

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE**

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IN RE:	*	
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TENN-FLA PARTNERS,	*	No. 92-27624-WHB
A Tennessee General Partnership,	*	Chapter 7
	*	
Debtor.	*	
	*	
HOWE SOLOMON & HALL, INC.,	*	
	*	
Plaintiff,	*	
	*	
v.	*	Adversary proceeding
	*	No. 94-0426
TENN-FLA PARTNERS,	*	
A Tennessee General Partnership, and	*	
FIRST UNION NATIONAL BANK	*	
OF FLORIDA, as Trustee,	*	
	*	
Defendants.	*	

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**MEMORANDUM OPINION ON  
CROSS MOTIONS FOR SUMMARY JUDGMENT**

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This adversary proceeding was commenced with the filing of a complaint by Howe, Solomon and Hall, Inc. ("Hall") against the debtor for "Revocation Of Confirmation Of Chapter 11 Plan Or In The Alternative For Damages, For Breach of Fiduciary Duty, Or, Alternatively, For Constructive Trust." The complaint also names First Union National Bank of Florida ("First Union") as a defendant in its capacity as bond trustee but no substantive relief is sought as to First Union except to prohibit further distribution to the bondholders unless Hall receives its proportionate share. A stay that accomplishes that result is in effect. See Order, Exhibit G to Hall's Motion. Hall, an investment firm, subsequently filed a motion for summary judgment on its claim contending that

inasmuch as the Court has made a prior finding in the related adversary proceeding number 94-0201<sup>1</sup> that the debtor breached its fiduciary duties to creditors in order to obtain confirmation of its chapter 11 plan and given that Hall was a creditor, it is entitled to judgment against the debtor as a matter of law. The debtor has filed a cross motion for summary judgment, for purposes of which it assumes the accuracy of the Court's prior findings,<sup>2</sup> which motion contests Hall's claim for relief. According to the debtor, Hall was not a creditor at the time of the confirmation because it agreed to sell its bonds to the debtor's designee during confirmation hearing negotiations and subsequently did so allegedly with notice of the debtor's fraud. The following constitutes findings of fact and conclusions of law pursuant to Fed.R.Bankr.P. 7052.

Hall's complaint was filed shortly before the trial of adversary proceeding 94-0201, and Hall moved to consolidate the two adversary proceedings for trial. That motion was not granted, and the trial of adversary proceeding 94-0201 resulted in a written published opinion of this Court. The substantive relief sought in the two adversary proceedings is similar, and the Court has concluded that its opinion in adversary proceeding 94-0201 establishes the law of this case unless altered by an appellate court. The debtor assumed in its motion that the debtor was estopped from arguing inconsistently with the Court's prior ruling. As a result, the Court adopts its earlier opinion for

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<sup>1</sup> First Union National Bank of Florida v. Tenn-Fla Partners (In re Tenn-Fla Partners), 170 B.R. 946 (Bankr. W.D. Tenn. 1994).

<sup>2</sup> The debtor has appealed the Court's decision in adversary proceeding number 94-0201 and that appeal is pending before the United States District Court for the Western District of Tennessee.

purposes of this adversary proceeding. The Court will grant partially Hall's motion for summary judgment against the debtor and deny completely the debtor's motion.

### **FACTUAL SUMMARY**

Briefly, the record reflects that the debtor filed its voluntary chapter 11 petition on July 17, 1992. The debtor is a Tennessee general partnership that owned a 360 unit apartment complex in Altamonte Springs, Florida. This apartment complex, known as Lakeside North at Altamonte Mall, was the debtor's only significant asset. The apartment complex, hereinafter referred to as "the Lakeside Project," had been financed with proceeds of bonds issued by the Florida Housing Finance Agency in 1982. The debtor obtained the Lakeside Project in 1984 for a purchase price of \$5,019,960.48 in cash and assumption of \$12,700,000 in debt. This indebtedness was refinanced in 1989 by another Florida Housing Finance Agency bond issuance. The 1989 bonds had an aggregate principal value of \$12,685,000. Florida National Bank, which subsequently merged with First Union, was named the indenture trustee for the 1989 bond issuance.

