IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION, as a receiver of United States National Bank Plaintiff, Counterdefendant and Appellant, v. AIR FLORIDA SYSTEM, INC., a Delaware Corporation, *et al*., Defendants, Counterclaimants and Appellees.	No. 85-6327; 84-6280 No. 82-0525-N(I) U.S.D.C., Southern District of California

APPELLANT'S OPENING BRIEF

On Appeal From The United States District Court
Southern District of California
Honorable Leland C. Nielsen, United States Judge

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APPELLANT'S OPENING BRIEF

ISSUES PRESENTED

A brief introduction is required. This appeal involves a contract between appellant, Federal Deposit Insurance Corporation ("FDIC"), acting as receiver of a closed national bank, and appellee, Air Florida System, Inc. ("Air Florida"), whereby Air Florida purchased a major block of corporate shares held by the FDIC. The contract required Air Florida to make a tender offer for the remaining outstanding shares, and pay additional compensation to the FDIC under certain prescribed conditions. Although Air Florida delayed and ultimately renounced any intention to make the tender offer, the district court (1) allowed Air Florida to keep its entire $7.7 million profit on the contract, without any restitution as demanded by the FDIC on unjust enrichment grounds; (2) allowed Air Florida to enforce other executory provisions of the contract against the FDIC; and (3) confirmed a $1.4 million arbitration award against the FDIC under one such provision, although the arbitrator had refused its repeated request for a hearing.

The central legal issues are as follow:

1) When Air Florida defaulted on its agreement to make a tender offer, depriving the FDIC of the agreed opportunity to obtain additional compensation for its shares, did the default discharge further contractual obligations on the FDIC's part?

2) Was the FDIC entitled to at least a partial restitutionary judgment, under Cal. Civil Code § 1692, on the grounds that Air Florida's substantial profit on the contract was unjust enrichment in view of its violation of the FDIC's tender

offer rights?

3) Could the district court properly construe the FDIC's tender offer rights as immaterial, if not illusory, by adopting Air Florida's theory that a paragraph in the contract defining a "minimum" price for the required tender offer created, instead, a maximum price for it, conflicting with the ordinary meaning of a tender offer price as a premium over the market price?

4) Assuming arguendo that the district court properly allowed Air Florida to keep its entire profit and still enforce executory provisions of the contract against the FDIC, did the $1.4 million arbitration award which followed meet due process requirements when the arbitrator refused to allow the FDIC a hearing?

5) Finally, did the district court properly award Air Florida $167,544 in prejudgment interest on the arbitration award when the parties had stipulated that it was not self-executing?

STATEMENT OF THE CASE

A) Background And Introduction

This action was brought by the FDIC in its capacity as receiver of the United States National Bank ("USNB"). USNB was closed on October 18, 1973 by order of the Comptroller of the Currency, who simultaneously appointed the FDIC as USNB receiver pursuant to Section 1821(c) of the Federal Deposit Insurance Act, 12 U.S.C. § 1811 et seq. (1933).

The factual background of this case has already been set forth in this Court's opinion in First Empire Bank v. Federal Deposit Ins. Corp., 572 F.2d 1361(9th Cir. 1978), tracing the August 1973

collapse of USNB, a major San Diego bank, under "suspect" circumstances connected with its president, board chairman and controlling shareholder, C. Arnholt Smith. Id. at 1364-5. The opinion also describes the legal structure under which the FDIC responded to the USNB crisis, acting first in its corporate capacity, then as USNB's receiver. 572 F.2d at 1364.

This case involves the FDIC's role as receiver, marshalling and liquidating the USNB assets which were associated with Smith, <u>see</u> 572 F.2d at 1365, to repay the $128 million loan to the receiver by the FDIC corporation. Id. at 1365-6. The liquidation went forward in October 1973 under the supervision of the United States District Court for the Southern District of California, and more specifically the Honorable Leland C. Nielsen. The same court also supervised a related undertaking, the Chapter X bankruptcy reorganization of Westgate-California Corporation ("Westgate"), one of Smith's controlled corporations. <u>See</u>, <u>e.g</u>. <u>Westgate California v. First Nat. Finance Corp</u>., 650 F.2d 1040(9th Cir. 1981). And the same district court ultimately presided over the instant litigation.

The instant dispute arose out of the single largest asset in the USNB liquidation proceeding. As USNB receiver, the FDIC was the largest creditor of Westgate. (E.R. 356) As of 1980, its various claims entitled the FDIC to a distribution of approximately $17 million in securities to be issued under the proposed plan for Westgate's reorganization. On November 14, 1980 FDIC sold that interest to Air Florida for $15.4 million cash plus the tender offer commitment with its potential price augmentation, and other potential adjustments in either direction.

Both sides found it necessary in 1982 to seek an adjudication of their rights under the contract. Surprisingly, though, the FDIC was not accorded the benefit of some ordinary rules of law in that process. The record in this respect is most unusual, and unusually revealing: it appears that both the FDIC's contractual and procedural rights were subordinated to the district court's personal views about some of the issues. For example, it commented as follows early in the dispute over the tender offer provisions:

> Wel, I certainly sympathize with Air Florida's position. I think that making a tender offer <u>when there are only two people that give a damn about it really</u> -- <u>the FDIC</u> and [a similarly situated private party] -- is a waste of time and effort and everything else. (E.R. 202) (emphasis added)

The result below, if affirmed, would have a damaging effect on the FDIC's ability to respond to bank failures effectively, and to administer such receiverships by receiving the benefit of its bargains. In a word, the FDIC did "give a damn" about the tender offer rights which it had bargained for, and also about its basic right to a hearing in the arbitration which followed the trial herein. A few ordinary principles of law require a reversal of the judgment entered below, <u>ie</u>., adherence to the texts of contracts and to the basic requirements of due process.

B) <u>Chronology Of Undisputed Events</u>

The following chronology represents facts not disputed below. This appeal will be limited to questions of law arising on those facts. It will not delve into the disputed areas of understandings or representations.

<u>August 1980</u>: Air Florida first approached the FDIC seeking to

purchase its position in Westgate. (E.R. 356)

October 20, 1980: The parties executed a Purchase Agreement (E.R. 1-56; Pl.Ex.6) which was subject to the consent of the USNB liquidation court. (E.R. 36; ¶ 11.01) The FDIC agreed to use its best efforts to obtain that consent (id.), and otherwise to see that all transactions contemplated by the agreement were "consummated as promptly as possible...." (Id.)

November 6, 1980: Judge Nielsen conducted the first of two hearings on the FDIC's request to approve the contract.

