

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ALASKA

In re: Case No. A00-00695-DMD

Chapter 11

KING FISCHER FISHERIES, LLC

Debtor.

LARRY D. COMPTON, Chapter 11
Trustee for the Bankruptcy Estate of King
Fischer Fisheries, LLC,

Adv. No. 03-90051-DMD

Plaintiff and Counterclaim
Defendant,

v.

CHERRIER & KING PARTNERSHIP,
CHERRIER KING CHERRIER FISHERY
PARTNERSHIP, and DRAGNET
FISHERIES COMPANY, INC.,
OFFICIAL FISHER CREDITORS
COMMITTEE,

Defendants and
Counterclaimants.

CHERRIER & KING PARTNERSHIP,
CHERRIER KING CHERRIER FISHERY
PARTNERSHIP, and DRAGNET
FISHERIES COMPANY, INC.,

Crossclaimant,

v.

OFFICIAL FISHER CREDITORS
COMMITTEE,

Crossclaim Defendant.

OFFICIAL FISHER CREDITORS
COMMITTEE,

Crossclaimant,

v.

CHERRIER & KING PARTNERSHIP,
CHERRIER KING CHERRIER FISHERY
PARTNERSHIP, and DRAGNET
FISHERIES COMPANY, INC.,

Crossclaim Defendant.

MEMORANDUM ON MOTIONS FOR SUMMARY JUDGMENT

A hearing on the following motions for summary judgment was held on February 18, 2004:

- CK Group's¹ Motion for Summary Judgment on 547 and 549 Claims, filed December 10, 2003 [Docket No. 24];
- Plaintiff's Motion for Partial Summary Judgment, filed December 10, 2003 [Docket No. 29];
- CK Group's Motion for Summary Judgment on Strong Arm Powers - 544(a), filed on December 10, 2003 [Docket No. 33];
- CK Group's Motion for Partial Summary Judgment on Fishermen Lien Claims, filed December 10, 2003 [Docket No. 36]; and
- Motion for Summary Judgment (Fishers Committee), filed December 11, 2003 [Docket No. 43].

Gary Sleeper and Robert Henderson appeared on behalf of plaintiff Larry Compton. John Siemers appeared for the CK Group, with Jay Cherrier also in attendance. Spencer Sneed and Jahna Lindemuth appeared for the Official Fisher Creditors Committee.

¹CK Group consists of the following defendants: Cherrier & King Partnership, Cherrier King Cherrier Fishery Partnership and Dragnet Fisheries Company, Inc.

I have extensively reviewed each of the motions, as well as the oppositions and replies thereto, and considered the arguments of counsel made at the hearing. I find that the third addendum assigned an interest in accounts to the CK Group, which had to be perfected under Article 9 of the Uniform Commercial Code regardless of whether the assignment was absolute or for security. I also find that the transfer of accounts was intended for security. And, because the CK Group failed to perfect its security interest in the accounts, its interest in the funds is subordinate to the statutory liens of the fishermen and packers who are represented by the Official Fisher Creditors Committee and to the interest of the trustee as a lien creditor under 11 U.S.C. § 544. Finally, I find that the payments made to the CK Group were preferences or unauthorized post-petition transfers.

I conclude that summary judgment should be granted in favor of the plaintiff and the Official Fisher Creditors Committee (hereinafter “Committee”). The CK Group’s motions for summary judgment will be denied. An order and judgment will be entered consistent with this memorandum on or after June 23, 2004.

Factual Background

Summary judgment can be entered when “there is no genuine issue as to any material fact” and the moving party has established that it is entitled to judgment as a matter of law.² The material facts in this case are not contested. Resolution of the legal issues in this case turn on the proper classification of an interest conveyed to the CK Group prepetition in conjunction with a proposed sale of certain assets by the CK Group to Chris

²Fed. R. Civ. P. 56(c), made applicable to adversary proceedings in bankruptcy pursuant to Fed. R. Bankr. P. 7056.