On December 16, 1992, the debtor filed its first plan which in essence proposed that the debtor would secure a new \$6,000,000 first mortgage and pay that amount to the bond trustee, First Union, for immediate distribution to the bondholders. First Union v. Tenn-Fla, 170 B.R. at 950. This proposal, along with its other plan terms, was not acceptable to the bond trustee, and the Court subsequently conducted a contested valuation hearing to determine the value of the Lakeside Project. This hearing resulted in the Court's finding set forth in an April 23, 1993 order that the value of the property was \$9,100,000. In addition, the Court determined that the beneficial bondholders were the "real secured creditors" and structured a procedure by which they could vote for a plan of

reorganization and for 11 U.S.C. §1111(b)(2) election.<sup>3</sup> First Union v. Tenn-Fla, 170 B.R. at 950. The debtor appealed this Court's valuation but on October 20, 1993 proposed its second plan that would have paid the bondholders \$9,200,000. This plan was filed after the bondholders elected to have their claims treated as fully secured under the debtor's plan pursuant to §1111(b)(2).

In July of 1993, First Union successfully opposed the debtor's attempt to extend its exclusivity period for filing a plan of reorganization. 11 U.S.C. §1121(d). First Union then sought potential purchasers for the Lakeside project and entered into an agreement with Apollo Real Estate Investment Funds, L.P. ("Apollo") whereby Apollo would purchase the project and bonds for \$8,200,000 cash and subordinated debt. Hall subsequently made a written proposal to First Union to purchase the project and bonds for \$9,100,000. These offers were incorporated into a plan filed by First Union. Apollo raised its offer to \$9,100,000. This was followed by proposal of the debtor's amended plan providing for cumulative payments of \$9,200,000 to the bondholders.

The debtor's amended plan and disclosure statement and First Union's competing plan and disclosure statement were simultaneously mailed to creditors pursuant to this Court's order of November 24, 1993. First Union v. Tenn-Fla, 170 B.R. at 951. Each plan was accompanied by a solicitation letter to the bondholders from the respective plan proponent. Id. First Union's letter encouraged the bondholders to vote for both plans, which they did. This result encouraged additional competitive bidding before and at the confirmation hearing on January 14, 1994. Id. On the morning of the confirmation hearing Hall owned bonds issued by the debtor with a face value of

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<sup>3</sup> Section 1111(b) of the Bankruptcy Code provides, *inter alia*, that holders of claims secured by property of the estate may elect to have their claims treated as fully secured under a proposed reorganization plan.

approximately \$2,600,000. Hall's holdings comprised approximately 20% of the outstanding bonds. Hall also had an outstanding offer to purchase the property, increased to \$9,500,000 through First Union's proposed plan. Through negotiations directly with the debtor's representatives and counsel on the day of confirmation Hall agreed to withdraw its offer to purchase the Lakeside Project, to change its vote to one in favor of the debtor's plan, and to withdraw its §1111(b)(2) election to be paid as a fully secured creditor. In exchange, the debtor agreed to pay Hall a 5% premium over the amounts to be paid to the remaining bondholders for Hall's transfer of its bonds to the debtor's designee. First Union v. Tenn-Fla, 170 B.R. at 958. The pleadings, supported by affidavits and exhibits in this adversary proceeding, establish that Hall was paid 80% of the face value of its bonds as contrasted with 75% to other bondholders as anticipated in the debtor's confirmed plan. In monetary terms, Hall received \$1,944,000 for its bonds plus \$25,000 as a negotiated administrative expense resulting in Hall's receipt of \$161,000 more than it would have otherwise received as a bondholder under the debtor's confirmed plan.

At the conclusion of the confirmation hearing, the Court orally approved the proposed agreement between the debtor, Hall, and First Union and ruled that the debtor's plan was confirmed by consent. As a part of the confirmation hearing, the debtor's counsel announced an oral amendment to the debtor's plan incorporating the settlement terms between Hall and the debtor. Transcript of confirmation hearing, pp. 98-102.