There was then a limited over-the-counter market for existing Westgate debentures, which were convertible into the new common stock to be issued. (E.R. 331-2) Prior to November 14, 1980 trading in the debentures was at the equivalent of $8 to $9.50 per share of new Westgate common. (E.R. 333)

November 14, 1980: With the approval of the USNB liquidation court (E.R. 356), FDIC and Air Florida entered into an Agreement for Purchase and Sale (E.R. 57-69; Pl.Ex.7), incorporating and modifying their October 20th Purchase Agreement. FDIC sold its entire block of shares to be issued by the reorganized Westgate (E.R. 2), approximately $17 million in equity securities (E.R. 6-7 and 76), for $15,432,000 in cash (E.R. 59) plus the "Right to Benefits of Tender Offer" (E.R. 67; ¶ 12), and other possible price adjustments. (E.R. 62-3)

The key disputed provisions of the agreement are these:

The Tender Offer Duty: Air Florida agreed, subject to only three stated conditions (E.R. 23, ¶ 6.04), to make a "general public offer" for all remaining Westgate common stock when issued. (E.R. 22, ¶ 6.01) The offer was to be made "no

later than 425 days after the date of Consummation [of the Westgate plan of reorganization]." (Id.) However, Air Florida also covenanted to "use its best efforts to cause the transactions contemplated by this Agreement to be consummated as promptly as possible." (E.R. 36; ¶ 10.1)

The Tender Offer Benefit: In one of the several new provisions added to the contract on November 14, 1980, Air Florida agreed to give the FDIC additional compensation for its block of shares -- "an equivalent amount of consideration" -- to match any higher price set in the tender offer which Air Florida "has agreed to make...." (E.R. 67; ¶ 12) The only condition on FDIC's right to the additional compensation was Air Florida's acquisition of at least 80% control of Westgate. (Id.)

The Tender Offer Price: No words in the contract stated that there was a maximum price or even an expected price at which Air Florida was obligated to make its tender offer. The only language addressing price established a "minimum" price for the tender offer, the price paid the FDIC. (E.R. 23; ¶ 6.03)

November-December 1980: Following the announcement of the sale to Air Florida at $18 per share, trading in the existing Westgate debentures rose to the range of a little over $14 per new common share. (E.R. 334-5)

March 27, 1981: Westgate's bankruptcy trustees entered into an agreement in principle to sell Air California out of the bankruptcy estate for $34,850,000. (E.R. 77; D.Ex.U) The acquisition of Air California, Westgate's main asset, had been

frequently stated by Air Florida to be its primary purpose in acquiring Westgate shares.

May 12, 1981: Over Air Florida's initial opposition (E.R. 105-12) District Judge Nielsen, sitting as the Westgate bankruptcy court, approved the sale of Air California to a third party for $61,500,000 in cash, far more than had been expected. (E.R. 113-19) Air Florida had entered into an aggressive bidding contest after its initial opposition to the sale was overruled. (E.R. 102 and 134)

May 26, 1981: With the company in unexpectedly good financial condition, the reorganization of Westgate was declared to be substantially consummated. (E.R. 358) Accordingly, all the new securities were issued and Air Florida's 425-day deadline commenced for making the agreed tender offer. (E.R. 22, ¶ 6.01)

June 1981: Despite the sale of Air California, Air Florida's counsel actively drafted the necessary papers for a possible tender offer for the remaining Westgate shares. An offer price being considered was $30 per share, in cash and Air Florida securities. (E.R. 336-9) The lawyers' work alone cost Air Florida $90,000 (id.), and its investment bankers were being consulted as well. (Id.)

July 29, 1981: The new Westgate board, which now included two representatives of Air Florida (E.R. 121; Pl. Ex. 19), determined a $21.50 fair market value for the new common stock. (E.R. 143) There were at least three brokerage firms which were then making a market in that range for this stock. (E.R. 122) Air Florida also announced to the board that day that it was going forward with the tender offer, and that it would be "favorable" to the new Westgate

shareholders. (E.R. 130-1)

<u>August 1981</u>: Westgate's common stock was listed with NASDAQ. It was traded in that market from August 20, 1981 through March 31, 1982. (E.R. 144) The trading price range during that period was from $21 to $26.50 per share. (Id.) Westgate's board publicly announced that it was seeking merger partners and other alternatives to liquidation. (Pl.Ex. 34)

<u>October 1981</u>: Westgate's board widely circulated a solicitation for merger partners. (E.R. 155-8; Pl.Ex. 20) Air Florida's principal corporate counsel still believed, as he had since at least July 1981, that a tender offer should be pursued "aggressively" by Air Florida because of its profit potential. (E.R. 343-5)

<u>January 26, 1982</u>: Westgate's board decided that liquidation was in the best interests of its shareholders. (E.R. 159-60; D. Ex. Y) Air Florida's representatives on the board then stated that economic conditions were no longer advantageous for a tender offer. (E.R. 161) Its own stock, and other airline stocks, had fallen significantly. (E.R. 345)

<u>February 1982</u>: After determining that a tender offer was not in its own interests, Air Florida informed the FDIC that it would not be making such an offer at all. (E.R. 346) The contractual deadline for doing so was still five months away, on July 25, 1982.

C) <u>Proceedings Below</u>

1) <u>Air Florida's Request For A "Clarification" Order</u>

After informing the FDIC that it would not make a tender

offer, Air Florida applied to the USNB liquidation court for relief from any legal consequences of its decision. On March 3, 1982, Air Florida sought an order of "clarification" providing that the tender offer obligation was now terminated by virtue of the pending liquidation of Westgate. (E.R. 162-9) Air Florida argued that its tender offer only had to be at $18 or less and, therefore, that such an offer at this point would be unsuccessful and confusing.

At the hearing on March 22 1982, Judge Nielsen expressed the views quoted previously herein (page 4), agreeing with Air Florida that the tender offer obligation had been terminated. (E.R. 202-4) But the court also expressed some doubt about its jurisdiction to "clarify" or adjudicate contractual rights without a formal adversary hearing or lawsuit, as the FDIC was arguing (E.R. 182-91), and it later denied Air Florida's application on the sole ground of lack of jurisdiction. (E.R. 206-7)

Two days later, on April 1, 1982, the Westgate directors declared a liquidating dividend of $28.25 per share of common stock, payable on May 3, 1982. (E.R. 144) Air Florida's share was just over $7.6 million (id.), representing a profit of $3.86 million on the common stock it had purchased from the FDIC. (E.R. 231) As Air Florida had already realized a cash profit in excess of $3.9 million on the preferred stock it had purchased from the FDIC (id.), Air Florida's total, cash-in-hand profit on the transaction with the FDIC was now in excess of $7.7 million.

2) <u>The FDIC's Lawsuit</u>

The FDIC commenced this suit on April 30, 1982, seeking rescission and restitution over the lack of a tender offer despite

Air Florida's substantial profit. The amended complaint is at E.R. 209. The FDIC sought a restitutionary judgment of $7.7 million. (E.R. 222) The action was originally assigned to District Judge Judith N. Keep. (E.R. 574; C.R. 7)

To secure an affirmative recovery, the FDIC applied for an attachment of Air Florida's $7.6 million liquidating dividend (E.R. 223-8), a close approximation of its profit. Judge Keep granted the attachment on April 30, 1982. (E.R. 277-9) However, after Judge Nielsen was assigned to the case under the "low number" rule (E.R. 574), he released the attachment on June 7, 1982, on the motions of both Air Florida and its secured lender for its Westgate purchases, appellee InterFirst Bank Dallas ("InterFirst") (then known as First National Bank in Dallas). The money was released to InterFirst in partial satisfaction of Air Florida's debt. (E.R. 576; C.R. 35)[1]

Air Florida answered the FDIC's complaint on May 18, 1982 (E.R. 285), and also counterclaimed. (E.R. 290-3) It first sought declaratory relief that the tender offer obligation was terminated, but that the contract with the FDIC otherwise remained in full force and effect. Secondly, it sought a $2 million judgment against the FDIC under the provisions of the contract calling for an "adjustment" -- a cash payment in either direction -- in the

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[1] The release of the attachment proved highly significant. Air Florida itself went into bankruptcy in July 1984 (E.R. 545), well prior to the entry of the judgment below. This litigation is now only proceeding under a stipulated order partially lifting the automatic bankruptcy stay. (E.R. 545-6) Although Air Florida and/or InterFirst will be allowed to enforce any final judgment against the FDIC, any final judgment in the FDIC's favor will merely be treated as an allowed but unsecured claim in the Air Florida bankruptcy proceeding. (Id.)

event that certain cannery assets of Westgate were ultimately sold for more or less than an assumed price of $15 million. (E.R. 11-13; ¶ 3.04(d)) The contract established a complex formula for determining any such adjustment. (Id.)

