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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, et al., | ) | Case No. 03-46590 (DML) |
| | ) | Jointly Administered |
| Debtors. | ) | |
| | ) | Hearing Date and Time: September 10, 2003: 10:30 a.m. (Central Time) |

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

**A HEARING WILL BE CONDUCTED ON THIS MATTER ON SEPTEMBER 10, 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, "Mirant" or the "Debtors"), as debtors-in-possession, file this motion (the "Motion") for the entry of an order pursuant to section 365(d)(4) of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the "Bankruptcy Code") extending the time for the Debtors to assume or reject all unexpired leases of nonresidential real property (the "Leases"), including the leases listed on Exhibit "1" attached to the Affidavit of Martin L. Brannon (the "Brannon Affidavit"), for 180 days, to and including March 10, 2004, and respectfully represent as follows:

## 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"), each of the Debtors filed a voluntary petition in this Court for relief under chapter 11 of the Bankruptcy Code.[1] The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

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[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.

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.

4. Creditors' Committees. On July 18, 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.

5. 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 in these cases ends September 12, 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 364(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. 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 ("EBITDA") on a consolidated basis. Its 2002 operating revenues were approximately $6.4 billion.

**B. The Debtors' Leases of Nonresidential Real Property.**

8. The Debtors are parties to the Leases,[2] including those listed on Exhibit "1" attached to the Brannon Affidavit.

9. Since the 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 Leases.

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

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[2] The Debtors are investigating the proper characterization of the Leases. Until completion of this review, the Debtors reserve all rights to recharacterize the Leases as "financing leases" or otherwise if facts and law support such.

the Leases, they would become postpetition obligations of the estates and the lessors would be entitled to administrative priority for any future claims under the Leases without the unsecured damage limitation set forth in section 502(b)(6) of the Bankruptcy Code. If the Debtors determine that one or more of the Leases are not needed for their ongoing operations, then an unnecessary and very large administrative liability may be created by the assumption of such Leases.

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

12. The Debtors are performing under the Leases in the ordinary course of their business operations. The Debtors are complying—and are in a position to continue to comply—with their postpetition rent obligations in accordance with the terms of the Leases as provided for in section 365(d)(3) of the Bankruptcy Code.[3] The lessors under the Leases will, therefore, not be prejudiced by a 180-day extension of the Sixty-Day Period. There is, thus, good cause to grant the 180-day extension of the Sixty-Day Period to and including March 10, 2004.

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[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).

## 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 Debtors much assume or reject nonresidential real property leases 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 Leases.**

**(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 in excess of 7,000 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 Leases.

**(ii) The Leases are Important Assets 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 Leases are at the heart of the Debtors' operations which involve the production and sale of electricity and electrical capacity. Without the Leases, the Debtors could not operate their businesses, the 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 Debtors are Current on the Rent Obligations Under the Leases.**

20. The 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. The 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
August 18, 2003

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## 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 Motion upon all persons identified in Exhibit "1" to the Brannon Affidavit and on the Limited Service List on the 18th day of August, 2003 via first class mail, postage prepaid, in accordance with the Federal Rules of Bankruptcy Procedure.

/s/ Michelle C. Campbell

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**IN THE UNITED STATES BANKRUPTCY COURT**
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**FORT WORTH DIVISION**

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| In re | ) | Chapter 11 Case |
| MIRANT CORPORATION, et al., | ) | Case No. 03-46590 (DML)<br>Jointly Administered |
| Debtors. | ) | Hearing Date and Time: September 10, 2003: 10:30 a.m. (Central Time) |

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

Upon consideration of the motion (the "Motion") of the debtors and debtors-in-possession in the above-styled chapter 11 cases (collectively, the "Debtors") dated August 18, 2003, for the entry of an Order, pursuant to section 365(d)(4) of the Bankruptcy Code[1] extending the time within which the Debtors may assume or reject all unexpired leases of nonresidential real property (the "Leases"); 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

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

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:

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

**ORDERED** that the Motion applies to all unexpired leases of nonresidential real property to which the Debtors are parties; it is further

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

**ORDERED** that nothing contained herein will be construed to characterize the Leases, including the leases on Exhibit "1" to the Affidavit of Martin L. Brannon, as "true" leases and not financing leases. Nothing contained herein will affect the ability of the Debtors to seek to recharacterize the Leases if facts and law support such; 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 some or all of their Leases; and (ii) the Debtors' right to seek further or different relief regarding the Leases.

SIGNED THIS ____ DAY OF AUGUST 2003.

_____

D. Michael Lynn
United States Bankruptcy Judge