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**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

In re

EUROFRESH, INC.

EUROFRESH PRODUCE, LTD.

Debtors.

Relief Requested Applies to:

- Eurofresh, Inc. Only
 Eurofresh Produce, Ltd. Only
 Both Debtors

Case No. 2:09-bk-07970-CGC

Case No. 2:09-bk-07971-CGC

Chapter 11

**OMNIBUS STATEMENT OF FACT IN
SUPPORT OF FIRST DAY MOTIONS**

Date of Hearing: April 22, 2009

Time of Hearing: 1:30 p.m.

EUROFRESH, INC. (“**EFI**”) and EUROFRESH PRODUCE, LTD. (“**EPL**”), debtors and debtors-in-possession (collectively the “**Debtors**”) in the above-captioned Chapter 11 cases (these “**Cases**”), submit this Omnibus Statement of Fact (this “**Statement**”) in support of all first day motions and other specified pleadings filed in these Cases.



DESCRIPTION OF THE DEBTORS

1. On April 21, 2009 (the “**Petition Date**”), the Debtors filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.* (as amended, the “**Bankruptcy Code**”), which cases are pending before the United States Bankruptcy Court for the District of Arizona (the “**Court**”).

2. EFI is a Delaware corporation that owns two substantial greenhouse facilities located in Snowflake, Arizona (Navajo County) and Willcox, Arizona (Graham County). EFI has administrative staff at both facilities. EFI's management spends significant time at both facilities. EPL is a wholly owned subsidiary of EFI that currently conducts no business operations. Accordingly, venue of these Cases is proper in this District under 28 U.S.C. §§ 1408 and 1409.

3. EFI is engaged in the hydroponic growing of tomatoes and cucumbers, selling premium quality, certified pesticide-free tomatoes and cucumbers. EFI grows these tomatoes and cucumbers in seven state-of-the-art greenhouse facilities with over 318 acres under glass. EFI markets its products directly to major U.S. food retailers and to food wholesalers under the label “Eurofresh Farms” and “Sweet Star”. Six of EFI's greenhouses, covering 274 acres, are located in Willcox, Arizona (the “**Willcox Facility**”) and one greenhouse covering 44 acres is located in Snowflake, Arizona (the “**Snowflake Facility**”) and together with the Willcox Facility, the “**Facilities**”). EFI also operates a small wholesaling business under the label “Garden Fresh Selections” out of a facility in Nogales, Arizona that imports various types of produce from Mexico, packages that produce and then sells that produce through brokers into various wholesale channels. EFI also operates a small maquiladora facility in Agua Prieta, Mexico where some of EFI's products are packaged.

4. EFI is privately held with three series of equity securities: (i) 53,000 issued shares of Series A Preferred Stock (the “**Preferred Shares**”); (ii) 4,730,229.48 issued shares of Class A Common stock (the “**Class A Shares**”) and (iii) 503,328.56 issued shares of Class B Common stock (the “**Class B Shares**”). In addition there are 224,234.90 issued warrants to purchase Class A Shares. A total of 833,611 of the Class B Shares have been allocated under the Second Amended and Restated Eurofresh 2005 Long-Term Equity Incentive Plan (the “**2005 Incentive Plan**”). On a fully diluted basis, the common ownership of EFI is divided as follows: (i) approximately 30.38% owned by BRS Tomato Acquisition, LLC;¹ (ii) approximately 25.77% owned by Bank of America Capital Advisors; (iii) approximately 22.60% owned by Bio Dynamics SARL;² (iii) approximately 13.25% held as part of the 2005 Incentive Plan; (iv) approximately 3.08% held by the former CEO and founder of EFI; and (v) approximately 4.92% held by current or former managers of EFI.

5. Since 2005 the Debtors have experienced consistent increases in revenues, from approximately \$123.268 million in 2005, to \$146.5 million in 2006, \$171.6 million in 2007 and \$177.1 million in 2008.³ Unfortunately, revenue growth has not resulted in similar growth in profitability, with gross profits⁴ declining from approximately \$46.195 million in 2005, to \$40.5 million in 2006, \$35.67 million in 2007 and \$23 million in 2008. As discussed below, the Debtors’ escalating losses are largely attributable to three factors: (i) the presence of certain diseases affecting tomato production, resulting in lost product, significant clean-up costs and lost

¹ BRS Tomato Acquisition, LLC is an affiliate of New York based investment fund Bruckmann, Rosser, Sherrill & Co. II, L.P.

² Bio Dynamics SARL is a Luxembourg entity affiliated with the Debtors’ founder and former CEO.

³ All data are audited except fiscal year 2008.

⁴ Sales less cost of sales.

productivity; (ii) labor shortages, particularly at the Willcox Facility and (iii) other factors, including regulatory matters related to the Debtors' recent labor shortages.

