

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

|                         |   |                           |
|-------------------------|---|---------------------------|
| IN RE:                  | ) |                           |
|                         | ) |                           |
| NATIONAL GYPSUM COMPANY | ) | CASE NO. 390-37213-SAF-11 |
| a Delaware Corporation, | ) |                           |
|                         | ) |                           |
| AANCOR HOLDINGS, INC.   | ) | CASE NO. 390-37214-SAF-11 |
| a Delaware Corporation, | ) |                           |
|                         | ) |                           |
|                         | ) | Jointly Administered      |
| <u>Debtors.</u>         | ) | Chapter 11                |

SETTLEMENT AGREEMENT

Debtors, National Gypsum Company and Aancor Holdings, Inc. ("Debtors") and the United States of America (the "United States") hereby enter into this Settlement Agreement (the "Agreement") dated as of July 15, 1992 in partial settlement of the claim filed by the United States against Debtors in the above-captioned bankruptcy proceedings.

WHEREAS Debtors filed voluntary petitions for bankruptcy in this Court (the "Bankruptcy Court") under Chapter 11 of the Bankruptcy Code on October 28, 1990 and are currently Debtors and Debtors-in-Possession;

WHEREAS the United States on behalf of the United States Environmental Protection Agency ("EPA") and the United States Department of the Interior ("DOI") filed a proof of claim

in these bankruptcy proceedings on May 29, 1991 (the "Proof of Claim"), alleging liability of Debtors under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607;

WHEREAS the United States alleged in the Proof of Claim that, inter alia, Debtors were liable for response costs incurred by the United States in the course of responding to alleged releases and threatened releases of hazardous substances into the environment from certain sites. The Proof of Claim also contingently addressed Debtors' alleged liability under CERCLA with respect to such sites for response costs not yet incurred and also for injury, destruction to, or loss of natural resources within the meaning of CERCLA Section 107(a)(4)(C), to the extent either of those categories of costs were considered "claims" within the meaning of the Bankruptcy Code;

WHEREAS Debtors filed on August 2, 1991, Debtors' Objection To Allowance of Claim of the United States, opposing the Proof of Claim and asserting counterclaims against the United States. On October 25, 1991, Debtors filed their Objection To Allowance of Claim of the United States of America and Amended Counterclaim;

WHEREAS Operable Unit One of the Asbestos Dump Sites listed in the Proof of Claim (the manufacturing plant in Millington, New Jersey, owned by National Gypsum Company from 1953 to 1978) (the "Millington Main Site") includes a mound of asbestos-containing waste on the bank of the Passaic River;

WHEREAS National Gypsum Company entered into an administrative order on consent with EPA in April 1985 for the conduct of certain investigations and studies known as a "Remedial Investigation and Feasibility Study" or "RI/FS" (Administrative Order No. CERCLA-50103) (the "RI/FS Order"). Pursuant to the RI/FS Order National Gypsum Company conducted the RI/FS for the Millington Main Site and submitted RI and FS Reports which were accepted as complete by EPA for the Millington Main Site;

WHEREAS on September 30, 1988, EPA selected a remedy for the Millington Main Site by the issuance of a "Record of Decision" or "ROD", which selected as the appropriate remedy for the site the installation of a two foot soil cover on areas of exposed or minimally covered asbestos and slope protection measures in the form of a retaining wall or a precast concrete mat, or an equivalent system, erosion and sediment controls, security fences, and implementation of institutional controls. Treatability studies will be conducted to analyze for permanent destruction or immobilization of asbestos;

WHEREAS EPA issued a second administrative order to National Gypsum Company on September 29, 1989 to undertake the remedy selected in the ROD for the Millington Main Site (Administrative Remediation Order Index No. II CERCLA-90113) (the "1989 Order"), pursuant to which order National Gypsum Company provided to EPA a \$2,111,000 letter of credit (currently from the

Security Pacific National Bank) and began the process of the preparation of a Remedial Design Work Plan;

WHEREAS National Gypsum Company and EPA have developed a series of disagreements as to the remedy of the Millington Main Site and its costs, in that:

(a) National Gypsum contends that the remedy can be completed for \$2,111,000 whereas EPA states that it will cost \$3,200,000; and

(b) National Gypsum contends that the remedy set forth in the Remedial Design Work Plan should be considered the permanent remedy whereas EPA takes the position that it may be only an interim remedy; and