The order confirming the plan included approval of the agreement between Hall and the debtor and was entered on January 21, 1994. The plan's self defined "effective date" was scheduled for 45 days following entry of the order or March 7, 1994. On February 2, 1994, two days after the confirmation order become final and nonappealable under the Federal Rules of Bankruptcy

Procedure, the debtor and United Dominion Realty Trust, Inc. ("United Dominion") executed a contract for United Dominion's purchase of the Lakeside Project for \$12,443,547, approximately \$2,500,000 more than the amount to be paid to the bondholders and other creditors under the debtor's confirmed plan. Subsequently, as directed by the order of confirmation, Hall transferred its bonds to the debtor's designee as agreed. See affidavit of John M. Curran.

According to the October 13, 1994 affidavit of Mr. Christopher Hall, one of the principal shareholders and the secretary/treasurer of Howe, Solomon and Hall, this transaction was completed on February 22, 1994, at which time "neither [Hall] or its agents, representatives, officers, directors, or principals had any knowledge that the debtor has sold the project to United Dominion . . . for \$12,443,547." Hall affidavit, ¶16. The debtor disputes that the transaction was completed by February 22, 1994, alleging instead that it was not complete until March 4, 1994. Moreover, according to the debtor, its property manager Harry R. Coleman informed Mr. Hall in a February 15, 1994 telephone conversation that the debtor had entered into a post confirmation contract for the sale of the Lakeside Project, which was giving rise to allegations by First Union that the debtor had engaged in fraud in the confirmation process. Mr. Coleman states that he informed Mr. Hall that the debtor would receive "about \$2,000,000" in excess of the confirmation price. Affidavit of Harry R. Coleman, December 12, 1994. According to the debtor, Mr. Hall's alleged knowledge of the United Dominion transaction prior to Hall's transfer of its bonds to the debtor's designee negates any claim Hall may have that it was defrauded. See also affidavits of Henry C. Shelton, III, the debtor's chapter 11 counsel. This apparent factual dispute does not present a genuine issue of material fact, as will be more fully discussed.

On March 3, 1994, First Union filed its complaint to revoke the order of confirmation pursuant to 11 U.S.C. §1144.<sup>4</sup> After a trial from May 10 until May 12, 1994 on the merits of the complaint, the Court determined that the debtor had concealed information it alone possessed regarding the potential for the sale of the Lakeside project and its value. Specifically, the Court found, *inter alia*,

. . . that the debtor provided misleading and incomplete disclosures, . . . that the effect of the debtor's actions was to misrepresent the market for and the market value of the property, . . . that the debtor concealed or 'parked' purchasers until after the confirmation . . . . In summary, the debtor violated its debtor in possession obligations and engaged in self-dealing to the expense of the bondholders, who had been induced by the debtor's misrepresentations to give up their §1111(b)(2) election. All of this was accomplished by the debtor without adequate disclosure to the court or to creditors until after the confirmation hearing and order.

First Union v. Tenn-Fla, 170 B.R. at 963.

The Court's findings resulted in revocation of the order of confirmation of the debtor's plan, award of damages to the bondholders in the form of payment for their professional fees and expenses incurred by First Union as a result of the debtor's fraudulent procurement of confirmation, conversion of the case to one under chapter 7, and award of the excess sales proceeds to the bondholders for whom First Union was the trustee. First Union v. Tenn-Fla, 170 B.R. at 973.<sup>5</sup> Subsequent to revocation, by consent, the Court ordered a sale of the Lakeside Project to United Dominion, a partial distribution to creditors and an escrow of the excess proceeds. See Order

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<sup>4</sup> Section 1144 of the Bankruptcy Code provides in pertinent part: "On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud . . . ."

<sup>5</sup> As noted previously, this decision is presently on appeal to the United States District Court for the Western District of Tennessee.

Exhibit E to Hall's motion. There is approximately \$2,400,000 in escrow to be distributed to bondholders if the Court's prior order is upheld on appeal.

### **SUMMARY JUDGMENT**

Summary judgment is available for a moving party when, after consideration of the pleadings, affidavits, answers to interrogatories, and depositions in a light most favorable to the non-moving party, there are no genuine issues of material fact in dispute. Fed.R.Civ.P. 56(c), incorporated by Fed.R.Bankr.P. 7056. The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986). Whether a fact is material is to be determined by the substantive law. Street v. J.C. Bradford & Co., 886 F. 2d 1472, 1480 (6th Cir. 1989). A fact is material if it "might affect the outcome of the suit under governing law." Anderson v. Liberty Lobby, Inc., 106 S. Ct. at 2510.