Fischer. At the time the sale transaction was initially negotiated, in January of 2000, Chris was doing business as Triton Fisheries, but was in the process of forming Triton Fisheries, LLC. This LLC was subsequently renamed King Fischer Fisheries, LLC, the debtor herein. Chris Fischer was the managing partner of the debtor at the time it filed a chapter 11 petition on July 19, 2000. The assets to be sold by the CK Group to Chris included real and personal property: a fish processing plant in Dillingham and related real estate at the King Salmon airport, a fish tender/tug and a barge, and a fish processing plant and associated realty in Kenai.

Chris Fischer, d/b/a Triton Fisheries, executed earnest money and sale agreements for the purchase of these assets in March of 2000. The purchase price for all assets was \$3,351,000.00. The closing was scheduled for May 1, 2000. Chris paid \$50,000 in earnest money. Because some of the members of the CK Group were concerned about Chris's ability to obtain financing for the purchase, a second addendum to the sale agreements was executed in April of 2000. The second addendum conditioned the sale upon Chris's acquisition of a financing commitment from a lender acceptable to the CK Group within 10 days of the date of the last signature on the addendum. Once the CK Group was satisfied that Chris had obtained such financing, he would then be entitled to possession of the assets pending closing, in order to prepare for the upcoming 2000 fishing season. The sale closing was extended by approximately 45 days.

By late April, 2000, Chris had submitted evidence of a financing commitment to the CK Group. The CK Group wasn't fully satisfied with the information which had been provided and wanted additional time to verify the prospective lender's qualifications.

Consequently, in early May of 2000, Chris and the CK Group entered a third addendum to the sale agreements which allowed Chris to take immediate possession of the assets pending the completion of satisfactory financing arrangements. The third addendum contained the following recitals and provisions:

Because Buyer needs immediate possession, and cannot wait until additional documentation is available to verify the financing commitments he has submitted, Buyer has proposed providing additional security for the sale in the event the closing does not occur on or before June 13, as required under the existing documents. The additional security for closing of the purchase will be a deposit in escrow of the first \$1.7 million in proceeds payable to Buyer from its seafood sales, which are anticipated to be received not later than the last week of June and the first week of July. Those proceeds, less a payment in lieu of interest, will be applied to a closing of the sale of the properties on or before July 18, 2000. If closing does not occur on or before July 18, the deposit shall be paid to Sellers as compensation for use of the properties during the period of possession, and all property shall be returned to Sellers.

. . . .

1. Assignment and Escrow of Sale Proceeds: If closing of the purchase of the properties pursuant to the underlying agreements does not occur on or before June 13, Buyer hereby irrevocably assigns to Sellers the first \$1.7 million in net proceeds from seafood sales. E&E FOODS, the Seafood Division of Double E Foods L.L.C., which will be the sole Sales Agent for sales of processed seafood by Fischer and/or Triton Fisheries, shall deposit the first \$1.7 million in net proceeds payable to Fischer and/or Triton in an interest bearing escrow that Sellers will establish with Pacific Northwest Title of Alaska, or such other escrow holder as may be designated unanimously by the Sellers. Only E & E sales commissions and any reimbursements that may be due to E & E for marketing or shipping costs may be deducted from sale proceeds prior to making the Escrow deposit.

2. Ownership of Escrow Account: All funds deposited in the Escrow account shall, upon receipt, become the

sole property of the Sellers free and clear of any claim, lien or right of the Buyer or Buyers creditors. . . .

. . . .

6. Application of Escrowed Funds to Purchase Price on Closing: On closing of the purchase of the properties on or before July 18, an amount equal to the principal and accrued interest in the escrow account, less an amount equal to simple interest at 9% per annum on the balance payable to Sellers at closing of the properties for the period between June 13, 2000 and the date of closing, shall be credited against the purchase price. It is the intention of this provision to pay Sellers 9% interest for amounts not paid at the present closing date, and to apply remaining sums in the escrow account to the purchase price.

