

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
(FORT LAUDERDALE DIVISION)

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COURT SOUTHERN DISTRICT OF FLORIDA  
FTL OFFICE

In re

SOUTHEAST BANKING CORPORATION,

Debtor.

)  
) Chapter 7  
)  
) Case No. 91-14561-BKC-PGH  
)  
)

**MOTION FOR ENTRY OF ORDER APPROVING AND IMPLEMENTING GLOBAL SETTLEMENT OF ISSUES AFFECTING CALCULATION AND PAYMENT OF POST PETITION INTEREST AND ATTORNEYS' FEES AND RELATED PRIORITY AND SUBORDINATION ISSUES, AND PROCEDURE FOR INTERIM DISTRIBUTIONS OF POST-PETITION INTEREST ON NEGATIVE NOTICE WITHOUT HEARING**

(Deferred Hearing to be Scheduled by Separate Order)

Jeffrey H. Beck, as Trustee for the Chapter 7 estate of Southeast Banking Corporation (the "Chapter 7 Trustee"), by and through his undersigned counsel and pursuant to Sections 105, 502, 503 and 726(a)(5) of the Bankruptcy Code, 11 U.S.C. §§ 105, 502, 503, 726(a)(5) and Fed.R.Bank. P. 9019, moves for entry of the annexed Order Approving and Implementing Global Settlement of Issues Affecting Calculation and Payment of Post Petition Interest and Attorneys' Fees and Related Priority and Subordination Issues, and Procedure for Interim Distributions of Post Petition Interest on Negative Notice Without Hearing (the "Settlement Order"). In support of the requested relief, the Chapter 7 Trustee would show as follows:

**PRELIMINARY STATEMENT**

1. By way of this Motion, the Chapter 7 Trustee seeks the entry of the Settlement Order in substantially the form annexed hereto as Exhibit "A", resolving a myriad of issues -- all or substantially all of which are issues of first impression in this

**COPY**

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Circuit – affecting the relative rights and interest of the holders of the Debtor's Senior and Subordinated Notes and their respective Indenture Trustees (all as defined hereinafter). The settlement and compromise embodied in the Order is the product of long and extensive negotiations initially commenced between representatives of Gabriel Capital, L.P. and its affiliates (collectively "Gabriel") and the Ad Hoc Committee of Subordinated Noteholders (the "Ad Hoc Committee").<sup>1</sup>

2. The negotiations arose in an effort first to address the issues raised in the Motion to Fix Interest Rate, Determine Applicability of Contractual Subordination Provisions and Statutory Priority Scheme, Establish Method for Calculation and Payment of Post Petition Interest Under 11 U.S.C. Section 726(a)(5), and Authorize Procedure for Interim Distributions of Post Petition Interest on Negative Notice Without Hearing, filed by the Chapter 7 Trustee on March 25, 2002 (the "Postpetition Interest Motion"). Also addressed were the issues arising from the pending appeal (the "Chase/Gabriel Appeal")<sup>2</sup> from this Court's Memorandum Decision and Order Denying Motion of Gabriel Capital, L.P. and The Chase Manhattan Bank to Fix and Allow a Claim for Postpetition Attorneys' Fees and Costs entered on March 8, 2002 (the "Chase/Gabriel Order").

3. As ultimately agreed upon with the Chapter 7 Trustee and JP Morgan Chase Bank as Indenture Trustee for the Senior Notes (collectively with Gabriel, the Ad

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<sup>1</sup> Gabriel is the largest holder of the Senior Notes and a holder of the Subordinated Notes as well, but not a member of the Ad Hoc Committee.

<sup>2</sup> The Chase/Gabriel Appeal is pending in the District Court as Case No. 02-21176-CIV-GRAHAM.

Hoc Committee, and the Subordinated Indenture Trustees,<sup>3</sup> the "Settlement Parties"), the proposed Global Settlement embodied in the Settlement Order resolves all of the issues raised in the Postpetition Interest Motion and the Chase/Gabriel Appeal, as well as a number of other actual and potential disputes that have arisen or may arise between the holders of Senior and Subordinated Notes for the remainder of this case. The proposed settlement is extremely detailed and complex, reflecting the complexity of the underlying contractual subordination provisions and statutory priority scheme governing the payment of Postpetition Interest, the tens of millions of dollars potentially payable in respect of such Interest, and the economic variables in this case.

4. In light of the overall significance of the proposed settlement, the Chapter 7 Trustee and Indenture Trustees desire to afford the broadest possible notice to all known creditors of the estate, including the estimated 900 holders of the U.S. Notes and an unknown number of holders of the EuroNotes (all as defined hereinafter). Accordingly, by separate Motion filed of even date herewith (the "Notice Procedures Motion"), the Chapter 7 Trustee seeks approval of, *inter alia*, the form and content of certain Notices, a Summary of Global Settlement (the "Summary"), and related procedures, including a budget for service by mail and foreign publication and the creation of an extranet website with a posted set of frequently asked questions ("FAQ's"), the fixing of a deadline for responses to this Motion, and the setting of an extended hearing date on this Motion to afford sufficient time for notice and response.

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<sup>3</sup> The Chapter 7 Trustee understands that the Subordinated Indenture Trustees have no objection to the proposed Global Settlement.

5. As explained more fully below, the Chapter 7 Trustee believes that the proposed settlement embodied in the Settlement Order is fair and reasonable and in the best interests of the estate and creditors, in that it will accelerate the payment of Postpetition Interest by avoiding the significant expense and delay that otherwise would undoubtedly ensue from years of litigation between holders of Senior and Subordinated Notes. In addition to resolving all of the issues raised in the Postpetition Interest Motion and leading to withdrawal of the Chase/Gabriel Appeal, the proposed settlement will govern all future Interim and Final Distributions in this Chapter 7 case, and provide a framework for a consensual plan of reorganization in the event that this case is converted to a case under Chapter 11. In this fashion, the proposed settlement addresses all future contingencies on a comprehensive basis.

### **STATEMENT OF FACTS**

#### **General**

6. This case was commenced on September 20, 1991 (the "Petition Date"), upon the filing of a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. Jeffrey H. Beck serves as the duly qualified and appointed Trustee of the Chapter 7 estate, having been appointed to that position upon the resignation of William A. Brandt, Jr. on April 1, 1998.

7. By Order dated October 16, 1991, the Court established February 10, 1992 (the "Bar Date") as the last day to file proofs of claim. The Chapter 7 Trustee calculates that some 1134 claims have been filed against the estate, including 348 claims filed after the Bar Date.

### The Interim Distributions

8. At various times over the past nine years creditors and bondholders have received or become entitled to receive six interim distributions collectively, of cash dividends (each, an "Interim Distribution," and referred to individually herein by ordinal number) from the estate. The second and final installment of the Sixth Interim Distribution was paid on or about July 31, 2002, as a result of which a total amount of \$360,081,354.26 has been paid to unsecured creditors, representing payment in full of the principal amount of allowed, timely filed general unsecured claims ("Allowed Claims"), without Postpetition Interest.

9. The first of these Distributions was approved by a series of Orders issued April 15, June 25 and September 3, 1993, which authorized an initial Interim Distribution of not more than \$50 million (the "First Interim Distribution"). Pursuant to the subordination provisions of the Indentures governing the various issues of Notes, all of the amounts paid in respect of the Subordinated Notes were remitted over to Chemical Bank, N.A., n/k/a JP Morgan Chase Bank ("Chase"), as Indenture Trustee for the Senior Noteholders,<sup>4</sup> and the Subordinated Noteholders received none of the proceeds.

10. The Second Interim Distribution of \$115 million was authorized by Order dated March 14, 1995, and proceeded in and after April of 1995. As with the First Interim Distribution, this Distribution was paid to creditors holding Allowed Claims and to

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<sup>4</sup> Chase is the ultimate successor by merger to Manufacturers Hanover Trust Company, the original Indenture Trustee for the Senior Notes.

Chase and the Subordinated Indenture Trustees.<sup>5</sup> This time, the Subordinated Indenture Trustees remitted over to Chase an amount calculated as sufficient to pay the outstanding principal balance and all pre-petition interest owed on the Senior Notes, and paid the balance of the Distribution proceeds as an initial dividend to Subordinated Noteholders.

11. The Third Interim Distribution of \$36 million was approved by Order dated July 22, 1997. Unlike the First and Second Interim Distributions, however, the Third Interim Distribution was paid directly to the Subordinated Noteholders, rather than through the Subordinated Indenture Trustees.<sup>6</sup> By subsequent Order Granting Emergency Motion for Further Authority to Effectuate Third Interim Distribution dated

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<sup>5</sup> The Bank of New York ("BNY"), as successor to Irving Trust Co., is Indenture Trustee for the 10½% Subordinated Notes due 2001 (the "10½% Notes") and 4¾% Convertible Subordinated Debentures due 1997 (the "4¾% Notes"). U.S. Bank National Association ("U.S. Bank"), as ultimate successor to Morgan Guaranty Trust Company, is Indenture Trustee for the 6½% Convertible Subordinated Capital Notes due 1999 (collectively with the 10 ½% Notes and 4¾% Notes, the "U.S. Notes"); the Floating Rate Subordinated Notes Due 1996; and the Floating Rate Subordinated Capital Notes due 1997 (collectively, the "EuroNotes," and together with the U.S. Notes, the "Subordinated Notes"). The Bank of New York and U.S. Bank are collectively referred to in this Motion as the "Subordinated Indenture Trustees," and collectively with Chase as the "Indenture Trustees."

<sup>6</sup> As the Court will recall, this change in distribution procedures was the result of the September, 1994 commencement of Adversary Proceeding. No. 94-0941-BKC-PGH-A (commonly referred to as the "Debt Securities Litigation"), wherein Chase and Gabriel contended that the subordination provisions of the Indentures governing the Subordinated Notes entitled the Senior Noteholders to receive Postpetition Interest, interest on delinquent payments of interest, attorneys' fees, and costs prior to any distribution in respect of the Subordinated Notes. Because of the uncertainty created by the Debt Securities Litigation and the provisions in the Indentures to the effect that payments received by the Subordinated Indenture Trustees are deemed to be held "in trust" for the benefit of Senior Noteholders until the Senior Noteholders are "paid in full," the Third, Fourth and Fifth Interim Distributions were made directly to the holders of the Subordinated Notes rather than through the Subordinated Indenture Trustees. In addition, the Court established special distribution procedures intended to facilitate the recapture of any funds which might later have been determined to be payable to the Senior Noteholders in respect of the interest, fees and costs at issue in the Debt Securities Litigation. These procedures included the execution and delivery of certain Letters of Transmittal which, among other things, contained an undertaking to submit to the jurisdiction of the Bankruptcy Court, repay the proceeds of any Interim Distribution if so ordered by the Court, and indemnify the Chapter 7 Trustee in connection with the Interim Distributions.

September 30, 1997, the Court also approved the forms of various Notices and Distribution Instructions to the Subordinated Noteholders, and Letters of Transmittal governing the presentment and processing of their bonds.

12. The Fourth Interim Distribution of \$100 million was approved by Order dated September 3, 1998. As with the Third Interim Distribution, the Fourth Interim Distribution Order approved separate forms of Transmittal Documents governing the presentment and processing of the U.S. Notes and EuroNotes. In addition, that Order approved the engagement and payment of a \$160,000 Processing Fee to the Processing Agent and European Sub-Agent, established a record date of August 31, 1998 for the Fourth Interim Distribution in respect of the U.S. Notes, and approved a foreign advertising budget to reach the holders of the EuroNotes.

13. The Fifth Interim Distribution of \$40 million was approved by Order dated June 17, 1999. That Order provided that the Fifth Interim Distribution would be made on the same terms and pursuant to the same procedures as the Third and Fourth Interim Distributions, and would be payable to creditors holding Allowed Claims, Subordinated Noteholders, and into the Disputed Claims Reserve in respect of disputed, unliquidated or contingent claims which had not been fully reserved.

14. Prior to the completion of the Third, Fourth, and Fifth Interim Distributions, the Debt Securities Litigation was finally resolved and disposed of by the Eleventh Circuit Court of Appeals.<sup>7</sup> On that basis, the Chapter 7 Trustee filed a Motion dated February 22, 2000, seeking authority to dispense with those special distribution

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<sup>7</sup> *Chemical Bank v. First Trust of New York, Nat'l Ass'n (In re Southeast Banking Corp.)*, 179 F.3d 1307 (11th Cir. 1999) ("Southeast V").

procedures established by the Court in consideration of the Debt Securities Litigation, and to disburse the remaining proceeds from those Interim Distributions directly to Chase and the Subordinated Indenture Trustees.<sup>8</sup> The Chapter 7 Trustee's Motion was granted by Order dated March 27, 2000. Accordingly, as with the First and Second Interim Distributions, the Chapter 7 Trustee distributed the remaining proceeds directly to the Indenture Trustees and dispensed with those special distribution procedures established in connection with the Third, Fourth and Fifth Interim Distributions.

15. The Sixth Interim Distribution was approved by Order dated July 30, 2001, and authorizes payment in full of timely-filed, allowed general unsecured claims, without interest from the Petition Date. Pursuant to that Order the Chapter 7 Trustee has now completed two installments of that Distribution, bringing the total amount paid in the six Interim Distributions to \$360,081,354.26.

16. By a series of Orders entered in January through March of 2002, the Chapter 7 Trustee obtained authority to settle certain long-pending litigation against the Debtor's former directors, officers and professionals.<sup>9</sup> The approval and funding of those settlements has infused the estate with sufficient funds to pay allowed late-filed

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<sup>8</sup> The Eleventh Circuit's final judgment in *Southeast V* affirmed this Court's decision that the subordination provisions did not extend to the Senior Noteholders' Postpetition Interest, fees and costs, and eliminated the need to maintain special distribution procedures in respect of amounts paid to the Subordinated Noteholders in the Interim Distributions. Based on their successful resolution of the Debt Securities Litigation, the Subordinated Indenture Trustees were once again in a position to assume responsibility for the remainder of the Third, Fourth and Fifth Interim Distributions, and all future distributions.

<sup>9</sup> See Order Granting Trustee's Motion for Authority to Compromise and Settle Claims Against Deloitte & Touche, et al., dated January 22, 2002; Order Granting Trustee's Motion for Authority to Compromise and Settle Claims Against and by Certain Former Directors and Officers of Southeast, entered March 18, 2002 (District Judge Moore), as amended by Amended Order entered March 21, 2002 (District Judge Moore); and Order on Trustee's Motion for Authority to Compromise and Settle Claims Against Steel Hector & Davis and Ross & Hardies, Etc., entered March 18, 2002 (District Judge Moore).



claims in full under Section 726(a)(3) of the Bankruptcy Code, and ultimately enable the Chapter 7 Trustee to make further Interim Distributions of Postpetition Interest under Section 726(a)(5) prior to a Final Distribution at the close of the case.<sup>10</sup> As demonstrated in the Postpetition Interest Motion, the payment of Postpetition Interest raises a great number of complex and intricate issues, particularly in the context of a case that has already seen protracted litigation between Senior and Subordinated Noteholders over priority and payment issues. See note 6, *supra*.

17. By way of the Postpetition Interest Motion, the Chapter 7 Trustee sought the entry of an order (A) fixing the rate or rates of Postpetition Interest to be paid to the holders of Allowed Claims, including the Senior and Subordinated Notes; (B) determining the applicability of contractual subordination provisions and the statutory priority scheme of Section 726(a) to the payment of Postpetition Interest; (C) establishing the method for calculation and payment of Postpetition Interest; and (D) authorizing a procedure for Interim Distributions of Postpetition Interest on negative notice without hearing. The sharp differences on these issues between Chase and Gabriel on the one hand, and the Ad Hoc Committee and Subordinated Indenture Trustees on the other, are reflected by their separate responses filed to the Postpetition Interest Motion (collectively, the "Responses").<sup>11</sup>

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<sup>10</sup> The Chapter 7 Trustee is unaware of any claims for any fines, penalties, forfeiture or multiple, exemplary or punitive damages payable under 11 U.S.C. §726(a)(4).

<sup>11</sup> See Response and Objection of JPMorgan Chase, filed April 25, 2002 (the "Chase Response"); Joinder of Gabriel Capital, L.P. and Its Affiliates, filed April 24, 2002 (the "Gabriel Joinder"); Brief of Indenture Trustee for Junior Notes, filed April 25, 2002 (the "Subordinated Indenture Trustee Brief"); and Memorandum of the Ad Hoc Committee in Support, filed April 25, 2002 (the "Ad Hoc Committee Memorandum").

18. As described below, the Global Settlement embodied in the Agreed Order resolves all of these issues, as well as issues pending before Judge Graham in the Chase/Gabriel Appeal, and other potential controversies as well.<sup>12</sup>

### **OVERVIEW OF PROPOSED SETTLEMENT**

19. The following is intended only as an Overview of the Global Settlement, and does not purport to reflect or describe the terms of the Global Settlement in their entirety. INTERESTED PARTIES SHOULD NOT RELY ON THE FOLLOWING OVERVIEW NOR THE SEPARATE SUMMARY ATTACHED TO THE NOTICE PROCEDURES MOTION, BUT SHOULD REFER TO THE PROPOSED SETTLEMENT ORDER ATTACHED TO THIS MOTION AS EXHIBIT "A".<sup>13</sup> In the event of any inconsistency between or among this Motion, the Summary and the Settlement Order, the terms of the Settlement Order shall govern.

20. Items A through G below address and explain the proposed resolution of issues raised in the Postpetition Interest Motion. Item H discusses issues arising in or related to the Chase/Gabriel Appeal. Items I through K deal with other aspects of the Global Settlement, including the reallocation of Postpetition Interest Distributions in respect of the contractual subordination issues relating to the FDIC Claim, a series of potential issues that would arise in the event this case were converted to a case under Chapter 11, and the Chapter 7 Trustee's request to make further Interim Distributions

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<sup>12</sup> By Order dated August 29, 2002, Judge Graham has relinquished jurisdiction over the Chase/Gabriel Appeal "for the sole and limited purpose of authorizing the Bankruptcy Court to consider approval of the proposed settlement, . . . and for related proceedings to approve the method and manner of notice to creditors. . . ." A true and correct copy of that Order is attached hereto as Exhibit "B".

