

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

IN RE:

TENN-FLA PARTNERS,
A Tennessee General Partnership

BK #92-27624-WHB
Chapter 11

Debtor.

ORDER ON RULE 3017(e) MOTION

First Union National Bank of Florida ("First Union") filed a motion pursuant to Federal Rule of Bankruptcy Procedure ("F.R.B.P.") 3017(e) seeking an order on certain issues presented in the pending contested Chapter 11 disclosure, which was filed by the debtor. That Rule provides that "the court shall consider the procedures for transmitting the documents and information required by [F.R.B.P. 3017(b)] to beneficial holders of . . . bonds . . . [and that the court shall further] determine the adequacy of such procedures and enter such orders as the court deems appropriate." F.R.B.P. 3017(e). Obviously that language indicates that there is a great deal of discretion given to the trial court about procedures and adequacy of those procedures. It does clearly provide that the court may enter such orders as the court deems appropriate. This order is entered after a hearing on First Union's motion, and it is intended to implement that rule.

F.R.B.P. 3017(d), which is referred to part (e), provides that upon approval of a disclosure statement, unless the court orders otherwise with respect to a particular class, the debtor in possession shall mail the plan, the disclosure statement that is approved by the court, notice of time for acceptances or rejections of the plan, and such other information as the court may direct. It is that

fourth part, F.R.B.P. 3017(d)(4) that will get some attention here, and that part of the rule provides for much discretion as to what other information the court may deem appropriate to send out with the disclosure statement. There are very few cases on point as to F.R.B.P. 3017(e), but the few cases that do exist illustrate that the court may structure appropriate information and procedures so as to protect the interests of all interested parties including the beneficial holders or owners of the bonds.

As to the present motion, the court finds first that the debtor in possession ("debtor") is a party in interest but also First Union is a party in interest because First Union is the indenture trustee under the bonds. Mutual Benefit Life Insurance Company in Rehabilitation ("Mutual Benefit"), the guarantor of the bonds, is also a party in interest.

Next, the court finds that the beneficial bondholders are the real creditors for whom First Union acts in its trustee and fiduciary capacity as indenture trustee. The debtor points to Code §1126 and F.R.B.P. 3018 as establishing that each bondholder is a separate claimant within a distinct secured class of bondholders and the debtor referred the court to cases on that point. Those cases are indirectly helpful, but the court does not find, for example, Allied Stores Corp. v. Chubb Insurance Co. of Canada, 135 B.R. 947 (Bankr. S.D. Ohio 1992) nor In re Elsinore Shore Assoc., 91 B.R. 238 (Bankr. D.N.J. 1988) to be directly on point, although they have some indirect influence. On the other hand, In re Central Medical Center, Inc., 122 B.R. 568 (Bankr. E.D. Mo. 1990) did address some bondholder issues. In that case, the debtor was not the plan proponent. The bondholders' committee objected to the plan although the bondholders themselves overwhelmingly voted to accept the plan. The committee was found by that court to have separate standing to object as a part of its §1129(a) duty and its fiduciary duty to the bond-holders. That court recognized a difference in the plan's pecuniary treatment, which was acceptable to the class itself, and the plan's

implementation methods, to which the committee itself objected. The case stands for the concept, as applied to the present case, that the bondholders can vote but that the bondholders and the indenture trustee have separate standing to file, if it is deemed necessary, their own objection to confirmation. In the present case a bondholders' committee has not been formed.

The Bankruptcy Court for the Western District of Texas in In re Temple Retirement Community, Inc., 80 B.R. 367 (Bankr. W.D. Tx. 1987), discussed the role of an indenture trustee, such as First Union. In that case there was dissention among the bondholders that made the bondholders' committee ineffective. The members could not agree on what the committee should do. Judge Clark was concerned about the potential for inadvertent misleading of the bondholders in the solicitation process. He did not require the indenture trustee to forward the dissenting bondholders' views to all bondholders. Rather, the dissenting bondholders were permitted to independently solicit rejections of the plan, with that solicitation to be accompanied with the dissenting bondholders' views. In Temple Retirement, therefore, solicitation of the vote on the plan confirmation was mailed, with an established procedure for the dissenting bondholders to send their own views along with the views of the trustee and other parties in interest. In this case, we do not know if there are dissenting or assenting bondholders because here the solicitation of the plan vote has not occurred. In fact, it is uncertain how many of the beneficial bondholders have notice of the bankruptcy.

