IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

IN RE: **EUFAULA INDUSTRIAL AUTHORITY,** **Debtor.**	**Case No. 97-71225** **Chapter 9**
CARTER-WATERS OKLAHOMA, INC. and WELLS ENTERPRISES, INC., **Plaintiffs,** **v.** **BANK ONE TRUST COMPANY, N.A., successor by merger to LIBERTY BANK & TRUST COMPANY, N.A., a national banking association, as trustee of the Eufaula Industrial Authority Bond Indenture of December 1, 1993, and EUFAULA INDUSTRIAL AUTHORITY,** **Defendants.**	**Adv. No. 98-7021**

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D. SUE ASHLEY, CLERK
United States Bankruptcy Court
Eastern District of Oklahoma

MEMORANDUM OPINION

THIS MATTER came before the Court for trial on October 12, 2000. Plaintiffs Carter-Waters Oklahoma, Inc., and Wells Enterprises, Inc. ("Plaintiffs") appeared by and through their attorney, Mark D. Mitchell. Defendant Bank One Trust Company, N.A., successor by merger to Liberty Bank & Trust Company, N.A., a national banking association, as trustee of the Eufaula Industrial Authority Bond Indenture of December 1, 1993 ("Defendant" or "Bank" or "Trustee"), appeared by and through its attorneys, G. Blaine Schwabe, III and Sarah A. Hall. Defendant Eufaula Industrial Authority (the "Authority") has disclaimed any interest in this litigation, and, with the agreement of the other parties, did not appear or take part in the trial of this adversary proceeding.

The Court received evidence and heard argument from the parties. The Court also considered the facts stipulated to by the parties in the Pre-Trial Order filed in this action on August 17, 2000. In addition, the Court considered the Supplemental Trial Stipulations filed by Plaintiffs and Defendant at the time of trial. The following findings of fact and conclusions of law are made pursuant to Bankruptcy Rule 7052 and Federal Rule of Civil Procedure 52.

Jurisdiction

The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C.A. §1334(b).[1] Reference to the Court of this adversary proceeding is proper pursuant to 28 U.S.C.A. §157(a). This is a core proceeding as contemplated by 28 U.S.C.A. §157(b)(2)(K).

Findings of Fact

The Court makes the following findings of fact based upon the stipulations of the parties:

1. Plaintiff Wells Enterprises, Inc. ("Wells") and Plaintiff Carter-Waters Oklahoma, Inc. ("Carter-Waters"), are Oklahoma corporations and partially unpaid creditors who have supplied materials and services for an outdoor amphitheater and amusement park facility in Eufaula, Oklahoma, part of the project known as the "Mega Star Project" (the "Project").

2. Defendant is the Trustee of the Eufaula Industrial Authority Bond Indenture of December 1, 1993 (the "Indenture"), a $5,000,000.00 trust established under the laws of the State of Oklahoma for construction of the Project.[2]

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[1] Unless otherwise noted, all statutory references are to sections of the United States Bankruptcy Code, 11 U.S.C.A. § 101 *et seq*. (West 2000).

[2] The Authority is an Oklahoma municipality as that term is defined by § 101(40) and is the Debtor in the Chapter 9 bankruptcy case underlying this adversary proceeding.

3. The beneficiaries of the Trust are the related bondholders (the "Bondholders").

4. Both real and personal property were mortgaged to Trustee as security for the Bond obligations and for the benefit of the Bondholders. The Trustee has security agreements, properly filed financing statements and properly recorded mortgages to evidence its security interests.

5. On or about October 13, 1994, the Authority and Wells entered into a Contract for Concrete Foundation and Slabs for the Mega Star Amphitheater (the "Wells Contract").

6. The Trustee was not (and is not) a party to the Wells Contract.

7. On or about November 2, 1994, the Authority and Carter-Waters entered into a Contract for the Stage Building and Seating Roof for the Mega Star Amphitheater (the "Carter-Waters Contract").

8. The Trustee was not (and is not) a party to the Carter-Waters Contract.

9. Plaintiffs commenced work and thereafter submitted Payment Requisitions to Trustee.

10. Under the terms of the Indenture, the Bank established an account into which were deposited the proceeds of Bonds issued under the Indenture (the "Project Fund").