<sup>13</sup> All capitalized terms appearing in the following Summary and not otherwise defined herein shall have the meanings specified in the proposed Settlement Order.

on negative notice without necessity of formal hearing. The Settlement Parties have worked with great diligence over many months to resolve all of these pending and potential issues, in order to achieve a comprehensive global understanding that is intended to eliminate any and all future litigation between and among holders of Senior and Subordinated Notes for the remainder of this case.<sup>14</sup>

**A. Legal Rate of Postpetition Interest**

21. The Legal Rate of Postpetition Interest to be paid to the holders of all Qualified Claims shall be the federal judgment rate of 5.57% per annum, calculated on the basis of a 365-day year without compounding of any kind. The foregoing Legal Rate shall govern any further Interim Distributions and any Final Distribution made in this case under Chapter 7 of the Bankruptcy Code. In the event that this case is converted to a case under Chapter 11 of the Bankruptcy Code, the allowed claim of each creditor shall include an amount equal to the difference between (i) the Postpetition Interest on such creditor's allowed claim in the Chapter 7 case at the rate of eight percent (8%) per annum, without compounding, through May 31, 2002, and (ii) the Distributions theretofore made to such creditor for Postpetition Interest prior to the conversion to Chapter 11.<sup>15</sup>

22. Section 726(a)(5) of the Bankruptcy Code provides that property of the estate shall be distributed "fifth, in payment of interest at the *legal rate* from the date of

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<sup>14</sup> Consistent with this comprehensive approach, paragraph 6 of the Settlement Order provides that except with respect to the reallocation provisions of paragraphs 4 and 5 of that Order, the Senior Indenture Trustee, holders of Senior Notes and other parties shall have no further claims against the Subordinated Indenture Trustees or holders of Subordinated Notes in respect of any contractual subordination provisions in the Notes and Indentures.

<sup>15</sup> See paragraph 47, *infra*.

filing the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection." 11 U.S.C. § 726 (a)(5) (emphasis added). The Chapter 7 Trustee contended in the Postpetition Interest Motion that the Legal Rate of interest under Section 726(a)(5) should be the federal judgment rate under 28 U.S.C. § 1961(a) as of the Petition Date,<sup>16</sup> which all parties agreed was 5.57% per annum. While the Subordinated Indenture Trustees and Ad Hoc Committee supported the Chapter 7 Trustee's position on that issue,<sup>17</sup> Gabriel and Chase argued that the contract rate applicable to each issue of Notes and all other creditor claims should apply, and that Postpetition Interest on the Senior Notes should be compounded under New York law.<sup>18</sup>

23. On this issue alone the competing positions of the parties produce a variance of over \$30 million. The Senior Notes bear the highest contract rate of interest at 11.25%, and have the most to gain by application of the contract rates rather than a single uniform rate. Calculated at the 5.57% rate without compounding, the Postpetition Interest payable on the Senior Notes is approximately \$8 million through May 31, 2002; compounding annually at that rate increases the interest accrual to almost \$13 million.<sup>19</sup> If the 11.25% contract rate were applied and compounded annually, the Postpetition Interest Payable on the Senior Notes would exceed \$42 million.

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<sup>16</sup> Post Petition Interest Motion, pp. 8-14.

<sup>17</sup> Subordinated Indenture Trustee Brief, p. 26; Ad Hoc Committee Memorandum, pp. 3-4.

<sup>18</sup> Chase Response, pp. 23-28; Gabriel Joinder.

<sup>19</sup> The actual amount is \$12,907,043, which forms the basis for calculation of the Senior Note Shortfall as defined in the Settlement Order and used in this Motion.

24. Although there appears to be no controlling law in this Circuit, the Chapter 7 Trustee believes that the Legal Rate proposed in the Settlement Order is consistent with the greater weight of authority from other courts.<sup>20</sup> *E.g.*, *Onink v. Cardelucci (In re Cardelucci)*, 285 F.3d 1231 (9<sup>th</sup> Cir. 2002); *cert. denied* 123 S.Ct. 663 (2002); *Shoen v. Shoen (In re Shoen)*, 176 F.3d 1150 (9<sup>th</sup> Cir. 1999); *In re Dow Corning Corp.*, 237 B.R. 380 (Bankr. E.D. Mich. 1999). Uniform application of the federal judgment rate also avoids the complexity associated with separate interest calculations for the various issues of Senior and Subordinated Notes bearing contract rates ranging from 4.75% to 11.25%, and particularly the floating rates applicable to the EuroNotes at various times since the Petition Date. Application of a single, uniform rate of interest also "ensur[es] fairness, equality and predictability,"<sup>21</sup> and avoids injustice to other, non-bondholder creditors whose claims would receive either no interest at all or varying rates of interest calculated only after an expensive and time-consuming review of their individual claim documents and applicable non-bankruptcy law.

25. Finally on this point, agreement on the 5.57% federal judgment rate represents a significant concession by Gabriel and Chase, in that the agreed rate is less than one-half the contract rate provided in the Senior Notes. *The entirety of the*

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<sup>20</sup> While the Eleventh Circuit Court of Appeals has not ruled directly on this issue, its decision in *U.S. Trustee v. Fishback (In re Glados, Inc.)*, 83 F.3d 1360 (11<sup>th</sup> Cir. 1996), strongly suggests that it would follow the majority view. In *Glados*, both lower courts held that Postpetition interest accruing on an award of professional fees under Section 726(a)(5) should be calculated at the federal statutory judgment rate. 83 F.3d at 1362. In reversing on other grounds the Eleventh Circuit did not disturb the rulings that interest should be calculated at the federal statutory rate. *Id.* Rather, the reversal focused on a timing issue, holding that interest on unpaid professional fees accrues as of the date of the fee award, not the date of the professional's appointment.

<sup>21</sup> *Beguelin v. Volcano Vision, Inc.*, 220 B.R. 94, 100 (B.A.P. 9<sup>th</sup> Cir. 1998).

*proposed Global Settlement must be considered in the context of this negotiated concession, for which the Chapter 7 Trustee and other settlement parties have made corresponding concessions as described below.*

B. **Application of Contractual Subordination Provisions**

26. The next issue addressed in the Postpetition Interest Motion is whether the contractual subordination provisions of the Indentures governing the Subordinated Notes apply to distributions of Postpetition Interest under Section 726(a)(5), and if so whether enforcement of these provisions requires that the holders of Senior Notes receive *all* of their contractual or statutory Postpetition Interest prior to the payment of any such Interest on the Subordinated Notes. The resolution of this issue is a key component of the proposed settlement, in that regardless of whether the amount of Postpetition Interest due on the Senior Notes is \$8 million, \$13 million or \$42 million,<sup>22</sup> payment of that amount to Gabriel and any other holders of the Senior Notes would significantly reduce the amount of Postpetition Interest available for payment on the Subordinated Notes.<sup>23</sup>

27. The Settlement Order provides for a compromise of the subordination issue that lies at the heart of the litigation over the Postpetition Interest Motion. Under the proposed settlement, the Subordinated Noteholders' right to Distributions on account of Postpetition Interest would be subordinated to an amount equal to the "Subordinated Notes Fraction" of 48% of the difference between (a) interest on the

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<sup>22</sup> See paragraph 23, *supra*.

<sup>23</sup> As with respect to the six Interim Distributions made to date, however, the Holders of Allowed Claims not arising under any of the Notes would remain unaffected.

Senior Notes from the Petition Date to May 31, 2002 at the Legal Rate, compounded annually (\$12,907,043.00); and (b) the distribution of Postpetition Interest that Senior Noteholders would otherwise receive on a ratable basis, before applying any subordination or giving effect to the FDIC Subordination Provisions.<sup>24</sup> Thus, paragraph 4 of the Settlement Order provides for the Subordinated Indenture Trustees to remit to Chase for the benefit of the Senior Notes an amount received from distributions in respect of Postpetition Interest equal to the Subordinated Notes Fraction<sup>25</sup> of 48% of the Senior Notes Shortfall.<sup>26</sup> If Chase receives in excess of 48% of the Senior Notes Shortfall from amounts that would otherwise have been distributed to the Subordinated Indenture Trustees and from the Reallocated FDIC Distribution, the amount of such excess shall be paid over to the Subordinated Indenture Trustees from amounts otherwise distributed to Chase on behalf of Senior Noteholders.

28. The reallocation provisions of paragraph 4 of the Settlement Order represent a key component of the Global Settlement in respect of the Senior and Subordinated Notes, and a compromise of two issues. First, those provisions represent a compromise of 48% on the issue of whether and to what extent the various

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<sup>24</sup> The FDIC Claim and Subordination Provisions are more fully described in item I, ¶¶ 44-47 below, and have yet to be addressed by the Court. A substantial likelihood exists that the FDIC Claim may be subject to objection, disallowance and/or subordination to the claims evidenced by the Senior Notes.

<sup>25</sup> As defined in paragraph 1(w) of the Settlement Order, the Subordinated Notes Fraction represents the aggregate amount of Postpetition Interest on the Subordinated Notes calculated through May 31, 2002 at the Legal Rate, as a fraction of that amount plus the Postpetition Interest on the FDIC Subordinated Notes for the same period.

<sup>26</sup> See n. 19, *supra*. Until the FDIC Claim is finally resolved, the Subordinated Notes Fraction will be calculated at approximately .89, as if the FDIC Claim is allowed in full. Pending that resolution, the Chapter 7 Trustee will maintain a separate reserve defined and described in paragraphs 1(u) and 4(b) of the Settlement Order as the "48% Guaranty Reserve."

subordination provisions in the Subordinated Indentures apply to Distributions of Postpetition Interest. Second, these provisions represent a compromise of the issue of which interest rate (contract rate or legal rate) would be used for purposes of applying the contractual subordination provisions, and whether that rate would be applied on a simple or compounded basis. Under this compromise, the Legal Rate with compounding is used as the benchmark against which the 48% compromise percentage is applied.

29. Except with respect to the FDIC Subordinated Notes as explained below,<sup>27</sup> the proposed compromise on this issue has no impact on the claims of other creditors. The Chapter 7 Trustee believes that this essential part of the Global Settlement represents a fair and reasonable compromise on a multi-million dollar issue which closely parallels the issues raised in the Debt Securities Litigation, and similarly could take years to resolve through litigation and appeals.

30. As the Court will recall, the Debt Securities Litigation posed the related question of whether the subordination provisions of the various Indentures required that holders of Senior Notes receive, among other things, all of their Postpetition Interest prior to any payment of *principal* in respect of the Subordinated Notes.<sup>28</sup> It is clear from the Responses to the Postpetition Interest Motion that, again, there are sharp differences between Chase/Gabriel and the Ad Hoc Committee/Subordinated Indenture Trustees on whether the ultimate decision of the Eleventh Circuit Court of Appeals in

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<sup>27</sup> See paragraphs 42 through 45, *infra*.

<sup>28</sup> See n.6, *supra*.



*Southeast V* is dispositive of the contractual subordination issues in respect of Postpetition Interest under Section 726(a)(5), and as to the applicability of the contractual subordination provisions even if that decision is not dispositive.<sup>29</sup>

31. For the purpose of evaluating the Global Settlement under Bankruptcy Rule 9019, the Court need only recall that the Debt Securities Litigation took five years to resolve, consumed millions of dollars in attorneys fees, and required a total of three appeals before the Eleventh Circuit and the New York Court of Appeals. In light of the "complexity, expense, and likely duration"<sup>30</sup> of yet another round of protracted litigation to resolve the novel priority issue as to Postpetition Interest presented by the apparently unprecedented circumstances of this case, involving the application of contractual subordination provisions where allowed pre-petition claims have been paid in full (not to mention the multitude of other issues resolved consensually in the Global Settlement), the Chapter 7 Trustee is comfortable that the proposed resolution reached between and among all of the Settlement Parties is fair and reasonable and in the best interests of creditors and the estate.

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<sup>29</sup> In the Postpetition Interest Motion the Chapter 7 Trustee offers the view that the same Rule of Explicitness analysis adopted by the Eleventh Circuit in *Southeast V* is likely to be determinative of the subordination issue in this context as well. Postpetition Interest Motion at ¶28. In fairness, however, the Chapter 7 Trustee also points out that *dicta* in this Court's prior decision in *Southeast I* suggests otherwise: "If the estate were solvent, then junior debentureholders' Postpetition interest would be subordinated to the payment of senior debentureholder Postpetition interest." *Southeast I*, 188 B.R. at 462 n.6. The issue is thus open to conflicting views, and best resolved through this Global Settlement.

<sup>30</sup> These factors are among those identified as governing the approval of a compromise and settlement in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968).

C. **The Distribution Scheme of Sections 726(a)(1) Through (4)**

32. The Global Settlement provides that interest on Qualified Claims under Section 726(a)(5) is payable on a pro rata basis, without regard to the priority scheme established in subsections (1) through (4) of that provision.<sup>31</sup> This result is consistent with the relief sought in the Postpetition Interest Motion and by the plain language of Section 726(b), which provides:

Payment on claims of a kind specified in . . .  
paragraph (2), (3), (4), or (5) of subsection (a) of this section,  
shall be made pro rata among claims of the kind specified in  
each such particular paragraph . . . .

11 U.S.C. § 726(b). The claim “specified in” subparagraph (a)(5) is “interest at the legal rate” on claims paid under subparagraphs (a)(1) through (a)(4) of the statute. 11 U.S.C. § 726(a)(5). It thus seems clear that Postpetition interest under Section 726(a)(5) is payable ratably on all claims paid under Section 726(a)(1) through (a)(4), without regard to the priority scheme that governed the payment of those claims, and the Global Settlement so provides.

D. **Interim Distributions Reduce Claim Amounts on Which Postpetition Interest is Calculated**

33. The Chapter 7 Trustee has taken the position that Postpetition Interest is payable only on the unpaid balance of each Qualified Claim after giving effect to each Interim Distribution and the redirection of each such Distribution under principles of subordination or subrogation.<sup>32</sup> The Settlement Order adopts this position, and

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<sup>31</sup> Settlement Order, ¶2.

<sup>32</sup> Postpetition Interest Motion, ¶32.

specifically provides that under this method of calculation, Postpetition Interest on the Senior Notes ceased to accrue as of the date of the Second Interim Distribution, through which the holders of those Notes received "payment in full" on their allowed claims.<sup>33</sup>

E. Payment of Postpetition Interest to Holders of Contingent, Disputed or Unliquidated Claims

34. The Settlement Order again adopts the proposal offered by the Chapter 7 Trustee in the Postpetition Interest Motion: that claims settled for allowance at a negotiated amount should be entitled to interest calculated on the settlement amount, from the Petition Date through date of payment on the settlement; provided, however, that where the settlement involved payment of a lump sum in full and complete satisfaction of the claim, no Postpetition Interest shall be payable and no further distribution of any kind shall be made.<sup>34</sup> Prior to the first Interim Distribution of Postpetition Interest, the Chapter 7 Trustee will file and serve a Notice setting forth the intended treatment of each settled claim. In connection with such Notice, the Chapter 7 Trustee will propose that the holder of each such claim shall then have thirty days within

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<sup>33</sup> See Settlement Order at ¶2. In calculating the payment of Postpetition Interest to holders of Senior and Subordinated Notes, principal reductions for the First, Second and Sixth Interim Distributions will be taken as of the dates shown on checks paid by the Chapter 7 Trustee to the Indenture Trustees; principal reductions for the Third, Fourth and Fifth Interim Distributions will be taken as of the date of the first batch of payments made to individual bondholders for each such Distributions.

<sup>34</sup> Settlement Order, ¶13. By way of example, if the holder of a disputed \$100 claim agreed to an allowed claim of \$50, interest on the \$50 allowed amount would be payable in the same manner as other allowed claims. If, however, that same creditor accepted a single payment of \$50 in satisfaction of the claim, no interest would be payable unless specifically reserved in the settlement order.

which to file and serve an Objection, or be deemed to have accepted the treatment proposed in the Chapter 7 Trustee's Notice.

**F. No Payment of Unpaid Postpetition Installments of Interest or Interest Thereon**

35. The Chapter 7 Trustee took the position in the Postpetition Interest Motion that Postpetition Interest is payable only on the allowed amounts of the Senior and Subordinated Note Claims (as reduced by prior Interim Distributions), and that neither delinquent installments of contractual interest nor interest on those missed installments is payable under the Bankruptcy Code.<sup>35</sup> While the Ad Hoc Committee supported this view,<sup>36</sup> Chase and Gabriel maintained that they are entitled to payment of compound interest under the applicable New York law by which the Indentures are governed.<sup>37</sup> The Global Settlement resolves this issue in the manner proposed by the Chapter 7 Trustee.

**G. Application of Preclusion Theories From Debt Securities Litigation**

36. As pointed out in the Postpetition Interest Motion,<sup>38</sup> lurking behind any treatment of the foregoing substantive issues is the question of whether the various rulings in the Debt Securities Litigation would have a preclusive effect -- under the doctrines of res judicata, collateral estoppel or law of the case -- on their resolution. One of the many benefits of the Global Settlement is to spare the Court the painstaking

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<sup>35</sup> Post Petition Interest Motion, ¶134.

<sup>36</sup> Ad Hoc Committee Memorandum, ¶18.

<sup>37</sup> Chase Response, pp. 18-21.

<sup>38</sup> Post Petition Interest Motion, p. 21.

issue-by-issue consideration that is otherwise necessary to that analysis. The Chapter 7 Trustee believes that none of the foregoing provisions of the Global Settlement run afoul of any ruling in the Debt Securities Litigation, and that each and every feature of the proposed Global Settlement relating to Postpetition Interest is consistent with the letter and spirit of Section 726(a)(5) of the Bankruptcy Code.

