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ATTORNEYS FOR THE NEW MIRANT ENTITIES

**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)11
Debtors.)	Jointly Administered
)	Hearing Date and Time: June 1, 2006 at
)	11:30 a.m.

**MOTION PURSUANT TO FEDERAL RULE OF BANKRUPTCY
PROCEDURE 9019 APPROVING THE AMENDED CONSENT
DECREE BETWEEN THE UNITED STATES OF AMERICA, THE
COMMONWEALTH OF VIRGINIA, THE STATE OF MARYLAND
AND MIRANT POTOMAC RIVER, LLC, MIRANT CHALK
POINT, LLC, AND MIRANT MID-ATLANTIC, LLC**

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

The New Mirant Entities (as defined below) file this motion (the "Motion") pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") requesting entry of an order authorizing Mirant Potomac River, LLC ("Mirant Potomac"), Mirant Mid-Atlantic LLC ("Mirant Mid-Atlantic"), and Mirant Chalk Point, LLC ("Mirant Chalk Point") to enter into the *Amended Consent Decree* (the "Amended Consent Decree") with the United States of America, through the United States Environmental Protection Agency (the "EPA"), the Commonwealth of Virginia, through its Department of Environmental Quality (the "Virginia

DEQ”), and the State of Maryland, through its Department of the Environment (the “MDE,” and together with the EPA and the Virginia DEQ, the “Agencies”), and authorizing Mirant Potomac, Mirant Chalk Point and Mirant Mid-Atlantic to perform all of their obligations thereunder upon entry of the Amended Consent Decree by the United States District Court for the Eastern District of Virginia (the “District Court”). In support of the Motion, the New Mirant Entities respectfully represent:

PRELIMINARY STATEMENT

The New Mirant Entities manage and operate businesses that are highly regulated at both the state and federal level. The New Mirant Entities’ Mid-Atlantic coal-fired fleet (the “Mid-Atlantic Coal-Fired Fleet”) is no exception. In response to certain enforcement and regulatory actions with respect to the Mid-Atlantic Coal-Fired Fleet, Mirant Potomac, Mirant Chalk Point and Mirant Mid-Atlantic have spent a significant period of time engaged in intense and complicated negotiations with the EPA, the Virginia DEQ and the MDE, resulting in a comprehensive settlement that (i) resolves certain disputes surrounding operation during the summer of 2003 of Mirant Potomac’s coal-fired electricity producing plant located on the Potomac River in Virginia (the “Potomac River Plant”); (ii) provides for the installation of certain pollution control systems at the Mid-Atlantic Coal-Fired Fleet; (iii) allows the plants comprising the Mid-Atlantic Coal-Fired Fleet to reduce nitrogen oxide (“NOx”) emissions on a fleet-wide basis, as opposed to on a plant-by-plant basis (except for the Potomac River plant); and (iv) establishes greater future operational certainty for the Mid-Atlantic Coal-Fired Fleet.

The parties originally reached a settlement regarding the foregoing in September 2004 (the “Original Consent Decree”) and filed a motion to seeking approval of that settlement and authorizing Mirant Mid-Atlantic, Mirant Chalk Point and Mirant Potomac to enter into the

Original Consent Decree in March 2005.¹ However, as the result of certain objections, the parties agreed to amend the Original Consent Decree and enter into an amended consent decree to reflect the possibility that Mirant Mid-Atlantic might reject or otherwise lose one or more of its leasehold interests in the Morgantown and Dickerson Plants and cease to operate one or both of the plants.

This amended settlement is evidenced by the Amended Consent Decree, which was entered into and lodged with the District Court on or about May 8, 2006.² Although the New Mirant Entities believe that Bankruptcy Court approval of the Amended Consent Decree may not be necessary, the New Mirant Entities filed this Motion out of an abundance of caution because the Amended Consent Decree provides for an allowed administrative expense of a \$500,000 penalty for alleged violations that occurred during the bankruptcy case. For the reasons discussed more fully below, the New Mirant Entities believe that the Amended Consent Decree represents a fair, reasonable and equitable settlement. The Mid-Atlantic Coal-Fired Fleet operates in a highly regulated environment that over the past ten (10) years has received significant attention and scrutiny from both federal and state regulatory agencies. Federal and state regulations have been promulgated, with more contemplated, all of which are designed to change substantially the landscape in which energy producers, including Mirant Potomac, Mirant Chalk Point and Mirant Mid-Atlantic, operate their businesses.

¹ *Debtors' Motion Pursuant to Federal Rule of Bankruptcy Procedure 9019 Approving Consent Decree Between the United States of America, The Commonwealth of Virginia, The State of Maryland and Debtors, Mirant Potomac River, LLC and Mirant Mid-Atlantic, LLC* (docket no. 8764) filed March 11, 2005 (the "Original 9019 Motion").