6. As of the Petition Date the Debtors employed approximately 706 employees (collectively, the "**Employees**"). Of these Employees, approximately 146 are salaried, and approximately 560 are hourly (the "**Hourly Employees**"). The Debtors also utilize approximately 286 individuals (the "**Contract Laborers**") provided pursuant to a farm labor contractor service agreement. In addition, the Debtors utilize approximately 351 inmates (the "**Inmate Laborers**") pursuant to an inmate work contract between Eurofresh, Inc. and the Arizona Department of Corrections (the "**ADC**"). Approximately 496 of the Debtors' Hourly Employees are covered by a collective bargaining agreement between the Eurofresh, Inc. and the United Food and Commercial Workers Union, Local 99.

THE DEBTORS' CAPITAL STRUCTURE

A. Silver Point Credit Facility

7. On March 25, 2008, the Debtors entered into a credit and guaranty agreement (the "**Credit Agreement**") among the Debtors, various lenders (each a "**Lender**" and together, the "**Lenders**") and Silver Point Finance, LLC ("**Silver Point**") as administrative agent, collateral agent, syndication agent, documentation agent and lead arranger. Pursuant to the Credit Agreement, the Lenders provided credit facilities to the Debtors in the aggregate amount of \$69.9 million consisting of: (i) \$42.5 million in Tranche A Term Loans (the "**Term A Loans**"); (ii) \$9.9 million in Tranche B Term Loans (the "**Term B Loans**"); and (iii) up to \$17.5 million under a revolving credit facility (the "**Revolving Loan**" and together with the Term A Loans and Term B Loans, the "**Credit Facility**"). The Credit Facility also provides for a letter of credit sublimit (the "**L/C Subfacility**") of up to \$2.5 million under the Revolving Loan.

8. All of the Debtors' obligations under the Credit Facility are secured by a blanket lien on substantially all of the Debtors' assets pursuant to a security agreement dated March 25, 2008 between the Debtors and Silver Point.

9. As of the Petition Date, the amount outstanding under the Term A Loans was \$42.5 million, the amount outstanding under the Term B Loans was \$9.9 million, the Debtors had no outstanding balance on the Revolving Loan and a letters of credit in the amount of approximately \$2.1 million issued under the L/C Subfacility. As of the Petition Date, the interest rate on the Term A Loans, Term B Loans and Revolving Loan was 12.75%, including default interest of 2%.

B. The Silver Point Capital Lease

10. Also on March 28, 2008, EFI entered into a sale-leaseback arrangement with SP Eurofresh LLC ("**SPE**"), an affiliate of Silver Point, whereby EFI sold all of the physical plant comprising the Snowflake Facility (the "**Snowflake Assets**") to SPE for \$15 million. Pursuant to this arrangement, EFI agreed to lease the real property underlying the Snowflake Facility to SPE and then sublease the same real property from SPE. EFI also entered into a master lease agreement (the "**Master Lease**") pursuant to which EFI agreed to lease the Snowflake Assets from SPE through July 15, 2012 (the "**Master Lease Term**"). The Master Lease is designed such that EFI will pay \$15 million in "Fixed Rent" over the Master Lease Term, plus interest in the form of "Variable Rent." EFI has a purchase option to acquire the Snowflake Assets at the end of the Master Lease Term for \$1.00.⁵

⁵ The Debtors anticipate that the Lease will be treated as a financing rather than a true lease under the Uniform Commercial Code and other applicable bankruptcy and non-bankruptcy law.

11. The Debtors' obligations under the Master Lease are secured by a blanket lien on substantially all of the Debtors' assets pursuant to a security agreement dated March 25, 2008 between the Debtors and SPE.

12. As of the Petition Date, the principal amount payable under the Master Lease (calculated based on the amount of Fixed Rent remaining to be paid over the Master Lease Term) was \$14,494,500. The interest rate, represented by the "Variable Rent" payable under the Master Lease was 12.75%.

C. Silver Point Forbearance

13. On March 31, 2009 the Debtors failed to make a scheduled interest payment under the Credit Facility in the amount of approximately \$1,626,583.33 as well as commitment fees related to the Revolving Loan totaling approximately \$10,272.76 and letter of credit fees related to the L/C Subfacility totaling approximately \$17,191.47. The failure to pay these amounts constituted an Event of Default under the Credit Agreement. Various non-monetary defaults related to the Debtors' financial performance also existed under the Credit Agreement.

14. Also on March 31, 2009, the Debtors failed to make a scheduled payment under the Master Lease comprised of approximately \$449,933.44 in Variable Rent and approximately \$168,500 in Fixed Rent.