H. **Payment of Postpetition Attorneys Fees**

37. As mentioned above, in addition to resolving all of the issues raised in the Postpetition Interest Motion, the proposed Global Settlement is intended to dispose of the Chase/Gabriel Appeal pending before Judge Graham, as well as other issues regarding the allowance and payment of various fees and expenses. At issue in that Appeal is whether Gabriel and Chase are entitled to receive \$1,355,848.98 in Postpetition attorneys fees and expenses allegedly incurred in connection with their efforts in the Debt Securities Litigation.

38. In consideration for the substantial concessions made by Chase and Gabriel in connection with the resolution of issues raised in the Postpetition Interest Motion as described above,<sup>39</sup> and recognizing the risk and uncertainty of the ultimate result in the Chase/Gabriel Appeal, as well as the continued cost of litigation if this issue is not resolved consensually, the Global Settlement contemplates that Chase, *but not Gabriel*, will be entitled to the allowance of contractual postpetition attorneys' fees and expenses incurred prior to July 31, 2002 under the terms of the Indenture governing the

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<sup>39</sup> See e.g., ¶¶ 22-25 *supra*.

Senior Notes.<sup>40</sup> The amount of attorneys' fees and expenses to be allowed to Chase is \$972,039.09, as incurred from the commencement of this Chapter 7 case in September of 1991 through and including July 31, 2002.

39. The Global Settlement also provides that both the Subordinated Indenture Trustees and the Ad Hoc Committee will likewise be entitled to receive payment from the estate of post petition attorneys' fees and expenses incurred prior to July 31, 2002.<sup>41</sup> BNY and U.S. Bank have been actively involved in this case from its inception, and under the Global Settlement will be awarded allowed claims for attorneys' fees and expenses under their Indentures in the amounts of \$1,923,771.22 and \$1,914,214.93, respectively, but without any accrued interest. Since its formation in 1996 the Ad Hoc Committee has incurred and paid attorneys' fees and expenses totaling not less than \$852,520.00, for which amount it will be reimbursed by the Chapter 7 estate following entry of the Settlement Order.

40. In consideration of the allowance and payment of attorneys' fees and expenses as described above, Gabriel will forego its claim for previously incurred attorneys' fees, and the Indenture Trustees will forego any claim to recovery from the estate of more than \$1 million in other fees and expenses incurred in connection with the performance of their duties under the Subordinated Indentures, such as indenture trustee fees and expenses. In addition, absent the conversion of this Chapter 7 case to a case under Chapter 11, the Indenture Trustees, the Ad Hoc Committee and Gabriel

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<sup>40</sup> Settlement Order, ¶ 9(a).

<sup>41</sup> Settlement Order, ¶¶ 9(b), 9(c), 10.

will forego any claim to recover from the estate any fees and expenses of any kind incurred after July 31, 2002. All of the Indenture Trustees will also forego any right to recover any interest in respect of the attorneys fees and costs they have incurred and paid over the 11-year life of this case. Nothing in the Settlement Order, however, will affect the right of any of the Indenture Trustees to recover or deduct fees and expenses payable under the applicable Indenture from the Distributions paid by the Chapter 7 Trustee, before remitting the remaining proceeds of such Distributions to holders of the applicable issue of notes or bonds.<sup>42</sup>

41. In agreeing (subject, of course, to the Court's approval of the Global Settlement) to the payment or reimbursement of the foregoing attorneys' fees and expenses from the Chapter 7 estate, the Chapter 7 Trustee has reviewed summaries and other information provided by both of the Subordinated Indenture Trustees and Ad Hoc Committee, and obtained confirmation that the amounts sought were actually incurred and paid. In addition, while the reasonableness of such fees and expenses is not squarely before the Court, the Chapter 7 Trustee is satisfied that *in the context of the other concessions which collectively form the basis of the Global Settlement*, payment of these amounts from the Chapter 7 estate is reasonable under the circumstances of an 11<sup>1</sup>/<sub>2</sub>-year case in which all timely-filed Allowed Claims have now been paid in full and will receive substantial amounts of Postpetition Interest.

42. It is also important to the Chapter 7 Trustee that the proposed payment of fees and expenses does not operate to diminish or impair the rights of non-bondholder

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<sup>42</sup> Settlement Order, ¶ 9.

creditors to seek the allowance of any claim for fees and expenses to which they may be entitled for the like period prior to July 31, 2002. The Settlement Order provides that any other creditor who may assert a contractual right to payment of attorneys fees and costs from this now-solvent bankruptcy estate shall have thirty days from entry of the Settlement Order within which to file a claim for attorneys fees and expenses incurred through the July 31, 2002 date as well.<sup>43</sup> The only creditor whose right to seek payment of previously incurred attorneys fees and expenses from the estate is forever barred by the Settlement Order is Gabriel, which has agreed as part of the Global Settlement to waive and forego any effort to recover an estimated \$500,000 or more paid in such fees and expenses. However, if this case is converted to a Chapter 11 case and a plan is confirmed, any right of Gabriel to assert an administrative claim for fees and expenses incurred after July 31, 2002 for a "substantial contribution" under Section 503(b)(3) of the Bankruptcy Code will not be affected, provided that such claim may not exceed \$100,000.

43. The foregoing agreement with respect to the payment of attorneys fees and costs through July 31, 2002 is intended to resolve all of the issues raised in the Chase/Gabriel Appeal, as well as other issues relating to claims for fees and expenses that might otherwise have resulted in still more litigation.<sup>44</sup> Accordingly, the Settlement

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<sup>43</sup> Settlement Order, ¶ 12. As further provided in that paragraph, any creditor whose claim is the subject of an objection shall have thirty days from the date that an order resolving the objection becomes final within which to seek the payment of contractual postpetition fees incurred through the last day of the month in which that order becomes final.

<sup>44</sup> As explained more fully in part J *infra*, the Settlement Order provides that in the event this case is converted to a case under Chapter 11 and a plan of reorganization is confirmed, the Indenture Trustees, Ad Hoc Committee and non-noteholder creditors – and, to a limited extent, Gabriel – may seek the



Order provides that within ten days following its entry or, at the option of Chase and Gabriel, within five days of the date upon which the Settlement Order becomes a Final Order, Chase and Gabriel will file a pleading with the District Court to withdraw that Appeal, with prejudice.<sup>45</sup> (Settlement Order, ¶ 12)

I. The FDIC Claim

44. In addition to the Senior and Subordinated Notes, the Debtor is also obligated under two separate 10.64% Subordinated Notes purportedly issued in December of 1989 to American Pioneer Federal Savings Bank ("American Pioneer"), in the amounts of \$3.5 million and \$18.6 million, respectively, in connection with the acquisition of First Pioneer Bank earlier that year.<sup>46</sup> After the issuance of these Notes American Pioneer itself was declared insolvent and placed in receivership, and the Resolution Trust Corporation ("RTC") was appointed as its receiver. The RTC filed a late proof of claim in respect of the FDIC Subordinated Notes on June 29, 1992, in the amount of \$23,275,720.<sup>47</sup>

45. The Chapter 7 Trustee is informed and believes that as statutory successor to the RTC, the Federal Deposit Insurance Corporation ("FDIC") now holds the FDIC Subordinated Notes and the FDIC Claim. Like the Subordinated Indentures,

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allowance of a claim or administrative expense against the estate to recover attorneys fees and costs incurred after the cutoff date of July 31, 2002. See ¶ 50, *infra*.

<sup>45</sup> Settlement Order, ¶ 11.

<sup>46</sup> See Settlement Order, ¶ 1(n), (r).

<sup>47</sup> Proof of Claim of American Pioneer Federal Savings Bank in Receivership of Resolution Trust Corporation, docketed as Claim No. 1076 in this case. The Chapter 7 Trustee has made no payment on the FDIC Claim, nor any other late-filed claim payable under 11 U.S.C. § 726(a)(3), and reserves the right to object to the FDIC Claim, in whole or in part, under 11 U.S.C. § 502(a) and (b).

the FDIC Subordinated Notes contain certain provisions by which their payment is subordinated to payment of the Senior Notes. Neither the RTC nor the FDIC was a party to the Debt Securities Litigation, and the extent of that subordination has yet to be addressed by any court.<sup>48</sup>

46. The Settlement Order preserves the rights of the Settlement Parties to object to or seek subordination of the FDIC Claim,<sup>49</sup> and conveys "sole and exclusive control" over enforcement of any subordination rights in respect of the FDIC Claim, including litigation and settlement, to the Ad Hoc Committee.<sup>50</sup> The Settlement Order further provides for the redistribution by the Senior Indenture Trustee of certain amounts that would have been distributed to the holder of the FDIC Claim but for the subordination provisions contained in the FDIC Notes, and which are required to be paid over to the Senior Indenture Trustee as a result of those contractual subordination provisions (the "Reallocated FDIC Distributions"). In particular, any Reallocated FDIC Distributions will be distributed as follows: (i) an amount equal to the FDIC Notes Fraction<sup>51</sup> of 48% of the Senior Note Shortfall will be retained by the Senior Indenture

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<sup>48</sup> As of the commencement of the Debt Securities Litigation in 1994, the Southeast estate was insolvent and lacked sufficient cash or other tangible assets with which to pay all timely-filed claims in full. Based on the statutory subordination scheme of 11 U.S.C. § 726(a)(2) and (3), there was no need to address the contractual subordination provisions of the FDIC Subordinated Notes in that Litigation. The availability of a surplus in the estate to pay late claims including, in particular, the FDIC Claim, along with Postpetition Interest under Section 726(a)(5), now brings the subordination issue on those Notes squarely into focus.

<sup>49</sup> Settlement Order, ¶ 7(a).

<sup>50</sup> Settlement Order, ¶ 7(b). The Ad Hoc Committee will designate Special Counsel to be retained by the Subordinated Indenture Trustees for these purposes, to be paid from a Special Reserve funded from certain amounts distributed to the Subordinated Indenture Trustees. Settlement Order, ¶ 7(c).

<sup>51</sup> Settlement Order ¶ 1(o).

Trustee for distribution to Senior Noteholders; and (ii) the balance will be distributed to the Subordinated Indenture Trustees for distribution to the Subordinated Noteholders.

47. This provision of the Global Settlement will not affect the rights of the FDIC in respect of the FDIC Claim, because the redistribution of Reallocated FDIC Distributions applies only to the extent that amounts otherwise distributable in respect of the FDIC Claim would have been subject to redirection to the Senior Indenture Trustee as a result of the contractual subordination provisions contained in the FDIC Subordinated Notes. Thus, the provision of the Global Settlement regarding Reallocated FDIC Distributions has substantive effect only if amounts distributable on the FDIC Claim are otherwise subject to redistribution to the Senior Indenture Trustee pursuant to those contractual subordination provisions. In the event that the FDIC Claim is not so subordinated, then to the extent that Claim is allowed the FDIC is entitled to receive pro rata Distributions of Postpetition Interest at the same Legal Rate and in the same manner as other Qualified Claims under the Settlement Order.

J. **Provisions in the Event of Conversion to Chapter 11**

48. In furtherance of the goal of comprehensive resolution of all real and potential issues between and among the Settlement Parties, the Global Settlement also addresses the contingency that at some undetermined point in the future this case may be converted to a case under Chapter 11 of the Bankruptcy Code. It should be made *absolutely clear* to the Court and all parties in interest that there is *no present intention* on the part of the Chapter 7 Trustee to convert this case to a case under Chapter 11 of the Bankruptcy Code. In the event, however, that circumstances may change and such

conversion may prove to be in the best interests of the estate and creditors, paragraph 5 of the Settlement Order contains a series of provisions that would govern the right to Postpetition Interest and the respective rights and treatment afforded to holders of Senior and Subordinated Notes.<sup>52</sup>

49. Change in Rate of Postpetition Interest. The use of the 5.57% federal judgment rate as the Legal Rate of Postpetition Interest is derived from and based on case law holding that, for purposes of applying section 726(a)(5) of the Bankruptcy Code, the statutory reference to the "Legal Rate" refers to interest at the federal judgment rate.<sup>53</sup> In a Chapter 11 case, however, the "fair and equitable" requirement of section 1129(b) of the Bankruptcy Code may require that Postpetition Interest be paid at the contract rate or a rate otherwise established under applicable nonbankruptcy law. See *In re Dow Corning Corp.*, 244 B.R. 678, 696 (Bankr. E.D. Mich. 1999). Recognizing that the application of the contract rate or varying state law judgment rates of interest would, on an overall basis, result in a much greater amount of Postpetition Interest being payable before equity holders could participate under a plan, but at the same time being mindful of the fact that attempting to determine the appropriate rate of interest on a creditor-by-creditor basis would impose enormous administrative burden and costs on the estate, the Settlement Parties have agreed to reconcile these competing considerations. The Settlement Order thus provides that in the event this case is converted to a case under Chapter 11, the rate of Postpetition Interest on all

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<sup>52</sup> Paragraph 5 of the Settlement Order confirms that no party in interest is required to file or support, or not to oppose, a motion seeking conversion of the case.

<sup>53</sup> See paragraph 24, *supra*.

Qualified Claims - - not just claims arising under the Senior and Subordinated Notes - - shall be calculated on a simple basis at the annual rate of 8%, rather than 5.57%, as described in paragraph 5a of the Settlement Order,<sup>54</sup> and that the allowed claim of each creditor in the Chapter 11 case shall include unpaid Postpetition Interest at the enhanced rate.

50. Right to Seek Additional Attorneys' Fees and Costs. The Settlement Order also provides that in the event this case is converted to a case under Chapter 11 and a Chapter 11 plan of reorganization is confirmed by the Court, the Indenture Trustees, the Ad Hoc Committee and other creditors may also seek the award of attorneys' fees and costs incurred after July 31, 2002 on any appropriate grounds.<sup>55</sup> In the case of Gabriel, however, this right is limited to fees and costs of not more than \$100,000 for a "substantial contribution" under sections 503(b)(3) and (b)(4) of the Bankruptcy Code, and only to the extent that the services from which fees and expenses result are determined to "enhance the aggregate overall distribution to creditors in [the] Chapter 11 case."<sup>56</sup>

51. Chapter 11-Attributable Distribution. The Settlement Order introduces the concept of a "Chapter 11-Attributable Distribution," defined as the amount by which the aggregate value of Distributions under a confirmed Chapter 11 plan exceeds the value of Distributions that Holders of Qualified Claims would have received had the case

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<sup>54</sup> See paragraph 21, *supra*.

<sup>55</sup> Settlement Order, ¶ 13.

<sup>56</sup> Settlement Order, ¶ 11.

remained pending under Chapter 7 of the Code.<sup>57</sup> In the event that this Chapter 7 case is converted to a Chapter 11 case (which would occur only if a Chapter 11 plan produced sufficient additional value in excess of the associated costs to make conversion to Chapter 11 beneficial to all creditors), the aggregate amount of the net incremental value (the "Chapter 11-Attributable Distributions") that would be allocable on a ratable basis to holders of the Senior Notes and the Subordinated Notes will be allocated as between those two groups in accordance with the provisions of paragraph 5 of the Settlement Order, and the provisions of paragraphs 2-4 of the Settlement Order will apply only to distributions which are not Chapter 11-Attributable Distributions.<sup>58</sup> Chapter 11-Attributable Distributions will be governed by the separate reallocation provisions of paragraphs 5c through h of the Settlement Order, which will only affect the rights of Senior Noteholders and Subordinated Noteholders vis-à-vis one another and have no impact on the rights of other creditors.

52. Essentially, the Global Settlement provides that the proceeds of a Chapter 11-Attributable Distribution payable to the Subordinated Indenture Trustees shall be reallocated to Chase as Senior Indenture Trustee under a formula providing for holders of the Senior Notes to receive 50% of the total amount of any Chapter 11-Attributable Distribution paid in respect of the Senior and Subordinated Notes, until such time as the Senior Indenture Trustee has received total Distributions of \$16 million in Postpetition Interest out of Chapter 11-Attributable Distributions. Once the \$16 million cap has been

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<sup>57</sup> Settlement Order, ¶ 1f.

<sup>58</sup> Settlement Order, ¶ 5(b).

reached, any additional distributions of Postpetition Interest otherwise payable to the Senior Indenture Trustee out of Chapter 11-Attributable Distributions shall be reallocated to the Subordinated Indenture Trustees, and the Holders of Senior Notes shall receive none of the proceeds of any such additional Distributions.<sup>59</sup>

53. Valuation and Determination of Chapter 11-Attributable Distributions and the "Qualified Plan" Concept. In the event that this case is converted to a case under Chapter 11, the special provisions of the Settlement Order governing the treatment of Chapter 11-Attributable Distributions will require a determination quantifying the amount of the Chapter 11-Attributable Distributions. That quantification will, in turn, require a valuation of non-cash Distributions for purposes of determining what portion, if any, of the Distributions under a confirmed plan constitute Chapter 11-Attributable Distributions. The Settlement Order attempts to simplify this valuation process by establishing a convention for making that determination in the event that a Qualified Plan<sup>60</sup> is confirmed.

54. As defined in paragraph 1(mm) of the Settlement Order, a Qualified Plan is a Chapter 11 Plan under which all property of the estate other than the Jacksonville Property,<sup>61</sup> certain intangible assets, and Retained Cash<sup>62</sup> is transferred to a Liquidating

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<sup>59</sup> Settlement Order, ¶ 5(d).

<sup>60</sup> Settlement Order, ¶1(mm), 5(e)(ii), 5(g).

<sup>61</sup> The Jacksonville Property, as defined in paragraph 1(y) of the Settlement Order, is often referred to as the Southwest Quadrant property, and the Belfort property. The Southwest Quadrant property consists of two parcels of vacant and undeveloped land: a 20-acre parcel owned by Southeast Properties, Inc. ("SEPI"), a non-debtor subsidiary of the Debtor; and a 174-acre parcel owned 50% by SWQ Holdings, Inc. ("SWQ") another non-debtor subsidiary, and 50% by an unrelated joint venture. Under a settlement of litigation reached in 1998, SEPI and SWQ are to receive 70% of the proceeds of the

Trust. In such event and under such a Qualified Plan, paragraph 5(e) of the Settlement Order establishes a formula to value Chapter 11-Attributable Distributions so as to give effect to the foregoing reallocation provisions.

