

1 BILL LOCKYER
Attorney General of the State of California
2 MORRIS BEATUS
Senior Assistant Attorney General
3 KEN ALEX
Supervising Deputy Attorney General
4 PAULA QUINTILIANI (SBN: 198208)
Deputy Attorney General
5 CLARENCE BINNINGER (SBN: 190015)
Deputy Attorney General
6 PAMELA MERCHANT
455 Golden Gate Avenue, Suite 11000
7 San Francisco, CA 94102-7004

8
9
10 HARVEY I. SAFERSTEIN (SBN: 49750)
NADA I. SHAMONKI
11 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
1620 26th Street, Suite 2068 North
12 Santa Monica, California 90404

13
14 Attorneys for the Plaintiffs

15 IN THE UNITED STATES DISTRICT COURT
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA

17 PEOPLE OF THE STATE OF CALIFORNIA, *ex rel.*
BILL LOCKYER, ATTORNEY GENERAL OF THE
18 STATE OF CALIFORNIA, AND THE
DEPARTMENT OF WATER RESOURCES; and
19 THE STATE OF CALIFORNIA,

20 Plaintiffs,

21 v.

22 MIRANT CORPORATION; MIRANT AMERICAS,
INC.; MIRANT CALIFORNIA INVESTMENTS,
23 INC.; MIRANT CALIFORNIA, L.L.C.; MIRANT
AMERICAS ENERGY MARKETING, L.L.P.;
24 MIRANT DELTA, L.L.C.; and MIRANT POTRERO,
L.L.C.

25
26 Defendants.
27
28

Case No.: C-02-1787

**COMPLAINT FOR ILLEGAL
ACQUISITIONS AND/OR
HOLDINGS OF ASSETS UNDER
§ 7 OF THE CLAYTON ACT;
INJUNCTION AND OTHER
EQUITABLE AND ANCILLARY
RELIEF, DIVESTITURE,
DAMAGES AND
RESTITUTION; VIOLATION OF
CALIFORNIA BUSINESS &
PROFESSIONS CODE § 17200**

JURY TRIAL DEMANDED

Clayton Act § 7, 15 U.S.C. § 18;
California Business & Professions
Code § 17200 *et seq.*; F.R.C.P. 38(b)

1 Plaintiffs, People of the State of California, the State of California, on its own behalf and
2 as *parens patrie* on behalf of its citizens, and the California Department of Water Resources, by
3 and through their Attorney General, Bill Lockyer, allege the following on information and belief:

4 **INTRODUCTION**

5 1. This action seeks to remedy defendants' illegal acquisition and continued holding
6 of California's electric power plants. Defendants are now some of the major players in California
7 wholesale electricity markets. Plaintiffs seek, *inter alia*, an injunction that requires defendants to
8 divest enough power plants to restore competition in the relevant market for the spot supply of
9 wholesale electricity and reserves in Northern California during higher demand.

10 **PARTIES**

11 **The Plaintiffs**

12 2. Bill Lockyer is the Attorney General of the State of California and is the chief law
13 officer of the State (Cal. Const., Art. 5 § 13). The Clayton Act authorizes the Attorney General
14 to bring suit to enjoin and remedy violations of Section 7 of the Clayton Act on behalf of the State
15 of California, its citizens and the general welfare of the State of California. California Business &
16 Professions Code § 17204 also authorizes the Attorney General to prosecute any business act or
17 practice prohibited by California Business & Professions Code § 17200.

18 3. The State of California buys electricity on behalf of itself, its departments and its
19 agencies.

20 4. The Department of Water Resources ("DWR") is a state agency and is a purchaser
21 of electricity on behalf of itself and the State of California.

22 **The Mirant Defendants**

23 5. Defendant MIRANT CORPORATION (together with its predecessors and
24 successors, "MIRANT"), formerly Southern Energy, Inc., is a Delaware corporation doing
25 business through its subsidiaries in California. MIRANT builds, owns and operates power plants,
26 and sells wholesale electricity and energy products.

27 //

28 //

1 6. Defendant MIRANT AMERICAS, INC. (“MIRANT AMERICAS”), formerly
2 Southern Energy North America, Inc., is a Delaware corporation doing business through its
3 subsidiaries in California. MIRANT AMERICAS is a subsidiary of defendant MIRANT.

4 7. Defendant MIRANT CALIFORNIA INVESTMENTS, INC. (“MIRANT
5 CALIFORNIA INVESTMENTS”), formerly Southern Energy California, L.L.C., is a Delaware
6 corporation doing business in California. MIRANT CALIFORNIA INVESTMENTS is a
7 subsidiary of defendant MIRANT AMERICAS and owns fifty percent of Mirant California,
8 L.L.C.