11. The February, 1995 Project Fund balance was $572,209.48.

12. As of March 31, 1995, the balance of the Project Funds was $369,066.93.

13. Plaintiffs submitted requisitions to Trustee for all sums itemized therein.

14. The Indenture contains specific terms for payment of requisitions in Section 5.07, including the following provisions:

a. "[a]ny disbursement by the Trustee hereunder is a ministerial act"; and

b. "the Trustee has no duty or obligation to examine, review or monitor the use of such monies by the Authority."[3]

15. Jake Riley, an officer of Trustee, visited the Project in the fall of 1994 and saw construction on the stage and cement work.

16. In October of 1994, the Trustee became aware that the Authority was experiencing financial problems and had insufficient revenues to make a scheduled payment to the Bondholders.

17. The Trustee was advised by the Authority in late January or early February, 1995, that there were additional problems and that the Project might be over-budget; however, the Authority assured the Trustee that it would be able to obtain additional financing for the Project.

18. On March 15, 1995, the Trustee paid $100,000.00 from the Project Fund to special workout counsel (a Mr. Bill Price of the law firm of Hastie and Steinhorn) pursuant to a resolution of the Authority and after receiving a requisition from Authority requesting such payment.

19. The Trustee assisted the drafting of a letter to the Bondholders dated March 30, 1995, printed on the letterhead of the Authority. The Trustee mailed that letter from its office in Oklahoma City.

20. Wells' Requisition No. 1 for $19,440.00 was submitted to Trustee on December 6, 1994, and was paid by Trustee December 23, 1994.

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[3] Section 5.07 of the Indenture is attached to this Memorandum Opinion in its entirety as Appendix "A."

21. Wells' Requisition No. 2 for $17,400.00 was submitted to Trustee on January 10, 1995, and was paid by Trustee January 25, 1995.

22. Wells submitted to Trustee its Requisition No. 3, dated February 28, 1995, in the sum of $22,300.73. This requisition was not paid at the time of submission but was partially paid on May 24, 1995.

23. Wells submitted to Trustee its Requisition No. 4, dated March 24, 1995, in the sum of $124,727.07. This requisition was not paid at the time of submission but was partially paid on May 24, 1995.

24. For purposes of this adversary proceeding, Wells holds a claim against the bankruptcy estate in the amount of $87,467.98, plus interest and fees.

25. Carter-Waters submitted to Trustee its Requisition No. 1, dated January 31, 1995, in the sum of $3,262.90, which was paid by Trustee March 8, 1995.

26. Carter-Waters submitted to Trustee its Requisition No. 2, dated February 2, 1995 in the sum of $176,948.72. This requisition was not paid at the time of submission but was partially paid on May 24, 1995.

27. Carter-Waters submitted to Trustee its Requisition No. 3, dated May 3, 1995 in the sum of $94,968.35. This requisition was not paid at the time of submission but was partially paid on May 24, 1995.

28. For purposes of this adversary proceeding, Carter-Waters holds a claim against the bankruptcy estate in the amount of $155,112.25, plus interest and fees.

29. No agent or employee of either Plaintiff ever inquired of the Trustee whether sufficient funds existed in the Project Fund, or elsewhere, to pay the claims made by the Plaintiffs for construction work related to the Project.

30. No agent or employee of the Trustee ever advised either Plaintiff that sufficient funds existed in the Project Fund, or elsewhere, to pay the claims made by the Plaintiffs for construction work related to the Project.

31. The Project has not been completed.

32. The Trustee's claim against the bankruptcy estate on behalf of the Bondholders is in the amount of $6,096,459.38, plus interest and fees.

33. The Project and all Collateral held by Trustee is worth substantially less than the amount due the Bondholders and has recently been appraised at $679,038.00.

See Pre-Trial Order, § 2(B) and *Supplemental Pre-Trial Stipulations*, filed October 12, 2000.

In addition to the stipulations of the parties, the Court heard testimony from Mr. Jake Riley ("Mr. Riley"), a senior vice president in the Trust Department of the Bank, and the officer responsible for the day-to-day operations of the Bank under the Indenture. According to Mr. Riley, the monies raised under the Indenture were not intended to be the sole source of funds for the Project. In addition to the $5 million raised through the issuance of bonds under the Indenture, the Authority envisioned raising an additional $2 million from other sources such as grants. *See Trustee's Exhibit 2.* In addition, Mr. Riley testified that even after the Project appeared to face a funding problem, representatives of the Authority assured the Bank that additional funding was in process.