7. Failure to Close: If Buyer fails to close the purchase of the properties on or before July 18, 2000, all funds paid into the escrow shall be compensation to Sellers for taking the properties off the market; and for Buyer's use of the property³

E & E Foods, the exclusive sales agent for Triton Fisheries,⁴ was to give the CK Group written acknowledgment of its understanding of the assignment and escrow provisions contained in the third addendum. In a letter to the CK Group dated May 22, 2000, Dave Gray, the chief financial officer of E & E, acknowledged E & E's understanding of the provisions in the third addendum relating to its obligation to "remit 100 percent of net proceeds . . . directly into escrow for the benefit of [the CK Group] at Pacific Northwest Title of Alaska." Gray also noted, however, that:

³See Ex. 7 to the CK Group's Mem. in Supp. of Mot. for Summ. J. on 547 and 549 Claims, filed Dec. 10, 2003 [Docket No. 25-28].

⁴See Ex. 8 to the CK Group's Mem. in Supp. of Mot. for Summ. J. on 547 and 549 Claims, filed Dec. 10, 2003 [Docket No. 25-28]. As sole sales agent, E&E was to "invoice buyers and collect the receivables, on behalf of TRITON, for all products sold" with "all receipts were to be to the benefit of TRITON." E&E was to receive a 3% commission on sales of roe, frozen seafood and canned salmon and 15¢ per pound for all fresh seafood invoiced on behalf of TRITON.

In reading the agreement, I do not find any provision for notice to E & E as to the status of our role on June 14th. In simple language, we will be looking for [the CK Group], together with [Fischer/Triton], to provide nonconflicting instructions as to the disposition of sales funds post June 13, as well as notice of satisfaction, in the event of escrow.”⁵

The sale failed to close by June 13, 2000. No funds were ever paid into the escrow account contemplated by the third addendum, however.⁶ Instead, on July 10, 2000, the CK Group was notified that “King Triton Fisheries (which has now changed its name to King Fischer Fisheries) is facing a cash crunch” due to a poor fishing season in Bristol Bay.⁷ King Fischer Fisheries needed cash to make payroll and meet other financial obligations. It asked for the CK Group’s approval to use \$300,000.00 of the fish proceeds, which would otherwise have been placed into escrow per the third addendum, to pay operating expenses. The letter further stated:

In order to persuade [the CK Group] to approve of the disbursements from E & E Foods to King Fischer, the LLC is prepared to modify its agreement with you so that \$500,000 of the approximately \$2,000,000 monies due form [sic] E & E Foods would be paid to [the CK Group] as a lease payment for the 2000 season, with the proviso that the full payment could be

⁵See Ex. 10 to the CK Group’s Mem. in Supp. of Mot. for Summ. J. on 547 and 549 Claims, filed Dec. 10, 2003 [Docket No. 25-28].

⁶In fact, an escrow account was never established. On June 13, 2000, the parties were still negotiating the provisions of the escrow agreement which was to be set up under the third addendum. The CK Group wanted Chris Fischer, individually, as well as Triton Fisheries, LLC, and any of their successors or assigns, designated as the payer on the agreement. Fischer needed to be “kept on as a payer” because the sale agreements were with him, individually, and the CK Group hadn’t consented to any assignment of Fischer’s interest in the properties. See Ex. K to Pl.’s Mem. in Supp. of Mot. for Summ. J., filed Dec. 10, 2003 [Docket No. 35].

⁷See Ex. 12 to the CK Group’s Mem. in Supp. of Mot. for Summ. J. on 547 and 549 Claims, filed Dec. 10, 2003 [Docket No. 25-28].

used as part of down payment should King Fischer receive its financing and be able to close on the sale.⁸

The CK Group promptly agreed to accommodate this request. By letter dated July 10, 2000, E & E Foods was advised that, with regard to its obligation “to pay all net proceeds from June 13, 2000 due to Chris Fischer and/or Triton Fisheries, into escrow.”⁹

[T]he Sellers and Buyer have agreed to a modification of the instructions with regard to the initial payments you are to make. By this letter, which is signed by the attorneys for the parties, you are directed to make distributions as follows:

