UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Not For Publication

In re:	:	Chapter 11
ENRON CORP., *et al*.,	:	Case No. 01-16034 (AJG)
	:	Jointly Administered
Reorganized Debtors.	:	(Confirmed)

MEMORANDUM OPINION REGARDING
STONEHILL INSTITUTIONAL PARTNERS, L.P.'S OBJECTION TO NOTICE OF TRANSFERS OF CLAIM NOS. 24423 (FORMERLY CLAIM NO. 16178) & 16179

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ARTHUR J. GONZALEZ
United States Bankruptcy Judge

The matter before the Court concerns the ownership of certain proofs of claim that were subject to notices of transfers pursuant to FED. R. BANKR. P. 3001(e)(2).

I. Background

A. Enron

Commencing on December 2, 2001, and from time to time continuing thereafter, Enron Corporation ("Enron Corp.") and certain of its affiliated entities (collectively, the "Debtors") filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). On July 15, 2004, the Court entered an order confirming the Debtors' Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors (the "Plan") in these cases. The Plan became effective on November 17, 2004.

B. Proofs of Claim

On August 1, 1996, BNP Paribas and certain other lenders (collectively, "BNP") and SB Linden, LLC ("SBL") entered into a credit agreement (the "Credit Agreement") and an accompanying security agreement (the "Security Agreement"). Pursuant to the Security Agreement, BNP took a security interest in all of SBL's assets then owned or thereafter acquired (the "Collateral") to secure its obligations to BNP (the "Lien"). The Credit Agreement prohibited SBL from disposing of any assets subject to the Lien, providing that SBL "shall not . . . dispose of any of its property or assets except immaterial items disposed of in the ordinary course of business."

On October 16, 1996, the Lien was perfected by filing financing statements in Delaware (SBL's place of incorporation) with the Delaware Secretary of State.[1] The perfection of the Lien was continued through the filing of a continuation statement, on October 11, 2001, with the Delaware Secretary of State.

On or about October 15, 2002, SBL filed Proof of Claim ("Claim") No. 16178 in the Debtors' bankruptcy proceeding. Claim No. 16178 is based upon an Enfolio Master Firm Sales Agreement ("the Enfolio Agreement") pursuant to which, *inter alia*, Enron Capital and Trade Resources Corp. n/k/a Enron North American Corp. ("ECTR") was to supply bundled

[1] The original filing number is 96-29251.

commodity and transportation pricing for natural gas to SBL delivery points for a term of fifteen years. Claim No. 16178 arises out of ECTR's alleged breach of the Enfolio Agreement. The damages amount set forth in Claim No. 16178 is $4,075,363.00 plus interest.

Also, on October 15, 2002, SBL filed Claim No. 16179 based upon the Debtors' unconditional guaranty of the obligations of ECTR under the Enfolio Agreement (hereinafter, Claim Nos. 16178 and 16179 are collectively, the "Claims").

The parties do not dispute that sometime prior to June 24, 2003 SBL defaulted on its obligations to BNP under the Credit Agreement. On June 24, 2003, pursuant to New York Uniform Commercial Code ("U.C.C.") section 9-610 (2005),[2] BNP entered into a Private Disposition of Assets Agreement (the "Disposition Agreement") with Fortistar Linden, LLC ("Fortistar"), whereby BNP was to foreclose upon and convey certain Collateral subject to the Lien to Fortistar, as listed in Exhibit A to the Disposition Agreement. Exhibit A did not list the Claims among the Collateral that was to be subject to the Disposition Agreement.

After the default, on July 14, 2003, pursuant to an Assignment of Claim Agreement (the "Assignment Agreement"), SBL assigned the Claims to Stonehill Institutional Partners, L.P. ("Stonehill") without giving notice of such Assignment Agreement to BNP. Under the terms of the Assignment Agreement, SBL represented and warranted to Stonehill that, *inter alia*:

> (i) no portion of the Claims had been sold, assigned or pledged to any third party in whole or in part;
>
> (ii) SBL holds good and sole legal and beneficial title to the Claims free and clear of all liens, security interests, encumbrances or claims of any kind or nature whatsoever; and
>
> (iii) no creditors of SBL have asserted an interest of any kind in the Claims.