The Court also heard the testimony of Mr. Paul Wells ("Mr. Wells"), the President of Wells Enterprises. Mr. Wells, a veteran of more than forty-one years in the concrete construction business, testified that he had worked on several projects which were funded using mechanisms similar to the Indenture. He further testified that he had looked to the terms of his contract with the Authority for

payment, and that he had no contact with any representative of the Bank until early April of 1995,[4] when he took some requisition forms directly to the Bank in order to demand their payment.

To the extent the "Conclusions of Law" contain any items which should more appropriately be considered "Findings of Fact," such items are incorporated herein by this reference.

Burden of Proof

Plaintiffs, as the parties seeking equitable subordination, have the burden of proof to establish the necessary elements. *See Citicorp Venture Capital, Ltd. v. Unsecured Creditors Committee (In re Papercraft Corp.)*, 211 B.R. 813, 823 (W.D. Pa. 1997); *see also In re Mobile Steel Corp.*, 563 F.2d 692, 701 (5th Cir. 1977) ("To constitute the type of challenge contemplated by the Court, an objection resting on equitable grounds cannot be merely formal, but rather must contain some substantial factual basis to support its allegation of impropriety."). Some courts have held that "[i]f the claimant is not an insider or fiduciary, the trustee must prove more egregious conduct such as fraud, spoilation, or overreaching and prove it with particularity." *Ansel Properties, Inc. v. NutriSystem of Florida Associates (In re NutriSystem of Florida Associates)*, 178 B.R. 645, 657 (E.D. Pa. 1997) *citing In re N & D Properties, Inc.*, 799 F.2d 726, 731 (11th Cir.1986).

Conclusions of Law

The only issue before the Court is whether the secured claim held by the Trustee for the benefit of the Bondholders should be equitably subordinated to the claims held by Carter-Waters and Wells.[5] Section 510(c) of the Bankruptcy Code provides that

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[4] By this time, Wells had ceased all work on the Project.

[5] Plaintiffs' original complaint contained several causes of action. However, in the Pre-Trial Order, the Plaintiffs explicitly abandoned "all causes of action excepting equitable subordination." *See Pre-Trial Order, § I.*

(c) Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may--

(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or

(2) order that any lien securing such a subordinated claim be transferred to the estate.

§ 510(c). The doctrine of equitable subordination has been the subject of much litigation, and a three part test for its application has evolved.

The general elements of an equitable subordination claim are well known. The plaintiff must plead and prove, under the three-pronged test set forth in *In re Mobile Steel Co.*, 563 F.2d 692 (5th Cir.1977), the following:

a) The claimant engaged in some type of inequitable conduct;
b) The misconduct caused injury to the creditors or conferred an unfair advantage on the claimant;
c) Equitable subordination of the claim is consistent with bankruptcy law.

In re Mobile Steel, 563 F.2d at 700; *accord United States v. Noland*, 517 U.S. 535, ----, 116 S.Ct. 1524, 1526, 134 L.Ed.2d 748 (1996); *see generally* 4 Lawrence P. King, et al., Collier on Bankruptcy ("Collier") ¶ 510.05[1], at 510-13 to 510-14 (15th rev. ed.1997).

Traditionally, equitable subordination has been limited to cases involving (1) fraud, illegality or breach of fiduciary duty, (2) undercapitalization, or (3) control or use of the debtor as an alter ego for the benefit of the claimant. *80 Nassau Assocs. v. Crossland Fed. Sav. Bank (In re 80 Nassau Assocs.)*, 169 B.R. 832, 838 (Bankr.S.D.N.Y.1994); *see In re 604 Columbus Ave. Realty Trust*, 968 F.2d 1332, 1359-60 (1st Cir.1992) (equitable subordination usually applies to three situations: the fiduciary's misuse of his position to the disadvantage of creditors, third party domination and control plus disadvantage, and fraud); *In re CTS Truss, Inc.*, 868 F.2d 146, 148-49 (5th Cir.1989) (same) *see generally* 4 Collier ¶ 510.05[4], at 510-16 to 510-19. Thus, it is not enough to allege simply that the defendant engaged in "inequitable conduct"; the party seeking equitable subordination must allege conduct that fits within one of these three paradigms. *In re After Six, Inc.*, 177 B.R. 219, 232 (Bankr.E.D.Pa.1995). Where noninsider, non-fiduciary claims are involved, the level of pleading and proof is even higher. *Id.* at 231-32. Although courts now agree that equitable subordination can apply to an ordinary creditor, the circumstances are "few and far between." *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1356 (7th Cir.1990); *accord Waslow v. MNC Commercial Corp. (In re M. Paolella & Sons, Inc.) ("Paolella II")*, 161 B.R. 107,