² A true and correct copy of the proposed Amended Consent Decree is attached hereto as Exhibit A. The United States intends to invite the public to comment on the proposed Amended Consent Decree for a period of 30 days before it seeks judicial approval from the District Court.

The New Mirant Entities submit that the agreement memorialized in the Amended Consent Decree substantially benefits Mirant Potomac, Mirant Chalk Point and Mirant Mid-Atlantic. By resolving issues relating to NOx emissions with federal and state environmental agencies on a fleet-wide basis, Mirant Potomac, Mirant Chalk Point and Mirant Mid-Atlantic will be afforded operational flexibility, not to mention cost and operational certainty around what had previously been an unknown future liability. Accordingly, this Court should authorize Mirant Mid-Atlantic, Mirant Potomac and Mirant Chalk Point to enter into the Amended Consent Decree and to comply with all of their obligations thereunder upon entry of the Amended Consent Decree by the District Court.

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. On July 14, 2003 and various dates thereafter (collectively, the “Petition Date”), MC 2005 LLC (f/k/a Mirant Corporation) and certain of its direct and indirect subsidiaries (the “Debtors”) filed voluntary chapter 11 petitions.

3. The Cases are Jointly Administered. This Court has entered orders approving the joint administration of the Debtors’ chapter 11 cases.

4. The Bar Date. This Court established December 16, 2003 (the “Claims Bar Date”) as the last day to timely file a proof of claim against the Debtors relating to claims that arose before the Petition Date.

5. The Examiner. On April 7, 2004, this Court authorized the Office of the United States Trustee for the Northern District of Texas (“UST”) to appoint an examiner in these cases to analyze certain potential causes of action and act as a referee with respect to certain disputes that arise among parties in interest. The UST appointed William K. Snyder as the examiner in these cases.

6. The Debtors’ Plan Of Reorganization and Disclosure Statement. Pursuant to an order dated December 9, 2005 (the “Confirmation Order”) (docket no. 12569), the Bankruptcy Court confirmed the *Amended And Restated Second Amended Joint Chapter 11 Plan of Reorganization for Mirant Corporation and Its Affiliated Debtors* dated December 9, 2005 (attached as Exhibit 1 to the Confirmation Order, the “Plan”) with respect to Mirant Corporation and certain of its affiliated debtors (collectively, the “New Mirant Entities”), which affiliated debtors exclude Mirant Bowline, LLC, Mirant Lovett, LLC, Mirant New York, Inc., Mirant NY-Gen, LLC and Hudson Valley Gas Corporation (collectively, the “Excluded Debtors”). The New Mirant Entities, together with the Excluded Debtors, are hereinafter referred to collectively as the “Debtors.”

7. The Effective Date. The effective date of the Plan with respect to the New Mirant Entities was January 3, 2006.

8. Administrative Expense Claims Bar Date and Extensions. On December 15, 2005, the Debtors served an Administrative Bar Date Notice establishing January 24, 2006 as the deadline to file claims for administrative expense. The Bankruptcy Court approved an extension until May 9, 2006 for the EPA and the Virginia DEQ to file administrative expense claims relating to this matter.

FACTUAL BACKGROUND

A. The Mid-Atlantic Coal-Fired Fleet

9. In mid-2000, MC 2005 LLC (f/k/a Mirant Corporation) (“Former Mirant”) agreed to purchase four electricity-producing plants in the Washington, D.C. region from Potomac Electric Power Company (“PEPCO”) pursuant to an Asset Purchase and Sale Agreement dated June 7, 2000. The four plants, the Potomac River Plant and three coal-fired plants operated by Mirant Mid-Atlantic and located in the State of Maryland (the “Maryland Plants”), today constitute the Mid-Atlantic Coal-Fired Fleet.³

10. The Maryland Plants are comprised of three plants commonly referred to as the “Morgantown Plant,” the “Dickerson Plant” and the “Chalk Point Plant.” The Morgantown Plant, which includes two 620 MW coal-fired units, is located on approximately 569 acres of land in Charles County, Maryland, and represents the largest plant in the Mid-Atlantic Coal-Fired Fleet, accounting for approximately 45% of the electricity produced by the fleet. The Dickerson Plant, which consists of three 182 MW coal-fired units, is located on approximately 779 acres of land in Montgomery County, Maryland. The Chalk Point Plant, which consists of two 342 MW coal-fired units, is located in Prince George’s County, Maryland.

11. The Potomac River Plant, which consists of two 88 MW and three 102 MW coal-fired units, is located in the City of Alexandria, Virginia.