As observed by Hall in its memorandum in support of its motion, the moving party bears the initial burden of establishing absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). However, the non-moving party must show specific facts demonstrating that a genuine issue of material fact requires a trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1355-56, 89 L. Ed. 2d 538 (1986).

This Court has concluded that partial summary judgment in favor of Hall and against the debtor is appropriate under the undisputed facts and under the prior findings of fact of this Court in adversary proceeding 94-0201, to which collateral estoppel applies. Moreover, the factual dispute

presented by the conflicting affidavits as to whether Hall learned of First Union's allegations of the debtor's fraud after confirmation but before its bonds were transferred is not a dispute of material fact, as will be discussed.

Also, it must be observed by the Court that the material determinative facts upon which no genuine issue exists have either already been found by the Court in adversary proceeding 94-0201 to be adverse to the debtor's position or were facts to which the Court was made a party in the confirmation process.

### **DISCUSSION**

The substantive law applicable to the remaining issues is that which governs the duties and obligations of a debtor in possession to its creditors. As discussed at length in the earlier First Union v. Tenn-Fla opinion, a debtor in possession owes, at a minimum, a duty to fairly disclose all information in its possession concerning the debtor's financial condition and potential. A debtor in possession further owes its creditors a duty to maximize return for their benefit. Failure to perform these duties constitutes a breach of fiduciary duty. As further discussed in the First Union opinion, the Court has no doubt that the debtor in possession here breached its fiduciary duties of disclosure and lack of self-dealing to all its creditors. The Court's prior findings and its conclusions as a result thereof have become the law of this case, to which collateral estoppel or issue preclusion attaches. See, e.g., Spilman v. Harley, 656 F. 2d 224, Bankr. L. Rep. ¶68,272 (6th Cir. 1981). As the debtor conceded, this Court has revoked the order of confirmation based upon specific findings of fraud. It can not be revoked again. Thus, the issue becomes whether Hall was a creditor at the time of confirmation and, if so, is Hall entitled to any relief as a result of the debtor's fraud in procurement of the order of confirmation.

As noted above, the debtor says that Hall lacks standing to file this complaint as Hall was not a creditor at confirmation because Hall agreed to sell its bonds to the debtor's nominee/designee. Thus, it is the debtor's position that the debtor, through its designee now holding Hall's bonds, should share in the excess sale proceeds. According to the debtor, Hall can not be a creditor entitled to relief absent rescission of the sales agreement whereby Hall agreed to sell its bonds to the debtor's designee. The debtor further contends that Hall has failed to seek such relief because such an action is non-core and Hall would be required to return the money it has been paid by the debtor or the debtor's designee for the bonds. Moreover, because Hall was paid a "premium" for its bonds, the debtor contends that Hall seeks impermissible double recovery. Additionally, the debtor asserts that Hall transferred its bonds to the debtor's designee with knowledge of the post confirmation contract for sale to United Dominion, thereby waiving any assertion by Hall that it was defrauded.

Hall disputes that it had knowledge of the United Dominion transaction at the time it transferred its bonds. More importantly, Hall asserts that it was induced to withdraw its offer to purchase the Lakeside Project, to change its vote to one in favor of the debtor's plan, to abandon its §1111(b)(2) election, and to sell its bonds to the debtor's designee for less than their true value (the proportionate share of the sales price paid by United Dominion), all by the debtor's misrepresentations and breach of its debtor in possession fiduciary duty to maximize return for creditors of the estate at the time of the confirmation. Accordingly, Hall contends that its subsequent actions in completing the transfer of its bonds were taken pursuant to the order of confirmation and that it is entitled to the same relief afforded the bondholders who were represented by First Union.<sup>6</sup>

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<sup>6</sup> Hall concedes that given the Court's revocation of the plan confirmation and imposition of a lien upon the sale proceeds under its ruling in First Union v. Tenn-Fla, 170 B.R. 946 (Bankr. W.D. Tenn. 1994), its request for revocation and a constructive trust are moot.