3) The Court Trial

The case came on for a court trial on September 8, 1982. At the outset, Air Florida's counsel correctly stated as follows:

> [A]ll of [the FDIC's] witnesses are going to tell you that they didn't use these words ["tender offer"] in this contract in any technical or special sense. These words were used in their ordinary and general meaning.... (E.R. 308)

Although parol or extrinsic evidence was adduced by both sides over the three-day trial, the court ultimately ruled that it was irrelevant:

> ... I don't think it makes a whole lot of difference whether I admit the parol evidence or not; I think the outcome is still the same and that is that the defendant wins. (E.R. 350)
>
> * * *
>
> I think it's almost as a matter of law. (E.R. 351)

The court entered findings of fact and conclusions of law on January 6, 1983. (E.R. 354) In brief, the court adopted Air Florida's version of "the ordinary meaning to be given to the words used by the parties to express their intent ...." (E.R. 357) That "ordinary meaning," as the court explained it, was a tender offer obligation "only at a price at least equal to the price payable to the FDIC [$18 per share] ...." (E.R. 361)

With the Westgate stock always trading above $18 during the

relevant time period, the court found that Air Florida "was relieved of its duty to make an offer ...." (E.R. 361) It concluded that the lack of a tender offer represented neither a breach of the contract nor a failure of consideration. (Id.) The findings nowhere mentioned Air Florida's profit on this transaction. The FDIC had contended that at least a portion of that profit should be disgorged to make up for the tender offer benefit.

As to Air Florida's counterclaims, the court concluded that the contract "remains in full force and effect, and the parties remain subject to the terms thereof, except that Air Florida is relieved of its duty to make a general public offer ...." (E.R. 361) Accordingly, Air Florida was allowed to pursue its second counterclaim for a $2 million "adjustment" from the FDIC.

4) The Cannery Arbitration

The parties had stipulated to limit the issues to be tried on the second counterclaim. As embodied in the pretrial order (E.R. 295-7), the stipulation was that "all issues with respect to the Cannery Adjustment will be determined by the Court with the exception of the calculation. ..." (E.R. 296) The calculation was to be determined "by the parties, the parties' accountants, or an independent accountant pursuant to the procedures set forth in Paragraph 7(b) of the Agreement. ..." Accordingly, "the judgment in this proceeding will remain open until said calculations have been performed and the Court is able to enter a single final judgment." (Id.)

There was a vast difference in the parties' calculations of

the cannery adjustment under ¶ 3.04(d) of the contract. (E.R. 11-13) As compared to Air Florida's claim for the maximum $2 million adjustment in its favor, the FDIC claimed a $1,079,000 adjustment in its favor. (E.R. 401) Neither the parties nor their accountants could reach agreement, and they invoked the contractual arbitration process. It called for "Independent accountants" to be selected (E.R. 64, ¶7(b)), whose "final determination shall be binding on the FDIC and Purchaser [Air Florida]." (E.R. 65)

The parties promptly selected an arbitrator on February 14, 1983, Mr. H. L. Gardner of Ernst & Whinney in San Diego. (E.R. 394) That same day, the United American Bank of Knoxville, Tennessee, one of a number of banks controlled by Jake Butcher was declared insolvent and was closed. (E.R. 397) Ernst & Whinney, its auditors, had given an unqualified opinion on the bank's financial statements only three weeks before its collapse. (Id.) After the closing of United Bank, Ernst & Whinney's opinion led to a rapidly escalating public conflict with the FDIC. (E.R. 397-9) Within months the FDIC "severed all contracts and contractual relationships with Ernst & Whinney." (E.R. 401)

Although Mr. Gardner had already begun working on the cannery adjustment, the FDIC notified him to stop in the spring or early summer of 1983. (E.R. 402) The FDIC's and Air Florida's counsel were considering the selection of alternate arbitrators as late as August 8, 1983, and possibly later. (Id.)

However, Air Florida filed a motion on or about September 2, 1983 to compel the FDIC to resume the arbitration with Mr. Gardner. (E.R. 364-5) FDIC filed opposition (E.R. 404-8), maintaining that its serious dispute with Ernst & Whinney -- a $172 million lawsuit

by the FDIC was imminent (E.R. 420) -- had completely undermined Mr. Gardner's ability to serve as a neutral arbitrator.

Air Florida contended that a challenge like the FDIC's could only be made at the conclusion of an arbitration. (E.R. 414-15) The FDIC's counsel agreed that entertaining the matter then was a matter within the court's discretion (E.R. 420), but strongly urged the exercise of that discretion under the circumstances presented. (Id.)

Judge Nielsen decided not to rule on the matter at that juncture, accepting Air Florida's position:

> I think I have discretion [to rule now]; I agree with you. I think I have discretion, but I don't choose to exercise it. ... (E.R. 420)

Nevertheless, the court offered the observation that "at this point I see no reasonable basis to challenge Mr. Gardner's independence and opinion and ability." (E.R. 420-1) The basis for the court's <u>dictum</u> was this:

> I should say I have known him personally for all the time he's been in San Diego. He has personally worked on many situations that have been before this Court. I have the utmost confidence in him. ...
>
> ... I see him almost every Saturday morning on the golf course. I play golf with him perhaps five times a year. To me, he's just absolutely a first-class citizen and first-class CPA. (E.R. 421)

The FDIC's counsel therefore asked whether another judge should handle the renewal of its challenge, if necessary, at the conclusion of the arbitration. (E.R. 421) The court agreed:

> I think if there's going to be a challenge at the end, you'd better take it to a different judge because I feel so strongly about Mr. Gardner's integrity. (E.R. 422)

That comment made it clear, once again, that the court was not

ruling on the merits of the FDIC's challenge. To the contrary, it had decided that the challenge was premature because the arbitration was still in progress.

It should be pointed out now, therefore, that when the FDIC's challenge was indeed renewed and referred to another judge, the Honorable Howard B. Turrentine found that Judge Nielsen had already "rejected the FDIC's claim of arbitrator bias. ..." (E.R. 534) "Judge Nielsen has previously ruled that no showing of bias has been made, and this Court agrees." (E.R. 537)

5) The Arbitrator's Decision Without A Hearing

The FDIC's first act upon being ordered back to arbitration with Mr. Gardner was to request a hearing. In an October 31, 1983 letter to him, the FDIC's counsel requested a hearing where "evidence could be presented," and where "the accountants and attorneys for both sides could be present. ..." (E.R. 462) The FDIC wanted a hearing, inter alia, on a central and disputed issue of contractual intent, "whether the operating losses of the Cannery were to be taken into consideration in computing the Cannery Adjustment." (Id.)