[2] U.C.C. § 9-610 provides that "[a]fter default, a secured party may sell . . . any or all of the collateral . . . following any commercially reasonable preparation or processing."

On July 21, 2003, pursuant to Bankruptcy Rule 3001(e)(2), Stonehill filed notices of transfer of claims with respect to the Claims in the Debtors' bankruptcy proceeding[3] (the "Stonehill Notices of Transfer"). No objection was filed to the Stonehill Notices of Transfer. The Stonehill Notices of Transfer mistakenly listed the transferee of the Claims as Stonehill Institutional Management, LLP rather than Stonehill. Thus, on October 16, 2003, Stonehill amended the notices of transfer to correctly list Stonehill as the transferee (the "Amended Stonehill Notices of Transfer"). No objection was filed to the Amended Stonehill Notices of Transfer.

Sometime in mid-2003,[4] BNP stated that it sent an initial notification of the disposition of collateral to SBL as well as to other parties that it knew to have potential interests in the Collateral that was to be foreclosed upon pursuant to the requirements of U.C.C. § 9-611 (2005).[5] However, BNP did not send such notice to Stonehill, nor does the record reflect that SBL forwarded such notice to Stonehill. BNP did not receive any objections to the notice of disposition.

On July 29, 2003, BNP and Fortistar amended the Disposition Agreement ("Amended Disposition Agreement") whereby BNP added the Claims to the list of Collateral subject to the Disposition Agreement allegedly without knowledge of the transfer of the Claims from SBL to Stonehill. On or prior to July 30, 2003, BNP stated that it sent an amended notification of disposition of collateral, pursuant to U.C.C. § 9-611, to the interested parties of which it had knowledge, including SBL. However, such amended notification of disposition of collateral was

[3] The Court notes that when it references that a party has filed a notice of transfer of claim it means that the notice of transfer of claim has been filed on the electronic docket of the Debtors' bankruptcy case.
[4] BNP does not state what date the initial notification of disposition of collateral was sent to SBL.
[5] U.C.C. § 9-611 provides "(b)[A] secured party that disposes of collateral under Section 9-610 shall send to the persons specified in subsection (c) a reasonable authenticated notification of disposition." Section 9-611(c) of the U.C.C. provides that the secured party shall send an authenticated notification of disposition to the debtor.

not sent by BNP to Stonehill, and the record is unclear as to whether SBL forwarded such amended notice to Stonehill. BNP did not receive any objections to the amended notice of disposition. Therefore, on September 29, 2003, the disposition sale was completed per a Bill of Sale and the Assignment and Assumption Agreement between BNP and Linden #2 LLC (Fortistar) (collectively, the "First Sale").

On October 29, 2003, Stonehill filed Claim No. 24423 in the amount of $7,835,348.62 to amend and replace Claim No. 16178 against ECTR. Claim No. 24423 increased the claim amount to $7,835,348.62 because of significant price changes in the natural gas markets which increased the damage claim arising from ECTR's alleged breach of the Enfolio Agreement.

On January 9, 2004, Enron filed its Twenty-Sixth Omnibus Objection seeking to expunge Claim No. 16178 on the grounds that it was amended and superseded by Claim No. 24423. On February 26, 2004, the Court issued an order which expunged Claim No. 16178 and replaced it with Claim No. 24423 (hereinafter, Claim No. 24423 and 16179 are collectively, the "Claims").

On May 6, 2004, pursuant to Bankruptcy Rule 3001(e)(2), Fortistar filed a notice of transfer of claim seeking to transfer Claim No. 16179 (the "Fortistar Notice of Transfer"). SBL was listed as the transferor on the Fortistar Notice of Transfer. However, Stonehill was not listed on the Fortistar Notice of Transfer.

On May 25, 2004, SBL, by its President, S. Lynn Sutcliffe, filed a written objection to the Fortistar Notice of Transfer. Fortistar did not file a response to SBL's objection. However, on June 3, 2004, Fortistar filed an amendment to the Fortistar Notice of Transfer seeking to transfer Claim No. 16178 (which was previously expunged by Claim No. 24423) and Claim No. 16179, listing SBL and Stonehill as the transferors, and increased the claim amount to $7,835,348.62

(collectively, the "Amended Fortistar Notice of Transfer"). On June 21, 2004, Stonehill filed an objection to the Amended Fortistar Notice of Transfer.