Hall's request for relief is consistent with its earlier stipulation that the bondholders who did not receive the premium paid to Hall first be paid a pro rata amount to neutralize Hall's premium, following which all bondholders including Hall would share pro rata in the excess proceeds. See, Hall's Motion For Summary Judgment And Memorandum Of Law . . . , October 14, 1995, p. 4 and July 19, 1994 Order made Exhibit E to Hall's motion.

As in the prior adversary proceeding, the debtor misses the critical point that its fraudulent procurement of its order of confirmation was a fraud not only upon creditors but also upon this Court. First Union v. Tenn-Fla, 170 B.R. at 966-67. The Court found in adversary proceeding 94-0201 that the Court had been the victim of the debtor's fraud and "that the Court was deceived when the debtor knowingly concealed information about the true market value and willing purchasers of the debtor's sole asset." Id. at 967. To allow the debtor to financially benefit from its fraud would be inconsistent with the Court's previous findings and conclusions and would be detrimental to the integrity of the Court and the bankruptcy law.

The Court's focus in this adversary proceeding and in the pending summary judgment motions is upon the confirmation process, hearing and order.

As noted above, the Court has previously determined that the bondholders in this case were the "real secured creditors." First Union v. Tenn-Fla, 170 B.R. at 950. The pleadings and affidavits submitted in this proceeding establish, without dispute, that Hall was a bondholder, and thus a creditor, at commencement of the confirmation process and on the day of the confirmation hearing. The evidence further demonstrates that during negotiations with the debtor on the day of the confirmation hearing, Hall was persuaded to withdraw its §1111(b)(2) election to be paid as a fully secured creditor and to change its vote to one for the debtor's plan of reorganization in exchange for

an agreement to sell its bonds to the debtor post confirmation, at less than face value. Hall did not complete performance of the agreement to sell until, at the earliest, February 17, 1994, approximately one month after confirmation and two weeks after the debtor's contract with United Dominion. However, the date of the consummation of the bond transfers is not a material fact nor does Hall's purported but disputed knowledge of allegations of the debtor's fraud before the bond transfer become a material fact issue. The Court reaches this conclusion based upon its analysis that the confirmation hearing is the critical focus for the Court.

This dispute is a core bankruptcy proceeding because it is inseparately connected to the confirmation hearing. See 28 U.S.C. §157(b)(2). It was at the confirmation hearing that debtor's counsel announced an agreement with Hall that was made an amendment to the debtor's plan. See 11 U.S.C. §1127(a). All objections to the debtor's plan were withdrawn and the change in votes by creditors, including First Union and Hall, permitted confirmation by the acceptance method under §1129(a). The debtor's counsel stated that a "condition precedent" to Hall's acceptance of the debtor's plan was the debtor's agreement to purchase, through a designee, Hall's bonds for \$2,080,000. Transcript of confirmation hearing, p. 100. The debtor now contends that the words "condition precedent" have another meaning and that the contract with Hall was executory until substantially performed at a later date when the bonds were transferred. Hall, however, like other bondholders represented by First Union, was induced to make its decisions on the day of confirmation by the debtor's fraudulent actions as found in adversary proceeding 94-0201. It was on the day of the confirmation hearing that Hall was induced to withdraw its offer to purchase the property, to withdraw its §1111(b)(2) election, and to accept the debtor's amended plan. The order of confirmation approved Hall's transfer of bonds as an integral part of the confirmation. Hall's

transfer of the bonds was consistent with the order of confirmation. Had Hall not withdrawn its §1111(b)(2) election, the debtor would have been required to treat Hall as fully secured. In reality, had Hall not withdrawn its §1111(b)(2) election, the debtor's plan would not have been confirmed. Had the Court known all of the facts concealed by the debtor, the Court could not have found the debtor's plan to be in compliance with all of the required elements for confirmation found in §1129(a), including that the plan was proposed in good faith. As a result of the Court's prior findings of fact it is now established that the debtor did not propose its plan, as orally amended on the day of confirmation, in good faith.