1. The first \$300,00 of net proceeds shall be distributed to or at the direction of Chris Fischer or Triton Fisheries.
2. The next \$500,000 of net proceeds shall be distributed to [the CK Group] as a minimum rental for all facilities based on current production. . . .
3. Unless and until you are otherwise directed in writing signed on behalf of the Sellers and Buyer, you shall then continue to make payments into the National Bank of Alaska account pursuant to the instructions you previously acknowledged until such time as an additional \$1.2 million has been paid into the account or you are advised that the sale of the properties contemplated by the transaction among the parties has closed.¹⁰

Financing for the sale of the CK Group assets never materialized. King Fischer Fisheries, LLC, filed a chapter 11 petition on July 19, 2000. In accordance with the July 10, 2003, letter modifying the escrow instructions in the third addendum, E & E made pre- and post-petition payments directly to the CK Group totaling approximately \$500,000.00. The

⁸*Id.* at p. 2.

⁹*See* Ex. 11 to the CK Group’s Mem. in Supp. of Mot. for Summ. J. on 547 and 549 Claims, filed Dec. 10, 2003 [Docket No. 25-28]. The letter was signed on behalf of the CK Group members and Chris Fischer, Triton Fisheries and King Fischer Fisheries.

¹⁰*Id.*

seafood proceeds paid to the CK Group were from the debtor's commercial fishing operations in Bristol Bay and Dillingham during the 2000 salmon season. The fishermen and packers who worked for the debtor during the 2000 season have not been paid for their services. They are owed well in excess of the \$500,000 at issue here, and claim liens against the proceeds in accordance with AS 34.35.391 and 34.35.320.

The debtor's chapter 11 trustee, plaintiff herein, initiated this adversary proceeding to recover the pre- and post-petition payments to the CK Group, alleging that these transfers are avoidable under 11 U.S.C. §§ 544, 547, 548, 549 and 550. These summary judgment motions followed. The trustee seeks summary judgment on the issues of avoidance of the transfers under § 547 (preference) and § 549 (unauthorized post-petition transfers). The Committee argues that the statutory liens held by the fishermen, packers and processors whom it represents prime any interest the CK Group may have in the funds. The CK Group contends the funds it has received are not property of the estate nor are they encumbered by statutory liens because the payments were made pursuant to independent obligations of E & E, rather than the debtor.

Discussion

This case involves a failed sales transaction. The CK Group has received \$50,000.00 in nonrefundable earnest money and recovered the real and personal property assets which were the subject of the sale. It now seeks to retain the \$500,000.00 paid to it in accordance with the July 10, 2003, modification of escrow instructions. To allow the CK

Group to do so would place it ahead of other general unsecured creditors in this case, a result inconsistent with the provisions of the Bankruptcy Code as well as Alaska law.

The CK Group contends the funds it received are not subject to avoidance by the trustee because “1) the transfers were made pursuant to independent obligations owed by E&E to [the CK Group] and, thus 2) the transfers did not involve property of the debtor or the estate.”¹¹ It says E&E’s joinder in the third addendum created an independent contractual obligation on E&E’s part to pay the CK Group, and irrefutably establishes that the debtor gave up all control over the first \$1.7 million of the net proceeds from its seafood sales. As noted by the Committee, the CK Group has referred to its interest as “the right to receive payment from E&E,” “E&E’s independent contractual obligation to make payment to CK,” an “assignment of revenue,” and “a property right, the contractual right to receive payment from E&E.”¹² These varying descriptions all miss the mark. The CK Group held a security interest in accounts.

The Third Addendum assigned the CK Group “the first \$1.7 million in net proceeds from seafood sales.” The net proceeds from seafood sales constitute accounts under the Uniform Commercial Code (“UCC”). The Alaska Uniform Commercial Code - Secured Transactions, defines “goods” to include “all things that are movable at the time the

¹¹CK Group’s Mem. in Supp. of Mot. for Summ. J. on 547 and 549 Claims, filed Dec. 10, 2003 [Docket No. 25], at p. 2.