55. The valuation of the non-cash Distributions under a plan will be critical in determining whether the Distributions under a Chapter 11 plan include incremental value that constitutes Chapter 11-Attributable Distributions. Accordingly, the Settlement Order establishes a mechanism for such valuation by providing in paragraph 5(f) that Gabriel and the Ad Hoc Committee may agree upon the value of any non-cash Distributions as of the Plan Effective Date, and that absent objection by any other party following notice of such determination, such agreed determination will be binding. Absent such agreement, or in the event of a sustained objection to such agreement, paragraphs 5(g) and (h) establish dispute resolution procedures to be used in the respective events that a Qualified Plan is confirmed or a Chapter 11 plan other than a Qualified Plan is confirmed.

56. Gabriel and the Ad Hoc Committee have also agreed that neither of them will propose, support, vote for, or solicit acceptances of a Chapter 11 plan that is not a Qualified Plan.<sup>63</sup> This agreement, while an essential component of the Global

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combined Jacksonville Property, with the remaining 30% paid to the joint venture. The Belfort property is a 7.3 acre parcel of land owned by Second Pioneer Corporation, another non-debtor subsidiary.

<sup>62</sup> Defined in paragraph 1(oo) of the Settlement Order as the amount which the Chapter 7 Trustee, Gabriel and the Ad Hoc Committee agree, or the Court may order in the absence of such an agreement, be retained as reasonably necessary for the continued business operations of the reorganized Debtor, and not transferred to the Liquidating Trust under a Qualified Plan.

<sup>63</sup> Settlement Order, ¶ 5(i). This agreement is subject to a "fiduciary out," which enables Gabriel and any member of the Ad Hoc Committee who may later serve on an official creditors committee in a Chapter 11 phase of this case to vote to have such committee oppose a Qualified Plan or support a



Settlement and a blueprint for a Chapter 11 plan that both of these constituencies would support, is not binding on the Chapter 7 Trustee or any other party in interest who may seek in the future to file a plan that is not a Qualified Plan. The Chapter 7 Trustee believes that Gabriel and the Ad Hoc Committee are to be commended for their foresight in anticipating and addressing in such detail the possibility that this case may be converted and that additional value not presently available to creditors may be created through a Chapter 11 plan.<sup>64</sup> This approach serves a primary underlying goal of the comprehensive Global Settlement -- to minimize the likelihood of further litigation and the associated costs and delays.

K. **Authority to Make Further Interim Distributions on Negative Notice, Without Necessity of Hearing.**

57. Once the issues addressed in the Global Settlement are resolved, paragraph 14 of the Settlement Order provides for the Chapter 7 Trustee to make further Interim Distributions of Postpetition Interest on negative notice under Local Rule 9013-1(D), without necessity of individual hearing on each such Distribution.<sup>65</sup> The Notice to be provided in respect of each such Distribution is required to specify the amount of that Distribution payable on a pro rata basis to the holders of Subordinated

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Chapter 11 plan that is not a Qualified Plan; provided, however, that notwithstanding such vote neither Gabriel, any member of the Ad Hoc Committee, nor their respective counsel may propose, support, solicit acceptances for or vote for a plan that is not a Qualified Plan.

<sup>64</sup> It is for this reason that the Settlement Order is intended to remain binding on the Settlement Parties and their successors and assigns even in the event the case is converted to a case under Chapter 11. Settlement Order, ¶15, 16.

<sup>65</sup> The request to invoke the Local Rule on negative notice applies to future Interim Distributions only, and not to the Final Distribution the Chapter 7 Trustee will make following a final allowance of Trustee and professional fees and expenses and the filing of a Final Report.

Notes, and the portion of the amount to be reallocated and distributed to the Senior Indenture Trustee under the mechanism created in the Settlement Order.

58. The formal requirement that the Court approve interim distributions under Fed.R.Bank.P. 3009 was deleted by amendment in 1993. By that time, however, the predecessor Trustee had already sought and obtained Court approval to commence the First Interim Distribution under the former version of the Rule. In light of that precedent, as well as the need to establish and implement special procedures for the Third, Fourth and Fifth Interim Distributions based on the pendency of the Debt Securities Litigation,<sup>66</sup> the Chapter 7 Trustee and his predecessors have continued the practice of seeking Court approval for each successive Interim Distribution, on notice and hearing.

59. Given the comprehensive terms of the Settlement Order and the broad notice to be afforded of its terms, the Global Settlement contemplates that future Interim Distributions of Postpetition Interest can and should proceed on negative notice. As required by Local Rule 9013-1(D), the Notice would bear a bold, capitalized legend advising that absent the filing of a formal written Objection within twenty days, with copies to be served on the Chapter 7 Trustee, his counsel, and counsel for the Senior and Subordinated Interim Trustees, the Ad Hoc Committee and Gabriel,<sup>67</sup> the Chapter 7 Trustee would submit an Order approving the Interim Distributions as described in the Notice.

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<sup>66</sup> See notes 4, 7 *supra*.

<sup>67</sup> If an Objection is timely filed, the Chapter 7 Trustee would undertake responsibility to serve copies of that Objection and a Notice of Hearing on all parties in interest on the Master Service List.

60. The Chapter 7 Trustee believes that the foregoing negative notice procedure for future Interim Distributions of Postpetition Interest is good and sufficient in the circumstances of this case, and within the contemplation and spirit of Local Rule 9013-1(D). The negative notice feature also avoids both the expense and delay associated with formal notice and hearing, and the piecemeal litigation or re-litigation of issues that the Chapter 7 Trustee proposes for the Court to address and resolve in the context of the instant Motion. Of course, should the Chapter 7 Trustee determine based on the pendency of any appeal, or for any other reason, that formal notice and hearing are necessary and appropriate, then the streamlined negative notice procedures described above would not be utilized.

#### **LEGAL STANDARD FOR APPROVAL OF SETTLEMENT**

61. The approval of any proposed settlement is a matter within the sound discretion of the bankruptcy court. *In re Jackson Brewing Co.*, 624 F.2d 599 (5<sup>th</sup> Cir. 1980); *In re Teltronics Servs., Inc.*, 762 F.2d 185 (2d Cir. 1985); *In re Prudence Co.*, 98 F.2d 599 (2d Cir. 1938), *cert. denied* 306 U.S. 636 (1939).

62. To exercise this discretion properly, the Court must consider all of the relevant facts and evaluate whether the proposed compromise falls below the "lowest point in the range of reasonableness." *See, e.g., Teltronics Servs.*, 762 F.2d at 189; *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983). In a case which remains binding authority in this Circuit, the former Fifth Circuit Court of Appeals stated as follows:

To assure a proper compromise, the bankruptcy judge must be apprised of all the necessary facts for an intelligent, objective and educated evaluation. He must compare the terms of the compromise with the likely rewards

of litigation [and] evaluate and set forth in a comprehensible fashion:

- (1) The probability of success in the litigation, with due consideration for the uncertainty in fact and law,
- (2) The complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and
- (3) All other factors bearing on the wisdom of the compromise.

*Jackson Brewing Co.*, 624 F.2d at 602 (citation omitted).

63. The third element has been interpreted to include the following factors:

- the proportion of the creditors who do not object to or who affirmatively support the proposed settlement;
- the relative benefits to be received;
- the nature and breadth of releases to be issued as a result of the settlement; and
- the extent to which the settlement is truly the product of arms' length bargaining and not the product of fraud or collusion.

*In re Best Products Co.*, 168 B.R. 35, 50 (Bankr. S.D.N.Y. 1994) (citing *In re Fugazy*, 150 B.R. 103, 106 (Bankr. S.D.N.Y. 1993)). Consideration of each of these factors leaves no question that the proposed settlement is in the best interests of the estate and creditors and should be approved.

#### Probability of Success and Uncertainty In Fact and Law

64. Because most if not all of the legal issues raised in the Postpetition Interest Motion are of first impression in this Circuit and appear to be unsettled in other Circuits as well, the outcome of that Motion is entirely unpredictable. What is certain, however, is that there will be litigation – likely for several more years – if these issues

are not resolved by entry of the Settlement Order. Because the Chapter 7 Trustee stands as a mere stakeholder in respect of most of the vexing issues between the Senior and Subordinated Note interests, "success" from the standpoint of the estate in this instance is best measured in avoiding the additional expense and delay of further litigation so that the case be closed expeditiously. To their credit, the Settlement Parties have worked despite little guidance from prevailing law to fashion a compromise that eliminates and resolves the considerable uncertainty surrounding the many issues addressed in the Global Settlement.

#### Complexity, Likely Duration and Expense of the Litigation

65. The complexity of the novel and unsettled legal issues in dispute, together with the substantial amount of money involved, virtually guarantees that, like the Debt Securities Litigation, resolution of the Postpetition Interest Motion and Chase/Gabriel Appeal will span several more years and require further appeals to the Eleventh Circuit. For these reasons - - and in light of the fact that the Chapter 7 Trustee has now resolved virtually all of the other issues and disputes that heretofore have required this case to remain pending - - the likely duration and expense of the litigation are the most significant factors in assessing the benefits of the proposed settlement. The Global Settlement will provide a substantial benefit to the estate and creditors of far greater value than years of contentious litigation and appeals, and approval of the Global Settlement is reasonable and in the best interests of the estate. This is particularly so in light of the fact that based on the attorneys fee provisions in the various Indentures, it is the *estate* that would be asked to bear the cost of that further litigation.

### Creditor Support and Lack of Opposition

66. The Global Settlement is the product of lengthy and extensive negotiations conducted primarily between Gabriel and the Ad Hoc Committee. Upon information and belief, the Senior Noteholders and Subordinated Noteholders (whose respective interests are advocated by Gabriel and the Ad Hoc Committee), collectively hold approximately 85% of the aggregate unsecured debt of the estate.<sup>68</sup> The other creditors hold a variety of other unsecured claims, some of which are disputed and/or untimely filed. In most respects the Global Settlement leaves the rights of those other creditors intact and unimpaired, and it relieves those parties of the risk of additional claims against the estate that would result from years of continued litigation over the matters that will be resolved as a part of the Global Settlement. The Settlement Parties have clearly been the most active and vocal participants in this case for the past several years, and the Chapter 7 Trustee anticipates little if any opposition to the proposed Global Settlement.

### Relative Benefits to be Received

67. The benefit flowing to the estate and creditors from the proposed settlement is immediate and substantial. Approval of the Global Settlement will avoid the significant expense and delay caused by years of intense litigation and appeals between Gabriel and the Ad Hoc Committee (and between the Senior and Subordinated Indenture Trustees), thereby accelerating the Distributions of Postpetition Interest on all Qualified Claims and, ultimately, closure of this case. The Settlement Order resolves all

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<sup>68</sup> Upon information and belief, Gabriel and the Ad Hoc Committee collectively control approximately \$325 million of the total undisputed debt of approximately \$375 million.

of the issues raised in the Postpetition Interest Motion and the Chase/Gabriel Appeal, and will govern future Distributions for the remainder of this case, whether it remains in Chapter 7 or is converted to Chapter 11.

#### Nature and Breadth of Releases to Be Issued

68. The Global Settlement does not provide for the issuance or exchange of any releases between and among any of the Settlement Parties. The Settlement Order does provide, however, that except for the various reallocation provisions described in that Order, Chase and the holders of the Senior Notes, on the one hand, and the Subordinated Indenture Trustees and holders of Subordinated Notes, on the other hand, will have no further rights against one another in respect of any of the contractual subordination provisions contained in the Subordinated Notes and Indentures.<sup>69</sup> The Global Settlement also provides for the release of certain claims for attorneys' fees and expenses and indenture trustee fees and expenses against the estate, and the payment of certain claims for attorneys' fees and expenses against the estate. As explained above, the Global Settlement also calls for withdrawal of the Chase/Gabriel Appeal, which effectively operates as a release and waiver of the pending claim by Gabriel for postpetition attorneys' fees from the estate.

#### Arms' Length Bargaining Without Fraud or Collusion

69. The proposed settlement reflects the culmination of difficult, lengthy and extensive negotiations between and among the Settlement Parties relating to a host of complex and unsettled issues raised by the Chapter 7 Trustee's intention to make

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<sup>69</sup> Settlement Order, ¶16. See n.14, *supra*.

Distributions in respect of Postpetition Interest under Section 726(a)(5). All of the Settlement Parties are sophisticated members of the insolvency community who have been involved in this bankruptcy case for several years and are represented by experienced counsel. The Global Settlement is unquestionably the product of arms' length bargaining between the parties; the negotiations were in no way tainted by fraud, collusion, nor any other factor which would dictate against approval of the proposed settlement in its entirety.

70. Moreover, having dealt extensively with each of the Indenture Trustees and/or their counsel on a multitude of issues over the past year, the Trustee believes and avers that in connection with the proposed Global Settlement, Chase and the Subordinated Indenture Trustees have each acted to fulfill their fiduciary responsibilities under their respective Indentures and applicable law and, consistent therewith, have used the same degree of care and skill as a prudent man would exercise or use in the conduct of his own affairs in the circumstances of this case.

71. In making its evaluation of the foregoing factors and in its analysis of the proposed settlement as a whole, the Court need not finally resolve all of the ultimate factual and legal issues underlying the disputes proposed to be compromised. *Teltronics Servs., Inc.*, 762 F.2d at 189. In another former Fifth Circuit Court of Appeals decision which remains binding in this Circuit, the Court stated:

Of course, the approval of a proposed settlement does not depend upon establishing as a matter of legal certainty that the subject claim or counterclaim is or is not worthless or valuable. The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. But the very



uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Parties would be hesitant to explore the likelihood of settlement apprehensive as they would then be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and hence no basis for a compromise.

*Florida Trailer and Equip. Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960) (emphasis added).

72. Thus, this Court need not resolve each discrete disputed matter in determining the propriety of this comprehensive and multi-faceted settlement; rather, the Court should make a pragmatic decision based on all of the relevant factors. In reaching this pragmatic decision, the Court "may credit and consider the opinion of counsel that the settlement is fair and equitable." *Best Products*, 168 B.R. at 51 (citing *In re Purified Down Prods. Corp.*, 150 B.R. 519, 522 (S.D.N.Y. 1993)). It is the strong and unanimous opinion of all counsel involved in the negotiations that the proposed settlement is fair and equitable and in the best interests of the estate and creditors, and produces a higher and more immediate benefit than could reasonably be expected through further litigation of the Postpetition Interest Motion and Chase/Gabriel Appeal, as well as the litigation of other disputed matters that will likely arise if the settlement is not approved.

### CONCLUSION

73. For all of the foregoing reasons, the Chapter 7 Trustee respectfully requests that the Court approve the Global Settlement and enter the Settlement Order.

WHEREFORE, the Chapter 7 Trustee respectfully requests that the Court enter the Settlement Order in the form annexed to this Motion as Exhibit A.

I hereby certify that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this court set forth in Local Rule 2090-1(A).

Dated: July 3, 2003.

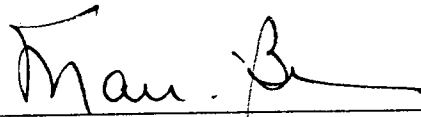
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Motion have been served on all persons identified on the attached Service List via U.S. Mail, postage prepaid, this 3rd day of July, 2003.

  
\_\_\_\_\_  
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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
(FORT LAUDERDALE DIVISION)

In re )  
 ) Chapter 7  
SOUTHEAST BANKING CORPORATION, )  
 ) Case No. 91-14561-BKC-PGH  
Debtor. )  
\_\_\_\_\_ )

**[PROPOSED]**  
**ORDER APPROVING AND IMPLEMENTING GLOBAL SETTLEMENT OF ISSUES**  
**AFFECTING CALCULATION AND PAYMENT OF POST PETITION INTEREST AND**  
**ATTORNEYS' FEES AND RELATED PRIORITY AND SUBORDINATION ISSUES,**  
**AND PROCEDURE FOR INTERIM DISTRIBUTIONS OF POST PETITION INTEREST**  
**ON NEGATIVE NOTICE WITHOUT HEARING**

THIS CAUSE came before the Court for hearing in Fort Lauderdale on \_\_\_\_\_,  
\_\_\_\_\_, 2003 at \_\_\_\_\_ a.m./p.m., upon the Trustee's Motion for Entry of  
Order Approving and Implementing Global Settlement of Issues Affecting Calculation  
and Payment of Post Petition Interest and Attorneys' Fees and Related Priority and  
Subordination Issues, and Procedure for Interim Distributions of Post Petition Interest  
on Negative Notice Without Hearing (C.P. \_\_\_\_\_) (the "Settlement Motion"), filed by  
Jeffrey H. Beck, in his capacity as Chapter 7 Trustee (the "Trustee") for the estate of  
Southeast Banking Corporation (the "Debtor").

By way of the Settlement Motion, the Trustee seeks approval of a comprehensive  
global settlement of issues pending before this Court and an appeal to the District  
Court, as well as other issues that may arise between and among various parties in  
interest in this case.

**EXHIBIT A**

The Court having read and considered the Settlement Motion [and all Responses and Objections thereto], heard the remarks and argument of counsel for the Trustee and other parties in interest, and otherwise been duly advised in the premises, finds and determines as follows:<sup>1</sup>

A. The Court has jurisdiction over proceeding commenced by the filing of the Settlement Motion, pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O), and the statutory predicates for the requested relief are 11 U.S.C. §§ 105, 502, 503 and 726.

B. On or about March 25, 2002, the Trustee filed the "Motion to Fix Interest Rate, Determine Applicability of Contractual Subordination Provisions and Statutory Priority Scheme, Establish Method for Calculation and Payment of Post-Petition Interest Under 11 U.S.C. Section 726(A)(5), and Authorize Procedure for Interim Distributions of Post-Petition Interest on Negative Notice Without Hearing" (the "Postpetition Interest Motion"). Responses to the Postpetition Interest Motion were filed by Chase (in which Gabriel Capital joined); the Subordinated Indenture Trustees and the Ad Hoc Committee.