Hall's consideration of relinquishment of valuable creditor and offeror rights was given on the day of the confirmation hearing. At that point in time there is no evidence that Hall had waived any of its rights. The Court has already found that the debtor fraudulently induced all bondholders to give up their §1111(b)(2) election. First Union v. Tenn-Fla, 170 B.R. at 963. This finding did not exclude Hall from the Court's intent to restore the bondholders to their pre-confirmation position.

The debtor argues that Hall is not entitled to this relief. It would be inconsistent with the Court's earlier opinion and with concepts of equity to deny Hall the same treatment as other bondholders. Had the debtor been forthright with all creditors, including Hall, as well as with the Court, it is logical to conclude that Hall and other bondholders would not have agreed to take less than full market value for their secured claims.

The Court concludes that §1144(1) of the Bankruptcy Code requires that Hall be given the same monetary treatment as other bondholders. Moreover, in light of the law of the case at this time, §105(a) of the Code mandates that treatment for Hall in order to give full effect to the Court's prior revocation of the order of confirmation. Otherwise the debtor would recover a portion of the "profit"

from the sale to United Dominion. The debtor argues that Hall assigned its claim to the debtor's nominee or designee. Any such assignment was an integral part of the order of confirmation and would not have occurred in the absence of the debtor's fraud. Moreover, the debtor may not shield itself by suggesting that its nominee is the real party in interest. As Hall stated in its memorandum, the nominee or designee is an agent of a disclosed principal. See, e.g., F.D.I.C. v. Tennesseans For Tyree, et al., 886 F. 2d 771, 775, 58 USLW 2242 (6th Cir. 1989).

Having concluded that the debtor may not benefit from its fraud, the Court will grant partially Hall's motion for summary judgment against the debtor. However the full extent of the relief that may be granted is still an issue upon which a dispute of facts exist or upon which the Court must weigh evidence in order to draw inferences.

Hall asked for monetary damages including its costs and attorney fees. The debtor denies that the Court has authority to award such damages. First, it is undisputed that Hall received a premium of \$136,000 plus \$25,000 in expenses, over what other bondholders have received, when it transferred its bonds to the debtor's designee. Hall now is willing to allow other bondholders to catch up with Hall before a further pro rata distribution is made to Hall. The Court approves of Hall's stipulation to allow other bondholders to reach the same percentage of distribution as Hall. However, the debtor presents an issue of fact as well as law as to whether Hall would receive a double recovery by retention of its previously paid premium. Specifically, for example, the debtor points to Mr. Hall's preconfirmation deposition in which he expresses doubt concerning the debtor being candid as to value and expresses an opinion of the property's value. Based upon that evidence, the Court must weigh it along with any other relevant evidence and must draw inferences as to whether Mr. Hall's preconfirmation suspicions require that Hall refund all or part of its premium to

the debtor. The debtor, Hall, and First Union may wish to introduce evidence as well as further memoranda on this and other issues of monetary damages.

Various approaches may be considered by the Court. Under authority of §105(a) and §1144(1) the effective method for carrying out the full effect of the revocation opinion and order may be to allow Hall to retain the \$136,000 premium paid by the debtor's designee, to retain the \$25,000 in agreed upon expenses, and to then allow Hall to receive a pro rata distribution with other bondholders from the escrowed funds. As that distribution is stayed until the Court's revocation order becomes final, Hall would enjoy the use of the \$136,000 premium until the pending appeal and any appeal from this adversary proceeding is finally determined. Hall may be entitled to retain the \$136,000 premium and \$25,000 expenses because of its reliance on the order of confirmation. But, there is at least a suggestion of an issue of fact as to whether Hall did rely in good faith. As previously noted, the debtor in argument suggests that Hall could not have relied in good faith because Mr. Hall stated in his preconfirmation deposition that he suspected the debtor was not being candid about the market value of the property. However, another view is that Mr. Hall's opinion is not evidence of any bad faith. Under another theory Mr. Hall's deposition testimony should have motivated the debtor to be more candid with creditors and the Court. The Court has found that Hall relied upon the Court's order of confirmation for purposes of transferring its bonds to the debtor. However, the fact issue now is whether Hall's reliance was in total good faith so as to permit Hall to retain the premium. The debtor chose to put its premium promised to Hall at risk by the debtor's own deception; however, a weighing of a totality of facts and inferences is required before ruling on the final disposition of the premium.