Mr. Gardner's original proposal for this assignment had included 20 hours of his own time for "Interview[ing] parties to the agreement to determine their original intentions." (E.R. 501) Both the FDIC and Air Florida accepted that phase of the arbitration in accepting Mr. Gardner's proposal. (E.R. 503-6) It was never accomplished. (E.R. 495-8) The intent issue had even been foreshadowed by Air Florida's principal corporate counsel, Larry J. Hoffman, who testified at the trial that he had personally

negotiated the matter of a cannery adjustment with the FDIC's top officials; that it was "somewhat complex"; and that "we discussed various ways of treating" it and "got into the question of the formula itself." (E.R. 330)

Nonetheless, Air Florida strenuously objected to the FDIC's request for a hearing. By letter of November 11, 1983 to Mr. Gardner, Air Florida's counsel wrote that his client "did not and will not agree to converting this arbitration into some quasi-judicial proceeding." (E.R. 468)

The FDIC's counsel replied by letter of November 22, 1983. (E.R. 464) He pointed out that he and his counterpart attorney did not even have to speak at the hearing, and that "the whole hearing process should take less than one-half day. ..." (E.R. 465)

Mr. Gardner had issued his decision the day before, and did not change his mind thereafter. The "meeting" requested by the FDIC "is not necessary." (E.R. 471) Instead, each side was invited "to submit additional information to me in writing. ..." (Id.)

The FDIC submitted an affidavit by one of the attorneys who was involved in the negotiations over the language of the cannery adjustment. (E.R. 474-94) What the FDIC could not do, of course, was have that witness, or any other witnesses, testify before Mr. Gardner in person and respond to his questions -- let alone confront such significant Air Florida witnesses as Mr. Hoffman.

Mr. Gardner rendered his decision on February 27, 1984. (E.R. 453) Given his refusal to conduct a hearing on the disputed issue of contractual intent, as urged by the FDIC, it is striking that Mr. Gardner opened his discussion as follows:

> [W]e [Ernst & Whinney] have concluded that the Agreement, as it relates to the Cannery Adjustment, is confusing and a precise interpretation of the Agreement is not possible. (E.R. 454)

There were numerous points in his opinion where Mr. Gardner acknowledged uncertainty over the intent of the parties to this contract.

After deciding that Air Florida was nonetheless entitled to $1,486,000, Mr. Gardner concluded his opinion with two qualifications:

> The above procedures do not constitute an examination in accordance with generally accepted auditing standards. Had we performed additional procedures, matters might have come to our attention that would affect our findings. (E.R. 460)

Certainly, one "additional procedure" would have been a hearing on the issues in dispute. Mr. Gardner had conducted neither a true audit nor a true arbitration.

6) Confirmation Of Award And Entry Of Judgment

Air Florida moved on March 20, 1984 to have the cannery adjustment inserted in the judgment. (E.R. 423) The FDIC cross-moved to vacate the award. (E.R. 441) Judge Turrentine's order in favor of Air Florida was entered on July 10, 1984. (E.R. 532)

The court acknowledged the requirement of "a full and fair hearing," (E.R. 538) but concluded that what occurred had been expected by the parties and was sufficient under the law. The court reasoned that accountants, unlike lawyers, usually do their work without evidentiary hearings; that written submissions were invited; and, finally, that oral arguments can be dispensed with on

appeals, so the same must hold true for arbitrations. (E.R. 540-1)

Air Florida submitted a proposed judgment on August 14, 1984 (E.R. 547), but its entry was delayed by the Air Florida bankruptcy. (E.R. 542) The automatic stay was partially lifted by the bankruptcy court on June 28, 1985, by a stipulated order. (E.R. 545)

A judgment, in the same form that Air Florida presented in August 1984, was entered by Judge Nielsen on August 23, 1985. (E.R. 547) Air Florida timely moved to "correct" it, under F.R.C.P. Rule 59, to add prejudgment interest on the arbitration award. (E.R. 552) The FDIC opposed the motion (E.R. 557), primarily arguing that Mr. Gardner's decision could not qualify for prejudgment interest because, as was stipulated in 1982 (E.R. 296), it was only to be given effect through insertion in the final judgment. Thus, the general rule that self-executing arbitration awards begin incurring interest immediately did not apply.

Judge Nielsen granted Air Florida's motion and entered an amended judgment on October 9, 1985. (E.R. 566) It added $167,574.12 in prejudgment interest on the cannery adjustment award.

This appeal followed on October 22, 1985. (E.R. 569)

D) Jurisdictional Statement

Subject matter jurisdiction rested below on 12 U.S.C. § 1819 and 28 U.S.C. §§ 1345 and 1348, in that the FDIC was seeking to recover assets in connection with the USNB receivership, and was also seeking to wind up the affairs of a national banking association. (E.R. 209)

Appellate jurisdiction exists under 28 U.S.C. § 1291. The district court entered a final judgment on October 9, 1985 disposing of all claims as to all parties, and the FDIC timely appealed therefrom on October 22, 1985. An earlier notice of appeal (docket no. 84-6280) had become void under F.R.A.P. Rule 4(a)(4), because of Air Florida's timely motion under F.R.C.P. Rule 59 to amend the original judgment. See, Griggs v. Provident Consumer Discount Company, 459 U.S. 56(1982).

ARGUMENT

Note On Standard Of Review

As stated previously, the FDIC is not asking this Court to review any of the fraud or other issues raised below involving factual disputes. From the tender offer issue to the award of prejudgment interest, this appeal is limited to questions of law subject to the "freely reviewable" standard, whether under the applicable California law, Matter of McLinn, 739 F.2d 1395(9th Cir. 1984), or federal law. On each issue of this appeal, there are undisputed facts requiring a reversal of the ruling made below.

I

AT A MINIMUM, AIR FLORIDA'S FAILURE TO MAKE A TENDER OFFER DISCHARGED ANY FURTHER CONTRACTUAL PAYMENTS BY THE FDIC

A) Applicable Law

Under well settled California (and American) law, the lack of an agreed performance under a contract excuses further performance by the other party. Restatement, Second, Contracts(1981),

§ 237[2]; 1 Witkin, Summary of California Law(8th ed. 1973), Contracts, § 584. Both Witkin and the Restatement make it explicit that the same rule applies whether or not there was a valid excuse for the lack of the earlier performance. As Witkin puts it:

> In bilateral contracts for an agreed exchange, where one party has materially failed to perform his promise, or there has been a material delay in his performance, the other party's duty to perform is discharged, even though the first party's default was excusable (as by impossibility) and therefore not a breach which would justify an action for damages. (Id.) (Emphasis added)

Similarly, the Restatement notes that the second party is discharged from further performance "without regard to whether or not the [first party's] failure of performance is a breach. ... for example, even though the failure is justified on the ground of impracticability ...." Comment (a) to § 237.

The rule operates the same way, irrespective of the existence of a valid excuse, because the impact of one side's failure to perform is precisely the same. In Witkin's terms:

> [The doctrine rests upon the theory that it is unjust to compel one party to perform when, for any reason, he does not receive the other party's performance. (Id.) (Emphasis added)

The Restatement likewise observes that the discharge of further duties on the part of the second party "is required out of a sense of fairness ...." Comment (a) to § 237, at p. 216.