C. On or about January 25, 2001, Gabriel Capital (as defined below) filed the "Motion, and Memorandum of Law in Support Thereof, to Fix and Allow a Claim for Post-Petition Attorneys' Fees and Costs," in which Chase joined (the "Chase/Gabriel

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<sup>1</sup> All capitalized terms used but not otherwise defined in the findings and determinations set forth in paragraphs A through K below have the respective meanings ascribed to them in paragraph 1 of this Order.

Motion"). Objections to the Chase/Gabriel Motion were filed on behalf of the Subordinated Indenture Trustees, the Trustee, and the Ad Hoc Committee.

D. On or about March 7, 2002, the Court issued its "Memorandum Decision and Order Denying Motion of Gabriel Capital, L.P. and The Chase Manhattan Bank to Fix and Allow a Claim for Post-Petition Attorneys' Fees and Costs" (the "Chase/Gabriel Order"). Chase and Gabriel have appealed from the Chase/Gabriel Order (the "Chase/Gabriel Appeal"), and such appeal has been perfected and is currently pending before the United States District Court for the Southern District of Florida (the "District Court").

E. Subsequent to the filing of the Chase/Gabriel Appeal, the Postpetition Interest Motion, and the various responses to said Motion, the Ad Hoc Committee, Gabriel, Chase and the Trustee agreed to the settlement of the various disputes which are the subject of the Chase/Gabriel Appeal, the Postpetition Interest Motion and the various responses to such Motion (such settlement being sometimes hereafter referred to as the "Global Settlement"), and Chase and the Subordinated Indenture Trustees determined not to object to such settlement. The terms of the Global Settlement are embodied in this Order, the entry and finality of which are conditions precedent to the effectiveness of the Global Settlement.

F. This Order, and the compromises embodied therein, represent the result of extensive, complex, difficult and prolonged negotiations involving, among others, the Trustee, Gabriel, and the Ad Hoc Committee. The parties desire to avoid the need for any further such negotiations regarding the relative rights of the holders of the Senior Notes (collectively, the "Senior Noteholders") and the holders of the Subordinated Notes

(collectively, the "Subordinated Noteholders") relating to the subordination provisions of the Subordinated Indentures in the event of various future contingencies, including, without limitation, any possible conversion of this case to a Chapter 11 case, and the Court agrees that it is appropriate for the parties to address such relative rights in the event of any such contingency, even if it may be remote, at this time. Accordingly, although no motion to convert this case to a Chapter 11 case has been filed or is pending, and although this Order in no way affects the right of any party in interest to file, support, or oppose any such motion, this Order also addresses certain potential issues that might arise in the event of a conversion to Chapter 11.

G. The provisions of this Order represent a comprehensive and integrated compromise of various issues relating to the Chase/Gabriel Appeal and the Postpetition Interest Motion, the terms of which compromise are mutually interdependent and nonseverable.

H. Notice of the proposed Global Settlement which is the subject of this Order and the proposed entry of this Order was given pursuant to this Court's Order Approving Procedures and Form of Notice, Etc., entered on \_\_\_\_\_, 2003 (the "Notice Order"), as follows:

(1) by U.S. mail to the last known addresses of the 777 known Holders of the U.S. Notes, as defined hereinafter;

(2) by publication of the Court-approved form of Notice in the London Financial Times and the Luxembourg Wort; and

(3) by U.S. mail to all persons and entities having appeared of record in this case and requested notice of any proceedings herein.

As set forth in the foregoing notices, parties in interest were afforded forty-five (45) days from entry of the Notice Order within which to serve and file responses or objections to the Settlement Motion, and advised of the date, time and place of the hearing before the Court.

Such notice and the opportunity to object to and be heard on the proposed Global Settlement and the entry of this Order are appropriate in the particular circumstance of this case, the Global Settlement and the related disputes; and such notice and opportunity for a hearing given to all parties in interest with respect to the Global Settlement and this Order are fair and reasonable and comply in all respects with all applicable requirements of the Local Rules of Bankruptcy Procedure, the Bankruptcy Code, the Bankruptcy Rules, and the United States Constitution.

I. By Order dated August 27, 2002, District Judge Donald Graham relinquished jurisdiction in the Chase/Gabriel Appeal for the sole and limited purpose of enabling this Court to conduct proceedings relating to consideration of the Settlement Motion, including the entry of the Notice Order.

J. [No party has objected to the proposed settlement embodied in this Order or to the entry of this Order] [Objections to the proposed settlement and the entry of this Order have been received from \_\_\_\_\_].

K. The Global Settlement, the entirety of which is embodied in the adjudicative portion of this Order below, constitutes a full and final resolution of the Postpetition Interest Motion and the Responses thereto, the Chase/Gabriel Appeal, and all issues raised by any or all of the foregoing. Accordingly, it is

ORDERED, ADJUDGED and DECREED as follows:

1. Definitions. All capitalized terms used in this Order that are not otherwise defined in this Order shall have the meanings specified in the Postpetition Interest Motion. All capitalized terms used in the foregoing findings and determinations of this Order shall have the meanings set forth in such findings and determinations. In addition, as used herein, the following terms shall have the following meanings:

a. "Ad Hoc Committee" means the Ad Hoc Committee of Subordinated Noteholders formed in the Debtor's Chapter 7 case, which consists of the following entities: Elliott Associates, L.P.; Stonehill Investment Group and Mariner Investment Group, Inc., which entities collectively own the majority of the Subordinated Notes.

b. "Administrative Claim" means any claim of the type described in section 507(a)(1) of the Bankruptcy Code, but only to the extent that such claim is allowed or awarded by this Court and becomes due and payable.

c. "Base Senior Note Interest Distribution," as determined at the time of any Distribution under this Order, means the aggregate amount of the Postpetition Interest that would have been distributed to the Senior Indenture Trustee for the benefit of holders of Senior Notes, under such Distribution and all prior Distributions as their Pro Rata Interest Fraction of all such Distributions, as determined under the provisions of paragraphs 2 and 3 of this Order, before giving effect to the FDIC Subordination Provisions or the provisions of paragraphs 4 and 5 of this Order.

d. "Base Subordinated Notes Interest Distribution," as determined for any Distribution or Distributions under this Order, means the aggregate amount

of the Postpetition Interest that would have been distributed to the Subordinated Indenture Trustees, for the benefit of holders of Subordinated Notes, under such Distribution or Distributions, as their Pro Rata Interest Fraction of such Distribution or Distributions, as determined under the provisions of paragraphs 2 and 3 of this Order, before giving effect to the FDIC Subordination Provisions or the provisions of paragraphs 4 and 5 of this Order.

e. "BNY" means the Bank of New York, in its capacity as Indenture Trustee under the 1972 Indenture and the 1989 Indenture.

f. "Chapter 11-Attributable Distribution" means, in the event that (i) this Chapter 7 case is converted to a case under Chapter 11 of the Bankruptcy Code; and (ii) creditors receive any Distributions under a Chapter 11 Plan for the Debtor, a distribution representing all or part of the amount by which (x) the aggregate value of the Distributions received by holders of Qualified Claims under the confirmed plan (valued as of the Plan Effective Date) exceeds (y) the aggregate value of the remaining Distributions which they would have received (valued as of the Plan Effective Date) had the case remained a Chapter 7 case on the Plan Effective Date, taking into account, among other factors, all Chapter 11 Costs. By way of illustration only, and not limitation, if the confirmation of a Chapter 11 Plan resulted in the creation of \$10,000,000 in additional distributable value over and above that which would have been available in the Chapter 7 case, but the Chapter 11 Costs aggregate \$3,000,000, then (a) the Chapter 11 Attributable Distribution would total \$7,000,000 of the \$10,000,000 in additional value (the \$10,000,000 in additional value less the \$3,000,000 in Chapter 11

Costs), not the full \$10,000,000 in additional value; and (b) the first \$3,000,000 of the \$10,000,000 in additional value would be distributed in accordance with paragraphs 2-4, inclusive, of this Order.

g. "Chapter 11 Costs" means, in the event that (i) the Debtor's Chapter 7 case is converted to a case under Chapter 11 of the Bankruptcy Code; and (ii) creditors receive any Distributions under a Chapter 11 Plan for the Debtor, all additional professional fees and expenses, other costs and other claims incurred in or in anticipation of the Chapter 11 case which would not have been incurred in the Chapter 7 case but for the conversion or possible conversion to Chapter 11, including, without limitation, expenditures made by the Debtor's estate or that constitute administrative expenses under §503(b) of the Bankruptcy Code or are required to be paid under §507(a)(1) or §1129(a)(9)(A) of the Bankruptcy Code, that were incurred or made from and after May 1, 2002, to investigate or evaluate matters relating to the use of the Debtor's net operating loss carry forwards, or that were incurred or made in anticipation of, to evaluate the potential benefits of, or subsequent to, or are otherwise related to, the conversion of this case to a case under Chapter 11 of the Bankruptcy Code or the confirmation of a Chapter 11 Plan.

h. "Chapter 11 Plan" means, in the event that this case may be converted to a case under Chapter 11, a plan of liquidation or reorganization for the Debtor confirmed by the Court under 11 U.S.C. § 1129.

i. "Chase" or "Senior Indenture Trustee" means JPMorgan Chase Bank f/k/a The Chase Manhattan Bank, as successor by merger to



Manufacturers Hanover Trust Co., in its capacity as the Indenture Trustee under the Senior Indenture. Any reference to a distribution or other payment being made "to the Senior Indenture Trustee" shall mean a distribution or payment "to the Senior Indenture Trustee, for the benefit of holders of Senior Notes."

j. "Chase/Gabriel Appeal" and "Chase/Gabriel Order" have the meanings set forth in paragraph D of this Order.

k. "Chase/Gabriel Motion" has the meaning set forth in paragraph C of this Order.

l. "Deemed Jacksonville Net Sale Proceeds" means, in the event that this Chapter 7 case is converted to a Chapter 11 case and a Qualified Plan is confirmed, the appraised value of the Jacksonville Property as of the Jacksonville Determination Date (as determined on or after the Jacksonville Determination Date by an appraiser selected jointly by the Ad Hoc Committee and Gabriel or, if they cannot agree on an appraiser, by an appraiser selected by the Trustee from four candidates, two of whom are submitted by each of the Ad Hoc Committee and Gabriel); in all cases: (i) such appraiser shall have been selected prior to the Jacksonville Determination Date, and (ii) if the Ad Hoc Committee or Gabriel fails to submit its two candidates on or before the 30<sup>th</sup> day prior to the Jacksonville Determination Date, such party shall be deemed to have waived its right to submit two candidates, and the Trustee shall select the appraiser from the two candidates submitted by the party that made a timely submission), less the cost of owning, maintaining, improving and developing the Jacksonville Property from the Plan Effective Date until the Jacksonville Determination Date, and less the

costs (such as brokerage commissions) that would be incurred in selling the Jacksonville Property on the Jacksonville Determination Date.

m. "Distribution" means each distribution to holders of Qualified Claims on account of Postpetition Interest made from and after the date of this Order, all of which Distributions shall be governed by the terms of this Order.

n. "FDIC Claim" means the proof of claim filed on behalf of American Pioneer Federal Savings Bank in receivership of Resolution Trust Corporation consisting of the "Proof of Claim of American Pioneer Federal Savings Bank in Receivership of Resolution Trust Corporation (10.64% Subordinated Note due 2001)," which claim is based upon the FDIC Subordinated Notes, and any claim asserted in such proof of claim, as such claim may be or may have been amended from time to time, and any other claim based on the FDIC Subordinated Notes.

o. "FDIC Notes Fraction" means that fraction which results from subtracting the Subordinated Notes Fraction from one.

p. "FDIC Notes Fraction Shortfall" has the meaning set forth in Paragraph 4(b)(iv) of this Order.

q. "FDIC Postpetition Interest Claim" means the amount of the Postpetition Interest on the FDIC Claim, calculated at the Legal Rate through May 31, 2002, in accordance with the provisions of paragraphs 2 and 3 of this Order, before giving effect to any other provisions of this Order or the FDIC Subordination Provisions, which amount would be \$13,877,424 if the FDIC Claim were allowed in full.

r. "FDIC Subordinated Notes" means the following notes, copies of which are appended to the FDIC Claim:

(i) that certain note entitled "Southeast Banking Corporation 10.64% Subordinated Note due 2001," dated December 28, 1989, in the principal amount of \$3.5 million, which is designated as "No. 1," purportedly issued by the Debtor; and

(ii) that certain note entitled "Southeast Banking Corporation 10.64% Subordinated Note due 2001," dated December 28, 1989, in the principal amount of \$18.6 million, which is designated "No. 2," purportedly issued by the Debtor.

s. "FDIC Subordination Provisions" means any and all provisions of the FDIC Subordinated Notes or any related documents, or any other contractual provisions, which provide for the subordination of all or any portion of the FDIC Subordinated Notes or the FDIC Claim, including, without limitation, the provisions of Article Seven, entitled "Subordination of Securities" of each of the FDIC Subordinated Notes, as set forth in sections 701 through 705, inclusive, of each of the FDIC Subordinated Notes.

t. "Final Order" means an order entered by this Court (or any court of competent jurisdiction) as to which no appeal, petition for certiorari, or other proceeding for reargument or rehearing may be timely filed or is then pending or, in the event that an appeal, writ of certiorari, or reargument or rehearing thereof has been sought, such order or judgment has been affirmed by the highest court to which such order or judgment was appealed, or certiorari, reargument, or

rehearing has been denied, and the time to take any further appeal, petition for certiorari, or move for reargument or rehearing shall have expired, excluding any motions, rehearings or other actions taken pursuant to or under Federal Rule of Civil Procedure 60(b) or Federal Rule of Bankruptcy Procedure 9024.

u. "48% Guarantee Reserve" has the meaning set forth in paragraph 4(b)(ii) of this Order.

v. "Gabriel" or "Gabriel Capital" means Gabriel Capital L.P., a Delaware limited partnership which owns, manages funds which own, and/or is the general partner of partnerships that own, a majority of the Senior Notes, and any entities affiliated with or under common control with Gabriel Capital.

w. "Indenture Trustees" means Chase and the Subordinated Indenture Trustees.

x. "Jacksonville Determination Date" means the date which is 18 months following the Plan Effective Date of a Qualified Plan.

y. "Jacksonville Property" means the interests currently owned by various non-debtor subsidiaries of the Debtor's estate in certain parcels of real property located in Jacksonville, Florida and more particularly described as follows: (i) the Southwest Quadrant Property, consisting of (x) a 20-acre parcel of vacant land owned by Southeast Properties, Inc. ("SEPI"), a non-debtor wholly owned subsidiary of the Debtor's estate, and (y) a 174-acre parcel owned 50% by SWQ Holdings, Inc. ("SWQ"), a non-debtor subsidiary wholly owned by the estate, and 50% by an unrelated joint venture in which the Debtor's estate has no interest, but in respect of which parcel SEPI and SWQ hold the right to receive

70% from the proceeds of any sale; and (ii) approximately 7.3 acres of vacant land owned by Second Pioneer Corporation, a non-debtor subsidiary wholly owned by the estate;

z. "Legal Interest" or "Legal Rate" means simple interest at the rate of 5.57% per annum, without compounding of any type.

aa. "Liquidating Trust" means the liquidating trust that will receive all property of the Debtor's estate and any interest earned thereon, other than any trade names, trademarks, customer lists and similar intellectual property and proprietary business information and the Retained Cash, and which also might not receive the Jacksonville Property (but would, in such event, receive the net proceeds and net income relating to the Jacksonville Property as provided herein and, if applicable, the note referred to in clause (v) of paragraph 1(mm) of this Order), under a Qualified Plan.

bb. "1972 Indenture" means the Indenture dated as of October 15, 1972, between the Debtor and Morgan Guaranty Trust Co. of New York, as Trustee, for \$35 million in original principal amount of 4-3/4% Convertible Subordinated Debentures due 1997.

cc. "1984 Indenture" means that certain Indenture between the Debtor and Morgan Guaranty Trust Co. of New York, as Trustee, dated as of December 1, 1984, for \$75 million in original principal amount of Floating Rate Subordinated Notes due 1996.

dd. "1985 Indenture" means that certain Indenture between the Debtor and Morgan Guaranty Trust Co. of New York, as Trustee, dated as of

November 1, 1985, for \$75 million in original principal amount of Floating Rate Subordinated Capital Notes due 1997.

ee. "1987 Indenture" means that certain Indenture between the Debtor and Morgan Guaranty Trust Company of New York, dated as of April 1, 1987 for \$50 million in original principal amount of 6½% Subordinated Capital Notes Due 1999.

ff. "1989 Indenture" means that certain Indenture between the Debtor and Irving Trust Co., as Trustee, dated as of March 15, 1989, for Subordinated Debt Securities.

gg. "Petition Date" means September 20, 1991.

hh. "Other Distributions" has the meaning set forth in clause (vii) of the definition of "Qualified Plan."

ii. "Plan Effective Date" means the effective date of a confirmed Chapter 11 plan for the Debtor, in the event that this Chapter 7 case is converted to a Chapter 11 case and a Chapter 11 plan for the Debtor is confirmed.

jj. "Postpetition Interest" means interest on any claim which accrues or is calculated for the period from and after the Petition Date.

kk. "Pro Rata Interest Fraction" means, as to each Qualified Claim, that fraction, the numerator of which is Postpetition Interest at the Legal Rate on such Qualified Claim calculated through May 31, 2002, and the denominator of which is the aggregate amount of all Postpetition Interest at the Legal Rate on all Qualified Claims calculated through May 31, 2002, in each case as calculated in accordance with the provisions of paragraphs 2 and 3 of this order.