Moreover, Hall contends that it has been further monetarily damaged by the debtor's fraudulent procurement of its confirmation order in that Hall has been required to incur professional fees and expenses in protecting its rights acquired through the confirmation. The Court will reserve ruling on this issue until after a status conference with all counsel in order to determine if any further evidence is to be offered or whether the parties wish to submit further briefing on this damage issue. However, the Court has concluded that § 1144 implicitly provides a statutory basis for the award of monetary damages in that "an order . . . revoking an order of confirmation shall contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation." 11 U.S.C. § 1144(1). Moreover, 11 U.S.C. § 105(a) broadly gives the bankruptcy court authority to award damages when necessary to carry out the provisions of title 11.

In order to aid in preparation for a status conference at which the issues remaining for resolution will be discussed, the Court directs Hall's counsel to promptly prepare, file and serve affidavits, with appropriate supporting time and expense records, of the professional fees and expenses incurred by Hall and concerning the subject matter of this adversary proceeding but limited to the time period after the transfer of Hall's bonds through the date of the submission of the affidavits. The debtor, the United States Trustee, the case trustee, First Union, or other parties in interest may move within ten (10) days of the filing of those affidavits for a hearing on the amount of the fees or expenses by filing an objection to such requested fees or expenses. Absent a timely objection, there will be no further hearing on the amount of Hall's fees and expenses. The only further hearing, as will be discussed at the status conference, will be on the issue of whether the Court should award those fees and expenses as monetary damages to Hall.

## **CONCLUSION**

The law of this case is that the debtor obtained the cooperation of the bondholders and other creditors and consensual confirmation of its plan by fraudulently withholding information concerning the true level of interest in and potential value of the Lakeside Project. First Union v. Tenn-Fla, 170 B.R. at 971-972. It is for this fraudulent conduct that the First Union bondholders have been afforded the relief sought here by Hall. Given the law of the case and there being no evidence that Hall was not a bondholder/creditor at the time of confirmation, nor evidence that Hall did not rely upon the order of confirmation, it may be concluded that Hall, like the other bondholders and creditors, was damaged by the debtor's failure to disclose material information.<sup>7</sup> Accordingly, Hall, in conjunction with the other bondholders, rather than the debtor's designee, is entitled to share in the excess proceeds from the sale of the Lakeside Project to United Dominion as a matter of law,<sup>8</sup> and partial summary judgment shall be granted to Hall on this issue. However, as there are remaining issues of fact mixed with inferences and with law as to whether Hall should retain the previously paid premium and expenses, whether the same should be refunded to the debtor, and whether Hall should be awarded further monetary damages including its post-transfer attorney fees

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<sup>7</sup> In fact, Hall potentially suffered more detriment than the other creditors because Hall was persuaded to withdraw its offer to purchase the property. Absent a revocation of confirmation, had Hall successfully persisted in its purchase efforts, Hall might have sold the property to United Dominion or another purchaser and reaped the excess proceeds solely for its own benefit.

<sup>8</sup> Having determined that Hall's status is only pertinent at the time of confirmation for purposes of this proceeding, the affidavits of the debtor's attorney and property manager concerning Hall's alleged knowledge of the United Dominion transaction after confirmation but before Hall transferred its bonds fails to raise a genuine issue of material fact.

and expenses, a further status conference with counsel shall be scheduled. At that conference, all counsel for the parties should be prepared to discuss whether further evidence is to be offered, whether further briefing is to be submitted and any other matters relating to the issues unresolved by the partial summary judgment granted to Hall.

From the above findings and conclusions, it will be separately ordered that the motion for summary judgment filed by the debtor, Tenn-Fla Partners, is denied and that the motion for summary judgment filed by the plaintiff, Howe, Solomon and Hall, Inc., is granted partially.

This 29<sup>th</sup> day of March, 1995.

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WILLIAM HOUSTON BROWN  
UNITED STATES BANKRUPTCY JUDGE

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