motion; and no previous motion for the relief therein having been made; and it appearing that the Court has jurisdiction

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<sup>1</sup> Capitalized terms used in this Order and not otherwise defined herein, shall bear the same meanings as those ascribed to them in the Motion.

over this matter and the relief requested in accordance with 28 U.S.C. sections 157 and 1334; and it appearing that due and proper notice of the Motion has been provided as set forth in the Motion, and that no other or further notice need be provided; and it further appearing that the relief requested in the Motion is in the best interests of the Debtors and their estates and creditors; and upon all of the proceedings heard before the Court; and after due deliberation and sufficient cause appearing therefor, it is

**ORDERED** that the Motion is granted; and it is further

**ORDERED** that, pursuant to section 365 of the Bankruptcy Code, (i) Mirant Services be authorized to assume the O&M Agreement and to assign the same to GEII and (ii) no cure amounts are owed under the O&M Agreement; and it is further

**ORDERED** that, pursuant to section 365 of the Bankruptcy Code, (i) Mirant Services be authorized to assume the O&M Transfer Agreement and (ii) no cure amounts are owed under the O&M Transfer Agreement; and it is further

**ORDERED** that, pursuant to section 363(b) of the Bankruptcy Code, Mirant Americas be authorized to perform its obligations under the Guaranty; and it is further

**ORDERED** that, pursuant to section 363(b) of the Bankruptcy Code, Mirant Americas be authorized to cause Mirant Birchwood to enter into and consummate the Transaction Documents to which it is a party, and the transactions contemplated thereby; and it is further

**ORDERED** that the Debtors are authorized and empowered to execute such other agreements, documents and instruments and to take such further actions as may be necessary or appropriate to effectuate the matters set out in this Order; and it is further

**ORDERED** that this Court shall, and hereby does, retain jurisdiction with respect to all matters arising from or related to the implementation of this Order.

SIGNED THIS \_\_\_\_ DAY OF OCTOBER 2003

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D. Michael Lynn  
United States Bankruptcy Court

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he has authorized BSI as service agent to cause to serve a true and correct copy of the foregoing document upon all parties listed below and upon all parties on the Limited Service List via email, facsimile or overnight courier, on the 10<sup>th</sup> day of September, 2003 in accordance with the Federal Rules of Bankruptcy Procedure:

General Electric Capital Corporation  
c/o GE Structured Finance, Inc.  
120 Long Ridge Road  
Stamford, CT 06927  
Attention: Daniel Gross, Vice President  
Fax: 203 357 3559

Chadbourne Parke  
30 Rockefeller Plaza  
New York, NY 10112  
Attention: J. Allen Miller  
Fax: 212 541 5369

General Electric Capital Corporation  
c/o GE Structured Finance, Inc.  
General Counsel  
120 Long Ridge Road  
Stamford, CT 06927  
Attention: Bond Koga, Senior Counsel  
Fax: 203 357 3559

Cogentrix/Birchwood Two, L.P.  
9405 Arrowpoint Boulevard  
Charlotte, NC 28273-8110  
Attention: Thomas Bonner, Vice President  
Fax: 704 527 4413

General Electric International Inc  
4200 Wildwood Parkway  
Atlanta, Georgia 30339  
Attention: General Manager – GE Contractual  
Services  
Fax: 678 884 5312

Dominion Virginia Power  
5000 Dominion Boulevard  
Glenn Allen, VA23060  
Attention: John Mable, Manager – Structured Contracts  
Fax: 804 273 2951

General Electric International Inc  
4200 Wildwood Parkway  
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