The rule is sometimes referred to as the doctrine of

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2 The Restatement rule is: "Except as stated in § 240 [divisible contracts], it is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time." In this case, the tender offer and cannery adjustment provisions were in the same post-consummation phase of the contract, and the repudiation of the tender offer preceded Air Florida's claim for a cannery adjustment.

constructive conditions of exchange. Comment (a) to Restatement, supra, § 237, at p. 216. It was stated as follows in Benson v. Andrews, 138 Cal.App.2d 123, 132(1955), quoting from an earlier Supreme Court decision:

> In all executory contracts the several obligations of the parties constitute to each, reciprocally, the consideration of the contract; and a failure to perform constitutes a failure of consideration -- either partial or total, as the case may be -- within the meaning of section 1689 of the Civil Code.

In Benson, the Court of Appeal reversed a judgment for the amount due under a promissory note, holding that the plaintiff's assignor had failed to perform construction work which he had promised as consideration for the note. "[T]he [trial] court's determination that there was no failure of consideration is completely contrary to the facts and unsupported by the evidence." 138 Cal.App.2d at 135.

In one of the California cases cited by Witkin, Walker v. Harbor Business Blocks Co., 181 Cal. 773(1919), the corporation's president declared that it "could not and would not perform its obligation under the contract within the time prescribed therein." Id. at 778. The Supreme Court held that a repudiation of this kind -- identical to Air Florida's -- "releases the obligee from the duty of making demand, and performance or tender...." Id. (emphasis added). The Supreme Court held, as a matter of law, that the lack of even a portion of certain agreed real estate improvements, representing "a considerable sum," "must be presumed to be a material part of the consideration to the vendees," id. at 782, and was "a condition concurrent with the[ir] agreement to make payment of the last installment." Id. See also, Madera C & I Co.

v. K. Arakelian, Inc., 103 Cal.App. 592,597-8(1930) (as a matter of law, a fixed annual water charge was excused by the lack of supply one year).

In effect, for the law to waive one party's promised performance, and still compel the other party to perform, is the equivalent of rewriting the parties' contract. A recent decision by this Court applied that very principle. It excused any further obligations by one party to a contract where, without any fault by the other party, it could no longer deliver its promised performance.

In Union Pacific R. Co. v. Chicago M. St. P & P. R. Co., 549 F.2d 114(9th Cir. 1976), there was a 1910 contract for the construction of "a continuous railroad system" between two cities in Washington, consisting of "some 60 miles of track." Id. at 115. The contract provided for 999 years of annual "rental payments" by the defendant, "whether or not the [defendant] actually used the tracks." Id.

In 1972 the City of Spokane, under threat of condemnation, took title to the land on which a terminal and the last 300 feet of the track system were situated. The City promptly dismantled same, and the defendant then gave notice that it was terminating the contract and all further rental payments. The great majority of the 60-mile track system was unaffected, and there was alternative track available for the last 300 feet in Spokane.

This Court unanimously affirmed a judgment for the defendant. It held that a basic implied condition for rental payments had been destroyed. "[T]he parties contemplated the existence of a continuous railway system when they entered into these contracts."

549 F.2d at 117. Without any fault on either side, the contemplated system ceased to exist. The law would not require the defendant to accept substitute track and keep making its rental payments. That would mean, in effect, forcing the defendant to accept a different contract. "One party cannot unilaterally modify a contract without the consent of the other party ... or without consideration. ..." Id. at 118 (citations omitted).

To summarize, the duty to continue performing under a contract is discharged, without regard to fault or excuse, when an executory performance by the other side has failed or been repudiated. One final point must be made, however. Although the performance which failed in the instant case was intangible and had no fixed value, -- it was the FDIC's opportunity for an additional payment -- California cases demonstrate that contractual rights of that nature are fully protected like any other.

Orton v. Embassy Realty Associates, 91 Cal.App.2d 434(1949), is strikingly in point. The plaintiffs had sold to the defendants all the stock of a corporation whose assets were primarily real estate. One of the buildings was not then under lease, and the parties disagreed as to its value. The stock purchase agreement therefore provided for a cash payment down and a "Contingent Addition To Purchase Price." Id. at 435. The plaintiffs were entitled to additional compensation for their stock if a lessee could be found within a fixed period of time. The higher the rent thus secured, the greater the additional payment would be. Id. at 436.

Precisely as happened in the instant case, the Orton plaintiffs' agreed opportunity for additional compensation was

frustrated. Well prior to the deadline for securing a lessee, the defendant sold off the building and made a lease impossible. Although "all" plaintiffs had lost was the remainder of their opportunity for compensation, not something of fixed value, the Court of Appeal saw no doubt whatsover that there was a material failure of performance, under the plain meaning of the contract:

> From a consideration of the contract itself and the intention of the parties as indicated by its terms, without resort to extrinsic evidence, it must be held that the buyer impliedly agreed to hold the property available for lease until September 1, 1946. To hold otherwise would be to do violence to the expressed intention of the parties that the sellers were to have until September 1, 1946, in which to bring about the contingency upon which the enhancement of the purchase price depended. A contract should be construed to give effect to all its provisions, if reasonably practicable. (Civ. Code, 1641) If defendant's position is correct, then it could with impunity have sold the property immediately upon acquiring it, thus giving plaintiffs no opportunity at all to perform.
>
> * * *
>
> ... A party who prevents fulfillment of a condition of his own obligation commits a breach of contract ... and cannot rely on such condition to defeat his liability. (91 Cal.App.2d at 438-9)

In sum, even though the performance which failed in <u>Orton</u> was "only" an implied condition not to frustrate a potential benefit for the other side, the failure of that performance was held to constitute a breach as a matter of law -- regardless of the obvious uncertainty as to what benefit, if any, the plaintiffs might have been entitled to had their rights not been interfered with.

A similar case is <u>Wolf v. Marsh</u>, 54 Cal.228(1880). The owner of some coal mines executed a promissory note for a sum certain, but it was only payable if he ever received a profit from the

mines. After four years without any profit he conveyed away his interest in the properties, cutting off any further opportunity for the note to become payable under the agreed condition. The payee sued, in effect disregarding the condition, and the California Supreme Court upheld his judgment for the full amount of the note. The defendant's conveyance had "made it impossible for the contingency upon which the note would become payable ever to arise. . . . [That] violated his contract, and the note at once became due and payable. 54 Cal. at 232.

We turn now to the application of these principles to the instant case.

B) The FDIC's Further Obligations Were Discharged

The few material facts bearing on this issue are not in dispute. Air Florida agreed to make a tender offer for the remaining Westgate shares. It agreed to do so promptly, beginning on May 26, 1981, and in no event later than July 25, 1982. There were only three technical conditions placed on its agreement (E.R. 23; ¶ 6.02), and none of them was ever asserted as an excuse or bar.

Air Florida also agreed to pay the FDIC additional compensation for its block of shares -- if the required tender offer was at a higher price than the FDIC's $18 per share, and if Air Florida obtained at least 80% control of Westgate.