9 8. Defendant MIRANT CALIFORNIA, L.L.C., (together with its predecessors and
10 successors, “MIRANT CALIFORNIA”), formerly Southern Energy California, L.L.C., is a
11 Delaware limited liability company doing business in California. MIRANT CALIFORNIA
12 markets and brokers electricity.

13 9. Defendant MIRANT AMERICAS ENERGY MARKETING, L.P. (together with
14 its predecessors and successors, “MIRANT AMERICAS ENERGY MARKETING”), formerly
15 Southern Company Energy Marketing, L.P., is a Delaware limited partnership, and is a wholly
16 owned indirect subsidiary of defendant MIRANT CORPORATION. MIRANT AMERICAS
17 ENERGY MARKETING sells energy-related products in California.

18 10. Defendant MIRANT DELTA, L.L.C. (together with its predecessors and
19 successors, “MIRANT DELTA”), formerly Southern Energy Delta, L.L.C., is a Delaware limited
20 liability company doing business in California. MIRANT DELTA is a wholly-owned subsidiary of
21 defendant MIRANT CALIFORNIA.

22 11. Defendant MIRANT POTRERO, L.L.C. (together with its predecessor and
23 successors, “MIRANT DELTA”), formerly Southern Energy Potrero, L.L.C., is a Delaware
24 limited liability company, doing business in California. MIRANT POTRERO is a wholly-owned
25 subsidiary of defendant MIRANT CALIFORNIA.

26 12. Unless otherwise alleged, when this Complaint refers to any act of the defendants,
27 such allegation shall mean that each defendant acted individually and jointly with the other
28 defendants named in the Complaint.

1 13. Unless otherwise alleged, when this Complaint refers to any act of any corporate
2 or other business defendant, such allegation shall mean that such corporation or other business
3 defendant did the acts alleged in this Complaint through its officers, directors, employees, agents,
4 or representatives while they were acting within the actual or ostensible scope of their authority.

5 14. At all relevant times alleged in this Complaint, each of the defendants has acted as
6 an agent, representative, or employee of each of the other defendants and has acted within the
7 course and scope of said agency, representation or employment.

8 **JURISDICTION AND VENUE**

9 15. This action arises under Section 7 of the Clayton Act, as amended, 15 U.S.C. §18,
10 and Section 17200 *et seq.* of the California Business & Professions Code. This Court has
11 jurisdiction under Section 4 of the Clayton Act, 15 U.S.C. § 15, Section 4(c) of the Clayton Act,
12 15 U.S.C. § 15(c), and Section 16 of the Clayton Act, 15 U.S.C. § 26.

13 16. Defendants are engaged in interstate commerce and in activities substantially
14 affecting interstate commerce. Defendants receive gas from interstate pipelines and use it to sell
15 electricity in California.

16 17. The Court has jurisdiction over the subject matter of this action and jurisdiction
17 over the parties under 15 U.S.C. § 22 and 28 U.S.C. §§ 1331 and 1337. Venue is proper under
18 28 U.S.C. § 1391(c) because the causes of action, liability, and many violations of the law
19 occurred in the City and County of San Francisco.

20 18. This Court has supplemental jurisdiction over plaintiffs' claims arising from alleged
21 violations of California Business & Professions Code § 17200, *et seq.* under 28 U.S.C. § 1367(a).
22 The plaintiffs' claims under California Business & Professions Code § 17200 are so related to the
23 plaintiffs' claims under Section 7 of the Clayton Act (15 U.S.C. § 18) that both form part of the
24 same case or controversy under Article III of the United States Constitution, as described below.

25 **NATURE OF THE ACTION**

26 19. In 1999, defendants acquired electricity power plants in California to provide
27 electricity for the newly deregulated California electricity markets. Defendants bought these
28 plants from Pacific Gas & Electricity Company ("PG&E"), one of the three major regulated

1 California utilities.

2 20. By at least 1999, the acquisitions were finalized, and defendants became some of
3 the major providers of the spot supply of wholesale electricity and reserves in Northern California
4 during higher demand.

5 21. By at least sometime in 2000, the defendants started to withhold energy and/or
6 raise the price of electricity in the Northern California market for the spot supply of wholesale
7 electricity and reserves during higher demand.

8 22. Defendants' acquisitions and continued holdings of power plants has substantially
9 lessened, and will likely continue to lessen, competition in the Northern California market for the
10 spot supply of wholesale electricity and reserves during higher demand, violating Section 7 of the
11 Clayton Act.

12 **THE ACQUISITIONS**

13 23. In or about March 1999, MIRANT DELTA acquired from PG&E the Pittsburgh
14 and Contra Costa Power Plants in Contra Costa County, California. The two plants have eleven
15 (11) electricity generating units with a total capacity of about 2,702 MW.