12. The Mid-Atlantic Coal-Fired Fleet services the region surrounding Washington, D.C. and generates sufficient power to substantially meet the electricity needs of that entire region. In 2004, the fleet produced approximately 17 million net MWHs of electricity or

³ The four plants also include certain oil and gas units that aggregate approximately 2300 MW.

approximately 65% of the electricity demand in the nation's capital.⁴ Accordingly, the Mid-Atlantic Coal-Fired Fleet represents a vital component of the New Mirant Entities' North American business operations.

B. The Mirant Mid-Atlantic Lease-Financing Transactions

13. In order to finance a portion of the total purchase price paid for the four plants purchased from PEPCO, Former Mirant made use of a leveraged lease financing transaction (the "Lease Financing").

14. Under the Lease Financing, three entities, Verizon Capital Corporation, Union Bank of California and Bank One, N.A., provided an equity contribution in order to facilitate the closing of the transaction with PEPCO. The equity contribution was made through four directly or indirectly wholly-owned subsidiaries, who in turn formed nine limited liability companies (collectively, the "Owner Participants") for the purpose of holding 100% of the membership interests in eleven other limited liability companies (collectively, the "Owner Lessors," and together with the Owner Participants, the "MIRMA Landlords").

15. As part of the Lease Financing, a portion of the above-ground components of each of the Morgantown Plant and the Dickerson Plant was notionally, but not physically, severed from the remainder of the Morgantown Plant and the Dickerson Plant. These interests were transferred to the Owner Lessors, who, in turn, simultaneously entered into a long-term lease with Mirant Mid-Atlantic to use and occupy the entire Morgantown and Dickerson Plants (collectively, the "Plant Lease Agreements").

⁴ For 2004, the New Mirant Entities' Mid-Atlantic operating business as a whole (including coal-fired units, cycling oil and gas-fired units, and peaking combustion turbine units) generated 18.7 million MWHs of electricity and \$165 million of EBITDA.

16. Following the Petition Date, significant disputes arose between the Debtors and the MIRMA Landlords regarding the nature and extent of Mirant Mid-Atlantic's ownership interest in the Morgantown and Dickerson Plants.

C. Air Quality in the Greater Washington, D.C. Area

17. The ten county region surrounding Washington D.C. is regulated as a common air shed by the EPA, which means that measures to improve ozone are applied to the entire region. During the last fifteen (15) years, this area has received a significant amount of attention from both federal and state environmental regulatory agencies. Washington D.C. regional air quality has been designated as "non-attainment" for ozone since 1990. In 2002, the Washington D.C. region was "bumped-up" from "serious" to "severe" non-attainment status under the 1-hour ozone standard. In 2004, the region was designated as moderately "non-attainment" under the 8-hour ozone standard.

18. The Mid-Atlantic Coal-Fired Fleet is subject to federal regulation by the EPA, as well as state regulation by the MDE and the Virginia DEQ, in particular, the implementation of the Clean Air Act,⁵ as well as federal regulations promulgated for the purpose of assuring healthy air and improved visibility.

19. State regulatory agencies have adopted measures to address air quality issues, particularly, the persistent ozone non-attainment in the Washington, D.C. region, which includes the District of Columbia, as well as parts of Maryland and Virginia. Both Maryland and Virginia

⁵ The Clean Air Act establishes a regulatory program designed to protect and enhance the quality of the nation's air to promote the public health and welfare. 42 U.S.C. § 7401(b)(1). Pursuant to 42 U.S.C. § 7409, the Administrator of the EPA has promulgated regulations establishing primary and secondary national ambient air quality standards for certain criteria air pollutants, including ozone, sulfur dioxide, NOx, and particulate matter. Pursuant to 42 U.S.C. § 7410, each state must adopt and submit to EPA for approval of a State Implementation Plan that provides for the attainment and maintenance of the national ambient air quality standards.

developed State Implementation Plans (“SIPs”) aimed at identifying emissions that must be reduced in the region to bring air quality into attainment with health standards. Both Maryland and Virginia filed their SIPs on or about March 1, 2004, which referenced an aggregate NOx emission rate⁶ for power plants of 0.15 lb/MBtu.⁷

20. Because NOx is the primary precursor to ozone formation in the region, with power plants representing by far the largest stationary source category of emitter of NOx in the region, not surprisingly, both federal and state environmental regulators have focused primarily on heightened regulation of power plants as a means of attaining ozone standards in the region.⁸

D. Regulatory Focus on the Mid-Atlantic Coal-Fired Fleet

21. Like many 1950’s vintage coal-fired power plants across the nation, the Mid-Atlantic Coal-Fired Fleet was targeted for potential federal enforcement as part of the EPA’s NSR enforcement initiative. The EPA has brought numerous civil enforcement proceedings against companies operating coal-fired electric plants on the theory that historic modifications were made to those plants to expand their capacity without a required Clean Air Act NSR permit, which, in turn, would have required updated pollution controls. After the EPA directed Clean Air Act Section 114 information requests to certain of the Debtors regarding the Mid-Atlantic Coal-Fired Fleet, discussions began with the environmental Agencies.