The most instructive case is In re The Southland Corp., 124 B.R. 211 (Bankr. N.D. Tx. 1991). The court in Southland was concerned about the reliability of a vote from only the record holder of bonds rather than from the beneficial holders of the bonds. As we have in this case, Southland involved publicly traded bonds, resulting in beneficial owners or holders of the bonds

and also "street names" or record holders, and institutional holders of the bonds. In Southland there was confusion about the voting process, about the ballot, about over-voting and about potential discounting of certain votes. Judge Abramson addressed §1126 of the Code and said that the Code did not mention "record holder." If there was any conflict between §1126 and F.R.B.P. 3018(a)'s reference to "holder of record," Judge Abramson said that the Code would prevail. As a result, he held that the only true holders of a claim who could vote on acceptance or rejection of the plan were the actual beneficial holders rather than the record holders. This court agrees with Southland on that point, but that conclusion does not answer all of the issues in the present case.

This court did not find any case that addressed the threshold problem of the Code §1111(b)(2) election that may be made in Chapter 11 cases, as it relates to bondholders. The court does find Judge Dreher's opinion in St. Therese Care Center, Inc., which is not published but found at 1991 WL 217669 (Bankr. D. Minn. 1991) to be instructive. There, the court had two competing plans and the creditors included revenue bondholders. A broker was the record holder of a significant number of the bonds. That broker was holding bonds, in street names, for 315 individual bondholders, and as here, the identity of the beneficial bondholders or owners was not known to the debtor nor to other plan proponents. A F.R.B.P. 3017(e) motion for determinations under that rule was sought. The court pointed out that this particular subdivision of the rule was newly added in August of 1991, and as Judge Dreher said, there was no body of case law as yet developed. That court found nothing in F.R.B.P. 3017(e) to prevent more than one party in interest from directly soliciting a vote from the beneficial holders of bonds. The rule does not constrict, that court said, the procedures the court may use. Section 1125, the court pointed out in St. Therese, gives the plan proponents a right to directly contact creditors in order to solicit their votes. But, in St. Therese, the

beneficial bondholders were few in number. The competing plans were complex, the court said. Those factors justified input from both plan proponents in the solicitation process. Judge Dreher was sensitive in St. Therese to the fact that some beneficial holders may need or desire their identity to remain confidential, and that concern exists in this case as well. As a result, Judge Dreher structured a procedure, which again did not include §1111(b)(2) election problems that are unique to this case. This court has studied the St. Therese procedure and has concluded that the following structure or procedure appears to be appropriate in the Tenn-Fla Partners case, under F.R.B.P. 3017(e):

First, the time for the §1111(b)(2) election under F.R.B.P. 3014 may be extended if the court deems it appropriate. There is cause to extend that time in this case until there is a tabulation of the vote to be cast on that particular issue by the beneficial bondholders and until the indenture trustee, First Union, then makes the §1111(b)(2) election as dictated by the class vote. The time for a §1111(b)(2) election is extended until the final disclosure hearing, as set out in this order.

Second, the time for voting acceptances or rejections of the plan will be deferred until after the §1111(b)(2) vote by the bondholder class. This is necessary as the class of beneficial bondholders may elect the §1111(b)(2) treatment, in which event the debtor's plan may need to be amended. This election is confusing enough without mixing §1111(b)(2) and plan vote issues together.

Third, the court recognizes the expense of what appears to be a double effort of voting but that expense seems to be a necessary result, and the expense must be borne ultimately by the debtor as an administrative expense.

Fourth, in order to protect the debtor, the indenture trustee, the beneficial holders of the bonds, the U.S. Trustee, Mutual Benefit and all creditors, the court will permit the debtor, the indenture trustee, the U.S. Trustee and Mutual Benefit, if they so choose, to submit information concerning the §1111(b) process and election and its impact to the beneficial bondholders. The debtor has requested an opportunity to amend its plan and is to make amendments to its filed plan by May 7, 1993. The parties to this motion then should exchange their proposed solicitation materials concerning the §1111(b) options, results, elections and their impact on this case and on any plans that are pending or might be formulated in this case. These solicitation materials will be exchanged between the parties by May 17, 1993, and then all of those parties will have until May 24, 1993, to file any objections to the solicitation materials. The court expects the attorneys to have a face to face meeting and discuss any changes or additions to the §1111(b) solicitation materials. A hearing on any such objections will be held on May 25, 1993, at 10:00 a.m. In the event the parties are not fully prepared for a hearing on that date, a back-up date for hearing will be June 1, 1993, at 10:30 a.m.