> 119 (E.D.Pa.1993) ("Equitable subordination has seldom been invoked, much less successfully so, in cases involving non-insiders and/or non-fiduciaries."), *aff'd*, 37 F.3d 1487 (3d Cir.1994). A creditor may generally improve his position vis-a-vis the other creditors provided he does not receive a preference or fraudulent transfer. *In re W.T. Grant Co.*, 699 F.2d 599, 609-10 (2d Cir.), *cert. denied*, 464 U.S. 822, 104 S.Ct. 89, 78 L.Ed.2d 97 (1983). Courts have described the degree of wrongful conduct warranting equitable subordination of an ordinary creditor's claim as "gross and egregious", "tantamount to fraud, misrepresentation, overreaching or spoilation" or "involving moral turpitude." *Nassau*, 169 B.R. at 838-39.

ABF Capital Management v. Kidder Peabody & Co., Inc., (In re Granite Partners, L.P.), 210 B.R. 508, 514-515 (Bankr. S.D.N.Y. 1997) (emphasis added). The United States Court of Appeals for the Tenth Circuit has adopted the three part test for equitable subordination outlined above, and has also noted that where no fiduciary relationship exists, a party seeking equitable subordination is required to demonstrate "gross misconduct tantamount to fraud, misrepresentation, overreaching or spoilation." *Sloan v. Zions First National Bank (In re Castletons, Inc.*, 990 F.2d 551, 559 (10th Cir. 1993) (quoting *In re Dry Wall Supply, Inc.*, 111 B.R. 933, 938 (Bankr. D. Colo. 1990) (citation omitted)). "Inequitable conduct" has been defined as

> . . . that conduct which may be lawful, yet shocks one's good conscience. It means, *inter alia*, a secret or open fraud, lack of faith or guardianship by a fiduciary; an unjust enrichment, not enrichment by bon chance, astuteness or business acumen, but enrichment through another's loss brought about by one's own unconscionable, unjust, unfair, close or double dealing or foul conduct.

Fundex Capital Corporation v. Balaber-Strauss (In re Tampa Chain Company, Inc.), 53 B.R. 772, 779 (Bankr. S.D.N.Y. 1985), *quoting In re Harvest Milling Co.*, 221 F. Supp. 836, 838 (D. Ore. 1963).[6]

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[6] Another court has put it this way:

> . . . the standard of inequitable conduct that justifies subordination of a non-insider/non-fiduciary's claim can be summarized in the following manner: unless the creditor has dominated or controlled the debtor to gain an unfair advantage, his claim will be subordinated, based upon inequitable conduct, only if the claimant has

In the present case, Bank performed its duties under the Indenture. It made no representations to the Plaintiffs. It was not a party to the contracts between Plaintiffs and the Authority. It owed no fiduciary duty to the Plaintiffs. It had no contact with the Plaintiffs, other than the payment of a portion of the amounts owed to Plaintiffs. The mere fact that the Trustee paid the early requisitions upon their presentation is not tantamount to a representation that monies would be available for payment of any and all such requisitions. The Court finds that the Bank has not engaged in any form of misconduct, let alone "gross misconduct tantamount to fraud, misrepresentation, overreaching or spoilation" or "unconscionable, unjust, unfair, close or double dealing or foul conduct" necessary to invoke the doctrine of equitable subordination.