⁶ In SIPs meant to achieve attainment of the ozone air quality standards, most states have allowed power plant participation in “cap and trade” regulatory programs, which have the effect of allowing one power plant to purchase another plant’s excess emission allowances and effectively allowing achievement of the target emission rate on an aggregate, weighted average basis.

⁷ Both Maryland and Virginia, like other states, are required to demonstrate progress in reducing ozone by reducing precursor NOx emissions consistent with their SIPs or face the potential loss of federal funding for regional transportation projects.

⁸ Indeed, most of the New Mirant Entities’ competitors in this region have already negotiated and consummated consent decrees specifically geared at reducing NOx emissions.

22. Mirant Potomac inherited a September 2000 operating permit (the "DEQ Operating Permit") for the Potomac River Plant that beginning in 2003 (i) established a NOx emission cap of 1019 tons during the ozone season (which runs May through September) and (ii) provided for trading of NOx emission allowances under state and federal emissions trading rules.

23. Although the Potomac River Plant historically had emitted approximately 2600 tons of NOx during each ozone season, Mirant Potomac believed it would be able to comply with the DEQ Operating Permit by participating in "cap and trade" programs and purchasing NOx trading allowances from facilities that were producing less than their allotted amount of NOx emissions.

24. However, "cap and trade" programs were not available in 2003 because in May 2002, the State of Virginia delayed implementation of its NOx trading rules until 2004 to align commencement of its state program with that of the federal trading program, which had been delayed until May 2004. As a result, Mirant Potomac was unable to comply with 1019 NOx ozone season cap utilizing allowances.

25. In the summer of 2003, Mirant Potomac initiated discussions with the Virginia DEQ geared towards a resolution that would avoid the imposition of severe operating restrictions of the Potomac River Plant, while at the same time achieve substantial NOx emission reductions within the larger Mid-Atlantic Coal-Fired Fleet.

26. In September 2003 and after negotiating with Mirant Potomac for most of that summer, the Virginia DEQ issued a notice of violation (the "DEQ NOV") alleging that Mirant Potomac had operated the plant in violation of the DEQ Operating Permit by exceeding the 2003 ozone season NOx cap.

27. While Mirant Potomac was negotiating with the Virginia DEQ over the DEQ NOV, in January 2004, the EPA issued a notice of violation (the "EPA NOV"), which contained the same allegations as the DEQ NOV.⁹

28. In March 2004, the Virginia DEQ proposed to amend the Potomac River Plant operating permit so as to eliminate Mirant Potomac's ability to comply with the 1019 ton NOx cap through the purchase of allowances, as would be allowed under its existing state operating permit since Virginia had promulgated enabling regulations for trading in 2004. Virginia's efforts to amend the Potomac River Plant operating permit so as to "cap" NOx emissions at 1019 tons for the Potomac River Plant¹⁰ with no opportunity to participate in "cap and trade" programs would have required as much as a fifty percent (50%) curtailment of operations at the Potomac River Plant, a level unacceptable to Mirant Potomac because the Potomac River Plant has been described by the Independent System Operator, PJM, as a "must run" facility for the delivery of reliable electricity supply in the region.¹¹

29. In the state of Maryland, there is recent legislation that will require the Mid-Atlantic Coal-Fired Fleet to reduce emissions of NOx and other pollutants. At the federal level, a Clean Air Interstate Rule has been promulgated, which will require very substantial reductions of NOx and sulfur dioxide emissions by coal-fired electric generating plants, including the Mid-Atlantic Coal-Fired Fleet.

⁹ To further complicate matters, after the EPA NOV was issued, the Virginia DEQ regional permitting division proposed a revised permit (the "Draft Permit") and scheduled a public hearing on the Draft Permit. The Draft Permit includes a 1019 ton annual NOx cap and, prohibits Mirant Potomac from participating in "cap and trade" programs as a means of compliance.

¹⁰ In contrast, the Amended Consent Decree provides for higher caps on the Potomac River Plant that would obviate the need for a severe curtailment of operations in order to comply.

¹¹ In addition, curtailment of operations at the Potomac River Plant could have resulted in PEPCO asserting claims against certain of the New Mirant Entities pursuant to a contract entered into in connection with the sale of the plant from PEPCO to Former Mirant related to plant unavailability.

30. In light of the EPA's and Virginia DEQ's NOV's and the risk of further emission reductions required by Maryland, discussions with the Virginia DEQ evolved into negotiations with the EPA, the MDE and the Virginia DEQ relating to NOx emissions from the entire Mid-Atlantic Coal-Fired Fleet.