Fifth, as to the §1111(b) solicitation materials, the goal is to obtain materials that are agreeable to the parties or are determined by the court to be suitable for mailing to the beneficial bondholders on the §1111(b)(2) election issue. This material will be mailed by First Union. First Union is to obtain an updated list of the approximately 223 beneficial holders as of May 24, 1993, the date for filing objections to the §1111(b) solicitation materials. This list will be used for all §1111(b) purposes in this case.

Sixth, at the same time that First Union mails this §1111(b) solicitation materials to the beneficial bondholders, First Union will mail a copy of the debtor's proposed disclosure statement,

which the debtor might further amend, with the understanding and with some notice going to the beneficial holders that the disclosure statement is not yet approved by the court. Notwithstanding lack of present approval, the proposed disclosure does provide some information that the bondholders may need to make their §1111(b) choices. Although First Union will mail this disclosure, the debtor will be responsible for providing sufficient copies of the disclosure statement to accomplish that mailing. In summary, First Union will mail a copy of the proposed disclosure statement, a copy of the §1111(b) solicitation materials, and forms, which, for lack of a better term, will be called ballots to allow the beneficial bondholders to make two choices. The first form or ballot will allow the bondholders to "opt out" of having his, her, or its name released to the debtor. That is a procedure which Judge Dreher followed in St. Therese. In other words, if a bondholder feels confidentiality is in its interest, it may "opt out" of having its name revealed. If, on the other hand, it does not care, then its name will be available for specific purposes identified later in this order.

The second form or ballot is for the bondholders to vote on their §1111(b) choices. There must be some notice, with this package of material going to the bondholders, that the bondholders have sixty (60) days from the date of mailing to return their "opt out" ballot and their §1111(b) ballot. On the latter ballot, each bondholder will be asked to vote on whether each bondholder elects the §1111(b)(2) treatment for the bondholder class. It is necessary to have two separate ballots, one for the opt out and one for the §1111(b)(2) election, in order to maintain the integrity of the opt out. If, for example, a particular bondholder opts out of having its named revealed, but has to then sign the ballot on the §1111(b)(2) election, we could have defeated the opt out purpose. Moreover, having two different types of choices on the same ballot may be overly confusing.

The notice with this mailing must, among other things, advise the bondholders that their §1111(b)(2) vote will be determined by a class vote of "at least two-thirds in amount and more than half in number of allowed claims of such class." 11 U.S.C. §1111(b)(1)(A)(i). If a sufficient number of bondholders so vote, then First Union will be driven by that class choice. First Union will tabulate the §1111(b)(2) vote in a confidential meeting with the U.S. Trustee's representative, the debtor's counsel, and Mutual Benefit's counsel. In that tabulation of the §1111(b)(2) vote the identity of those who opt out from having their identities revealed to the debtor or other parties will need to be concealed by First Union.

After that tabulation of the class vote, First Union then will either make or not make the §1111(b)(2) election.

Seventh, with the mailing of the opt out and §1111(b) solicitation material, First Union must supply each bondholder with a self-addressed, stamped envelope for the return of both the opt out ballot and the §1111(b)(2) ballot. The notice with the mailing to the bondholder class should direct those bondholders to return their opt out and §1111(b) ballots in that envelope. The court's suggestion is that First Union obtain a post office box for that purpose. The ballots must not be returned to the court nor to the debtor or the U.S. Trustee or anyone other than First Union as that would nullify the opt out provision.

Eighth, as to the notice in reference the opt out, the notice must clearly advise the bondholders that if they do not exercise their opt out, their identities will be given, but only to First Union, the debtor, Mutual Benefit and the U.S. Trustee. Once revealed, the debtor and other parties may then directly solicit the identified bondholders on a plan acceptance or rejection, just as First Union may solicit directly. The debtor will have no separate or direct solicitation in reference the

§1111(b)(2) election. In order to protect their identity, the notice must clearly advise the bondholders that they must return the opt out ballot. The failure to return the opt out ballot, in other words, will result in the identity of that entity being revealed for plan solicitation purposes only.