The parties who will be made to suffer if the liens held by the Bank as Trustee were to be subordinated are the Bondholders. The Bondholders invested their money in the Project under the terms of the Indenture. The Indenture provided the Bondholders with a first lien upon all of the assets of the Project. There is no evidence that the Bondholders have engaged in any form of inequitable conduct. The Court fails to see how placing the claims of the Bondholders below the claims of the Plaintiffs would be either fair or equitable.

In order to rule for the Plaintiffs, the Court must find that the Trustee had a duty to monitor the Project for the benefit of contractors such as the Plaintiffs and also had a duty to warn the

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> committed some breach of an existing, legally recognized duty arising under contract, tort or other area of law. In commercial cases, the proponent must demonstrate a substantial breach of contract and advantage-taking by the creditor. In the absence of a contractual breach, the proponent must demonstrate fraud, misrepresentation, estoppel or similar conduct that justifies the intervention of equity.

80 Nassau Associates v. Crossland Savings Bank (In re 80 Nassau Associates), 169 B.R. 832, 840 (Bankr.S.D.N.Y. 1994) (citations omitted). The *80 Nassau Associates* case contains a thorough review of the cases dealing with the concept of equitable subordination, which the Court recommends to the parties.

Plaintiffs that monies might not be available for payment of their claims. In effect, Plaintiffs ask this Court to place the Bank (and/or the Bondholders) in the position of guaranteeing their payment. There is nothing in the Indenture which creates such a duty. Indeed, if such a duty existed, it is highly unlikely that any financial institution would be willing to serve as trustee under such an indenture. In addition, it strikes the Court that if the Bank had acted as the Plaintiffs suggest, it would be a defendant in a far different lawsuit, where it would stand accused of improperly interfering with the Project's construction.

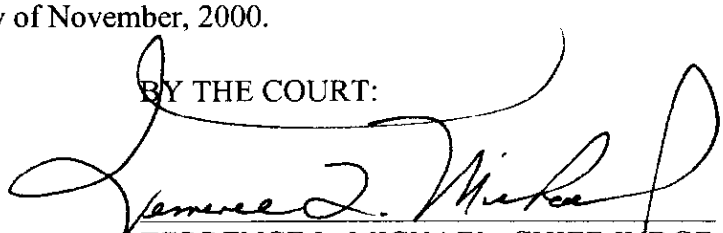
Conclusion

The Court finds that the Plaintiffs have failed to establish that the Bank has engaged in inequitable conduct. Having found the first element of equitable subordination to be lacking, the Court goes no further. Plaintiffs are not entitled to an order equitably subordinating the claims of the Bank (and, in effect, the Bondholders) to their claims.

A separate judgment consistent with this Memorandum Opinion is entered concurrently herewith.

Dated this 29th day of November, 2000.

BY THE COURT:



TERRENCE L. MICHAEL, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

cc: Mark D. Mitchell
G. Blaine Schwabe, III
Sarah A. Hall
Ron Wright

2177.5

INDENTURE

between

EUFAULA INDUSTRIAL AUTHORITY
Eufaula, Oklahoma

and

LIBERTY BANK AND TRUST
COMPANY OF OKLAHOMA CITY, NATIONAL ASSOCIATION
Oklahoma City, Oklahoma

Securing

$5,000,000
EUFAULA INDUSTRIAL AUTHORITY
REVENUE BONDS 1993 SERIES A
(AMPHITHEATER PROJECT)

Dated as of December 1, 1993

APPENDIX A

time shall be less than the Contingency Reserve Fund Requirement, the Trustee shall, if possible, transfer moneys from the Special Reserve Fund into the Contingency Reserve Fund to increase the balance of such fund back to the Contingency Reserve Fund Requirement. Provided, if such transfers be insufficient to restore the balance of such fund to the level of the Contingency Reserve Fund Requirement, then, in such circumstances, the Trustee shall thereupon notify the Authority and the Manager of the amount of such deficiency, and the Authority shall direct the Manager to pay to the Trustee for deposit in the Contingency Reserve Fund monies to replenish same on such terms as may be acceptable to the Trustee, or, if no decision is made by the Trustee, then such moneys will be furnished as will replenish such fund commencing within thirty (30) days of any such transfer or depletion, each monthly payment to be not less than one twenty-fourth (1/24) of the amount of such deficiency until such deficiency shall be eliminated.