In addition, National Gypsum Company and EPA appear to differ on who has been responsible for the delays in finalizing the Remedial Design Work Plan and, consequently, whether National Gypsum Company may be liable for penalties. Further, National Gypsum and EPA differ as to the priority of the Proof of Claim for the Millington Main Site with the United States taking the position that it should be an administrative expense claim and National Gypsum Company taking the position that it should be a general unsecured claim. Finally, the parties disagree as to the status of the \$2,111,000 letter of credit with the United States taking the position that access to the letter of credit is not subject to the jurisdiction of the Bankruptcy Court, whereas National Gypsum Company takes the opposite position;

WHEREAS the parties have agreed to compromise and settle the claims of the United States for the Millington Main Site on the terms set forth herein below to spare the expense and

uncertainty of litigation, to facilitate and expedite the remediation of the site and to resolve the issue of penalties under the 1989 Order;

WHEREAS the Debtors and the United States, having agreed that the settlement without further litigation of Debtors' alleged liability under CERCLA for all response costs and natural resource damages incurred or sustained or to be incurred or sustained at the Millington Main Site and five other sites listed in the Proof of Claim -- namely, the City Industries Site in Orlando, Florida; the Yellow Water Road Site in Jacksonville, Florida; the Coakley Landfill in North Hampton, New Hampshire; the H.O.D. Landfill in Antioch, Illinois; and the Yeoman Creek Landfill in Waukegan, Illinois (collectively, the "Five Settled Sites"); and all counterclaims related thereto, is fair, reasonable, and in the public interest;

NOW, THEREFORE, without the admission or any adjudication of any issues of fact or law, and upon the consent and agreement of the parties to this Agreement by their attorneys and authorized officials and the Bankruptcy Court, Debtors and the United States hereby agree as follows:

#### I. AUTHORITY

1. This Agreement shall apply to and be binding upon Debtors and the United States. The undersigned representatives for the Debtors and the Assistant Attorney General for Environment and Natural Resources Division certify that they are fully authorized to execute and bind the Debtors and the United

States, respectively, to this Agreement. The parties agree not to contest the validity of this Agreement in any subsequent proceeding arising from it.

## II. BANKRUPTCY COURT APPROVAL

2. This Agreement is expressly subject to approval by the Bankruptcy Court. After this Agreement has been executed by the United States and the Debtors, and the United States provides final approval under Section IX of this Agreement, the parties shall promptly move the Bankruptcy Court for approval of the Agreement. Approval of this Agreement by the Bankruptcy Court may be done as part of confirmation of a plan of reorganization containing this Agreement.

## III. EFFECTIVE DATE OF AGREEMENT

3. The Effective Date of this Agreement ("Effective Date") shall be the date that the Bankruptcy Court's approval of this Agreement in accordance with Section II above becomes a final non-appealable order.

## IV. WITHDRAWAL OF 1989 ORDER

4. Any penalties under the 1989 Order are hereby waived and shall not begin to accrue until thirty days following receipt by National Gypsum of notice (if any) that the Settlement Agreement shall not become effective.

5. Upon receipt by the United States of full payment of the \$2,650,000 settlement payment for the Millington Main Site

specified in Paragraph 6(b) below, the 1989 Order against National Gypsum Company shall be deemed terminated.

V. ALLOWANCE OF CLAIM

6. (a) In settlement of Debtors' alleged liabilities under CERCLA with respect to the Five Settled Sites, Debtors agree that the Proof of Claim in connection with the Five Settled Sites shall be allowed as a general unsecured prepetition claim against Debtor National Gypsum Company in the amount of \$850,000, as follows:

- (1) City Industries Site (See Paragraph 13 below)
- (2) Yellow Water Road Site (\$25,000)
  - The United States on behalf of EPA: \$25,000
- (3) Coakley Landfill (\$745,000)
  - The United States on behalf of EPA: \$610,000
  - The United States on behalf of DOI: \$135,000
- (4) H.O.D. Landfill (\$65,000)
  - The United States on behalf of EPA: \$50,000
  - The United States on behalf of DOI: \$15,000
- (5) Yeoman Creek Landfill (\$15,000)
  - The United States on behalf of EPA: \$10,000
  - The United States on behalf of DOI: \$5,000

(b) In settlement of Debtors' alleged liabilities under CERCLA with respect to the Millington Main Site, Debtors agree that the United States' claim in connection with the Millington Main Site shall be allowed as an administrative claim

against Debtor National Gypsum Company in the amount of \$2,650,000 to be paid as follows:

(1) \$2,111,000 will be realized by the United States by exercising its rights under the letter of credit dated April 22, 1991 issued by the Security Pacific National Bank on behalf of National Gypsum Company to secure performance of National Gypsum Company's obligations under the 1989 Order (the "Letter of Credit").