On July 27, 2004, BNP sent Stonehill a notice of disposition of collateral, in accordance with U.C.C. § 9-611 (received on July 28, 2004); and, thereafter, on July 29, 2004, executed a second Bill of Sale and Assignment and Assumption Agreement with Fortistar to transfer any rights Stonehill may have had in/or to the Claims to Fortistar (collectively, the "Second Sale").

On July 30, 2004, BNP filed a "Notice of Interest of Lien Holder in Proofs of Claim." Stonehill filed a response to this notice on August 4, 2004. On August 5, 2004, the Court held a hearing regarding Stonehill's objection to the Amended Fortistar Notice of Transfer. At this hearing, the Court requested that the parties produce certain documents to the Court, and scheduled a re-hearing. On September 16, 2004, BNP filed a "Memorandum of Lien Holder BNP Paribus in Support of Transfer of Claims."

On December 17, 2004, Enron filed the Seventieth Omnibus Objection (the "Enron Objection") seeking to disallow the Claims. Stonehill filed a response to the Enron Objection, on January 18, 2005, and BNP filed a response on January 31, 2005. The Enron Objection is currently scheduled for a hearing on July 28, 2005.

On January 20, 2005, the Court had further arguments with regard to Stonehill's objection to the Amended Fortistar Notices of Transfer and took the matter under advisement. In addition, at that hearing, the Court requested submissions regarding the applicable statute of limitations with respect to an action against a secured creditor for its failure to give proper notice of the sale of a debtor's collateral pursuant to Article 9 of the U.C.C., such submissions were filed by both parties on February 3, 2005.

II. Discussion

A. FED. R. BANKR. P. 3001(e)

Bankruptcy Rule 3001(e) governs the assignment of claims, and provides that

> (2) If a claim other than one based on a publicly traded note, bond, or debenture has been transferred other than for security after the proof of claim has been filed, evidence of transfer shall be filed by the transferee. The clerk shall immediately notify the alleged transferor by mail to the filing of the evidence of the transfer and that objection thereto, if any, must be filed within 20 days of the mailing of the notice or within any additional time allowed by the court. If the alleged transferor files a timely objection and the court finds, after notice and a hearing, that the claim has been transferred other than for security, it shall enter an order substituting the transferee for the transferor. If a timely objection is not filed by the alleged transferor, the transferee shall be substituted for the transferor.

FED. R. BANKR. P. 3001(e)(2) (2005)

Prior to the 1991 amendment to Rule 3001(e)(2), courts had power to review the claims trading process by requiring court approval after notice to parties in interest and a hearing. However, the 1991 amendment "was expressly intended to curtail judicial oversight of the claim assignment process itself by eliminating notice to third parties and limiting the court's role to determining disputes between assignee and assignor, the only party entitled to notice of the purported transfer." *In re Lynn*, 285 B.R. 858, 861 (Bankr. S.D.N.Y. 2002). Further, the Advisory Committee Note to the 1991 Amendment states in relevant part that:

> Subdivision (e) is amended to limit the court's role to the adjudication of disputes regarding transfers of claims . . . If a claim has been transferred other than for security after a proof of claim has been filed, the transferee is substituted for the transferor in the absence of a timely objection by the alleged transferor. In that event, the clerk should note the transfer without the need for court approval. If a timely objection is filed, the court's role is to determine whether a transfer has been made that is enforceable under nonbankruptcy law. *Id.*

Therefore, the Court's role in the instant case is to determine who is the valid owner of the Claims.

A. Release of Collateral

1. Parties' Contentions

Stonehill concedes that BNP has a valid perfected security interest in the Claims, which were part of the Collateral upon which BNP's Lien attached. Stonehill, however, argues that the Claims were not included in the original Disposition Agreement, and that the Amended Disposition Agreement, which included the Claims, did not provide for a concomitant increase in the purchase price for the Claims. Stonehill contends that, as a result, there was no consideration given. Therefore, the Amended Disposition Agreement was void.