SECTION 5.06. Limitation on Amount of Contingency Reserve Fund. Notwithstanding anything contained herein to the contrary, at all times during the term of the Bonds, the balance of the Contingency Reserve Fund (including investment earnings derived from the investment of the principal balance of such fund) shall at no time exceed 10% of the proceeds of the Bonds (or such lesser amount as may be permitted by the Arbitrage Regulations then in effect), and the Trustee acting on the advice of Bond Counsel, if necessary, shall at all times so invest the Contingency Reserve Fund so that at no time will such fund be in contravention of the arbitrage provisions of Section 148 of the Code and it is specifically provided that all such investments shall be made in such a manner as to fully conform to the requirements of Section 148 of the Code and the applicable Regulations promulgated thereunder, and any decision made by such Trustee in reliance upon the opinion of Bond Counsel shall be conclusive and binding on the parties hereto, and the Authority hereby covenants to hold the Trustee and Bond Counsel harmless in the premises for any decision so made with respect thereto, it being the intent of all parties hereto to fully protect the tax-exempt status of the Bonds at all times.

SECTION 5.07. Project Fund; Completion of Project. There is hereby created a separate trust account designated the Eufaula Industrial Authority Project Fund (hereinafter the "Project Fund"), and such is to be held by the Trustee.

(a) The Project Fund. - The Project Fund shall be funded at the time of delivery of the Bonds by the transfer from the Bond Proceeds Fund pursuant to Section 4.07(d) of this Indenture out of the proceeds of the Bonds. Amounts in the Project Fund shall be disbursed for costs relating to the issuance of the Bonds not paid from the Bond Proceeds Fund and costs and expenses of the Project upon submission of a requisition originated by the

Authority in form satisfactory to Trustee and to Bond Counsel stating with respect to each disbursement to be made: (1) the payment number; (2) the name and address of the person, firm or corporation to whom payment is to be made; or if the payment is to be made to the Authority for a reimbursable payment, the name and address of the person or firm to whom such advance payment was made together with proof of payment by the Authority and lien waiver satisfactory to the Trustee; (3) the amount to be disbursed; (4) that each obligation mentioned therein is a proper charge against the Project Fund, is unpaid or unreimbursed, and has not been the subject of any previous payments; and (5) that, if such disbursement of the proceeds of the Bonds be requested, the expenditure of such disbursement will be exclusively utilized in such a manner as to protect the Bonds as being classified "essential purpose bonds" under the Code.

Any disbursement by the Trustee hereunder is a ministerial act and the Trustee has no duty or obligation to examine, review or monitor the use of such monies by the Authority. Notwithstanding anything in this Indenture to the contrary, upon the occurrence of a monetary default hereunder or under the Mortgage, following a decision by the Trustee to seek to have a receiver appointed to operate the Project, the Trustee may refuse to make the disbursement otherwise required by this Section and shall thereafter make such disbursements to the receiver. Any disbursement hereunder by the Trustee to such receiver shall also constitute a ministerial act and the Trustee shall be under no duty to review or examine the use of monies disbursed to the receiver.

Unless the Trustee receives an opinion of Bond Counsel stating that rebate is not required to be paid, the Authority will cause the rebate calculation to be made. The cost of the calculation is to be paid for from monies contained within the Trust Estate, and the amount of rebatable amount so calculated will thereupon be placed in the Rebate Fund established by the terms of this instrument, and thereupon remitted to the Federal government in conformity with the requirements of Sec. 148 the Code.

Any investment earnings and profits in any fund under this Indenture which may be necessary to meet and pay such rebate requirement, shall be transferred to the Rebate Fund.

Upon receipt from the Authority of a statement certifying that no further amounts are to be disbursed for costs of the Project, amounts, if any, remaining in the Project Fund shall be transferred into the Interest Account of the Bond Fund, and shall thereupon be invested at a yield (as such term be defined within the Code and related Regulations and Rulings) not in excess of the yield of the Bonds and the Project Fund shall be closed.

The Trustee shall cause adequate records pertaining to the Project Fund and all such payments therefrom to be kept and maintained.