(2) Debtors hereby stipulate that, as of the Effective Date of this Agreement, all conditions precedent to the United States' drawing upon the Letter of Credit will have been satisfied.

(3) In the event that the United States is unsuccessful in drawing upon the Letter of Credit in whole or in part, any amount of the \$2,111,000 not obtained through drawing on the Letter of Credit shall be treated as an administrative expense and paid in cash under the final plan of reorganization as confirmed by the Bankruptcy Court in a final order.

(4) \$539,000 (or a greater amount as called for in Paragraph 6(b)(3) above) will be treated as an administrative claim payable in cash under the final plan of reorganization as confirmed by the Bankruptcy Court in a final order.

(c) The payments made pursuant to this Agreement are settlement payments of claims for response costs and natural resource damages and are not fines or penalties.



(d) The United States agrees that Debtor Aancor Holdings, Inc. is not liable to the United States for matters addressed by this Agreement.

7. In no event shall payment to the United States by National Gypsum Company be made by assignment to the United States of any other claims that the Debtors potentially have against third parties, including claims for contribution under CERCLA.

8.(a) Payment of any administrative claim or other cash payment pursuant to this Agreement (excluding payment under the Letter of Credit) shall be by cashier's or certified checks made payable to the "EPA Hazardous Substance Superfund," which shall be transmitted by certified mail to:

EPA - Region II  
Attention: Superfund Accounting  
P.O. Box 360188M  
Pittsburgh, PA 15251

The checks and the transmittal letters shall reference the civil action number of this case and the Department of Justice ("DOJ") case number (#90-11-2-689).

(b) Any securities to be distributed to the United States on its allowed general unsecured claim hereunder shall be distributed as soon as possible after the effective date of the confirmed plan of reorganization (as defined therein) in such form and sent to such address as the United States shall notify Debtors not later than 30 days following such effective date.

(c) Copies of all checks, securities and transmittal letters evidencing National Gypsum Company's payments to the

United States pursuant to this Agreement (excluding payment under the Letter of Credit) shall be sent by first class mail to each of the following:

Office of Regional Counsel  
U.S. Environmental Protection Agency  
Region II  
26 Federal Plaza, Room 437  
New York, New York 10278

Chief, Environmental Enforcement Section  
Re: DOJ #90-11-2-689  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611, Ben Franklin Station  
Washington, D.C. 20044

John Wheeler  
Office of Enforcement  
LE-1345  
U.S. Environmental Protection Agency  
401 M Street, S.W.  
Washington, D.C. 20460

Peter Raynor  
Office of the Solicitor  
Fish and Wildlife Branch  
Department of the Interior  
Washington, D.C. 20044

Chief, Division of Finance  
U.S. Fish and Wildlife Service  
4401 N. Fairfax Drive  
Room 380  
Arlington, Virginia 22203

**VI. DISCHARGE; COVENANT NOT TO SUE; PRESERVATION OF CLAIMS**

9. Upon the effective date of this Agreement, and subject to the limitations set forth in subparagraph (d) below:

(a) For purposes of this Section VI, "Debtors" shall mean Debtors and their affiliates, successors-in-interest, directors, officers, employees and agents.

(b) Any liability of Debtors to the United States under CERCLA or Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973 regarding the Five Settled Sites and the Millington Main Site, including liability for response costs (including, but not limited to oversight costs and costs of the United States Department of Justice) and natural resource damages incurred or sustained or to be incurred or sustained under CERCLA, shall be discharged under the Bankruptcy Court's confirmation of a plan of reorganization.

(c) The United States, on behalf of the Environmental Protection Agency and the Department of the Interior, covenants not to sue or take any civil judicial or administrative claim or action against the Debtors with respect to the Five Settled Sites and the Millington Main Site under CERCLA or Section 7003 of RCRA.