¹²See Opp. to Cherrier King Mot. for Summ. J. Against Fishers Committee, filed Feb. 3, 2004 [Docket No. 51], at p. 22 .

security interest attaches.”¹³ Seafood is a good.¹⁴ The sale of seafood creates a right to payment, or an “account.”¹⁵

If an account is assigned, either as an absolute assignment or for security, the transfer is governed by Article 9 of the UCC.¹⁶ AS 45.09.102(a), in effect at the time the third addendum was entered, provides:

(a) Except as otherwise provided in AS 45.09.104 on excluded transactions, this chapter applies:

(1) to a transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, or accounts; and

(2) to a sale of accounts or chattel paper.¹⁷

¹³AS 45.09.105(8) (repealed 2001). Because the relative priorities of the CK Group, the Committee and the trustee were all established before July of 2001, former AS 45.09 applies with regard to the CK Group’s interest. *See* AS 45.29.709(a).

¹⁴*Cf. Matter of Bindl*, 13 B.R. 148, 149 (Bankr. D. Wis. 1981) [milk sold by dairy farmer was a “good” and farmer’s right to payment for sales of milk was an “account” under Wisconsin UCC]; *Bank of Stockton v. Diamond Walnut Growers, Inc.*, 244 Cal.Rptr. 744, 747-48 (Cal. Ct. App. 1988) [farm’s walnuts were “goods” and right to receive proceeds from their sale was an “account” under California UCC].

¹⁵Per AS 45.09.106 (repealed 2001), an “account” is “a right to payment for goods sold or leased or for services rendered that is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance.”

¹⁶*Dewhirst v. Citibank (In re Contractors Equip. Supply Co., Inc.)*, 861 F.2d 241, 245 (9th Cir. 1988); *Southern Rock, Inc., v. B & B Auto Supply*, 711 F.2d 683, 685 (5th Cir. 1983); *Major’s Furniture Mart v. Castle Credit Corp., Inc.*, 602 F.2d 538, 542 (3rd Cir. 1979); *Concrete Equipment Co., Inc. v. Fox (In re Vigil Bros. Constr., Inc.)*, 193 B.R. 513, 517 (B.A.P. 9th Cir. 1996); *Suburban Trust and Sav. Bank v. Univ. of Delaware*, 910 F.Supp. 1009, 1013-14 (D. Del. 1995) [an absolute and unconditional assignment of an account created a security interest governed by Article 9]; *Sherburne Corp. v. Carter*, 340 A.2d 82 (Vt. 1975) [transfer governed by Article 9 notwithstanding bank’s argument that it had received absolute transfer of accounts]; *Gold Coast Leasing Co. v. Calif. Carrots, Inc.*, 155 Cal.Rptr. 511, 514 (Cal. Ct. App. 1979); *Sun Bank, N.A. v. Parkland Design and Dev. Corp.*, 466 So.2d 1089, 1091 (Fla. Dist. Ct. App. 1985) [Article 9 governed an absolute assignment of accounts].

¹⁷AS 45.09.102(a) (repealed 2001).

The provisions of Article 9 apply regardless of “whether title to collateral is in the secured party or in the debtor.”¹⁸ Article 9 applies to both security interests in accounts and outright sales of accounts because of the difficulty in distinguishing between the two.¹⁹ The perfection rules of Article 9 were consequently made applicable to both types of transactions.²⁰

The reason for subjecting both sales and secured transactions [of accounts] to Article 9 was to inform third parties of existing interests in a debtor’s receivables and to provide protection for all types of assignments of receivables

This is not to say, however, that Article 9 has no impact upon a buyer’s ownership rights regarding the purchased receivables. *For example, a failure to perfect as required by Article 9 may leave the transferee’s ownership of the receivables subject to the claims of third parties, such as the seller’s lien creditors or trustee in bankruptcy.* This perfection requirement, however, does not by its terms or by implication affect the transfer of ownership as between the seller and buyer.²¹

The perfection requirements in Article 9 not only provide greater security to creditors but also serve to “enforce the policy against secret liens.”²² With a few exceptions not applicable here, an assignment of accounts is perfected by filing.²³

¹⁸AS 45.09.202 (repealed 2001).

¹⁹Official Code Comment 2 to UCC 9-102, as printed in 8A *Anderson on the Uniform Commercial Code* § 9-102:1 (3d ed. 1996 rev. of Vol. 8).