Based upon the above argument, Stonehill then argues that according to the original Disposition Agreement between BNP and Fortistar which did not include the Claims, BNP agreed to apply the proceeds of the purchase price to discharge all of SBL's obligations under the Credit Agreement with BNP. Thus, Stonehill maintains that, pursuant to the original Disposition Agreement, BNP would no longer have a security interest in any of the Collateral, which includes the Claims, since SBL's underlying debt obligation to BNP under the Credit Agreement was satisfied when the sale was consummated. Stonehill maintains that as a consequence, Stonehill owns the Claims free and clear of BNP's security interest.

In response to Stonehill's argument that the Amended Disposition Agreement was unsupported by consideration, BNP asserts that at the time the original Disposition Agreement was executed, it believed that the Claims were covered in the general language contained in the original Disposition Agreement. BNP further asserts that since the Claims were not initially specifically enumerated among the assets to be conveyed to Fortistar, BNP and Fortistar executed an amendment to the Disposition Agreement, on July 29, 2003, specifically including the Claims among the assets to be included in the sale to Fortistar.

BNP argues that it did not purport to release SBL from any payment or other obligations owed under the Credit Agreement in connection with either of the foreclosure sales. Neither did BNP release its Lien in respect to any of the Collateral subject to the Lien that may not have been foreclosed upon. BNP also argues that according to U.C.C. Section 9-615(c) (2005), a foreclosing creditor is not required to apply noncash proceeds to a secured debt obligation "unless the failure to do so would be commercially unreasonable." BNP maintains that it did not receive a cash payment of the stated purchase price under the Amended Disposition Agreement. Instead it received a new, entirely non-recourse, obligation from Fortistar to pay up to $16,340,118.85 (the approximate amount due and owing to BNP under the Credit Agreement and a related swap agreement at the time of the foreclosure), together with interest thereon.

BNP argues, further, that the New Credit Agreement, dated September 29, 2003, by and among Fortistar and Bayerische Hypo-Und Vereinsank AG (the "New Credit Agreement"), evidenced this obligation. BNP maintains that its "failure" not to apply the noncash proceeds is not commercially unreasonable because the structure of the New Credit Agreement reflects the parties' recognition that the assets conveyed to Fortistar are worth far less than the more than $16 million that was owed by SBL, and the New Credit Agreement is a non-recourse obligation – facts not disputed by Stonehill. Further, the amortization schedule in the New Credit Agreement does not require even a single principal payment until the maturity date of the loan, November 30, 2011. In addition, BNP and Bayerische Hypo-Und Vereinsank AG are entitled solely to receive the excess cash flow generated by the assets (if any) after deducting a management fee to be received by another Fortistar affiliate. Furthermore, BNP argues that at the time of the filing of its motion,[6] they have received approximately $188,000.00 of interest and $99,000.00 of

[6] The motion was filed with the Court at or about September 15, 2004. It is not clear what the actual amount would be as of this Memorandum Opinion.

principal in respect of Fortistar's obligations under the New Credit Agreement, leaving an excess of $16 million of principal outstanding.

Moreover, BNP argues that it expressly reserved all of its rights against SBL regarding any of the Collateral subject to the Lien that may not have been foreclosed upon in connection with the foreclosure by a letter agreement entered into with TRC Energy Services LLC ("TRC") (an SBL affiliate that managed many of the secured assets) respecting the anticipated post-foreclosure transition of the assets to new management, expressly stating that "[t]he execution, delivery and effectiveness of this Letter Agreement shall not operate as a waiver of any right, power or remedy of . . . [BNP] under the Loan Documents (as defined in the Credit Agreement . . ."). The Court notes that Stonehill does not dispute BNP's above arguments. Specifically, Stonehill does not dispute that the proceeds were noncash nor does it argue that it was commercially unreasonable for BNP not to apply the noncash proceeds.

2. Analysis

Article 9 of the U.C.C. governs the enforcement of a creditor's security interest. An extensively revised Article 9 became effective in New York on July 1, 2001. *See* U.C.C. § 9-701 (2005), and is applicable here.[7] Under both the old and revised U.C.C., upon a debtor's default, "a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing." U.C.C. § 9-610(a).

However "every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings . . . at any time and place and on

[7] Generally, "secured transactions entered into under former Article 9 must be terminated, completed, consummated, and enforced under" the revised Article 9. *See* Comment 1 to U.C.C. § 9-702. In addition, it does not appear that any of the exceptions requiring application of former Article 9 are present in this case.

any terms." U.C.C. § 9-610(b). In addition, if a secured party decides to sell the collateral, the secured party must send "a reasonable authenticated notification of disposition" to the debtor(s). *See* U.C.C. § 9-611(b).