E. Negotiations with the EPA, MDE and the Virginia DEQ

31. While the issuance of the EPA NOV necessitated multilateral discussions as to emissions from the entire Mid-Atlantic Coal-Fired Fleet, these discussions afforded Mirant Mid-Atlantic, Mirant Potomac and Mirant Chalk Point the opportunity not only to resolve both the DEQ NOV and the EPA NOV, but also to devise a fleet-wide timetable and strategy for the installation of pollution control systems and compliance with NOx emission limits.

32. Indeed, the factors discussed above led the Debtors to conclude that they needed to address the entire Mid-Atlantic Coal-Fired Fleet to reap the benefits of a fleet-wide solution.

F. The Original Consent Decree

33. On or about September 27, 2004, the Original Consent Decree was entered into between Mirant Potomac and Mirant Mid-Atlantic on the one hand, and the EPA and the States of Maryland and Virginia.

34. In order for the Original Consent Decree to be enforceable as an order of the District Court, it was necessary to commence an action in the district court. To that end, on September 27, 2004, a lawsuit was filed by the United States of America and the State of Maryland in the United States District Court for the Eastern District of Virginia (the "District Court"), commencing the case of United States of America, the State of Maryland and the Commonwealth of Virginia, Department of Environmental Quality v. Mirant Potomac, LLC and

Mirant Mid-Atlantic, LLC, (Case No. 1:04-CV-1136) (the “District Court Action”), naming Mirant Potomac and Mirant Mid-Atlantic as defendants.¹²

35. Also on September 27, 2004, the United States lodged the Original Consent Decree in the District Court and shortly thereafter, published notice thereof in the Federal Register soliciting public comment on the Original Consent Decree, as is required by 28 C.F.R. § 50.7.¹³ On October 28, 2004, the District Court entered an order advising the parties to the District Court Action that it had reviewed the Original Consent Decree and was prepared to approve same once the Debtors had secured the approval of this Court, provided that there would not be sufficient opposition so as to require the United States to withdraw the Original Consent Decree.

36. On February 7, 2005, the MIRMA Landlords filed with the District Court their Motion for Leave to Intervene in the District Court Action (the “Intervention Motion”). Mirant Potomac and Mirant Mid-Atlantic opposed the Intervention Motion.

37. On March 11, 2005, the Debtors filed the Original 9019 Motion in the Bankruptcy Court seeking approval of the Original Consent Decree. The MIRMA Landlords objected to the Original Consent Decree. No hearing was held on the Original 9019 Motion.

38. On December 1, 2005, the Debtors and the MIRMA Landlords announced a consensual resolution with respect to the MIRMA Leases as part of the Plan (the “MIRMA Settlement”). The MIRMA Settlement was incorporated into the Confirmation Order and Plan.

¹² On the same day, the Virginia DEQ filed a motion to intervene in the District Court Action, which motion was approved by order dated September 30, 2004.

¹³ Since that time, the United States has received comments on the Original Consent Decree from a number of interested parties, including the MIRMA Landlords.

Among other things, the MIRMA Settlement provided that the MIRMA Landlords would not oppose the Amended Consent Decree that contained certain terms and provisions.

G. Material Terms of the Amended Consent Decree

39. The material terms of the Amended Consent Decree are as follows:

(a) Installation of pollution control systems at the Potomac River and Morgantown Plants, in particular:

- i. installation of low NOx burners for Units 3-5 at the Potomac River Plant with an estimated aggregate cost of \$800,000 (Amended Consent Decree at ¶ 50);
- ii. installation of Separated-Over-Fire-Air system ("SOFA") for Units 3-5 at the Potomac River Plant with an estimated aggregate cost of \$9 million (Amended Consent Decree at ¶ 51);¹⁴
- iii. installation of a Selective Catalytic Reduction system ("SCR") for Units 1 and 2 at the Morgantown Plant (or, at the New Mirant Entities' discretion, equivalent NOx technology) with an estimated aggregate cost of \$180 million (Amended Consent Decree at ¶¶ 53-56),¹⁵ and
- iv. installation of additional controls (or alternatively, the curtailment of operations), at the discretion of the New Mirant Entities, necessary to comply with the emission standards set forth in the Amended Consent Decree.¹⁶

(b) Operation of the Mid-Atlantic Coal-Fired Fleet must comply with the following emission standards:

- i. NOx annual cap for the entire Mid-Atlantic Coal-Fired Fleet (expressed in tons) of 36,500 beginning in 2004, and decreasing to

¹⁴ A SOFA system is a boiler air injection system, separate and downstream from the primary combustion zone, and which relies on modifying the fuel-air ratio to suppress NOx formation.

¹⁵ An SCR system places layers of catalyst into a boiler flue gas stream. As the flue gas passes over the SCR catalyst, a chemical reaction occurs whereby NOx is removed from the gas.