Granted, there was no guarantee that Air Florida would obtain 80% control, nor that the tender offer would have to be at a price higher than $18 per share. To the contrary, the market price at the time of this agreement was well below that figure. If the

market price had stayed there, or lower, the FDIC might have had no valid complaint about a good faith tender offer at $18 per share. Similarly, there was no guarantee in the Orton or Wolf cases that the condition for the payments involved would ever have been fulfilled.

While there was no guarantee of an additional payment, the FDIC had nevertheless bargained for a potential payment under specified conditions, just as in Orton and Wolf. That potential was undisputably a part of the bargain. Its failure or repudiation by Air Florida, whether excused or unexcused, fully invoked the rule set forth in this brief. Air Florida could not foreswear any attempt to fulfill the agreed condition for additional compensation to the FDIC, and then turn around and insist that the FDIC perform other executory provisions of the same contract.

The $30 tender offer Air Florida was considering, if successful, would have meant an additional $12 per common share for the FDIC. With 377,000 common shares involved, its additional compensation under the contract would have been $4,524,000. Even a tender offer at the highest actual trading price, $26.50, without any premium at all, would have meant a $3,204,500 payment to the FDIC.

C) Summary

With the FDIC's right to a potential tender offer payment violated by Air Florida, the FDIC was discharged as a matter of law from the cannery adjustment and any other contractual obligations. The district court's decision to waive the FDIC's part of this contract, yet enforce the part favoring Air Florida, is

unsupportable as a matter of law. Its finding that there was no failure of consideration, like the same finding in Benson v. Andrews, supra, 138 Cal.App.2d 123, is "contrary to the facts and unsupported by the evidence." Id. at 135.

The court's sole basis for ruling as it did was to construe the FDIC's tender offer rights as essentially illusory. It held that Air Florida had no obligation at all, express or implied, to price its tender offer above $18. As the Orton and Wolf cases have already foreshadowed, Part III of this argument, beginning at p.30, will demonstrate that the district court's reading of the contract was flatly contrary to the ordinary meaning of its words, and the implied covenant of good faith and fair dealing.

II

THE FDIC WAS ALSO ENTITLED TO AT LEAST A PARTIAL RESTITUTION OF AIR FLORIDA'S $7.7 MILLION PROFIT ON THE CONTRACT

Under the same undisputed facts, the FDIC was entitled to at least some restitutionary award in addition to being discharged from further contractual obligations of its own. Unless the FDIC's tender offer rights can indeed be construed as meaningless (see Part III, infra), it suffered a material failure of consideration, as a matter of law, and could therefore invoke California's statutory and well settled restitutionary remedies.

The California statutes expressly authorize equitable adjustment of rights in any action where "a party seeks relief based on rescission ...." Cal. Civil Code § 1692. Whatever other relief may or may not be granted in the action, the court "may otherwise in its judgment adjust the equities between the parties."

Id.

A leading case underscoring that statute is Runyon v. Pacific Air Industries, Inc., 2 Cal.3d 304(1970). There, the Supreme Court approved certain long-standing principles applicable in rescission cases:

> "[T]he court should do complete equity between the parties" and to that end "may grant any monetary relief necessary" to do so .... It is the purpose of rescission "to restore both parties to their former position as far as possible" ... and "to bring about substantial justice by adjusting the equities between the parties ...." (2 Cal.3d at 316)

The prevention of unjust enrichment is the most fundamental principle of California (and American) restitution law. Kossian v. American National Insurance Co., 254 Cal.App.2d 648(1967)(hearing denied); Witkin, supra, Contracts, § 28; Restatement of Restitution (1937),§ 1. Even a defaulting party to a contract will be awarded restitution for the benefits it has conferred upon the other side in excess of any damages caused by the default. Branche v. Hetzel, 241 Cal.App.2d 801(1966); accord, Restatement of Contracts, supra, § 374. Yet, in the instant case, Air Florida was allowed to retain the entirety of the benefit conferred upon it through the FDIC's performance -- a $7.7 million profit -- notwithstanding Air Florida's own repudiation and frustration of the FDIC's tender offer rights.

The FDIC's right to a restitutionary award rests on alternative legal grounds. Precisely like the rule discharging the FDIC's further performance, the FDIC's right to restitution exists no matter how Air Florida's failure to make a tender offer is legally categorized. Whether it was a breach as in the Orton and

Wolf cases, or a simple failure of consideration, in either event it invoked an established ground for restitutionary remedies. Restatement of Restitution, supra, § 108; Cal. Civil Code § 1689(b)(2) & (4) (the failure of consideration can result from the other party's fault or "from any cause").

The Restatement of Contracts, supra, at § 373, also suggests that Air Florida's anticipatory repudiation of the tender offer obligation gave the FDIC an absolute right to a restitutionary award, although a mere breach alone might possibly not have done so. A mere breach does not invoke the right to restitution unless it gives rise to "a claim for damages for total breach" (emphasis added), but that requirement is absent "on a repudiation...." Id.

The district court never exercised its remedial discretion about how much of a restitutionary award was appropriate. It held that there were no grounds for such an award, neither breach, failure of consideration, nor even unjust enrichment. See, Witkin, supra, § 42. Nevertheless, the undisputed facts demonstrate that all of those grounds were established.

The FDIC recognizes that this Court may be reluctant to order a full restitution of Air Florida's benefit under this contract. Indeed, Civil Code § 1692 would permit Air Florida to argue that the restitutionary award must be in some equitable proportion to the FDIC's lost tender offer rights.

Accordingly, the FDIC submits that an equal division of the gain in value of the Westgate stock would be equitable, and fair to both sides. The likely range of the FDIC's lost tender offer payment was from $3.2 to $4.5 million (see p.26, supra), and a restitutionary judgment in the amount of one-half of Air Florida's

$7.7 million profit, or $3.85 million, would be <u>exactly</u> in the middle of that range. The justice of such an award would be exquisite.

III

THE DISTRICT COURT NULLIFIED THE FDIC'S TENDER OFFER RIGHTS THROUGH AN IMPERMISSIBLE CONSTRUCTION OF THE CONTRACT

A) Introduction

There is only one finding below which, if affirmed, could possibly avert the legal conclusions thus far demonstrated in this brief. If Air Florida indeed had an unfettered discretion not to make a tender offer if the market exceeded the FDIC's $18 per share, then Air Florida could at least argue that its exercise of such a discretion represented no loss, harm or injustice to the FDIC. That is precisely and <u>solely</u> the reasoning which underlies the district court's legal conclusions herein, that there was neither a breach of contract nor a failure of consideration. That is also why the point can be determined as a matter of law; only a contractual interpretation is involved.

There are two separate grounds for rejecting the district court's reading of the contract. First, the ordinary meaning of the words used in the contract will only yield one conclusion: that Air Florida did not have any discretion to refrain from making a tender offer in a market higher than $18 per share. Secondly, if Air Florida had any discretion at all regarding the tender offer, that discretion was sharply restricted by Air Florida's covenant of best efforts (E.R. 36; ¶ 10.1) and its implied duty of good faith and fair dealing. Cal. Civil Code §§ 1655 and 1666. In sum, even

an obligation with some discretion was a valuable contractual right of the FDIC's. The frustration and ultimate repudiation of that right still entitled the FDIC to a discharge of further obligations and a restitutionary award.