As stated above, Stonehill does not dispute that SBL defaulted on the Credit Agreement. As a result of that default, BNP exercised its right to dispose of some of the Collateral. BNP entered into the original Disposition Agreement with Fortistar for such Collateral, and the Disposition Agreement was later amended to include the Claims at issue. As stated above, Stonehill has conceded that BNP has a valid perfected security interest in the Claims, which were part of the Collateral to which BNP's Lien attached.

With regard to Stonehill's argument that the amended Disposition Agreement which included the Claims was unsupported by consideration, the Court finds that this argument is really subsumed in Stonehill's argument regarding the issue of release. Inasmuch as it appears to be premised upon the assumption that the original Disposition Agreement evidenced on its face, that prior to the amendment to the Disposition Agreement, the parties agreed that the outstanding debt was satisfied in full. Therefore, BNP's Lien on the Collateral, which included the Claims, was released. Thus, according to Stonehill's argument, amending the Disposition Agreement to include the Claims was done without a concomitant increase in the purchase price. The Court notes, however, that Stonehill does not appear to have standing to challenge the enforceability of a contract to which it is not a party.

Even if Stonehill did have such standing, the Court finds that the amendment to the Disposition Agreement which added the Claims was supported by consideration. The parties, here, added value to their agreement because the face value of the note given was not equal to the liquidation value of the assets purchased. Stonehill does not dispute that the value of the

assets was worth far less than the face value of the note that was given. Thus, adding assets to the agreement would increase the distribution of value to satisfy the non-recourse note. Stated otherwise, as long as the increase in value realized from the added assets did not exceed the non-recourse obligation, any assets added would continue to provide consideration. Thus, the amendment to the Disposition Agreement is valid.

The next issue is whether the Disposition Agreement released BNP's Lien in the Collateral. The Disposition Agreement states that "[a]t Closing, . . . [BNP] shall apply the Purchase Price[8] to the discharge of the Obligations[9] pursuant to the terms and conditions of the Credit Agreement." Disposition Agreement, § 3, pg. 5. The U.C.C. directs that the application of the proceeds of a disposition is contingent upon whether the proceeds are cash[10] or noncash.[11] *See* U.C.C. § 9-615. BNP argues, and Stonehill does not dispute, that the proceeds are noncash because BNP entered into a New Credit Agreement. The Court agrees that the proceeds of the

[8] Purchase Price is defined as follows: [t]he consideration to be paid by [Fortistar] to [BNP] for the Transferred Property [(as described in Exhibit A to the Disposition Agreement)] shall be equal to the sum of the Outstanding Swap Amounts [($2,812,313.70 plus all additional interest which accrues on such amount from May 22, 2003 through the Closing Date pursuant to the Borrower ISDA Agreement)] plus the Outstanding Loan Amounts [($13,206,153.00 plus (a) $94,946.74 in past due interest and (b) all additional interest which accrues on such amounts from May 1, 2003 through the Closing Date pursuant to the Credit Agreement)]." Disposition Agreement, §1, pg. 4.

[9] Obligations is defined as having the same meaning stated in the Credit Agreement. Disposition Agreement, § 1 pg. 3. Obligations is defined in the Credit Agreement as

> (a) each and every obligation, covenant and agreement of the Borrower now or hereafter existing contained in this Agreement, and any of the other Loan Documents to which the Borrower is a party, whether for principal, interest, fees, expenses or otherwise, and any amendments or supplements thereto, extensions or renewals thereof or replacements therefore, (b) all sums advanced in accordance with the Security Documents to which the Borrower is a party by or on behalf of the Agent or the Banks to protect any of the Collateral purported to be covered thereby, (c) any amounts paid by any Indemnitee (as defined in the Security Agreement) as to which such Indemnitee has the right to reimbursement, and (d) any amounts paid by the Agent or the Banks in preservation of any of the Agent's or Banks' rights or interest in the Collateral, together with interest on such amounts from the date such amounts are paid until reimbursement in full at a rate per annum equal at all times to the Default Rate; in each case whether joint or not from time to time decreased or extinguished and later increased, created or incurred, and including all Debt of the Borrower under any instrument now or hereafter evidencing or securing any of the foregoing. Credit Agreement, Article I, § 1.01, pg. 18.