II. "Qualified Claim" means any claim of the type described in any of sections 726(a)(1)-(4), inclusive, of the Bankruptcy Code, which is entitled to the payment of interest from the Petition Date under section 726(a)(5) of the Bankruptcy Code.

mm. "Qualified Plan" means a Chapter 11 Plan for the Debtor which provides that:

(i) all property of the Debtor's estate (as defined in 11 U.S.C. § 541) and interest earned thereon, other than the Jacksonville Property [(or the non-debtor subsidiaries which own the Jacksonville Property)] (which may but need not be included in the Liquidating Trust), any trade names, trademarks, customer lists and similar intellectual property and proprietary business information and the Retained Cash will be transferred to the Liquidating Trust on the Plan Effective Date;

(ii) all costs of administration will be paid by the Liquidating Trust out of assets transferred to the Liquidating Trust under the preceding clause (i);

(iii) to the extent that the costs of administration paid by the Liquidating Trust under the preceding clause (ii) constitute Chapter 11 Costs, the Liquidating Trust shall be reimbursed as follows: there shall be transferred to the Liquidating Trust, out of any cash, securities or other property not transferred to the Liquidating Trust under the preceding clause (i) which is to be distributed to the holders of Qualified Claims under the Chapter 11 Plan ("Other Property"), an amount of cash and, to the extent that the Other Property includes insufficient

cash, non-cash assets, with a value (as determined, in the case of non-cash assets, in accordance with the provisions of paragraphs 5(e)-(h), inclusive, of this Order) equal to the amount of the Chapter 11 Costs paid by the Liquidating Trust. If any non-cash assets are to be included in the Other Property to be transferred to the Liquidating Trust under this clause (iii) and consist of more than one type of property (with the different types of property including, without limitation, different types of securities), the non-cash assets to be transferred to the Liquidating Trust from the Other Property under this clause (iii) shall include that percentage of each type of non-cash asset included in the Other Property which is equal to the percentage of the aggregate value of all of the non-cash assets comprising Other Property which is to be transferred to the Liquidating Trust.

(iv) if, rather than transferring the Jacksonville Property (or the non debtor subsidiaries which own the Jacksonville Property) to the Liquidating Trust, the Debtor instead retains the Jacksonville Property and such non-debtor subsidiaries after the effective date of the Chapter 11 Plan, and the Jacksonville Property is sold on or before the Jacksonville Determination Date (it being understood that the Jacksonville Property may be sold during the Chapter 7 case or during the Chapter 11 case and prior to the Plan Effective Date), then all net income earned from the Jacksonville Property until it is sold, and all net proceeds of the sale of the Jacksonville Property, after deducting the cost of owning, maintaining, improving and developing the property from the Plan Effective Date until it is sold, will be paid to the Liquidating Trust (unless the Ad Hoc Committee



and Gabriel agree that a plan which provides for a different distribution of such net proceeds and net income can qualify as a "Qualified Plan");

(v) if neither the Jacksonville Property nor any of the non-debtor subsidiaries which own the Jacksonville Property is transferred to the Liquidating Trust and the Jacksonville Property is not sold on or before the Jacksonville Determination Date, then all net income earned from the Jacksonville Property until the Jacksonville Determination Date will be paid to the Liquidating Trust (unless the Ad Hoc Committee and Gabriel agree that a plan which provides for a different distribution of such net income can qualify as a "Qualified Plan"), and the Reorganized Debtor will issue to the Liquidating Trust a nonrecourse interest-bearing note secured by the Jacksonville Property in a principal amount equal to the Deemed Jacksonville Net Sale Proceeds;

(vi) all Distributions from the Liquidating Trust shall be made to the holders of Qualified Claims in accordance with the provisions of paragraphs 1-4 of this Order, except that: (x) each creditor shall be deemed to have an allowed claim for Postpetition Interest calculated at the rate of 8% per annum, without compounding, through May 31, 2002; and (y) each creditor's share of each Distribution under the plan shall be determined based on a fraction which applies Postpetition Interest at the rate of 8% per annum, rather than at the rate of 5.57% per annum; and

(vii) all other Distributions of cash or other property to the holders of Qualified Claims that are not made from the Liquidating Trust ("Other Distributions") shall be made (x) in accordance with the provisions of paragraphs

1-4 of this Order, to the extent that such Other Distributions do not constitute Chapter 11-Attributable Distributions; and (y) in accordance with the provisions of paragraphs 1-3 and 5 of this Order, to the extent that such Other Distributions constitute Chapter 11-Attributable Distributions, in each case subject to the exceptions contained in subclauses (x) and (y) of the preceding clause (vi); and subject to the irrebuttable presumption that (i) that portion of such Other Distribution which is not a Chapter 11-Attributable Distribution shall be made from the cash included in such Other Distribution (to the extent that such cash is sufficient for that purpose), and shall be made from the non-cash assets included in such Other Distribution only to the extent that the cash included in such Other Distribution is insufficient for that purpose; and (ii) where such Other Distribution includes more than one type of non-cash property (with the different types of non-cash property including, without limitation, different types of securities), the percentage of each type of non-cash property that is deemed to be a Chapter 11-Attributable Distribution shall be the same as the percentage of the total amount of the non-cash property included in such Other Distribution that is determined to be a Chapter 11-Attributable Distribution.

For purposes of applying the foregoing, "net income" earned from the Jacksonville Property shall be computed in accordance with generally accepted accounting principles, and the expenses deducted in determining such net income shall include, without limitation, any interest actually paid on account of debt incurred to finance the cost of owning, maintaining, improving or developing the Jacksonville Property. The "net proceeds" of any sale of the

Jacksonville Property shall be computed by deducting from the gross proceeds of any such sale, any direct costs of sale (including, without limitation, any brokerage commissions) and any costs of owning, maintaining, improving or developing the Jacksonville Property that have not been deducted in computing net income from the Jacksonville Property.

nn. "Reallocated FDIC Distribution" means any distribution (or portion thereof) which would have been made or would be made on account of the FDIC Claim, the FDIC Subordinated Notes or any Postpetition Interest thereon, whether under the terms of this Order, under the terms of any prior order of this Court, or otherwise, in the absence of the FDIC Subordination Provisions, but which is required to be paid over or distributed to the Senior Indenture Trustee, for the benefit of holders of the Senior Notes, or to the holders of Senior Notes, pursuant to the terms of the FDIC Subordination Provisions or the documents underlying the FDIC Claim, or pursuant to agreement between the holder of the FDIC Claim and the Ad Hoc Committee.

oo. "Retained Cash" means, in the event that a Qualified Plan for the Debtor is confirmed, such amount of cash of the Debtor's estate that is held by the estate as of the Plan Effective Date and that does not represent the proceeds of exit financing under such Qualified Plan or other funds that are borrowed under such Qualified Plan, as may be determined by agreement of the Trustee, Gabriel Capital and the Ad Hoc Committee or, absent such agreement, by a Final Order of the Court, to be reasonably necessary for the Reorganized Debtor's

business operations that is not otherwise provided for and that will not be transferred to the Liquidating Trust on the Plan Effective Date.

pp. "Senior Indenture" means the Indenture, dated as of March 1, 1983, between the Debtor and Manufacturers Hanover Trust Co., as Trustee.

qq. "Senior Notes" means the Notes issued under the Senior Indenture.

rr. **[INTENTIONALLY OMITTED]**

ss. "Senior Note Shortfall" means, with respect to each Distribution, the difference between (y) \$12,907,043 and (x) the Base Senior Note Interest Distribution.

tt. "Subordinated Indentures" means, collectively, the 1972 Indenture, the 1984 Indenture, the 1985 Indenture, the 1987 Indenture, and the 1989 Indenture.

uu. "Subordinated Indenture Trustees" means, collectively, BNY and U.S. Bank. Any reference to a distribution or other payment being made "to the Subordinated Indenture Trustees" shall mean a distribution or payment "to the Subordinated Indenture Trustees, for the benefit of holders of Subordinated Notes."

vv. "Subordinated Notes" means the notes issued by the Debtor under each of the Subordinated Indentures.

ww. "Subordinated Notes Fraction" means that fraction, the numerator of which is the Subordinated Notes Postpetition Interest Claim, and the denominator of which is the sum of the Subordinated Notes Postpetition Interest Claim and the FDIC Postpetition Interest Claim.

xx. "Subordinated Notes Fraction Shortfall" has the meaning set forth in Paragraph 4(b)(iii) of this Order.

yy. "Subordinated Notes Postpetition Interest Claim" means the aggregate amount of the Postpetition Interest on the Subordinated Note Claims, calculated at the Legal Rate through May 31, 2002, in accordance with the provisions of paragraphs 2 and 3 of this Order, which aggregate amount is \$105,864,234.

zz. "U.S. Bank" means U.S. Bank National Association, in its capacity as successor Indenture Trustee under the 1984 Indenture, the 1985 Indenture, and the 1989 Indenture.

aaa. "U.S. Notes" means the Subordinated Notes issued pursuant to the 1972 Indenture, the 1987 Indenture, and the 1989 Indenture.

Unless otherwise indicated, all references to "paragraphs" herein are to paragraphs of this Order.

2. Computation and Distribution of Postpetition Interest on Qualified Claims.

a. Except as otherwise provided in paragraphs 4, 5, 6 and 7 of this Order, and subject to the effect and enforcement of the FDIC Subordination Provisions, each Distribution with respect to Postpetition Interest on Qualified Claims shall be made ratably to the holders of Qualified Claims, as follows: Each holder of a Qualified Claim shall (subject to the foregoing exceptions) receive its Pro Rata Interest Fraction of each such Distribution. For purposes of calculating the Pro Rata Interest Fraction for each Qualified Claim, Postpetition Interest on each Qualified Claim shall be calculated based on a 365-day year only on the unpaid balance of each Qualified Claim after giving effect

to: (i) the receipt of each interim distribution made by the Trustee on account of allowed claims prior to the date of this Order; and (ii) the receipt of each redirection of each such distribution under principles of subordination or subrogation. In the case of any Administrative Claim, the calculation of interest shall be made by applying the Legal Rate to the unpaid balance of such claim only for the period from and after the date upon which the Administrative Claim is allowed or awarded by a Final Order of the Court, and Postpetition Interest shall not accrue or be calculated for any period prior to such date. Accordingly, and without limiting the foregoing, the calculation of Postpetition Interest on each Qualified Claim shall be made by applying the Legal Rate to the full allowed amount of the Qualified Claim for the number of days from the Petition Date (in the case of all claims other than Administrative Claims) or from the date the claim is allowed and awarded by Final Order of the Court (in the case of Administrative Claims) up to the first payment on that Qualified Claim, and then applying the Legal Rate to the remaining unpaid balance for the number of days up to the second payment on such Qualified Claim, and continuing in the same manner on the successive unpaid balance (or balances) of the Qualified Claim until the allowed amount of the Qualified Claim has been paid in full.

b. In calculating the payment of Postpetition Interest to holders of Senior Notes and Subordinated Notes, principal reductions for the First, Second and Sixth Interim Distributions (as defined and described in the Postpetition Interest Motion and Settlement Motion) will be taken as of the dates shown on checks paid by the Trustee to the Indenture Trustees, and principal reductions for the Third, Fourth and Fifth Interim Distributions (also as defined and described in the Postpetition Interest

Motion and Settlement Motion) will be taken as of the date of the first batch of payments made to individual bondholders for each such Interim Distribution. By way of illustration of the foregoing, and not limitation, Postpetition Interest on the Senior Notes shall cease to accrue as of the date shown on the check paid by the Trustee to the Senior Indenture Trustee under the Second Interim Distribution (as defined and described in the Postpetition Interest Motion and Settlement Motion).

c. Notwithstanding anything to the contrary contained in this Order, except as otherwise specifically ordered by this Court, each Distribution on account of Qualified Claims under the Subordinated Notes or the Subordinated Indentures shall be made to the applicable Subordinated Indenture Trustee, and distributed in accordance with the terms of the applicable Subordinated Indenture (but without reference to the subordination provisions of the Subordinated Indentures), and each Distribution with respect to Qualified Claims under the Senior Notes or the Senior Note Indenture shall be made to the Senior Indenture Trustee, and distributed in accordance with and subject to the terms of the Senior Indenture.

3. Calculations With Respect to Previously Contingent, Disputed, or Unliquidated Claims. With respect to contingent, disputed or unliquidated claims which were settled by the Trustee and the claimant, Postpetition Interest for purposes of applying the Pro Rata Interest Fraction shall be computed as follows: Qualified Claims which were settled by allowance at a negotiated amount shall be entitled to Postpetition Interest using, as the numerator of the Pro Rata Interest Fraction for such Qualified Claim, Postpetition Interest at the Legal Rate on the settlement amount from the Petition Date through date of payment of the settlement amount; provided, however, that in

those instances where the settlement involved the payment of a lump sum to the claimant in full and complete satisfaction of the claim, the Postpetition Interest on such claim shall be deemed to be zero, such claim shall not be deemed a Qualified Claim; and no further distribution of any kind shall be made on such claim. Prior to the first Distribution on account of Postpetition Interest pursuant to the terms of this Order, the Trustee shall file and serve a motion or notice setting forth the intended treatment of each settled claim for purposes of determining whether any Postpetition Interest shall be distributed thereon.

4. Reallocation of Distributions from Subordinated Notes to Senior Notes.

a. Except with respect to any Chapter 11-Attributable Distribution, which shall be governed by paragraph 5 of this Order, after calculating the ratable distribution of Postpetition Interest that would be made to holders of Qualified Claims as part of a Distribution in accordance with paragraphs 2 and 3 of this Order, there shall be paid over to the Senior Indenture Trustee, out of the Base Subordinated Note Interest Distribution that would otherwise have been made to the Subordinated Indenture Trustees out of such Distribution, the lesser of (a) the Base Subordinated Note Interest Distribution made to the Subordinated Indenture Trustees; and (b) that amount which, when added to the aggregate amount of all payments made to the Senior Indenture Trustee out of prior Distributions pursuant to the terms of this paragraph 4 out of amounts that otherwise would have been distributed to the Subordinated Indenture Trustees pursuant to paragraphs 2 and 3 of this Order, totals the Subordinated Notes Fraction of 48% of the Senior Note Shortfall. Such reallocated distributions shall be deemed paid to the Subordinated Indenture Trustees and from the Subordinated



Indenture Trustees to the Senior Indenture Trustee. Provided, however, that if, after giving effect to the Base Senior Note Interest Distribution to be made to the Senior Indenture Trustee as part of any Distribution, the aggregate amount of the payments made to the Senior Indenture Trustee pursuant to this paragraph 4(a) out of amounts that otherwise would have been distributed to the Subordinated Indenture Trustees pursuant to paragraphs 2 and 3 of this Order exceeds the Subordinated Notes Fraction of 48% of the Senior Note Shortfall, such excess shall be paid over to the Subordinated Indenture Trustees from amounts that would otherwise have been paid to the Senior Indenture Trustee as part of such pending Distribution. This reallocation to the Subordinated Indenture Trustees of amounts that would otherwise have been distributed to the Senior Indenture Trustee shall continue in each subsequent Distribution so that, after giving effect to each subsequent Distribution, the aggregate amount of the Base Subordinated Notes Interest Distributions that has been reallocated to the Senior Indenture Trustee under this paragraph 4 shall at no time exceed the Subordinated Notes Fraction of 48% of the Senior Note Shortfall.

b. Notwithstanding anything to the contrary contained in this Order:

(i) Until such time as the allowed amount of the FDIC Claim is determined by a Final Order, the Subordinated Notes Fraction shall be deemed to be .884105, and the FDIC Notes Fraction shall be deemed to be .115895;

(ii) Until such time as a Final Order or Final Orders of this Court or settlement or settlements determining the allowed amount of the FDIC Claim and resolving the enforcement of the FDIC Subordination Provisions have been entered, so that the Subordinated Notes Fraction Shortfall and the FDIC Notes

Fraction Shortfall can be finally determined, and except with respect to any Chapter 11-Attributable Distribution (which shall be governed by paragraph 5 of this Order), the Trustee shall withhold from amounts that would otherwise have been distributed to the Subordinated Indenture Trustees out of each Distribution, and reserve in an interest bearing escrow (the "48% Guarantee Reserve") an amount equal to the lesser of (a) that portion of the Base Subordinated Notes Interest Distribution (if any) that would otherwise have been distributed to the Subordinated Indenture Trustees out of such Distribution after giving effect to the reallocation required by paragraph 4(a) of this Order; and (b) that amount which, when added to all prior payments made to the 48% Guarantee Reserve out of prior Distributions pursuant to the terms of this paragraph 4(b)(ii), totals the FDIC Notes Fraction of 48% of the Senior Note Shortfall. Provided, however, that (x) in no event shall the amount withheld from amounts that would otherwise have been distributed to the Subordinated Indenture Trustees as part of any Distribution, and added to the 48% Guarantee Reserve, exceed the amount necessary to cause the aggregate amount in the 48% Guarantee Reserve to equal the FDIC Notes Fraction of 48% of the Senior Note Shortfall, calculated after giving effect to such Distribution; and (y) In the event that, after giving effect to the Base Senior Note Interest Distribution to be made to the Senior Indenture Trustee as part of any Distribution, the aggregate amount of the payments deposited into the 48% Guarantee Reserve pursuant to this paragraph 4(b)(ii) out of amounts that otherwise would have been distributed to the Subordinated Indenture Trustee pursuant to paragraphs 2 and 3 of this Order exceeds the

FDIC Notes Fraction of 48% of the Senior Note Shortfall, such excess shall be paid over to the Subordinated Indenture Trustees from the 48% Guarantee Reserve, and no further payments shall be made into the 48% Guarantee Reserve. The payment to the Subordinated Indenture Trustees of amounts in the 48% Guarantee Reserve, as provided for in the foregoing proviso, shall continue in each subsequent Distribution so that, after giving effect to each subsequent Distribution, the aggregate amount remaining in the 48% Guarantee Reserve shall at no time exceed the FDIC Notes Fraction of 48% of the Senior Note Shortfall, calculated after giving effect to the latest pending Distribution.