¹⁶ Importantly, there is no express requirement under the Amended Consent Decree that any pollution reducing technologies be installed in either the Dickerson Plant or the Chalk Point Plant, leaving the New Mirant Entities with operational flexibility in deciding how to satisfy emission standards under the Amended Consent Decree. However, the NOx caps to which the entire fleet is subject reduce over time such that additional installations or operational curtailments will be required in order to comply with the Amended Consent Decree.

16,000 by 2010 (Amended Consent Decree at ¶ 57);

- ii. NOx annual cap for the Potomac River Plant (expressed in tons) of 3,700 beginning in 2005 (Amended Consent Decree at ¶ 52);
- iii. NOx ozone season cap for the entire Mid-Atlantic Coal-Fired Fleet (expressed in tons) of 14,700 beginning in 2004, and decreasing to 5,200 by 2010 (Amended Consent Decree at ¶ 58);
- iv. NOx ozone season cap for the Potomac River Plant (expressed in tons) of 1,750 beginning in 2004, and decreasing to 1,475 by 2010 (Amended Consent Decree at ¶ 52); and
- v. emission rate (expressed in lb/MBtu) during ozone season of 0.150 for the entire Mid-Atlantic Coal-Fired Fleet beginning in 2008 (Amended Consent Decree at ¶ 59).

(c) Resolution of the alleged violations set forth in the enforcement proceedings against Mirant Potomac in connection with the issuance of the DEQ NOV and the EPA NOV (Amended Consent Decree at ¶ 84).

(d) Mirant Potomac, Mirant Chalk Point and Mirant Mid-Atlantic, collectively, would be required to make a one-time penalty payment of \$500,000 as an allowed administrative expense, as well as invest \$1 million in supplemental programs designed to reduce dust and particulate matter at the Potomac River Plant (Amended Consent Decree at ¶¶ 72, 79, 81, 211).

(e) Mirant Mid-Atlantic, Mirant Potomac, and Mirant Chalk Point are required to provide semi-annual reports to the EPA, the MDE and Virginia DEQ demonstrating compliance with the terms of the Amended Consent Decree (Amended Consent Decree at ¶¶ 88-89).

(f) The Amended Consent Decree contains provisions for remedies and stipulated fines for failure to comply (Amended Consent Decree at ¶¶ 96-104).

(g) Any disputes arising under the Amended Consent Decree are to be resolved pursuant to the alternative dispute resolution procedure set forth in the Amended Consent Decree (Amended Consent Decree at ¶¶ 115-122).

(h) The New Mirant Entities are required to seek approval of the Amended Consent Decree from this Court within sixty (60) days from the Amended Consent Decree having been lodged, subject to extensions by agreement amongst the parties (Amended Consent Decree at ¶ 197).

40. The terms of the Amended Consent Decree are substantially similar to the terms of the Original Consent Decree. However, Mirant Chalk Point, which was not a party to the

Original Consent Decree, is a party to the Amended Consent Decree. In addition, the Amended Consent Decree adds a Nox annual cap for the Potomac River Plant (expressed in tons) of 3,700 tons.

41. The Amended Consent Decree also provides as follows if Mirant Mid-Atlantic rejects or otherwise loses one more of its leasehold interests in the Morgantown and Dickerson Plants and ceases to operate one or both of the plants:

(a) Mirant Mid-Atlantic, Mirant Chalk Point and/or Mirant Potomac will provide written notice to the EPA, Virginia DEQ and the MDE (Amended Consent Decree at ¶¶ 137-38).

(b) Mirant Mid-Atlantic, Mirant Chalk Point and/or Mirant Potomac will provide the EPA, Virginia DEQ and the MDE with the written agreement of the new owner or operator of the plant to be bound by the obligations of the Amended Consent Decree (Amended Consent Decree at ¶ 139).

(c) Mirant Mid-Atlantic, Mirant Chalk Point and/or Mirant Potomac will make a written offer to any and all prospective owners and/or operators of the Morgantown Plant to pay for completion of engineering, construction and installation of the SCRs required by the Amended Consent Decree (Amended Consent Decree at ¶ 140).

(d) The Amended Consent Decree releases Mirant Mid-Atlantic, Mirant Chalk Point and/or Mirant Potomac from the obligations applicable to the plants the foregoing no longer own if the new owner operators referred to in clause (c) above accept the offer of the relevant Mirant entity and agree to be bound by the provisions of the Amended Consent Decree applicable to the plants owned by the new owner operator. The Amended Consent Decree also obligates Mirant Mid-Atlantic, Mirant Chalk Point and/or Mirant Potomac to install an alternative suite of controls at the plants they continue to own if the new owner operators referred to in clause (c) above reject the offer of the New Mirant Entities and then releases Mirant Mid-Atlantic, Mirant Chalk Point and/or Mirant Potomac from the provisions of the Amended Consent Decree applicable to the plants they no longer own. (Amended Consent Decree at ¶¶ 143-46).