[10] Cash proceeds means proceeds that are money, checks, deposit accounts, or the like. U.C.C. § 9-102(9) (2005).

[11] Noncash proceeds means proceeds other than cash proceeds. U.C.C. § 9-102(58) (2005).

disposition sale are noncash because BNP entered into the New Credit Agreement as a non-recourse loan, which is a form of chattel paper.[12]

Section 9-615(c) of the U.C.C. states that "[a] secured party need not apply or pay over for application noncash proceeds of disposition under [s]ection 9-610 unless the failure to do so would be commercially unreasonable." *Id.* Therefore, since the proceeds of the disposition are noncash proceeds, BNP is not required to apply it or to pay them over to SBL's debt unless the failure to do so would be commercially unreasonable. The Court must then determine whether BNP's failure to apply the noncash proceeds or their value to SBL's debt is commercially unreasonable. Comment 3 to U.C.C. section 9-615 explains that it would be commercially unreasonable for a secured party not to apply the noncash proceeds when the noncash proceeds "are of the type that the secured party regularly generates in the ordinary course of its financing business in non-foreclosure transactions." *Id.* This is based on the principal that "[t]he original debtor should not be exposed to delay or uncertainty in this type of situation." *Id.*

Stonehill does not respond to BNP's contentions that it was not commercially unreasonable for BNP not to apply the noncash proceeds to SBL's debt. There is no evidence in the record to support that it was commercially unreasonable for BNP not to apply the noncash proceeds to SBL's debt. Here, BNP was given a non-recourse loan where the collateral's face value is alleged, without dispute, to be worth far less than the debt owed by the original debtor. This is coupled with the fact that BNP only receives the excess cash flow generated by the assets (if any) following the deduction of a management fee to be received by another entity, a Fortistar affiliate. In addition, BNP and Fortistar have structured the New Credit Agreement so that the amortization schedule does not even require a single principal payment until the maturity date of

[12] Chattel paper means a record or records that evidence both a monetary obligation and a security interest in specific goods. U.C.C. § 9-102(11) (2005).

the loan, November 30, 2011. Therefore, the Court finds that it was not commercially unreasonable for BNP not to apply or pay over the noncash proceeds to SBL's debt.

Accordingly, based upon the above, the Disposition Agreement between BNP and Fortistar did not discharge SBL's debt. Thus, according to U.C.C. § 9-315(a)(1) (2005), notwithstanding the Disposition Agreement, BNP's Lien continues to be attached to the Collateral. *See Id.* ("a security interest . . . continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien . . . .).

B. Disposition Sales

1. Parties' Contentions

Two disposition sales occurred relating to the underlying Claims. The First Sale occurred on September 29, 2003, and the Second Sale occurred on July 29, 2004. With respect to the First Sale, Stonehill argues that, if the Court were to find that the Claims were included in the Amended Disposition Agreement, the U.C.C. required that BNP send it notice of the disposition of collateral. Furthermore, Stonehill argues that it was not given notice, notwithstanding the fact that, at the very least, BNP was on notice of Stonehill's interest in the claim by virtue of the docketing of the Stonehill Notices of Transfer. In addition Stonehill raises the issue of BNP's good faith regarding its "lack of knowledge" of Stonehill's interest in the Claims because of the close proximity of BNP's amendment to the Disposition Agreement and the docketing of the Stonehill Notices of Transfer. Stonehill contends that due to BNP's failure to provide such notice to Stonehill, the Court should order that the Claims are free and clear of BNP's Lien or that BNP is preempted from being able to either attach the proceeds of the Claims or foreclose

on the Claims and sell them to a third party (when they have not objected to either the Stonehill Notices of Transfer or the Amended Stonehill Notices of Transfer).