(iii) In the event that, following the entry of a Final Order or settlement determining the allowed amount of the FDIC Claim, the result of calculating the Subordinated Notes Fraction based on such finally allowed amount is that the Subordinated Notes Fraction is greater than .884105, then the amount by which (x) the aggregate amount that would have been paid over to the Senior Indenture Trustee from all prior Distributions pursuant to paragraph 4(a) of this Order, had such greater amount of the Subordinated Notes Fraction been used to calculate the amount to be paid over to the Senior Indenture Trustee pursuant to said paragraph 4(a) exceeds (y) the amount which has, in fact, been paid over to the Senior Indenture Trustee from all prior Distributions pursuant to paragraph 4(a) of this Order (the "Subordinated Notes Fraction Shortfall"), shall be paid to the Senior Indenture Trustee out of the 48% Guarantee Reserve and shall be deemed to have been paid to the Subordinated Indenture Trustees and from the Subordinated Indenture Trustees to the Senior Indenture Trustee;

(iv) In the event that, as a result of any Final Order or settlement resolving the enforcement of the FDIC Subordination Provisions, the aggregate amount of the Reallocated FDIC Distribution will be less than the FDIC Notes Fraction of 48% of the Senior Note Shortfall (as determined following the entry of a Final Order determining the allowed amount of the FDIC Claim), the amount of any such deficiency (the "FDIC Notes Fraction Shortfall") shall be paid to the Senior Indenture Trustee out of the 48% Guarantee Reserve and shall be deemed to have been paid to the Subordinated Indenture Trustees and from the Subordinated Indenture Trustees to the Senior Indenture Trustee;

(v) Following (x) the entry of a Final Order or Final Orders of this Court or a settlement or settlements resolving both the allowed amount of the FDIC Claim and the enforcement of the FDIC Subordination Provisions, and (y) the payment out of the 48% Guarantee Reserve of the amounts required to be paid under the foregoing clauses (iii) and (iv), the Trustee shall promptly distribute any funds remaining in the 48% Guarantee Reserve (including, without limitation, any interest earned thereon) to the Subordinated Indenture Trustees, for the benefit of holders of the Subordinated Notes.

(vi) Notwithstanding anything to the contrary contained in this Order, the aggregate amount paid to the Senior Indenture Trustee out of the 48% Guarantee Reserve pursuant to clauses (iii) and (iv) above shall not exceed the amount which remains after subtracting: (y) the sum of (i) the amount distributed to the Senior Indenture Trustee from the Reallocated FDIC Distribution under clause (i) of Paragraph 7(a) of this Order; and (ii) the amount paid over to the

Senior Indenture Trustee out of the Base Subordinated Note Interest Distribution that would otherwise have been made to the Subordinated Indenture Trustees pursuant to Paragraph 4(a) of this Order, from (x) 48% of the Senior Note Shortfall.

(vii) Notwithstanding anything to the contrary contained in this Order, in the event that, after giving effect to the Base Senior Note Interest Distribution to be made to the Senior Indenture Trustee as part of a Distribution, the sum of (x) the aggregate amount of the payments made to the Senior Indenture Trustee pursuant to Paragraph 4(a) out of amounts that otherwise would have been distributed to the Subordinated Indenture Trustees pursuant to paragraphs 2 and 3 of this Order, plus (y) the amount distributed to the Senior Indenture Trustee from the Reallocated FDIC Distribution under clause (i) of Paragraph 7(a); plus (z) the aggregate amount paid to the Senior Indenture Trustee out of the 48% Guarantee Reserve pursuant to clauses (iii) and (iv) of Paragraph 4(b), exceeds 48% of the Senior Note Shortfall, such excess shall be paid over to the Subordinated Indenture Trustees from amounts that would otherwise have been paid to the Senior Indenture Trustee as part of such pending Distribution. This reallocation to the Subordinated Indenture Trustees of amounts that would otherwise have been distributed to the Senior Indenture Trustee shall continue in each subsequent Distribution so that, after giving effect to each subsequent Distribution, the sum of: (I) the aggregate amount of the payments made to the Senior Indenture Trustee pursuant to Paragraph 4(a) out of amounts that otherwise would have been distributed to the Subordinated Indenture Trustees

pursuant to Paragraphs 2 and 3 of this Order; plus (II) the amount distributed to the Senior Indenture Trustee from the Reallocated FDIC Distribution under clause (i) of Paragraph 7(a); plus (III) the aggregate amount paid to the Senior Indenture Trustee out of the 48% Guarantee Reserve pursuant to clauses (iii) and (iv) of Paragraph 4(b), shall not exceed 48% of the Senior Note Shortfall.

5. Provisions In The Event Of Conversion to Chapter 11 Case and Reallocation of Chapter 11-Attributable Distributions Otherwise Payable to Subordinated Indenture Trustees. This paragraph 5 of this Order is intended to address the contingency that a party might, in the future, file a motion to convert this Chapter 7 case to a Chapter 11 case and that such motion might be granted. However, notwithstanding anything herein to the contrary, nothing contained in this Order is intended or shall be construed to require any party to file or support, or to prevent any party from opposing, a motion to convert this Chapter 7 case to a Chapter 11 case, or to affect, limit or modify the ability of the Court to grant or deny any such motion. If and only if the Debtor's Chapter 7 case is converted to a case under Chapter 11 of the Bankruptcy Code, the following provisions shall apply in such Chapter 11 case for the Debtor:

a. The allowed claim of each creditor in such Chapter 11 case shall include an amount equal to the difference between: (i) the Postpetition Interest on the amount of such creditor's allowed claim in the Chapter 7 case, calculated at the rate of eight percent (8%) per annum (rather than at the rate of 5.57% per annum), without compounding, through May 31, 2002, and (ii) the distribution made to such creditor for Postpetition Interest under all of the terms of this Order prior to the date upon which this

case is converted from a Chapter 7 case to a Chapter 11 case. Each creditor's share of each Distribution under the plan of reorganization in such Chapter 11 case shall be determined on the basis of a fraction which uses interest at the rate of 8% per annum, rather than at the rate of 5.57% per annum, as the rate of Postpetition Interest.

b. In the event that any Distribution is made in such Chapter 11 case which is, in whole or in part, a Chapter 11-Attributable Distribution, only that portion of such Distribution which is not a Chapter 11-Attributable Distribution shall be subject to paragraph 4 of this Order, and that portion of such Distribution which is a Chapter 11-Attributable Distribution shall be subject to the provisions of this paragraph.

c. With respect to any Chapter 11-Attributable Distribution, there shall be paid to the Senior Indenture Trustee, out of the Base Subordinated Notes Interest Distribution that would otherwise have been made to the Subordinated Indenture Trustees out of such Chapter 11-Attributable Distribution, the lesser of: (x) the amount which results from subtracting (i) the Pro Rata Interest Fraction of such Chapter 11-Attributable Distribution that would be distributed to the Senior Indenture Trustee based on a pro rata distribution, as determined under the provisions of paragraphs 2 and 3 of this Order, from (ii) fifty percent (50%) of the aggregate amount of the Pro Rata Interest Fractions of the Chapter 11-Attributable Distribution of the Senior Noteholders and the Subordinated Noteholders that would be distributed to their respective Indenture Trustees for their benefit based on a pro rata distribution, as determined under the provisions of paragraphs 2 and 3 of this Order; and (y) the amount which, when added to the sum of (i) the value of all prior Distributions to the Senior Indenture Trustee out of any Chapter 11-Attributable Distributions (including both those calculated in accordance

with paragraphs 2 and 3 and those resulting from reallocations under this paragraph 5(c)) plus (ii) the value of the Senior Noteholders' Pro Rata Interest Fraction of a pending Chapter 11-Attributable Distribution, produces a value of \$16 million in the aggregate. Such reallocated distributions shall be deemed to have been paid to the Subordinated Indenture Trustees and from the Subordinated Indenture Trustees to the Senior Indenture Trustee.

d. In no event shall the sum of: (x) the Pro Rata Interest Fraction of all Chapter 11-Attributable Distributions that would have been distributed to the Senior Indenture Trustee, as determined under the provisions of paragraphs 2 and 3 of this Order, plus (y) the amounts that are reallocated from the Subordinated Indenture Trustees to the Senior Indenture Trustees pursuant to paragraph 5(c) out of the Base Subordinated Notes Interest Distributions that would otherwise have been made to the Subordinated Indenture Trustees out of all such Chapter 11-Attributable Distributions, have a value in excess of \$16 million in the aggregate. In the event of any such excess, the amount of such excess shall be repaid to the Subordinated Indenture Trustees, out of the next Distribution that would otherwise be made to the Senior Indenture Trustee pursuant to any provision of this Order. At such time as the total value of the Distributions made to the Senior Indenture Trustee out of Chapter 11-Attributable Distributions (whether on account of the pro-rata distribution calculated in accordance with paragraphs 2 and 3 or the reallocation provisions of paragraph 5(c)) reaches \$16 million, no further amounts will be distributed to the Senior Indenture Trustee from Chapter 11-Attributable Distributions, and any such Distributions that would otherwise



have been made to the Senior Indenture Trustee under paragraphs 2 and 3 of this Order will be made instead to the Subordinated Indenture Trustees.

e. For purposes of applying the provisions of paragraphs 5(a)-(d) and clause (iii) of paragraph 1(mm) of this Order: (i) All non-cash Distributions and the rights to Distributions under a confirmed Chapter 11 plan for the Debtor shall be valued as of the Plan Effective Date; (ii) in the case of a Qualified Plan, the amount and/or value of the Chapter 11-Attributable Distributions will be deemed to equal the value of all cash and non-cash Distributions other than interests in or Distributions (whether cash or non-cash) from the Liquidating Trust and minus (x) the amount of the Retained Cash; and (y) the Chapter 11 Costs; (iii) that portion of the non-cash Distribution under any Qualified Plan (including without limitation any securities of the Reorganized Debtor) which has a value equal to the amount of the Retained Cash shall be distributed in accordance with paragraphs 2, 3 and 4 of this Order and shall not constitute a Chapter 11-Attributable Distribution, and any interests in or Distributions from the Liquidating Trust shall be distributed in accordance with paragraphs 2, 3 and 4 of this Order, in each case as the provisions of paragraphs 2 and 3 are modified in a Chapter 11 case by the provisions of paragraph 5(a) of this Order; and (iv) the determination of Chapter 11-Attributable Distributions in the event that a Chapter 11 plan for the Debtor other than a Qualified Plan is confirmed shall be made in a manner designed to approximate as closely as possible the principles underlying the determination of the Chapter 11-Attributable Distribution in connection with a Qualified Plan under the provisions of the foregoing clauses (i)-(iii).

f. For purposes of applying the provisions of paragraphs 5(a)-(e) and clause (iii) of paragraph 1(mm) of this Order, any non-cash Distributions will be valued as of the Plan Effective Date, either: (i) by agreement of Gabriel Capital and the Ad Hoc Committee, if there is no successful objection to such agreement by any party in interest following negative notice under Local Rule 9013-1(D), which notice shall specify, without limitation, the nature of the non-cash Distribution under the confirmed Chapter 11 plan, the agreed-upon value of such non-cash Distribution and the calculation of the Chapter 11-Attributable Distribution under such confirmed plan resulting from such valuation; or (ii) absent such agreement of Gabriel Capital and the Ad Hoc Committee, or in the event that a party in interest objects to such agreement and the objection is sustained by the Court, in accordance with the dispute resolutions procedure described in subparagraphs (g) and (h) below.

g. For purposes of applying the provisions of paragraphs 5(a)-(e) and clause (iii) of paragraph 1(mm) of this Order, in the event that a Qualified Plan is confirmed and clause (ii) or (iii) of paragraph 5(e) of this Order applies, any non-cash Distribution (such as, without limitation, any equity securities or any debt or debt securities) shall be valued at fair market value as of one business day after the Plan Effective Date, taking into account, without limitation, relevant market indications for such securities (such as actual trades, bids to purchase and offers to sell) ("Market Indications") or, if necessary to take into account such Market Indications, as soon after the Plan Effective Date as practicable, but in no event as of a date which is later than seven (7) days after the Effective Date, by one of the following independent third parties, at the expense of the Debtor's estate (which shall constitute a Chapter 11 Cost),

in the following order of preference: (x) CIBC; (y) Kroll Zolfo Cooper; and (z) Houlihan Lokey Howard & Zukin. In the event that none of such independent third parties is willing or able to undertake such a valuation, then such a valuation shall be performed by another independent third party which is mutually acceptable to the Ad Hoc Committee and Gabriel Capital or, in the event that the Ad Hoc Committee and Gabriel Capital cannot agree upon such other independent third party, by an independent third party who is selected jointly by an independent third party selected by Gabriel Capital and an independent third party selected by the Ad Hoc Committee.

h. For purposes of applying the provisions of paragraphs 5(a)-(e) and clause (iii) of paragraph 1(mm) of this Order, in the event that a Chapter 11 plan for the Debtor other than a Qualified Plan is confirmed, clause (iv) of paragraph 5(e) will apply, and any dispute as to the value of the non-cash Distribution and/or the amount of the Chapter 11-Attributable Distribution shall be resolved by binding arbitration among Gabriel Capital, the Ad Hoc Committee, the Senior Indenture Trustee, the Subordinated Indenture Trustees and any party in interest who successfully objects to any agreement between Gabriel and the Ad Hoc Committee (if such objecting party in interest elects to participate in such binding arbitration). Arbitration proceedings shall be administered by the American Arbitration Association ("AAA") or such other administrator as the parties shall mutually agree upon in accordance with the AAA Commercial Arbitration Rules. All disputes submitted to arbitration shall be resolved in accordance with the Federal Arbitration Act (Title 9 of the United States Code). The arbitration shall be conducted at a location in New York selected by the AAA or other administrator. If there is any inconsistency between the terms of this Order and any such rules, the terms and

procedures set forth herein shall control. All discovery activities shall be expressly limited to matters directly relevant to the dispute being arbitrated. The arbitrator's determination shall be subject to enforcement by this Court.

i. The Ad Hoc Committee (and its individual members) shall not, without the consent of Gabriel Capital, and Gabriel Capital shall not, without the consent of a majority of the Ad Hoc Committee (measured by principal amount of holdings of Subordinated Notes), support, vote for, or solicit acceptances of any Chapter 11 plan that is not a Qualified Plan; provided, however, that the foregoing prohibition shall not limit Gabriel Capital or any member of the Ad Hoc Committee in the exercise of its fiduciary duty in its capacity as a member of an official creditors' committee in a Chapter 11 case in voting to have the Committee propose, support, or solicit acceptances for a particular plan. Accordingly, Gabriel Capital and any member of the Ad Hoc Committee may, solely in its capacity as a member of an official creditors' committee in a Chapter 11 case, vote to have the committee oppose a Qualified Plan or support a Chapter 11 plan which is not a Qualified Plan; however, regardless of how Gabriel Capital or any member of the Ad Hoc Committee votes in its capacity as a member of an official creditors' committee, neither Gabriel Capital, nor any member of the Ad Hoc Committee, nor any of their respective counsel, may in any way propose, support, solicit acceptances or vote for a plan which is not a Qualified Plan.

6. No Further Claims Against Subordinated Noteholders. Except as expressly provided in paragraphs 4 and 5 of this Order with respect to the reallocation to the Senior Indenture Trustee of certain distributions that would otherwise be made to the Subordinated Indenture Trustees, and in paragraph 7 of this Order with respect to

Reallocated FDIC Distributions: (a) neither the Senior Indenture Trustee, the holders of Senior Notes, nor any other party shall have any other or further rights against the Subordinated Indenture Trustees or the holders of Subordinated Notes under, on account of or with respect to any contractual subordination provisions contained in the Subordinated Indentures or the Subordinated Notes or any other contractual subordination rights against the Subordinated Indenture Trustees or the holders of Subordinated Notes on any grounds whatsoever, whether in law, equity, or otherwise; (b) neither the Subordinated Indenture Trustees, the holders of Subordinated Notes, nor any other party shall have any other or further rights against the Senior Indenture Trustee or the holders of Senior Notes under, on account of or with respect to any contractual subordination provisions contained in the Subordinated Indentures or the Subordinated Notes or any other contractual rights against the Senior Indenture Trustee or the holders of the Senior Notes on any grounds whatsoever, whether in law, equity, or otherwise; (c) all distributions to the Subordinated Indenture Trustees or to the holders of Subordinated Notes shall not be subject to levy, garnishment, attachment, other legal process, reallocation or redirection by the Senior Indenture Trustee, the holders of Senior Notes or any other party by reason of claimed contractual subordination rights or any other rights; (d) all distributions to the Senior Indenture Trustee or to the holders of Senior Notes shall not be subject to levy, garnishment, attachment, other legal process, reallocation or redirection by the Subordinated Indenture Trustees, the holders of Subordinated Notes or any other party by reason of claimed contractual subordination rights or any other rights; and (e) any and all rights arising or alleged to arise on account of or with respect to any contractual subordination

provisions contained in the Subordinated Indentures or the Subordinated Notes shall be deemed waived and of no further force or effect.