²⁰*Id.*

²¹PEB Commentary No. 14 to UCC 9-102, as printed in 8A *Anderson on the Uniform Commercial Code* (3d ed. Cum. Supp. June 2003) § 9-102:1.5 [emphasis added].

²²Official Comment 9 to UCC 9-301, as printed in 9 *Anderson on the Uniform Commercial Code* § 9-301:1 (3d ed. 1990 rev.); *see also* 68A Am. Jur. 2d *Secured Transactions* § 2 (2003).

²³AS 45.09.302(a) (repealed 2001).

Because the CK Group acquired an interest in accounts, Article 9, rather than the common law of assignments, governs the transfer of seafood proceeds to the CK Group.²⁴ For this reason, the *Broadcast Music*²⁵ case on which the CK Group so heavily relies is distinguishable. That case involved an assignment of future royalties from licensed public performances of copyrighted music. Royalties are not “accounts” under the UCC.²⁶ The *Commerce Bank*²⁷ case, also relied on by the CK Group, is distinguishable as well. In that case, the issue was whether a manufacturer’s contractual right to setoff a dealer’s factory receivables primed a subsequently perfected security interest in the receivables. The CK Group does not have setoff rights in this case.

For the purposes of determining priority between the CK Group, the trustee and the Committee, it is unnecessary to determine whether the assignment of accounts was absolute or for security.²⁸ I do find, however, that the transfer of accounts to the CK Group was for security. The purpose of the third addendum, as stated in its recitals, was to provide “additional security for the sale [of the CK Group’s facilities] in the event the closing does

²⁴*Vigil Bros.*, 193 B.R. at 516-17 [even outright assignment of accounts is governed by UCC rather than by law of assignments]; *Dist. of Columbia v. Thomas Funding Corp.*, 593 A.2d 1030, 1034-35 (D.C. 1991) [Article 9 controlled assignment of accounts, rather than common law of assignments]; *Gold Coast Leasing*, 155 Cal. Rptr. at 513-14 [same].

²⁵*Broadcast Music, Inc. v. Hirsch*, 104 F.3d 1163 (9th Cir. 1997).

²⁶A right to receive payment under licenses of patents and copyrights is a general intangible rather than an account. See Official Code Comment to UCC 9-106, as printed in 8A *Anderson on the Uniform Commercial Code* § 9-102:1 (3d ed. 1996 rev. of Vol. 8). Intent to create a security interest, rather than give an outright assignment, determines whether Article 9 applies to a transfer, *unless* the transfer is one of accounts. AS 45.09.102(a) (repealed 2001); see also *Saunders, Curtis, Ginestra & Gore, P.A. v. Beck (In re Sun Air Intern., Inc.)*, 24 B.R. 135, 137 (Bankr. S.D. Fla. 1982).

²⁷*Commerce Bank. v. Chrysler Realty*, 244 F.3d 777 (10th Cir. 2001).

²⁸*Contractors Equip. Supply Co.*, 861 F.2d at 245; *In re Cripps*, 31 B.R. 541, 544 (Bankr. W.D. Okla. 1983).

not occur on or before June 13, as required under the existing documents.” The additional security, “a deposit into escrow of the first \$1.7 million in proceeds payable to buyer from its seafood sales,” was to be paid into an escrow account if the sale did not close by June 13, 2000. The funds would become the sole property of the CK Group once deposited into escrow. The funds were to be credited against the purchase price for the assets or, if the sale failed to close by July 18, 2000, the funds would serve essentially as liquidated damages to the CK Group for failure of the transaction. The buyer, Chris Fischer, remained independently obligated for the full purchase price of the properties after the assignment of accounts. Further, notice of the transfer to E&E did not operate to reduce Chris’s obligation to the CK Group. This was a transfer for security,²⁹ in spite of the irrevocable assignment language contained in the third addendum.³⁰

An interest in accounts is perfected by filing.³¹ The CK Group’s interest was unperfected. Its interest in the accounts is subordinate to the trustee as a lien creditor³² and to the statutory liens of the fishermen and packers who provided services to the debtor.³³

The CK Group’s other arguments do not compel a different result. The CK Group relies on the earmarking doctrine to buttress its contention that E&E had an

²⁹*Contractor’s Equip. Supply*, 861 F.2d at 245.