42. With respect to the installation of NOx reduction technology, the New Mirant Entities concluded that the most cost-effective way for them to comply was to install state of the art NOx control technology at Morgantown because it produces the most coal-fired generation in

the fleet and, therefore, every dollar spent on pollution control at Morgantown would produce four times the amount of NOx reductions as compared to feasible control operations at the Potomac River Plant.¹⁷ In addition, it is important to point out that the pollution control technology to be installed at Morgantown is not the only control technology the New Mirant Entities will have to install in order to comply with the emission reductions required by the Amended Consent Decree. Indeed, in addition to the pollution control technology required at the Potomac River and Morgantown Plants, Mirant Potomac and Mirant Mid-Atlantic will have to install additional technologies at one or more of the plants in the Mid-Atlantic Coal-Fired Fleet. However, Mirant Potomac, Mirant Mid-Atlantic and Mirant Chalk Point have retained the flexibility under the Amended Consent Decree to decide where to install such technology and how much to spend.

43. Another significant advantage of the Amended Consent Decree from the New Mirant Entities' perspective is the flexibility given to Mirant Potomac, Mirant Chalk Point, and Mirant Mid-Atlantic to determine the best way to comply with emission standards (since compliance will be judged on a fleet-wide basis), including the option of temporarily shutting down one or more plants to demonstrate compliance.

RELIEF REQUESTED

44. The New Mirant Entities request an order of this Court pursuant to Bankruptcy Rule 9019(a) authorizing Mirant Potomac, Mirant Chalk Point, and Mirant Mid-Atlantic to formally enter into the Amended Consent Decree, and authorizing Mirant Potomac, Mirant Chalk Point, and Mirant Mid-Atlantic to undertake all acts required thereunder. Although the

¹⁷ Moreover, the small geographic footprint of the Potomac River Plant will not accommodate state of the art NOx pollution control known as SCR.

New Mirant Entities recognize that Bankruptcy Court approval of the Amended Consent Decree may not be required following confirmation of the Plan (based on specific terms of the Confirmation Order), the New Mirant Entities have filed this Motion out of an abundance of caution because the Amended Consent Decree provides for an allowed administrative expense of a \$500,000 penalty for alleged violations that occurred during the bankruptcy case.

APPLICABLE AUTHORITY

45. A “bankruptcy court derives its authority to approve settlement from [B]ankruptcy [R]ule 9019(a).” United States v. AWECO, Inc. (In re AWECO, Inc.), 725 F.2d 293, 297 (5th Cir.), cert. denied, 469 U.S. 880 (1984). That rule provides, in relevant part, that “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.” FED. R. BANKR. P. 9019(a).

46. Bankruptcy Rule 9019(a) empowers a bankruptcy court to approve compromises and settlements if they are “fair and equitable and in the best interest of the estate.” In re Cajun Electric Power Coop., Inc., 119 F.3d 349, 355 (5th Cir. 1997); see also In re Zale Corp., 62 F.3d 746, 754 (5th Cir. 1995) (stating that “the ‘fair and equitable’ determination does not give the bankruptcy court jurisdiction over settlement conditions that do not bear on the court’s duties to preserve the estate and protect creditors.”). A decision to accept or reject a compromise or settlement is within the sound discretion of the Court. See 9 COLLIER ON BANKRUPTCY ¶ 9019.02 (15th ed. 2001); In re Drexel Burnham Lambert Group, Inc., 134 B.R. 499, 505 (Bankr. S.D.N.Y. 1991).

47. Compromises are favored in bankruptcy because they minimize the costs of litigation and further the parties’ interest in expediting the administration of a bankruptcy estate. In re Martin, 91 F.3d 389, 393 (3d Cir. 1996) (citing 9 COLLIER ON BANKRUPTCY ¶ 9019.03[1]

(15th ed. 2001)). The settlement need not result in the best possible outcome for the debtor, but must not “fall beneath the lowest point in the range of reasonableness.” Drexel Burnham, 134 B.R. at 505 (citations omitted). Basic to the process of evaluating proposed settlements, then, is “the need to compare the terms of the compromise with the likely rewards of litigation.”

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 425 (1968).

48. In order to determine whether a settlement is fair and equitable, this Court should consider and evaluate the following factors:

- (a) the probability of success in the litigation, with due consideration for the uncertainty in fact and law;
- (b) the complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and
- (c) all other factors bearing on the wisdom of the compromise.

Cajun Electric, 119 F.3d at 356 (citations omitted). Each of these factors will be discussed below.

A. Probability of Success in the Litigation

49. With regard to the first factor, Mirant Mid-Atlantic, Mirant Chalk Point and Mirant Potomac have engaged in lengthy negotiations with the Virginia DEQ to avoid litigation with these parties with respect to the DEQ NOV and EPA NOV.