7. Distribution of Reallocated FDIC Distributions.

a. The Senior Indenture Trustee shall allocate and distribute each Reallocated FDIC Distribution to which the Senior Indenture Trustee or the holders of Senior Notes are entitled as follows: (i) an amount equal to the lesser of (x) the amount of such Reallocated FDIC Distribution and (y) the FDIC Notes Fraction of 48% of the Senior Note Shortfall shall be retained by the Senior Indenture Trustee for distribution to the holders of Senior Notes; and (ii) any amount of such Reallocated FDIC Distribution in excess of the amounts allocated under clause (i) shall be paid over by the Senior Indenture Trustee to the Subordinated Indenture Trustees; and the Senior Indenture Trustee shall be deemed to have accomplished such distribution by directing the Trustee to retain the amount of any Reallocated FDIC Distribution covered by clause (ii) that otherwise would have been paid over to the Senior Indenture Trustee, and distributing such funds instead to the Subordinated Indenture Trustees, for distribution to the holders of Subordinated Notes in accordance with the terms of the Subordinated Indentures, without giving effect to any subordination provisions contained therein or any of the provisions of Paragraphs 4 and 5 of this Order.

b. The Ad Hoc Committee shall have the sole and exclusive control over the enforcement of the FDIC Subordination Provisions, the commencement or prosecution of any related litigation, and the settlement of any claims under the FDIC Subordination Provisions, and shall have the sole and exclusive power to enforce, prosecute, litigate and settle such claims, in its sole discretion, either (a) in its own

name, or (b) on behalf of and in the name of the Senior Indenture Trustee; provided, however, that (i) if the Ad Hoc Committee elects to prosecute such claims in its own name, then (x) the Ad Hoc Committee shall have all of the right, power, standing and authority to prosecute such claims as the Senior Indenture Trustee would have had in its capacity as indenture trustee under the Senior Indenture to enforce, prosecute, litigate and settle such claims, and (y) any action or proceeding commenced by the Ad Hoc Committee to prosecute or enforce such claims shall be treated in all respects as if it had been commenced and prosecuted in the name of the Senior Indenture Trustee; and (ii) if the Ad Hoc Committee elects to prosecute such claims on behalf of and in the name of the Senior Indenture Trustee, then (x) the Ad Hoc Committee shall have all of the same rights and privileges to direct the Senior Indenture Trustee with respect to the prosecution of any such claims as Gabriel would have had under the Senior Indenture, and (y) the Senior Indenture Trustee and its counsel shall have the right to review and comment on all of the relevant documentation relating thereto as to any matters in such documentation that could adversely affect the Senior Indenture Trustee. Notwithstanding any election by the Ad Hoc Committee to enforce, prosecute, litigate or settle such claims in its own name, or on behalf of and in the name of the Senior Indenture Trustee, as the case may be, the Ad Hoc Committee may, at any time, elect to change to such other alternative, in its sole and absolute discretion.

c. The Subordinated Indenture Trustees shall retain counsel designated by the Ad Hoc Committee who is acceptable to the Subordinated Indenture Trustees ("Special Counsel") to represent the Ad Hoc Committee and the Senior Indenture Trustee in connection with the matter described in paragraph 7(b) and shall

withhold from amounts distributed to the Subordinated Indenture Trustees other than under paragraph 9 an amount agreed upon by the Ad Hoc Committee and the Subordinated Indenture Trustees and utilize such funds to establish a special reserve fund (the "Special Reserve"), from which any fees and expenses of the foregoing Special Counsel shall be paid. The Subordinated Indenture Trustees shall have no obligation to pay fees and expenses to such Special Counsel, other than out of funds held in the Special Reserve. The attorneys' fees and expenses of such Special Counsel in the enforcement, prosecution, litigation and settlement of all claims under the FDIC Subordination Provisions shall constitute expenses under the Subordinated Indentures.

8. Reservation of Rights Regarding FDIC Claims. Nothing contained in this Order, and no previous failure or omission of any party in interest to raise any issue, objection or defense with respect to the allowance or subordination of the FDIC Claims or any distribution thereon (including, without limitation, in response to the Postpetition Interest Motion), shall in any way prevent any party in interest from, or prejudice any party in interest with respect to, objecting to any of the FDIC Claims, seeking to enforce any FDIC Subordination Provision, or otherwise seeking to subordinate the FDIC Claims, and all parties shall be deemed to have preserved any and all rights to object to the allowance of the FDIC Claims or to seek to enforce any contractual subordination provision pertaining to the FDIC Claims. Until such time as this Court enters a Final Order determining the scope and effect of the FDIC Subordination Provisions, or the holder of the FDIC Claims and the Ad Hoc Committee (or the Senior Indenture Trustee, at the direction of the Ad Hoc Committee) agree in writing upon a settlement of any subordination claims arising out of the FDIC Subordination Provisions, any distributions



which the Trustee would otherwise make or have made with respect to the FDIC Claims, whether under the terms of this Order, any prior order of the Court, or otherwise, shall be retained by the Trustee in a segregated account and not distributed. The amounts so retained shall be distributed only in accordance with a Final Order of this Court or settlement approved by Final Order of this Court, as described in the prior sentence.

9. Limited Allowance of Claims for Indenture Trustee Fees and Expenses. In full and complete satisfaction of any claim of any of the Indenture Trustees for attorneys' fees and expenses and indenture trustee fees and expenses under any of the Subordinated Indentures or the Senior Indenture, as applicable, for the period from the Petition Date through and including July 31, 2002, the Indenture Trustees shall be allowed only the following claims:

a. Chase shall have an allowed claim in the amount of \$972,039.09 for attorneys' fees and expenses under the Senior Indenture for the period through and including July 31, 2002.

b. BNY shall have an allowed claim in the amount of \$1,923,771.22 for attorneys' fees and expenses under the 1972 Indenture and the 1989 Indenture for the period through July 31, 2002.

c. U.S. Bank shall have an allowed claim in the amount of \$1,914,214.93 for attorneys' fees and expenses under the 1984 Indenture, the 1985 Indenture, and the 1987 Indenture for the period through July 31, 2002.

The payment of the claims allowed pursuant to this paragraph 9 shall be made by the Trustee to Chase, BNY and U.S. Bank, respectively, on behalf of the Debtor within 10

days from the date upon which this Order becomes a Final Order. As part of the compromises embodied in this Order: (i) any claim of the Indenture Trustees for their respective Indenture Trustee fees and expenses (other than attorneys' fees and expenses) under the Subordinated Indentures or Senior Indenture, as applicable, which the Court has been advised aggregate in excess of \$1 million, shall be disallowed (without prejudice to any right of an Indenture Trustee to recover such amounts from distributions to be made to holders of debt securities issued under the applicable indenture); and (ii) notwithstanding anything to the contrary contained in this Order, no Postpetition Interest shall be paid on any of the claims which are being allowed pursuant to this paragraph 9. The disallowance of the Indenture Trustee fees and expenses in the preceding sentence is as a result of the compromises reflected herein, and does not evidence a finding by the Court as to the reasonableness or legitimacy, or lack thereof, of such fees and expenses.

10. Reimbursement of Attorneys' Fees and Expenses Incurred by Ad Hoc Committee. In full and complete satisfaction of any claim which the Ad Hoc Committee might assert against any distributions payable to the holders of Subordinated Notes or against the estate to recover any fees and expenses incurred by the Ad Hoc Committee from the Petition Date through July 31, 2002, whether asserted in this Chapter 7 case or in the event that the case is converted to a case under Chapter 11, the estate shall reimburse the Ad Hoc Committee for attorneys' fees and expenses in the aggregate amount of \$852,520 within ten days following the date upon which this Order becomes a Final Order; and the Ad Hoc Committee and its individual members shall assert no further claim against any person, entity or fund for any attorneys' fees or expenses

incurred by the Ad Hoc Committee for the period from the Petition Date through and including July 31, 2002.

11. Dismissal Of Chase/Gabriel Appeal. Within ten days following the entry of this Order, or, at the option of Chase and Gabriel, within five days of the date upon which this Order becomes a Final Order, Chase and Gabriel shall file a pleading with the United States District Court for the Southern District of Florida withdrawing the Chase/Gabriel Appeal, with prejudice. Gabriel specifically waives any claim to, and shall not attempt to recover, any attorneys' fees and expenses incurred in connection with this Chapter 7 case (or any Chapter 11 case to which it is converted) against the estate or any creditor; provided, however, that in the event that this case is converted to a case under Chapter 11 of the Bankruptcy Code, and a plan of reorganization for the Debtor is confirmed in such Chapter 11 case, then (and only in such event) nothing contained in this Order or the Chase/Gabriel Order shall affect any right of Gabriel to seek the allowance of an administrative expense for fees and expenses incurred subsequent to July 31, 2002 for a "substantial contribution" under section 503(b)(3)(D) and section 503(b)(4) of the Bankruptcy Code, provided that such claim of Gabriel shall not exceed \$100,000 in the aggregate and that the services for which such claim may be asserted shall be limited to services which enhance the aggregate overall distribution to creditors in a Chapter 11 case, and provided further, that nothing in this Order shall limit Gabriel from seeking reimbursement of expenses, other than attorneys fees and expenses, as a member of an official committee appointed pursuant to section 1102 of the Bankruptcy Code; and the payment of any such expenses as a member of such

official committee shall not be counted nor applied against the \$100,000 substantial contribution claim limit of this paragraph.

12. Right of Other Creditors to Seek Allowance Of Claim For Attorneys' Fees.  
Except as specifically set forth in paragraphs 9, 10, 11, 12 and 13 of this Order, nothing contained in this Order shall affect the right (if any) of any creditor to seek the allowance of a claim against, or recovery from, the Debtor's estate with respect to attorneys' fees and expenses of that creditor incurred prior to July 31, 2002, or the right of any party in interest to object to any such claim or request for payment. Notwithstanding the foregoing: (i) unless this Chapter 7 case is converted to a case under Chapter 11 of the Bankruptcy Code, no creditor shall be allowed or paid from the Debtor's estate any claim for attorneys' fees or expenses incurred subsequent to July 31, 2002; and (ii) any claim or request for payment from the estate of attorneys' fees and expenses incurred by any creditor for the period prior to July 31, 2002, shall be filed with the Court and served on the Trustee prior to the thirtieth (30th) day following the entry of this Order, or be forever barred and unrecoverable from the Debtor's estate; provided, however, that the limitation contained in the foregoing clauses (i) and (ii) shall not apply with respect to any creditor whose proof of claim is currently the subject of an unresolved objection to claim, or as to whose claim the Trustee subsequently files an objection, until such claim is resolved by a Final Order of this Court. Upon the entry of a Final Order of this Court adjudicating such objection, the provisions of clauses (i) and (ii) of the preceding sentence shall apply to such creditor, with the following modifications: the 30-day period described in clause (i) shall run from the date upon which the order resolving such objection becomes a Final Order, and the reference to "July 31, 2002" in clause (ii)

shall be replaced with a reference to the last day of the month in which such order becomes a Final Order.

13. Limitation On Assertion Of Claims for Post-July 31, 2002 Fees And Expenses By The Ad Hoc Committee And The Indenture Trustees. Unless this Chapter 7 case is converted to a case under Chapter 11 of the Bankruptcy Code, the Ad Hoc Committee and the Indenture Trustees shall not be allowed or paid any amounts from the Debtor's estate on account of fees and expenses incurred subsequent to July 31, 2002; provided, however, that in the event that this case is converted to a case under Chapter 11 of the Bankruptcy Code, and a plan of reorganization for the Debtor is confirmed in such Chapter 11 case, then (and only in such event) nothing contained in this Order or the Chase/Gabriel Order shall affect any right of the Ad Hoc Committee or any of the Indenture Trustees to seek the allowance of a claim or administrative expense against, or recovery from, the Debtor's estate with respect to attorneys fees and expenses incurred after July 31, 2002, or the right of any party in interest to object to any such claim or request for payment. Accordingly, if a Chapter 11 Plan for the Debtor is confirmed, the Indenture Trustees, the Ad Hoc Committee and other creditors (but in the case of Gabriel, subject to the limitations in Paragraph 11) may seek the allowance of a claim (including, without limitation, a claim for administrative expense) against the Debtor's estate to recover attorneys fees and costs incurred after July 31, 2002, on any appropriate grounds. In addition, in light of the fact that the Chase/Gabriel Appeal is being voluntarily withdrawn pursuant to this settlement, without an opportunity for a full adjudication on the merits of the issues raised in that appeal, if and only if this Chapter 7 case is converted to a Chapter 11

case and a plan of reorganization for the Debtor is confirmed, then the Chase/Gabriel Order shall in no way preclude any Indenture Trustee or the Ad Hoc Committee from seeking the allowance or recovery of any attorneys fees and expenses incurred after July 31, 2002, whether under principles of *res judicata*, collateral estoppel or law of the case, but shall be fully preclusive as against Gabriel, except as provided in Paragraph 11.

14. Distributions To Be Made On Negative Notice. Any interim or final Distribution with respect to Postpetition Interest under the terms of this Order, including, without limitation, any Distribution with respect to any Reallocated FDIC Distribution pursuant to paragraph 7, shall be made by the Trustee on negative notice under Local Rule 9013-1(D), without the necessity of an individual hearing on each such Distribution in the absence of any objection. Such notice shall specify, without limitation: (i) the amount of the Base Subordinated Note Interest Distribution that would otherwise have been made to the holders of Subordinated Notes if distribution were calculated solely in accordance with the provisions of paragraphs 2 and 3 of this Order; (ii) the amount of such Base Subordinated Note Interest Distribution that will be reallocated and distributed to the Senior Indenture Trustee, for the benefit of holders of the Senior Notes, and shall be deemed to have been paid to the Subordinated Indenture Trustees and from the Subordinated Indenture Trustees to the Senior Indenture Trustee, pursuant to the provisions of paragraphs 4 and 5 of this Order, along with the underlying calculations; (iii) amounts allocated to the 48% Guarantee Reserve; and (iv) such other and further information as shall be reasonably necessary to advise the Court and

holders of Qualified Claims of the amount, timing and terms of the proposed Distribution.

15. Successors and Assigns. This Order shall be binding on all creditors, including, without limitation, the Senior Indenture Trustee, the Subordinated Indenture Trustees, all holders of Senior Notes and Subordinated Notes, the Trustee and each of their respective successors, assigns and transferees (including, without limitation, any person or entity who receives a "transfer" of any claim, as "transfer" is defined in 11 U.S.C. § 101(54)).

16. Continued Effect In Chapter 11. The provisions of this Order shall continue to be binding in the event of a conversion of this case to a case under Chapter 11 of the Bankruptcy Code, and any distributions in any such Chapter 11 case shall conform in all respects to the requirements and provisions of this Order.

17. In connection with the settlement embodied in this Order, Chase and the Subordinated Indenture Trustees have each (i) fulfilled their fiduciary responsibilities under their respective Indentures and under applicable law and (ii) have used the same degree of care and skill in their exercise as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.

18. Waiver Of Any Otherwise Applicable Ten-Day Stay. To the extent, if any, that the ten-day stay of Rule 6004(g) of the Federal Rules of Bankruptcy Procedure or any other rule providing for an automatic stay of this Order might otherwise be applicable, no such stay shall apply to this Order, and this Order shall be effective and enforceable and, in the event that the Trustee, in his sole discretion, files with the Court a written waiver of the requirement that this Order become a Final Order in paragraphs

9 and 10 of this Order, shall be complied with by the parties immediately upon its entry. In the event of such a waiver by the Trustee, any requirement for a "Final Order" contained in paragraph E of this Order shall be deemed to be deleted, and the time for making the payments required under paragraphs 9 and 10 of this Order shall be 10 days from the date upon which this Order is entered, rather than the date upon which this Order becomes a Final Order.

19. Retention of Jurisdiction. This Court retains exclusive jurisdiction throughout the duration of this case to construe, interpret, modify (but, in the case of any modification, only with the consent of each of Gabriel Capital, the Ad Hoc Committee and the Trustee, and the non-objection of the Indenture Trustees, but not otherwise) and enforce the terms of this Order.

ORDERED in the Southern District of Florida, this \_\_\_\_ day of \_\_\_\_\_, 2003.

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HONORABLE PAUL G. HYMAN, JR.  
UNITED STATES BANKRUPTCY JUDGE

Copies furnished to:  
Mark D. Bloom, Esq.  
Jeffrey H. Beck, Trustee

*(Attorney Bloom is directed to serve conformed copies of this Order upon all parties in interest, immediately upon receipt thereof and to file a Certificate of Service with the Court confirming same.)*



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION  
Case No. 02-21176-CIV-GRAHAM

JP MORGAN CHASE BANK and  
GABRIEL CAPITAL, LLP,

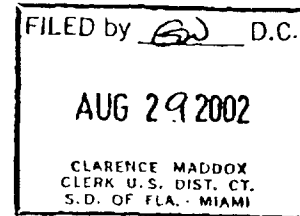
Appellants,

vs.

JEFFREY H. BECK, TRUSTEE,

Appellee.

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ORDER

THIS CAUSE came before the Court upon the Agreed Motion to Relinquish Jurisdiction and Suspend Briefing Schedule to Facilitate Bankruptcy Court Approval of Proposed Settlement, and Directing Trustee to File Status Report (D.E. 21).

THE COURT having considered the Agreed Motion and pertinent portions of the record, and being otherwise duly advised in the premises, it is

ORDERED AND ADJUDGED that the Motion is GRANTED, upon the terms and conditions set forth as follows:

1. The Court hereby relinquishes jurisdiction over this Appeal for the sole and limited purpose of authorizing the Bankruptcy Court to consider approval of the proposed settlement, the approval of which would result in the withdrawal of this Appeal, and for related proceedings to approve the method and manner of notice to creditors as described in the Agreed Motion.

EXHIBIT B

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wc

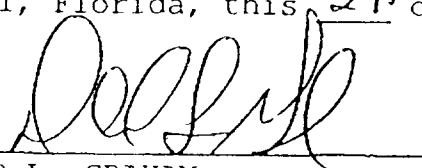
2. Consistent with the foregoing, all briefing and other deadlines in this Appeal are suspended, pending further Order of this Court.

3. The Court having relinquished jurisdiction over this Cause for the purpose of facilitating the proposed settlement, the Clerk of the Court is directed to CLOSE this case for administrative purposes.

4. In the event that the settlement is not approved by the Bankruptcy Court, any party to this Appeal may file a motion requesting that this Court reinstate its jurisdiction over this Appeal. In the event of such reinstatement, the Answer briefs will be due within ten (10) days of reinstatement. Reply briefs will be due within five (5) days thereafter.

5. In the event no motion or notice seeking a final order of dismissal of this Appeal has been filed within 120 days from the date of this Order, counsel for the Trustee is directed to file a Status Report advising the Court of the status of the proposed settlement and related proceedings before the Bankruptcy Court.

DONE AND ORDERED in Chambers at Miami, Florida, this 29<sup>th</sup> day of August, 2002.



DONALD L. GRAHAM  
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record