(b) Prohibition of Commingling of Project Fund Pertaining to Bonds and any similar fund established with respect to the Series B Note Not Permitted Without Approving Opinion of Bond Counsel. It being the intent of the parties hereto to fully protect the tax exempt status of the Bonds in any and all cases, the proceeds of the Bonds (being tax exempt) shall not be commingled in any fashion with the proceeds of the Series B Note for any reason, and, with respect thereto, at no time shall any amounts contained within the Bond Proceeds Fund or Project Fund be permitted to be transferred to any similar proceeds or project fund pertaining to the Series B Note unless and until such transfer is specifically permitted by the prior written opinion of Bond Counsel.

(c) Construction Contracts. The Authority shall award the necessary contracts for the construction of the Project (the "Construction Contracts"). The Construction Contracts shall require that the contractors thereunder, prior to the commencement of construction, deliver to the Authority and the Trustee performance bonds and labor and material payment bonds in the full amount of the Construction Contracts, made by the contractors thereunder as principal and a surety company or companies approved in writing by the Authority and the Trustee. Such bonds shall be in a form approved in writing by the Authority and the Trustee and shall name the Authority and the Trustee as dual obligees. All payments received by the Authority and\or the Trustee under such bonds shall become a part of and deposited in the Project Fund. Any and all amounts received by the Authority and/or Trustee from any of the contractors or other suppliers of machinery or equipment by way of breach of contract, refunds or adjustments shall become a part of and be deposited in the Project Fund.

(d) Payment for Construction. The Authority hereby agrees to pay for the construction of the Project solely from the Project Fund, and hereby authorizes and directs the Trustee to pay for same solely from the Project Fund, in the following manner: At the time of delivery of the Bonds, the Authority shall deliver to the Trustee a budget for construction of the Project (the "Construction Budget") setting forth an estimate in reasonable detail of the amounts to be expended from the Project Fund for the Project. Funds out of the Project Fund shall be paid from time to time upon receipt by the Trustee of copies of the Construction Contract and performance bonds and labor and material payment bonds relating thereto covering that portion of the Project for which payment is to be made, and of a requisition for disbursement as set forth in Section 5.07 of this Indenture. If the amounts requested to be disbursed exceed the Construction

Budget, the Authority must, prior to disbursement, set forth an amendment to the Construction Budget which either (i) provides for elimination or redesign of portions the Project which have not yet been made the subject of a Construction Contract so that the total amount of the of the Construction Budget does not exceed the total amount of the Project Fund, or (ii) provide for the Authority to deposit in the Project Fund the full amount of the excess of the Construction Budget, as amended, over the Project Fund prior to such additional deposit.

SECTION 5.08. Investment of Funds. Notwithstanding anything herein contained to the contrary, any and all monies contained in the Bond Proceeds Fund, the Principal Account and Interest Account of the Bond Fund, the Contingency Reserve Fund and Special Reserve Fund and the Project Fund (or any other fund attributable to the Bonds) shall be invested and reinvested in such a manner as to protect the tax exemption with respect to the Bonds in all respects.

Commensurate with the provisions above stated, to the extent possible the moneys contained from time to time within the aforedescribed funds may be invested and reinvested at the direction of the Authority, or in the absence of such direction by the Trustee in direct obligations of the United States of America; in obligations the principal of and interest on which are guaranteed by the United States of America; in repurchase agreements, the obligation under which is secured by direct obligations of, or obligations the principal and interest of which are unconditionally guaranteed by, the United States of America; in negotiable or non-negotiable certificates of deposit secured by collateral security of the type described above or fully insured by the Federal Deposit Insurance Corporation and issued by any bank, trust company or national banking association (including the Depository Bank or Trustee) which is a member of the Federal Reserve System or in money market funds rated in the highest category by Standard & Poor's Corporation and/or Moody's Investors Service.

Investment obligations shall mature not later than the date on which monies will be required to be paid from said accounts, but in no event, later than twelve (12) months for the Principal Account investments and six (6) months for the Interest Account investments and as determined by the Trustee for Contingency Reserve Fund and Special Reserve Fund investments. If need arises, the obligations so purchased shall be sold to the extent necessary to make payments from the accounts, and the proceeds of sale applied to such payment. Interest earned from investment of the Bond Proceeds Fund, the Interest Account and Principal Account of the Bond Fund, the Project Fund and the Special Reserve Fund shall be deposited by the Trustee in the respective accounts from which they are derived. Interest earned from