16 24. In or about March 1999, MIRANT POTRERO acquired from PG&E the Potrero
17 Power Plant in San Francisco, California. The Potrero Power Plant has four (4) electricity
18 generating units with a total capacity of about 363 MW.

19 **TRADE AND COMMERCE**

20 25. Defendants are major suppliers of spot wholesale electricity and reserves in
21 Northern California during higher demand.

22 26. Through their acquisitions, defendants acquired and still hold the plants necessary
23 for much of the spot supply of wholesale electricity and reserves in Northern California during
24 higher demand.

25 **THE RELEVANT MARKET**

26 27. Purchasers of the spot supply of wholesale electricity and reserves during higher
27 demand in Northern California cannot and do not switch to other products in response to an
28 increase in the price of that electricity.

1 28. There is limited electricity transmission capacity into California. During higher
2 demand, the transmission lines into California are fully loaded, making it virtually impossible to
3 send additional electricity into California from other sources. Also, potential imports are often
4 constrained by the exporters' own local needs.

5 29. During higher demand, the transmission lines (*i.e.*, Path 15) between Northern and
6 Southern California are fully loaded, making it virtually impossible to send more electricity from
7 North (*i.e.*, NP 15) to South (*i.e.*, SP15) or *vice versa*.

8 30. During higher demand, there is no substitute for spot electricity and reserves
9 because other sources of electricity (*e.g.*, baseload electricity) are used to full capacity, and
10 purchasers have no choice but to buy electricity like that of the defendants.

11 31. The spot supply of wholesale electricity and reserves in Northern California during
12 higher demand is a relevant market ("the Market") (*i.e.*, a line of commerce and a section of the
13 country) under Section 7 of the Clayton Act.

14 **MARKET SHARES AND STRUCTURE**

15 32. As a result of acquiring two (2) plants, defendants captured approximately forty
16 four percent (44%) of the Market, controlling about 3,065 MW of capacity.

17 **ENTRY**

18 33. Entry into the Market would not be timely, likely, and sufficient in its magnitude,
19 character and scope to deter or counteract the anti-competitive effects that have occurred and are
20 likely to occur from defendants' accumulation of holdings and market power.

21 34. Sufficient entry into the Market by building new plants is not likely to occur in
22 sufficient time to protect California from defendants' current market power. Similarly, significant
23 entry by building new lines to transmit electricity from outside California is unlikely because it
24 would require a myriad of difficult, costly, and time consuming regulatory, environmental and
25 safety approvals.

26 **ANTI-COMPETITIVE EFFECTS**

27 35. As a result of acquiring the plants, defendants can increase the price and/or
28 withhold output of spot electricity in the Market. By at least 2000, defendants could (and did)

1 exploit their market power to raise prices and withhold output in the Market.

2 36. Indeed, in just one month (August 2000) defendants charged about 100% to 200%
3 more than what prices would have been had their plants been owned more diversely.

4 37. As a result of acquiring and holding the plants, the defendants are more likely to
5 coordinate their pricing, production and withholding of electricity with other electricity generators
6 in the Market.

7 **INJURY**

8 38. The State of California (as well as State departments and agencies) purchased
9 electricity directly from defendants.

10 39. DWR bought electricity directly from defendants.

11 40. As a result of defendants' unlawful acquisitions and/or holdings, the State of
12 California, its consumers, departments and agencies, and DWR paid more for electricity than they
13 would have had the Market been more diverse.

14 41. As a result of defendants' unlawful acquisitions and/or holdings, the State of
15 California and its citizens were injured and continued to be injured by, among other things, wide-
16 spread brown-outs and disruption in the California economy.

17 42. As a result of defendants' unlawful acquisitions and/or holdings, the State of
18 California, its consumers, departments, and agencies, and DWR have all suffered and will
19 continue to suffer irreparable harm due to the substantial lessening of competition in the Market.

20 43. As a result of defendants' acquisitions and/or holdings, defendants have reaped and
21 are continuing to reap unlawful profits.

22 **COUNT 1**

23 **Equitable Relief for Violation of Section 7 of the Clayton Act:**

24 **Divestiture and Disgorgement**

25 44. Defendants' acquisitions and continued holdings of electrical power plants violates
26 Section 7 of the Clayton Act. Injunctive relief, including divesting enough plants to restore
27 competition to the marketplace, should be required. In addition, defendants should be ordered to
28 disgorge all illegal profits that they made from the plants.

45. Defendants' continuing wrongful conduct, as alleged above, unless and until restrained by an Order of this Court, will further cause great and irreparable harm to the State of California, its consumers, departments, and agencies and DWR.