B) The Ordinary Meaning Of The Tender Offer Provisions

"Air Florida, at its own expense, agrees to make a general public offer ...." (E.R. 22; ¶ 6.01) That is the opening language of the principal clause of the contract on this subject. The language is completely unconditional. "Air Florida agrees to make an offer." Not Air Florida "may" or "might" make an offer, subject to market conditions or anything similar. The language in the plainest terms imposes an unconditional agreement to make an offer.

The unconditionality is greatly strengthened, for the purposes of this case, by the fact that later in the same contract three conditions are stated as qualifiers on Air Florida's "obligation ... to make the offer," (E.R. 23; ¶ 6.04),[3] none of which has ever been asserted to have failed. The parties' express statement of those three agreed conditions leaves Air Florida's theory of an additional condition, a price-ceiling, open to the gravest suspicion.

Moreover, the asserted price-ceiling condition would conflict with the fundamental concept of a tender offer, not just with the language creating an unconditional duty beyond the three conditions stated. It was undisputed below -- and even established by uncontradicted expert testimony (E.R.308-9) -- that the common and

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[3] The conditions are: compliance with the laws governing tender or exchange offers, the consummation of Westgate's reorganization, and Air Florida's actual receipt of the FDIC's shares.

ordinary meaning of a tender offer is one that exceeds the market or trading price of the securities being solicited. This Court has recognized or declared that meaning on more than one occasion. S.E.C. v. Carter-Hawley Hale Stores, 760 F.2d 945(9th Cir. 1985); Polinsky v. M.C.A.., 680 F.2d 1286, 1291(9th Cir. 1982) A tender offer by its very nature must exceed the market price, whatever it is at the time of the offer, in order to have any prospect whatsoever for success.

It follows, therefore, that the ordinary meaning of an unconditional agreement to make a tender offer is that there is no price-ceiling condition. To impose one would require the clearest words to that effect. See, Gray v. Zurich Insurance Co., 65 Cal.2d 263(1966). "Since the policy sets forth the duty to defend as a primary one and since the insurer attempts to avoid it only by an unclear exclusionary clause, the insured would reasonably expect, and is legally entitled to, such protection." Id. at 268. Likewise, because the FDIC's tender offer rights apparently rested on a plain and unconditional agreement, so far as is material here, to read Air Florida's price-ceiling condition into it would impermissibly destroy the FDIC's reasonable expectations based on the ordinary meaning of words.

The point is underscored dramatically by another provision of the same contract. The parties similarly provided for a "tender offer" by Air Florida for Westgate preferred stock (E.R. 69), but expressly modified the ordinary meaning and implications of that term. The tender offer for the preferred stock was to be "at the same price" paid to the FDIC for those securities. (Id.) Naturally, there was no corresponding right to additional

compensation for the FDIC. Only an unmodified tender offer obligation would make such a right at all meaningful.

It is against that background that Air Florida's central thesis must be tested. A paragraph in the contract set a "minimum price" for the required tender offer. (E.R. 23; ¶ 6.03) The FDIC has no quarrel with Air Florida's explanation of why that minimum price was established. It was to guarantee the other Westgate shareholders the chance to receive at least (at a "minimum") what the FDIC received for its shares, and in so doing to protect the FDIC from any legal challenge asserted by those other shareholders for receiving more than they did.

The minimum price clause, so understood, would in no way conflict with the FDIC's converse right to price protection through the tender offer provisions. If Air Florida paid the other shareholders more than it paid the FDIC, then the FDIC would likewise be entitled to equal treatment. That is the plain meaning of the clause establishing the FDIC's right to any additional compensation. (E.R. 67; ¶ 12)

What the FDIC <u>does</u> quarrel with is Air Florida's successful attempt below to have one aspect of the tender offer provisions erase the other aspect. This is where Orwellian "doublespeak" is required to express Air Florida's position.

In brief, Air Florida seriously contends that "minimum" means "maximum." It argues that the <u>minimum</u> price for the required tender offer, $18 per share, was in reality a <u>maximum</u> price for it; that is, that any offer requiring a higher price was wholly within Air Florida's discretion. The FDIC submits that the ordinary meaning of the word "minimum" provides a completely sufficient

rebuttal to this entire argument. If further illustration is required, however, it can be found in the tortuous expression of the point in the district court's findings and conclusions. It may be sufficient to cite the finding that the contract gave Air Florida the "right" to make a tender offer above $18 per share (E.R. 361; ¶8), when it hardly needed the FDIC's permission to do so at any time. The illusory "right" was required, however, to give an illusion of balance to the illusory rendering being given to the FDIC's rights under these provisions.

To summarize, the ordinary meanings of "minimum" and "tender offer" were ignored below, along with the plain unconditionality of Air Florida's agreement. Only by such a process could the FDIC's tender offer rights be effectively and literally nullified, their destruction brushed aside as constituting no breach, no failure of consideration, not anything which could possibly interest a court of law and equity.

C) The Restrictions On Air Florida's Discretion

If Air Florida had any discretion at all with regard to the tender offer, it was in the area of how much higher than the market price it would fix the tender offer, and possibly how long it could delay and still make the offer "as promptly as possible." (E.R. 36; ¶ 10.01) Neither of those areas is material now, however. Air Florida made no offer at any price, at any time.

Accordingly, the only question presented is whether any measure of discretion which Air Florida did have rendered the FDIC's tender offer rights too contingent or speculative ab initio

to justify any legal remedies for their destruction. One complete answer, of course, is the rule of Orton v. Embassy Realty Associates, supra, 91 Cal.App.2d 434, and Wolf v. Marsh, supra, 54 Cal. 228, that a party who destroys another's opportunity for a contingent payment forfeits his defenses under the contingency clause. Accord, Restatement, supra, § 255.

Another answer, though, is that Air Florida had agreed, both expressly (E.R. 36; ¶ 10.01) and by law, to use its best efforts to bring about the conditions for the FDIC's payment through a tender offer. The implied duty of good faith and fair dealing, see Restatement, supra, § 204 and Witkin, supra, § 576, adds independent weight to Air Florida's covenant of best efforts. The parties placed the FDIC's significant potential benefit in Air Florida's hands. Like a fiduciary, Air Florida was being trusted to do its utmost in good faith to exercise its discretion for the FDIC's benefit. Cal. Lettuce Growers v. Union Sugar Co., 45 Cal.2d 474(1955). That meant, at a minimum: (1) making a tender offer at all, (2) making it promptly before favorable conditions were lost, and (3) pricing it to have a good chance of obtaining at least 80% control of Westgate, which triggered the FDIC's right to price parity.

If Air Florida had the unfettered discretion to spurn a tender offer in the only market conditions (above $18) under which the FDIC's right had any value at all, then indeed those rights were meaningless surplusage in the contract. See, 1 Corbin on Contracts (1963), § 98. That reading, however, does violence to the ordinary meaning of words; to Air Florida's express and legally implied covenants; and to the fundamental rule that contracts are to be

construed, wherever possible, to give effect to the language used instead of nullifying it. Cal. Civil Code §§ 1641 & 1643; Elte, Inc. v. S. S. Mullen, Inc., 469 F.2d 1127, 1131(9th Cir. 1972).

