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**In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Savannah Division**

In the matter of:	)	
	)	
TOPGALLANT LINES, INC.	)	Chapter 7 Case
	)	Number <u>89-41996</u>
<i>Debtor</i>	)	
	)	
	)	
JAMES L. DRAKE, JR., TRUSTEE	)	
	)	Adversary Proceeding
<i>Plaintiff</i>	)	Number <u>91-4141</u>
	)	
v.	)	
	)	
FRANK K. PEEPLES, et. al.,	)	
	)	
<i>Defendants</i>	)	
	)	
<u>and</u>	)	
	)	
TOPGALLANT GROUP, INC.	)	Chapter 7 Case
	)	Number <u>89-41997</u>
<i>Debtor</i>	)	
	)	
	)	
JAMES L. DRAKE, JR., TRUSTEE	)	
	)	Adversary Proceeding
<i>Plaintiff</i>	)	Number <u>91-4142</u>
	)	
v.	)	
	)	
FRANK K. PEEPLES, et. al.,	)	
	)	
<i>Defendants</i>	)	

**ORDER ON MOTION TO APPROVE COMPROMISE**  
**AND PAYMENT OF ATTORNEYS' FEES AND EXPENSES**

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Trustee's Motion was filed October 6, 1996, and scheduled for a hearing on October 30, 1996. The Motion is set out in detail and requests authority to settle the case upon payment of the total sum of \$400,000.00 in full satisfaction and settlement of all Trustee's claims in accordance with the Settlement Agreement attached to the Motion. As part of the application the Trustee also requested approval of attorneys' fees for his counsel in the amount of \$200,000.00 for the firm of Brennan, Harris and Rominger, and \$35,000.00 for Richard C.E. Jennings. In regard to the attorneys' fees, it was demonstrated that in addition to fees previously awarded, accrued fees exceeding \$350,000.00 are owed Brennan, Harris and Rominger at its normal hourly rate and in excess of \$46,000.00 to Mr. Jennings at his normal hourly rate. Accordingly, the requested approval of attorneys' fees represents a compromise by counsel which is integral to the Trustee's requested settlement authority.

Notice of the Trustee's application was provided to all parties in interest by notice issued October 9, 1996, by the Clerk's Office and objections to the settlement were ordered to be filed on or before October 24. The only objection filed and asserted was that of First American Bulk Carrier Corporation ("FABC") and that objection will be dealt with in this Order.

FABC raises two objections. First, it contends that the Trustee proposes to release to Ambassador Factors, a secured creditor in this case, funds now held in the Trustee's fiduciary accounts which would include freights of the final voyage of the M/V Delaware Bay to which FABC has an adverse claim and which still is being litigated in a related case. See Ambassador Factors, et al. v. First American Bulk Carrier Corp. et al. (Matter of Topgallant Lines, Inc.), Ch. 7 Case No 89-41996, Adv. No. 90-4072, Doc. No. 391, slip op. (Bankr.S.D.Ga., Dec. 17, 1996) (Davis J.) (final order). FABC also objects to the settlement because the Trustee intends to release any claim which he might be able to assert under 11 U.S.C. Section 506(c) against Ambassador Factors. Having considered the argument of counsel and relevant authorities I sustain FABC's objection in part and deny it in part as follows:

1) To the extent that the settlement agreement between the Trustee and the adverse parties contemplates payment to Ambassador of any proceeds of the final voyage of the M/V Delaware Bay before final determination of the above-captioned litigation, including all appeals, FABC's objection is sustained and the Trustee is directed to retain those funds pending a final determination of the parties' entitlement to them.

2) FABC's objection that the Trustee should not be permitted to settle this case and waive his rights under 11 U.S.C. Section 506(c) is overruled.

FABC correctly points out that this Court previously has ruled that it may not pursue an action under 11 U.S.C. Section 506(c) and that Order is on appeal as part of the related litigation. *See Ambassador Factors, et al. v. First American Bulk Carrier Corp. et al. (Matter of Topgallant Lines, Inc.)*, Ch. 7 Case No 89-41996, Adv. No. 90-4072, Doc. No. 366, slip op. (Bankr.S.D.Ga., Aug. 9, 1996) (Davis J.) (pre-trial order). If this Court's order is reversed, of course, FABC will retain its rights to pursue that claim against Ambassador. However, FABC contends that if the appeal is unsuccessful, it will have been precluded from pursuing a claim under 11 U.S.C. Section 506(c) and the Trustee, by a settlement of this case, will have waived any right he would have to pursue it. The Trustee's position is that he has no 506(c) claim arising in his own right and he does not intend to pursue one on behalf of any other party. He does not purport, however, to release any Section 506(c) right that FABC could assert, if my Order on that issue is reversed. I hold that FABC would not be precluded in that event.

This dispute is at the heart of my initial ruling on Section 506(c). FABC continues to argue that it should have a derivative right to surcharge Ambassador's collateral for expenses it incurred despite the specific language of the statute, but if it does not, that the Trustee must assert that right on its behalf. The Trustee argues that he has advanced no funds in this case which have not been already collected out of Ambassador's collateral under Section 506(c). Moreover, the Trustee

does not believe that he can assert a Section 506(c) claim when the funds in issue were advanced by a single creditor. I agree.

The Trustee, because of the unique position he holds in bankruptcy proceedings, because he is a fiduciary, and because the recovery will enhance the estate as a whole, is given an extraordinary right under Section 506(c) to recover from secured property if he advances estate funds to preserve such property. Section 506(c) is the vehicle to prevent costs of preserving collateral from being shifted from the secured party to the estate. It insures that unsecured creditors generally will not bear the costs of preserving collateral in which they have no interest. When expenses are incurred by a single creditor, however, its recovery of those expenses will benefit only that individual claimant, not the estate as a whole. As a result, Section 506(c) does not contemplate that the trustee can surcharge for the benefit of a single creditor. Rather, the creditor must travel under 11 U.S.C. Section 503 which provides for an allowance of administrative priority claims for its advances on an equal footing with similar expenditures of other creditors, i.e., “. . . the actual, necessary costs and expenses of preserving the estate.” Unfortunately, in any case where assets are insufficient to satisfy all secured claims, administrative expense priority claims, unlike Section 506(c) claims, will not be paid. *See Matter of Oakland Care Center, Inc.*, 142 B.R. 791, 794 (E.D.Mich. 1992). Thus, it matters tremendously whether FABC’s claim can be asserted under Section 503 or 506. I have concluded, consistent with my previous

order, that FABC's remedy is under Section 503 only.

The Trustee, who alone holds 506(c) rights under the Code, asserts no claim in his own behalf and I therefore overrule FABC's objection that the Trustee, by this settlement, will not be able to pursue FABC's derivative 506(c) claim.

Except as modified herein, the Motion to Approve the Compromise and Payment of Attorneys' Fees is approved subject to the proviso that the proceeds of the final voyage of the M/V Delaware Bay must be held in escrow pending a final resolution of that litigation, and that Trustee's release will not be deemed to extinguish any Section 506(c) rights of FABC, should my order in the related case be reversed.

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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This \_\_\_\_ day of December, 1996.