BNP argues that U.C.C. § 9-611 expressly states that a secured party is required to give notice to a party who has given it an authenticated notification of a claim of interest in the collateral. They argue that at the time of the First Sale, they did not have notice or know of the improper transfer of the Claims by SBL to Stonehill. In addition, BNP disagrees with Stonehill's position that they should have been surveying every claim filed or transferred in the bankruptcy court. Furthermore, BNP argues that assuming, arguendo, that notice was not properly given, the only consequence would be that BNP would be required to foreclose again in order to obtain title to the property, but the Lien would remain in force regardless of any defects in the sale.

2. Analysis

Section 9-611(b) of the U.C.C. requires a secured party to send a reasonable authenticated notification of disposition to the debtor, any secondary obligor, and, if the collateral is other than consumer goods, (A) any other person from which the secured party has received, before the notification date, an authenticated notification of a claim of an interest in the collateral. *Id.* "The purpose of the notice requirement is 'to give the debtor an opportunity to protect his interest in the collateral by exercising any right of redemption or by bidding at the sale, to challenge any aspect of the disposition before it is made, or to interest potential purchasers in the sale, all to the end that the merchandise not be sacrificed by a sale less than the true value.'" *Coxall v. Clover Commercial Corp.*, 781 N.Y.S. 2d 567, 572 (N.Y. Civ. Ct. 2004) (citation and quotation marks omitted).

A debtor is defined in U.C.C. § 9-102 (28)(a) (2005) as "a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an

obligor . . . ." Comment 2(a) to U.C.C. § 9-102(28)(a) notes that the U.C.C. redefines debtor and includes into the definition "persons who may have a stake in the proper enforcement of a security interest by virtue of their non-lien property interest (typically, an ownership interest) in the collateral." Furthermore, Comment 2(a) states that "[b]y including in the definition of 'debtor' all persons with a property interest (other than a security interest in or other lien on collateral), the definition includes transferees of collateral, whether or not the secured party knows of the transfer or the transferee's identity."

However, under U.C.C. § 9-605(a) (2005) a secured party does not owe a duty to provide a debtor with notification of disposition of collateral, unless the secured party knows "(1) that the person is a debtor or obligor; (2) the identity of the person; and (3) how to communicate with the person." U.C.C. § 9-605(a)(1)-(3). Comment 2 to U.C.C. § 9-605(a)(1)-(3) provides that "[f]or example, a secured party may be unaware that the original debtor has sold the collateral subject to the security interest and that the new owner has become the debtor. If so, the secured party owes no duty to the new owner (debtor) . . . ."

Accordingly, Stonehill is a transferee of the Claims by virtue of the Assignment Agreement between SBL and Stonehill, thus, it is a debtor according to U.C.C. § 9-102(28)(a). Here, it is undisputed by the parties that SBL assigned the Claims to Stonehill without BNP's knowledge. Thus, it would appear that BNP would not then owe a duty to notify Stonehill of the disposition of collateral, unless BNP had knowledge of Stonehill pursuant to § 9-605(a)(1)-(3). A question of fact remains as to whether BNP had such knowledge of Stonehill's interest in the Claims. The Court, however, will not make a finding as to whether BNP had knowledge, pursuant to § 9-605, of Stonehill's interest in the Claims because even if BNP violated § 9-611,

the appropriate remedy in this matter would not be an invalidation of the First Sale, but a damages remedy based upon U.C.C. § 9-625(b) (2005).

Prior to the revision of the Uniform Commercial Code, courts were divided on the consequences of non-compliance with the Article 9 proscriptions for disposition of collateral. The revised U.C.C., however, expressly provides remedies for a secured party's failure to comply with Article 9. The remedies afforded are found in section 9-625 which provides in relevant part:

> (a) Judicial orders concerning noncompliance. If it is established that a secured party *is* not proceeding in accordance with this article, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions. (emphasis added).
>
> (b) Damages for noncompliance. Subject to subsections (c), (d), and (f), a person is liable for damages in the amount of any loss caused by a failure to comply with this article. Loss caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing.

U.C.C. § 9-625.