15. As a result of these defaults under the Credit Facility and Master Lease, on April 1, 2009 the Debtors entered into a forbearance agreement (the "**SP Forbearance Agreement**") with Silver Point and the Lenders whereby Silver Point, with the consent of the Lenders, would forbear from exercising its remedies under the Credit Facility or Master Lease until April 15, 2009. Pursuant to the terms of the SP Forbearance Agreement, the Debtors were obligated to

sweep all of their cash in excess of an agreed upon budgeted amount for each week plus a fixed \$250,000 into an account controlled by Silver Point on a daily basis.

D. 11½% Senior Notes

16. In December of 2005, as part of a comprehensive recapitalization of EFI (the “**Recapitalization**”), the Debtors issued \$170,000,000 in principal amount of 11½% Senior Notes Due in 2013 (the “**Senior Notes**”). The Senior Notes are unsecured. US Bank, N.A. (“**US Bank**”) serves as the indenture trustee pursuant to the indenture dated December 21, 2005 (the “**Senior Indenture**”) on behalf of holders of the Senior Notes. Interest-only payments (each an “**Interest Payment**”) on the Senior Notes are due on January 15 and July 15 of each year (an “**Interest Payment Date**”). Interest paid on each Interest Payment Date has totaled approximately \$9,750,000.

17. The Debtors failed to make an Interest Payment on January 15, 2009. The Senior Indenture provides for a grace period of 30 days with regard to the payment of any Interest Payment before the failure to make such Interest Payment constitutes an Event of Default. The Senior Indenture also provides that a majority in aggregate principal amount of the then-outstanding Senior Notes may direct the enforcement of any remedies under the Senior Indenture. On February 13, 2009, holders of a majority of the Senior Notes entered into a forbearance agreement (the “**Noteholder Forbearance**”) pursuant to which these note holders agreed to forbear from directing US Bank to exercise any of the remedies provided for under the Senior Indenture upon an event of default until March 18, 2009. On March 18, 2009, the Noteholder Forbearance was extended through April 17, 2009.

18. As of the Petition Date, the principal amount outstanding under the Senior Notes was \$170 million and interest due but not paid totaled approximately \$10,078,799, including interest accrued on the missed Interest Payment at the default rate of 12½% per annum.

E. 14½% Senior Subordinated Discount Notes Due 2014

19. Also in December of 2005, as part of the Recapitalization, the Debtors issued \$44,147,000 in principal amount of 14½% Senior Subordinated Discount Notes Due in 2014 (the “**Subordinated Notes**”), receiving gross proceeds of \$25,000,000. The current accreted value of the Subordinated Notes is \$39,562,388. The Subordinated Notes are unsecured and are subordinated to the Senior Notes. US Bank serves as the indenture trustee pursuant to the indenture dated December 21, 2005 (the “**Subordinated Indenture**”) on behalf of holders of the Senior Notes. No payments are due on the Subordinated Notes until January 15, 2010.

F. Unsecured Claims

20. As of the Petition Date, the Debtors believe there are approximately \$10.3 million in prepetition general unsecured claims pending against the Debtors, which comprise a relatively small amount of debt relative to the approximately \$300 million in both secured debt and unsecured noteholder debt described above.

21. The Senior Notes, the Subordinated Notes and holders of general unsecured claims are all *pari passu*, except that the Subordinated Notes, and any recovery thereon, are expressly subordinated to the Senior Notes.

EVENTS LEADING TO CHAPTER 11 FILING

22. No single event has caused the Debtors to seek relief under Chapter 11 of the Bankruptcy Code. Rather, the Debtors have experienced several events and circumstances that,

when combined with the fact that the Debtors are significantly over-leveraged, have made reorganization of the Debtors' capital structure through the Chapter 11 process necessary.

23. The Recapitalization undertaken by the Debtors in 2005 left the Debtors with a significant amount of debt and little margin for error in executing the Debtors' business plan. As part of the Recapitalization, the Debtors assumed \$60 million in new secured debt and approximately \$214.15 million in unsecured debt. Some of this new debt allowed the Debtors to expand their operations significantly, with production capacity growing from 220 acres in 2005 to 318 acres in 2008, resulting in an increase in greenhouse-related revenues from \$114.6 million to \$148.7 million.

24. Unfortunately, despite the Debtors' increase in capacity, the Debtors began experiencing significant declines in production and productivity due to the presence of certain diseases or infestations attacking the tomato crops as well as labor shortages.

A. Diseases and Infestations

25. Tomatoes grown in greenhouses are particularly prone to certain types of disease and infestation. **These diseases and infestation present no risk to humans.** Rather, the diseases generally cause damage to either the tomato plant or fruit that either causes the plant to die, causes the fruit to wither, stunts the growth of the fruit or makes the fruit unsightly and unsellable.