Ninth, after that §1111(b)(2) vote is tabulated, the results should be reported to the court, to the U.S. Trustee, to Mutual Benefit's counsel, and of course to the debtor's counsel. That report to the court's calendar clerk will trigger the setting of a final hearing on approval of the debtor's disclosure statement. The debtor will be responsible for mailing notice of that final disclosure statement hearing after the date has been set by the court.

Tenth, after that final disclosure statement hearing and assuming approval of the disclosure statement, the debtor will again furnish to First Union sufficient copies of its approved disclosure statement, its amended plan, and a ballot for the plan vote for mailing by First Union to all beneficial bondholders. The debtor will mail the approved disclosure, the amended plan and the ballot to all other classes provided for in the plan. And, once again, a self-addressed, stamped envelope for return of the plan ballot must be sent to all bondholders. That plan ballot is to be returned, as to the bondholder class, to First Union's special post office box and not to the court. All other ballots in other classes, other than the bondholder class, are to be returned to the debtor's counsel or separate post office box.

Eleventh, unless the court is persuaded otherwise at the final disclosure hearing, the bondholders would vote their acceptance or rejection of the plan as a class with the traditional standards applying. 11 U.S.C. §1126(c). Once again, First Union's counsel in another confidential meeting with the U.S. Trustee, the debtor's counsel, and Mutual Benefit's counsel, will count that

bondholder class vote. First Union, as the indenture trustee, will then act in compliance with the class vote as to the plan acceptance or rejection by that class.

Twelfth, as to those bondholders who have not opted out, that is those who have allowed their identities to become known to the debtor, and other parties to this order, the debtor may make a direct plan vote solicitation. First Union and other parties in interest also may make direct vote solicitations as to that group. However, as to those bondholders who have opted out of having their identities revealed, the debtor would have no way to directly mail a plan solicitation to those holders, but the debtor and other parties may represent a plan solicitation to those opt out class members, which solicitation may be under seal. In other words, the debtor's plan solicitation could be in a sealed envelope that would protect the debtor, for example, from any fears that anyone might tamper with that solicitation. Each party would supply sufficient copies of its plan solicitation material to First Union for mailing, with its own plan solicitation materials, to all of the bondholders who had opted out of having their identity revealed. That solicitation material, of course, would be mailed to the opt out bondholders along with the amended disclosure statement, plan, and a ballot. As to the non-opt out bondholders, First Union will turn that list of bondholders over to the other parties' counsel immediately after the final disclosure statement hearing, assuming approval of the disclosure statement. That list will only be used for the purpose of solicitations on the plan vote and any other plan votes that might subsequently be required. No information concerning the list of bondholders will be disseminated to any entity except counsel for parties as outlined herein, and anyone obtaining that information must sign a confidentiality agreement that will be drafted by First Union's counsel. No copies of the list will be retained by the debtor or its counsel, or by the U.S. Trustee, or by other counsel or parties after completion of this Chapter 11 plan vote.

Thirteenth, First Union will be entitled to an administrative expense claim relating to its duties under this order, subject of course to objections to the amount, for its clerical, professional time and expenses related to the §1111(b), the opt out, and the plan solicitation mailings and for its efforts related thereto. First Union also will be entitled, as an administrative expense, to reimbursement for its expenses, professional time and clerical time in compiling the lists of beneficial bondholders.

Fourteenth, the ballots on the opt out, on the §1111(b) election, and on the plan acceptance or rejection, must be carefully tailored, after review by all counsel. The debtor's counsel and First Union's counsel should make an initial joint effort in drafting those ballots.

Fifteenth, a pre-trial on the confirmation hearing and hearing dates for any contested confirmation hearing will be set by the court at the final disclosure statement hearing.

Sixteenth, although the bondholders vote as a class on the plan acceptance or rejection, the individual bondholders, First Union as indenture trustee, and Mutual Benefit have separate standing to object to confirmation of the plan, and the individual bondholders should be so notified in the notice that will be mailed to them.¹

Finally, as to disclosure of financial information on the general partners of the debtor, there must be disclosure to all creditors that First Union's counsel and the debtor's counsel will have that information and that it will be available upon request. See 11 U.S.C. §1129(a)(7) and §723. However, the identity of each general partner may be deleted before disclosure of that information.

The foregoing is **SO ORDERED** this 29th day of April, 1993.

¹ The U.S. Trustee, of course, has statutory authority to object to confirmation. 28 U.S.C. §586.

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