Stonehill argues that the Court should either (1) order that the Claims are free and clear of BNP's Lien; (2) BNP should be preempted from attaching the proceeds of the Claims; or (3) BNP should be estopped from foreclosing on the Claims and selling them to a third party (when they have not objected to either the Stonehill Notices of Transfer or the Amended Stonehill Notices of Transfer [13]). BNP argues that the consequence of this Court finding that it violated §

[13] BNP was not listed as the transferor on the Stonehill Notices of Transfer or the Amended Stonehill Notices of Transfer. SBL was listed as the transferor on both notices. According to the plain language of Bankruptcy Rule 3001(e)(2) only the transferor has the right to object to the notice of transfer of claim filed by the transferee. Thus, Bankruptcy Rule 3001(e)(2) does not on its face allow third parties to have standing to object to the notice of transfer of claim. *See Viking Assocs. v. Drewes (In re Olson)*, 120 F.3d 98, 102 (8th Cir. 1997) (limiting the right to object to the transferor under Rule 3001(e)(2) (the Second Circuit in, *Martin v. Ehrlich (In re Kinderhill* Corp.), 199 F.3d 1322 (Table) (2d Cir. 1999), an unpublished opinion which, while not deciding

9-611 would be another foreclosure sale of the Claims which would not change the ultimate outcome. Neither Stonehill nor BNP, however, have directed the Court's attention to any cases, nor has the Court found any cases, to support the proposed remedies for BNP's alleged failure to comply with the notice requirement.

Arguably, even if an equitable remedy of the types suggested were available, the facts as alleged do not warrant such a remedy. Specifically, even if Stonehill's allegations of BNP's conduct were found to be true, BNP's conduct does not rise to the level that would warrant granting such equitable relief. Further, the Court notes that Stonehill could have avoided this situation had it done appropriate due diligence. At a minimum, Stonehill could have performed a lien search on the Claims. Further, an examination of the Credit and Security Agreement between BNP and SBL would have revealed (1) BNP's security interest in the Collateral, including the Claims and (2) SBL's limitation on selling the Collateral, including the Claims. Moreover, Stonehill never challenged the commercial reasonableness of the foreclosure sales pursuant to § § 9-610(b) and 9-627 of the U.C.C. in this Court nor has it filed a petition in state court. In addition, whatever interest Stonehill may have in the Claims is an economic interest and any improper extinguishment or reduction of such interest would result in a claim for money damages. Furthermore, ordering another sale would not result in any change in the outcome. Therefore, the Court does not find that any of the proposed equitable remedies are appropriate.

Furthermore, section 625(a) would not appear to be applicable here. Under a plain meaning of the statute, that section would be applicable in circumstances where the secured party

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the issue of whether a bankruptcy court may hear an objection by someone other than the transferor, found that *In re Olson* "may be persuasive under the appropriate circumstances.")) *See also In re Lynn*, 285 B.R. at 862; *Troy Savings Bank v. Travelers Motor Inn, Inc.*, 215 B.R. 485, 491 (N.D.N.Y. 1997). Thus, since BNP was not listed as transferor on either the Stonehill Notices of Transfer or the Amended Stonehill Notices of Transfer, BNP was not required to object to either of the notices of transfer.

is *proceeding* to dispose of the collateral and not in a situation where the disposition of the collateral has already occurred.[14] Therefore, since the First Sale has already occurred, Stonehill's remedy, if it were shown that BNP did not comply with the requisite provisions of Article 9, would be an action for damages under section 9-625(b) of the U.C.C. and not an invalidation of the sale. Accordingly, the Court finds that pursuant to the First Sale, without deciding the issues regarding notice or the possibility of any damages under section 9-625(b), Fortistar is the valid owner of the Claims. Additionally, since the Court finds that the First Sale transferred the Claims to Fortistar it need not make a finding as to the Second Sale.

Conclusion

Therefore, based upon the foregoing, the Claims are held by Fortistar. BNP is to settle an order consistent with this Memorandum Opinion.

Dated: New York, NY
June 16, 2005

s/ Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE

[14] Old U.C.C. § 9-507(1) (1999) is similar to the language provided in revised 9-625 (a), it provides in relevant part:

> If it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions.

Comment No. 1 to U.C.C. § 9-507(1) (1999) provides, in part, by way of explanation that:

> This remedy will be of particular importance when it is applied prospectively before the unreasonable disposition has been concluded. This Section, therefore, provides that a secured party proposing to dispose of collateral in an unreasonable manner, may, by court order, be restrained from doing so, and such an order might appropriately provide either that he proceed with the sale or other disposition under specified terms and conditions, or that the sale be made by a representative of creditors where insolvency proceedings have been instituted.