(d) This Agreement does not include or affect any claims that the United States or Debtors may have as to the following:

-- Sites other than those specifically addressed by this Agreement, including, without limitation, claims for alleged response costs at Operable Unit Two of the Millington Asbestos Dump Sites and for alleged response costs and natural resource damages at Operable Unit Three of the Millington Asbestos Dump Sites, and claims for alleged response costs at the Salford Quarry Site;

-- Any claims based on ownership or operation of any site after the Bankruptcy Court's confirmation of a plan of reorganization or on transportation or arrangement for treatment or disposal of hazardous substances after the Bankruptcy Court's confirmation of a plan of reorganization; and

-- Any alleged criminal liability.

10. Debtors reserve all rights they may have to assert that claims not within the scope of Paragraph 9(b) - (c) are within the scope of any discharge they receive under 11 U.S.C. § 1141. The United States reserves the right to assert that such claims are not within the scope of such discharge.

11. Nothing in this Agreement is intended as a covenant not to sue or a release from liability for any person or entity other than the Debtors and the United States. The United States and Debtors expressly reserve all claims, demands and causes of action either judicial or administrative, past or future, in law or equity, which the United States or Debtors may have against any person, firm, corporation, or other entity not a party to this Agreement for any matter arising at or relating in any manner to the sites addressed herein.

12. It is the intent of the parties to this Agreement, and the parties agree, that Debtors will be entitled to contribution protection to the extent provided under Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for matters addressed by this Agreement.

13. The United States has entered into this Agreement on the understanding that Debtors agree to comply with their obligations under the Settlement Agreement entered into by the Debtors and the City Chemical Claimants effective June 5, 1992 regarding the City Industries Site. A copy of that Settlement Agreement is attached hereto as Exhibit A. The Debtors hereby confirm that they will comply with their obligations under such Settlement Agreement.

#### VII. WAIVER OF CLAIMS

14. In consideration of the entry of this Agreement, the Debtors waive any claims or set-off against the United States or the Hazardous Substances Superfund established under 26 U.S.C. § 9507, including any claims or set-off pursuant to Sections 111 and 112 of CERCLA, 42 U.S.C. § 9611 and § 9612, with respect to the Five Settled Sites and the Millington Main Site, or for any attorneys' fees related to the matters concerning such sites addressed in this Agreement.

15. In further consideration of the entry of this Agreement, Debtors finally and completely waive, release and covenant not to sue the United States on any claim, counterclaim, or cause of action with respect to the Five Settled Sites and the Millington Main Site.

### VIII. RETENTION OF JURISDICTION

16. The Bankruptcy Court shall retain jurisdiction of this matter for the purpose of enforcing the terms of this Agreement.

### IX. PUBLIC NOTICE AND COMMENT

17. This Agreement shall be subject to publication in the Federal Register and an opportunity for public comment. Final approval of the United States is contingent upon review of any public comments received. This Agreement is also subject to any Order entered by the Bankruptcy Court pursuant to the parties' Joint Motion to Stay Proceedings Concerning Millington Main Site and Five Other Sites.

#### FOR THE UNITED STATES OF AMERICA

\_\_\_\_\_  
Roger Clegg  
Acting Assistant Attorney General  
Environment and Natural Resources  
Division  
U.S. Department of Justice

\_\_\_\_\_  
Date

\_\_\_\_\_  
Joel M. Gross  
Deputy Section Chief  
Environmental Enforcement Section  
U.S. Department of Justice

\_\_\_\_\_  
Date

\_\_\_\_\_  
Herbert H. Tate, Jr.  
Assistant Administrator for  
Enforcement  
U.S. Environmental Protection Agency

\_\_\_\_\_  
Date

7- 3-92 5:29 PM 1992  
John H. Wheeler  
Office of Enforcement  
U.S. Environmental Protection Agency

\_\_\_\_\_  
Date

Marvin Collins  
United States Attorney  
Northern District of Texas

By:

\_\_\_\_\_  
Rebecca A. Gregory  
Assistant United States Attorney  
Northern District of Texas

\_\_\_\_\_  
Date

FOR NATIONAL GYPSUM COMPANY:

\_\_\_\_\_  
Edward A. Porter  
Vice President -- Administration,  
General Counsel and Secretary

\_\_\_\_\_  
Date

FOR AANCOR HOLDINGS, INC.:

\_\_\_\_\_  
Edward A. Porter  
Vice President -- Administration,  
General Counsel and Secretary

\_\_\_\_\_  
Date