IV

THE $1.4 MILLION ARBITRATION AWARD AGAINST THE FDIC, EVEN IF NOT BARRED BY THE DISCHARGE OF ITS CONTRACTUAL DUTIES, WAS VOID FOR THE PLAIN VIOLATION OF DUE PROCESS

The basic right to a hearing in an arbitration dates back at least to 18th century England, See, Lutz v. Linthicum, 8 Pet. 165, 8 L.Ed. 904 at 909(1834) (opinion by Justice Story). In a more recent case, involving Florida law, Citizens Bldg. v. Western Union Tel. Co., 120 F. 2d 982(5th Cir. 1941), the court stated as follows:

> The universal rule in common-law arbitrations is that the parties are entitled to be heard, after reasonable notice, upon the subject matter in dispute.... Unless a hearing is had or waived, the board is without power to make a valid award. (120 F.2d at 984) (emphasis added)

California case law agrees, e.g., Meloy v. Imperial Land Co., 163 Cal. 99(1912), as does its modern arbitration statute. Code Civ. Proc. §§ 1282(a)(1) and 1286.2(c) & (e).

Although the instant case is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq., not surprisingly the basic right to a hearing is guaranteed thereunder. See 9 U.S.C. § 10(c). This Court's recent opinion in Coast Trading Co., Inc. v. Pacific Molasses Co., 681 F.2d 1195(9th Cir. 1982), stated the requirement succinctly: an award must, at a bare minimum, reflect

"the honest decision of the arbitrators, after a full and fair hearing of the parties." Id. at 1198 (emphasis added), quoting from Burchell v. Marsh, 58 U.S. 344(1854). Another court has likewise expressed this strong policy of the federal act, in a case where an arbitration award was rendered without any hearing: "No court, state or federal, should affix its imprimatur to any such 'award.'" Riko Enterprises, Inc. v. Seattle Supersonics Corp., 357 F.Supp. 521, 526 (S.D.N.Y. 1973), citing Fuentes v. Shevin, 407 U.S. 67(1972).

The pertinent facts are, once again, not in dispute. There was simply no hearing in this arbitration, not even an inadequate one. Inviting written submissions is no substitute. Tube & Steel Corp. of America v. Chicago Carbon Steel Prod., 319 F.Supp. 1302(S.D.N.Y. 1970). The FDIC twice requested such a hearing, and even offered to have counsel present only in an advisory capacity for the parties, yet even that request was denied at Air Florida's urging.

The impact was plain. The FDIC's uncontroverted affidavit on the parties' intentions was of no moment. The arbitrator decided that the agreement was too uncertain or "confusing" to be applied. Instead, he resorted to a series of "assumptions"[4] and proceeded to apply them in lieu of the contract. The due process violation thus led to a decision violating still another rule enunciated in this Court's Coast Trading opinion. Awards must be "grounded on the agreement of the parties and the issues they present for resolution." 681 F.2d at 1198(emphasis added).

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4 See E.R. 458-9. "[W]e do not believe the Agreement can be complied with ... without making certain assumptions." Operating on this "belief," without a hearing, is arbitrary and capricious.

As Coast Trading emphasizes, arbitration is a "consensual" process, id. at 1197, and to encourage its use certain minimum guarantees are extended by the law. Those guarantees were egregiously breached in this case. After being forced to arbitrate with a partner in an accounting firm heading into major litigation against it, the FDIC may not be subjected to a $1.4 million award which emerged from an arbitration (1) without a hearing, (2) not grounded in the parties' contract but on "assumptions," and (3) conducted by an arbitrator whose very neutrality was open to serious doubt.

V

THE AWARD OF PREJUDGMENT INTEREST ON THE ARBITRATION AWARD VIOLATED THE PARTIES' STIPULATION THAT IT WAS NOT SELF-EXECUTING

If there had been no stipulation to the contrary in this litigation, a valid arbitration award would admittedly have been self-executing, and prejudgment interest would have been recoverable in principle. Air Florida relied primarily on Precision Automotive v. Northern Insurance Co., 252 Cal.App.2d 1036(1967). Applying and quoting Cal. Civil Code § 3287, which is also appliable here, the court stated as follows:

> "Every person who is entitled to recover damages certain, ... upon a particular day, is entitled also to recover interest thereon from that day...."

> The two requirements are met here. The amount of damages was made certain by the arbitration award and the "particular day" is fixed by the policy provision. Neither item needed to be determined by the court. (252 Cal.App.2d at 1043) (emphasis added)

The same does not hold in the instant case. The parties stipulated that only the calculation of the cannery adjustment would be accomplished through the arbitration. (E.R. 296) "All other issues" were to be determined by the court, and the calculation was accordingly to be inserted in the court's "single final judgment." (Id.) That is the only way courts determine issues, not by interlocutory orders.

In the terms of Civil Code § 3287, Air Florida's right to recover did not arise "upon a particular day" by virtue of the arbitrator's decision. The parties had stipulated that the decision would only be given effect through the court's judgment determining all of the pertinent issues, other than the "calculation" itself.

While there was a substantial delay in the entry of a final judgment, it was largely attributable to Air Florida's delay in seeking an order or stipulation lifting its own automatic bankruptcy stay. Any lost use of money for that time was an avoidable consequence not chargeable to the FDIC.

CONCLUSION

For the foregoing reasons, the FDIC requests that the judgment below be reversed; that judgment be entered in its favor on the two counterclaims; and that judgment also be entered in its favor on the first and second causes of action of the amended complaint, seeking a restitutionary award on the grounds of failure of consideration, in the amount of $3.85 million.

DATED: February 3, 1986

BRONSON, BRONSON & McKINNON

BY ________________________
ELLIOT L. BIEN

OFFICE OF THE GENERAL COUNSEL
FEDERAL DEPOSIT INSURANCE CORPORATION

BY ________________________
E. WHITNEY DRAKE

Attorneys for Appellant, FEDERAL DEPOSIT INSURANCE CORPORATION, As Receiver Of United States National Bank

STATEMENT OF RELATED CASES

To our knowledge there are no related cases pending in this Court.

CERTIFICATE OF SERVICE BY MAIL

I, Josephine E. Sawyer, declare under penalty of perjury that the following facts are true and correct:

I am over the age of 18 years and not a party to or interested in the within entitled cause. I am an employee of Bronson, Bronson & McKinnon and my business address is 555 California Street, San Francisco, California.

I served by mail the following document(s):

TWO COPIES OF APPELLANT'S OPENING BRIEF
AND ONE COPY OF EXCERPT OF THE RECORD

in the following manner:

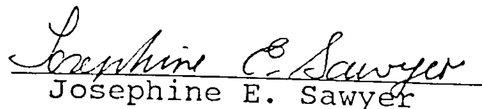
I enclosed a true copy of said document(s) in envelope(s) addressed as follows:

Ralph Zarefsky, Esq.
McCutchen, Black, Verleger & Shea
600 Wilshire Boulevard
Los Angeles, California 90017

Patrick C. Shea, Esq.
Luce, Forward, Hamilton & Scripps
110 West A. Street
Suite 1700
San Diego, California 92101

I sealed said envelopes and deposited them so sealed and addressed on February 3, 1986, with the said document(s) enclosed therein and with the postage thereon fully prepaid in the U.S. Post Office, City and County of San Francisco, State of California.

Executed on February 3, 1986, at San Francisco, California.



Josephine E. Sawyer