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UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF ARIZONA

EUROFRESH, INC., et al)	In Chapter 11 proceedings
)	Case No. 2:09-bk-7970-CGC
)	MEMORANDUM DECISION
Debtor.)	

This dispute arises out of a sale leaseback of the Debtor's facility in Snowflake, Arizona. In March, 2008, Debtor sold the facility to SP Eurofresh ("SPE"), a wholly owned subsidiary of Silver Point Capital Fund, L.P. ("SPCF") for \$15 million; SPE leased the facility and the ground on which it stands back to Debtor in exchange for rental payments calculated on an amortizing basis. The transaction has been referred to by the parties as the Capital Lease.

The purchase was initially funded by a loan of \$12.5 million from SPCF to SPE together with a capital contribution of \$2.5 million. This note was secured by a first priority security interest in all of SPE's rights in the Capital Lease documents, including the lease and the ground sublease from SPE to Debtor. In July, 2008, SPCF subsequently borrowed \$12.5 million from Wells Fargo Foothill, LLC ("WFF") and assigned its rights under the Capital Lease Documents as security. This case was filed on April 21, 2009; the claims register does not reveal a claim filed by either SPE or WFF.

As part of the documentation of the WFF transaction, the original SPE/SPCF note was replaced in its entirety by a new Amended and Restated Senior Secured Promissory Note directly from SPE, as Borrower, to WFF, as Lender. The Restated Note makes clear that all parties intended that it replace the Original Note in its entirety, although it was not intended as a novation of that note nor was it intended that any of the other original note documents be modified except as specifically set forth in the Restated Note. However, it was a condition precedent to the closing of the WFF transaction that the Original Note be cancelled. (Paragraph 3(a)). As a result, WFF became the direct lender to SPE, secured by a collateral assignment of SPCF's original rights against SPE. Silver Point Finance, LLC, an affiliate of SPCF, is the Agent appointed to act on behalf of the

1 Holders, subject to the terms of the Restated Note. Although the Restated Note refers to “Holders”,
2 in the plural, the only “Holder” identified as a signatory is WFF; SPCF is a signatory only “in its
3 capacity as the Original Lender.” The Note references a “Participation Agreement” (not provided)
4 that suggests that slices of the Note could be sold by WFF to other participants but no such
5 participants have identified.

6 The issue presented is whether SPE or WFF is entitled to vote the secured claim in this
7 Chapter 11 case. The result is informed by Fed R. Bank. Proc. 3001(e)(3) and the terms of the
8 Restated Note.

9 Rule 3001(e) deals generally with the transfer of claims. Subsections (1) and (2) treat the
10 transfer of claims “other than for security.” Subsection (3) directly addresses the situation where
11 a claimant has transferred its claim for security to another party before a proof of claim has been
12 filed in the case. It provides that if neither the transferor nor the transferee files “an agreement
13 regarding its relative rights respecting voting of the claim . . .”, then the court, on motion from a
14 party in interest, shall enter such orders as “may be appropriate.” Thus, the question is, first,
15 whether there is an agreement that controls voting rights, and, second, if not, what is the
16 “appropriate” result.

17 It must be remembered that WFF has no direct contractual relationship with the debtor,
18 Eurofresh, Inc., in connection with the Snowflake transaction. Rather, that relationship is between
19 SPE and Debtor through the lease and the ground sublease. WFF is SPE’s lender with a security
20 interest in SPE’s rights under those documents, among others.

21 Paragraph 5(t) of the Restated Note is entitled “Bankruptcy Voting Rights.” It provides (1)
22 that no Capital Lease Party, including the Agent, may consent to any use or disposition of the
23 collateral without consent from the Holders, here WFF, and indeed (2) must object in such
24 circumstance. It further provides that each “Holder” shall retain its rights to vote its claim.

25 As noted above, the documents do not support a conclusion that SPE is a Holder. The only
26 Holder specifically identified in the Restated Note is WFF, both in the definitions and on the
27 signature pages. The Note is unambiguous that to be a Holder, a party would have to be a
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1 participant with WFF in its capacity as Lender. There is no suggestion that SPE has that status.
2 Rather, SPE's argument is premised on the fact that it is the party with the direct contractual
3 relationship with the Debtor and that WFF is merely a secured party by virtue of the collateral
4 assignment of SPE's rights under the original documents. SPE acknowledges that, after foreclosure
5 of its security interest, WFF could succeed to those rights but emphasizes that that has not yet
6 happened.

7 On the other hand, the parties have clearly allocated most, but not all, of the control of the
8 claim in a bankruptcy to WFF which, after all, has over 80% of the "skin in the game." While the
9 Restated Note makes clear that SPE or the Agent cannot consent to any use or sale of the collateral
10 without WFF's consent, it has no language indicating that WFF can direct SPE, or the Agent, to vote
11 the claim in any particular way. Rather, the Note simply states that each "Holder" retains its own
12 right to vote the claim in *any* bankruptcy case.

13 Thus, the paper record is less than explicit as to which of these parties is to have the right
14 to vote the Capital Lease Claim in *this* bankruptcy case of Eurofresh, Inc. As a result, the Court
15 must determine what is the most "appropriate" result. Looking at the transaction as a whole, and
16 taking guidance from the documents, the Court concludes that WFF is the appropriate party to vote
17 the claim. As noted, over 80% of the economic interests lie with WFF; it is the only "Holder" who
18 has been identified under the Note; and control has been largely allocated to WFF by the parties.
19 The primary consideration on the other side is the lack of privity between WFF and Eurofresh.
20 Although that is significant, on balance, the more important issues are the true economic interests
21 held by each of the parties, particularly in a sale leaseback transaction such as exists here. Using
22 that test, WFF is the more appropriate party to vote the claim.

23 For the foregoing reasons, the motion will be granted. WFF is to upload a form of order.

24 DATED: July 31, 2009

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27 CHARLES G. CASE II
28 UNITED STATES BANKRUPTCY JUDGE

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