50. While the New Mirant Entities believe that they have strong defenses in the event of litigation with the EPA and Virginia DEQ over the NOV’s based, in part, on the Commonwealth of Virginia’s reversal of its prior authorization of “cap and trade” program utilizing NOx allowances, the New Mirant Entities have determined, in their business judgment, that entering into the Amended Consent Decree is the better course of action because it not only

resolved the outstanding violations at the Potomac River Plant, but also provides the forum for the New Mirant Entities to reasonably address emission issues for the entire Mid-Atlantic Coal-Fired Fleet.

B. Complexity, Likely Duration of the Litigation, and Expense

51. With regard to the second factor, it cannot be denied that environmental litigation is generally lengthy, complex and costly. Indeed, the New Mirant Entities have already expended significant resources in time, attorneys' fees and consultant fees in negotiations with the EPA, Virginia DEQ and MDE, as well as the preparation of financial analyses which support the New Mirant Entities conclusion that the Amended Consent Decree is the best possible result attainable. If litigation were commenced, the New Mirant Entities would be required to engage consultants with extensive scientific backgrounds to testify as expert witnesses because of the complexity of the issues surrounding environmental regulations. The expert witness costs, as well as the expense of depositions and related discovery would render such litigation extremely expensive. It should also be noted that individuals, public interest groups, and other governmental agencies often intervene in environmental litigation, thereby increasing the litigation costs even further. Such litigation could easily take several years to resolve, without regard to appeals of any final judgment.

52. In contrast, the Amended Consent Decree avoids this burden on the New Mirant Entities, and importantly, provides the New Mirant Entities with a comprehensive resolution of the DEQ NOV and EPA NOV, as well as current and future operations of the entire Mid-Atlantic Coal-Fired Fleet. This factor weighs heavily in favor of approving the Amended Consent Decree.

C. **Other Factors Weigh in Favor of Authorizing Entry of the Amended Consent Decree.**

53. As discussed above, the Amended Consent Decree is a good result for the New Mirant Entities. By entering into the Amended Consent Decree, the New Mirant Entities avoid the negative publicity, which often attach to a contested environmental lawsuit. The Amended Consent Decree grants the New Mirant Entities significant flexibility in how to best reduce emissions and where dollars should be invested to meet emission standards. The New Mirant Entities also have the ability to incorporate the newest technology if better, more cost-efficient methods are developed in the coming years to reduce NOx emissions.

54. The New Mirant Entities also note that in dealing with approval of environmental settlements and consent decrees, courts have deferred to the governmental entities, which have executed the settlement or consent decree, as in this case. This deference arises out of recognition of the important role that governmental agencies play in ensuring compliance with environmental laws, which directly affect the health of their constituents. For example, in In re Eagle-Picher Indus., Inc., 197 B.R. 260 (Bankr. S.D. Ohio 1996), the bankruptcy court was asked to approve an environmental settlement entered into in connection with the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") between the debtor and the EPA. The court noted the following:

The U.S. urges that approval of the Settlement Agreement is within the discretion of the reviewing court, and in exercising that discretion, the reviewing court is to do so in a limited and deferential manner.

The position of the U.S. in an accurate statement of the law in this circuit.
[Citation omitted.]

...

'When examining this kind of scientific determination. . . a reviewing court must generally be at its most deferential.' [Citation omitted.]

Id. at 269 (citing U.S. v. Akzo Coatings of America, Inc., 949 F.2d 1409 (6th Cir. 1991) (emphasis added); see also, Texas Oil & Gas Ass'n v. United States Env'tl. Prot. Agency, 161 F.3d 923 (5th Cir. 1998) (applying limited review standard to regulations promulgated by EPA in connection with Clean Water Act).

55. Therefore, given the important environmental issues resolved by the Amended Consent Decree and the flexibility afforded to Mirant Potomac, Mirant Chalk Point and Mirant Mid-Atlantic in complying with their obligations thereunder, Mirant Potomac, Mirant Chalk Point and Mirant Mid-Atlantic respectfully submit that the Amended Consent Decree is in the best interests of the New Mirant Entities and that they should be authorized to enter into the Amended Consent Decree.

CONCLUSION

WHEREFORE, based upon the foregoing, the New Mirant Entities respectfully request that the Court grant the relief requested herein, and any other relief that is necessary and proper.

Dated: Fort Worth, Texas
May 8, 2006

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ENTITIES

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the undersigned has authorized BSI as service agent to cause to serve a true and correct copy of the foregoing Motion upon all parties listed below and upon all parties on the Limited Service List via U.S. mail on the 8th day of May 2006 in accordance with the Federal Rules of Bankruptcy Procedure.

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