COUNT 2

Violation of Section 7: Damages

46. Beginning by at least sometime in 2000, the defendants exercised (and still exercise) market power from the illegal acquisition of power plants in Northern California, damaging the State of California, its departments, and agencies and DWR. Defendants' conduct caused, among other things, higher energy prices and electricity shortages. The State of California, its departments, agencies and DWR request damages according to proof.

COUNT 3

Violation of Cal. Business & Professions Code § 17200

47. Section 17200 of the California Business & Professions Code prohibits unfair competition, which includes any unlawful or unfair business act(s) or practices(s).

48. Section 7 of the Clayton Act, 15 U.S.C. § 18, provides that no person engaged in commerce shall acquire the assets of another person engaged in commerce where the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.

49. Defendants engaged in unlawful and unfair competition, and still do so, violating Section 17200 of the California Business & Professions Code. These violations include, but are not limited to:

a. Defendants acquired and continue to hold power plants in Northern California, reducing competition in the Market, in violation of Section 7 of the Clayton Act;

b. Defendants obtained and exercised market power to withhold electricity from the Market and raise electricity prices, in violation of Section 7 of the Clayton Act; and

c. Defendants obtained, held and exercised market power to withhold electricity from the Market causing brown-outs and disrupting the economy, in violation of Section 7 of the Clayton Act.

50. Defendants' continuing wrongful conduct, as alleged above, unless and until

1 restrained by an Order of this Court, will further cause great and irreparable harm to the State of
2 California, its consumers, departments and agencies, and to DWR.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, plaintiffs pray for judgment against defendants, and each of them, as
5 follows:

6 1. For an injunction, as authorized by the Clayton Act, ordering divestiture and other
7 relief as is necessary to prevent irreparable harm to the State of California and its residents;

8 2. For an injunction, as authorized by the Clayton Act, ordering defendants not to
9 buy or sell power plants or assets in California without adequate notification to the Plaintiffs;

10 3. For an order directing defendants to disgorge all illegal profits gained from the
11 unlawful acquisition and holding of California power plants in violation of Section 7 of the
12 Clayton Act;

13 4. That damages be awarded according to proof under the Clayton Act, and that such
14 damages be trebled;

15 5. For an injunction, as authorized by Cal. Bus. & Prof. Code § 17203, enjoining
16 defendants, their successors, agents, representatives, employees and all persons acting in concert
17 with them, from engaging in unfair competition as defined in Cal. Bus. & Prof. Code § 17200,
18 including but not limited to the types of acts or practices alleged herein;

19 6. For an injunction, as authorized by Cal. Bus. & Prof. Code § 17203, ordering
20 divestiture and such other relief as necessary to prevent irreparable harm to California's ratepayers
21 and taxpayers;

22 7. For an order directing defendants to disgorge all monies, including any profits,
23 they gained as a result of their violations of Cal. Bus. and Prof. Code § 17200, in an amount
24 according to proof;

25 8. For an order assessing civil penalties of two thousand five hundred dollars
26 (\$2,500) against each defendant for each violation of Cal. Bus. and Prof. Code § 17200, as
27 authorized by § 17206, in an amount according to proof;

28 9. For an order directing defendants to pay restitution in an amount according to

1 proof as authorized by Cal. Bus. and Prof. Code § 17200;

2 10. For costs of suit incurred herein, including reasonable attorneys fees; and

3 11. For such other further relief as the nature of the case may require and the Court
4 deems just and proper.

5 Dated: April 15, 2002.

6 Respectfully,

7 BILL LOCKYER

8 Attorney General

MORRIS BEATUS

9 Senior Assistant Attorney General

KEN ALEX

10 Supervising Deputy Attorney General

PAULA QUINTILIANI

11 Deputy Attorney General

CLARENCE BINNINGER

12 Deputy Attorney General

PAMELA MERCHANT

13 HARVEY I. SAFERSTEIN

14 NADA I. SHAMONKI

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

15
16 By: _____

Paula Quintiliani

17 Deputy Attorney General

18 Attorneys for Plaintiffs
19
20
21
22
23
24
25
26
27
28

JURY DEMAND UNDER F.R.C.P. 38(b)

Plaintiffs request a jury trial for all issues properly determined by a jury.

Dated: April 15, 2002.

Respectfully,

BILL LOCKYER
Attorney General
MORRIS BEATUS
Senior Assistant Attorney General
KEN ALEX
Supervising Deputy Attorney General
PAULA QUINTILIANI
Deputy Attorney General
CLARENCE BINNINGER
Deputy Attorney General
PAMELA MERCHANT

HARVEY I. SAFERSTEIN
NADA I. SHAMONKI
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

By: **PAULA QUINTILIANI**
Deputy Attorney General

Attorneys for Plaintiffs