³⁰*Major’s Furniture Mart*, 602 F.2d at 542 [court should look to true nature of transaction instead of the nomenclature chosen by the parties]; *Matter of Candy Lane Corp.*, 38 B.R. 571, 575-76 (Bankr. S.D.N.Y. 1984).

³¹AS 45.09.302(a). The limited exceptions to the filing requirement are inapplicable here.

³²11 U.S.C. § 544; AS 45.09.301(a)(2), (c); *In re Cripps*, 31 B.R. 541 (Bankr. W. D. Okla. 1983).

³³In this regard, I concur with the analysis of the Committee. See Mot. for Summ. J. (Fisher’s Committee), filed Dec. 11, 2003 [Docket No. 43]; Opp. to Cherrier King Mot. for Summ. J. Against Fishers Committee, filed Feb. 3, 2004 [Docket No. 51].

independent contractual obligation to pay \$1.7 million of seafood proceeds into escrow. The earmarking doctrine is applicable “when a third party lends money to a debtor for the specific purpose of paying a selected creditor.”³⁴ Another factor to consider under the earmarking doctrine is whether new funds provided by a third party to pay a specific creditor are controlled by the debtor.³⁵ The debtor’s seafood proceeds, in the hands of E&E, are not “new funds.” E&E was simply a sales agent for the debtor; it never owned the seafood proceeds. Its only obligation under the third addendum was to pay Triton’s net seafood sales proceeds, up to the sum of \$1.7 million, into an escrow. E&E was not independently obligated to pay this sum from any other source of revenue. Accordingly, the facts in this case are distinguishable from the earmarking cases relied upon by the CK Group.

Further, the CK Group did not receive any funds from E&E in accordance with the provisions of the third addendum. The escrow provisions of the third addendum were modified by the July 10 letter agreement, which is the only document in this entire transaction which was executed on behalf of the debtor. The letter agreement specified that E&E was to pay the debtor \$300,000 of its seafood proceeds and remit \$500,000 in seafood proceeds directly to the CK Group as a minimum rental payment for the debtor’s use of the CK Group’s facilities pending the sale. The debtor had, at that point, been occupying the facilities for two months. This payment, if considered as rent, was not in the ordinary course of business, nor was it a contemporaneous exchange for value. Additionally, both the \$1.7 million of seafood assigned as security under the third addendum and the \$500,000 paid as

³⁴*In re Superior Stamp & Coin Co., Inc.*, 223 F.3d 1004, 1008 (9th Cir. 2000), *citing Hansen v. MacDonald Meat Co. (In re Kemp Pacific Fisheries, Inc.)*, 16 F.3d 313, 316 (9th Cir. 1994).

³⁵*Kemp Pacific Fisheries*, 16 F.3d at 316.

minimum rental under the July 10 letter agreement were ultimately to be applied against the purchase price for the assets. That obligation was an antecedent debt. Accordingly, I conclude that the \$500,000 paid by E&E to the CK Group may be recovered by the trustee under §§ 547 and 549.³⁶

The CK Group's final argument is that it should be considered an "enabling transferee," on par with suppliers and materialmen who provide essential services that allow a project to go forward. But the CK Group didn't provide essential services. It was the seller in a failed commercial sales transaction. It has recovered its real and personal property and has received \$50,000 in nonrefundable earnest money. The fishermen and packers whose labor produced the seafood that generated the proceeds would be better candidates for the "enabling transferee" classification urged by the CK Group.

Conclusion

For the foregoing reasons, the summary judgment motions of the plaintiff and the Committee will be granted. The CK Group's motions for summary judgment will be denied. An order and judgment will be entered consistent with this memorandum on or after June 23, 2004.

Dated: June 3, 2004

DONALD MacDONALD IV
United States Bankruptcy Judge

³⁶There are additional problems with the CK Group's claim to the funds because the debtor did not execute the third addendum. These issues have been adequately addressed by the trustee and the Committee and will not be reiterated here.