26. In 2006, the Debtors began seeing crops with significant infections of *calvibacter michiganensis* subsp. *michiganensis*, or CMM, a type of bacterial canker that attacks primarily the fruit of the tomato plant, resulting in small dark spots on the fruit surrounded by a white halo and yellowing or browning on the inside of the fruit. The Debtors estimate that the presence of CMM in their greenhouses resulted in a crop loss of 3.1 million pounds, 2.6 million pounds and

2.1 million pounds of fruit in 2006, 2007 and 2008, respectively, and lost revenue of \$3.1 million, \$2.6 million and \$2.2 million in 2006, 2007 and 2008 respectively. The Debtors believe that they have largely contained the spread of CMM in their greenhouses through a program of continuous scouting, controlled labor movement and removal of infected plants.

27. During the second quarter of 2007, the Debtors experienced an outbreak of whitefly, an insect that feeds on the leaves and fruit of the tomato plant, resulting in withering of the plant and destruction of the fruit and making the plant more susceptible to other diseases. The result of the whitefly infestation was a crop loss of 5 million pounds of fruit and lost revenue in 2007 of approximately \$5 million. However, the Debtors believe that they have contained the whitefly infestation through Cleanouts (defined below) of the greenhouses and the utilization of a natural predator program using wasps.

28. Also during the second quarter of 2007, the Debtors experienced their first major outbreak of tomato chlorotic dwarf viroid (TCDVd), or “viroid.” Viroid is a plant pathogen similar to a prion and smaller than a virus that is distinguishable from a virus by its lack of any protein coating. Viroids are the smallest “organisms” known to cause plant diseases. The viroid uses the nucleolus of the plant cell to replicate and then spreads from plant cell to plant cell, accumulating in the cells of the plant. Within three to six weeks of infection, the infection results in yellowing of the leaves of the tomato plant and progresses to stunted growth and eventually plant death. Once detected, the plant must be removed. The viroid first appeared in Canada in 1996 and has been discovered in numerous tomato greenhouses in North America and Holland.

29. Very little is known about the pathology of the viroid, particularly the factors leading to the presentment of the disease in tomato plants, and there are only a handful of

pathologists spending significant time studying the viroid. However, it is known that viroid is easily transmitted by contact with contaminated pruning tools, equipment, clothing and neighboring plants. The only effective method for eradicating the viroid from an infected greenhouse is to clear the greenhouse of all plants and sanitize the greenhouse (a “**Cleanout**”).

30. Historically the Debtors have maintained an edge over their competitors by “interplanting” their tomato crops, or planting a new crop approximately eight weeks before the life-cycle of an old crop is about to end. Interplanting allowed the Debtors to avoid the lag between crop life cycles. However, the Debtors have been forced to scale back interplanting due to the viroid, as viroid spreads easily from one plant to another and interplanting places older plants in close contact with younger plants.

31. The loss of fruit due to viroid, delayed planting and delayed productivity due to Cleanouts as well as the inability to interplant 100% of crops has resulted in significant loss of production and increased costs. The Debtors estimate that in 2007, viroid resulted in a loss of 6.3 million pounds of fruit and \$6.2 million in revenues and that in 2008, viroid resulted in a loss of 24.5 million pounds of fruit and \$26.2 million in revenues.

32. The Debtors estimate that the combined effects of CMM, whitefly and viroid reduced operating profit by \$2.6 million in 2006, \$11.2 million in 2007 and \$23.6 million in 2008.

B. Labor Shortages

33. The Debtors have recently faced significant challenges in obtaining sufficient labor, particularly at the Willcox Facility, due to its relative remoteness. The Debtors have, in the past, relied on guest workers in the United States pursuant to H2A visas, as well as labor contractors, and also experimented with a program of busing refugees from Tucson, Arizona to

the Willcox Facility in 2007. The Debtors began to experience a labor shortage in 2006 and 2007 as changes in immigration policy made it more difficult for the Debtors to retain their legal immigrant labor pool as the pool of illegal immigrant labor in the area surrounding the Facilities shrank, creating higher overall demand for legal immigrant labor. This labor shortage has, in the past, caused serious disruption to the Debtors' ability to harvest its crops, plant new crops and combat various diseases that have attacked the crops. Between 2005 and 2008, pounds produced per greenhouse hour declined from 147.6 to 93.1 - a decline of almost 37% - while labor cost per pound produced increased from approximately 13 cents to 18.5 cents - an increase of almost 30%.

34. By eliminating H2A labor, increasing their use of Inmate Labor and finding a larger and more reliable provider of Contract Labor, the Debtors believe that they are beginning to better control labor costs, increase productivity and contain plant diseases.

C. Other Factors

35. While not precipitating factors, other circumstances have contributed to the Debtors' decline in profitability and need to seek bankruptcy protection. The Debtors rely heavily on the transportation of their products from the Facilities to customers' distribution centers. As fuel prices skyrocketed in 2007 and 2008, the Debtors' transportation costs followed, increasing 6.3%.

36. Since July of 2006 the Debtors have also been the subject an ongoing investigation by U.S. Immigration and Customs Enforcement ("ICE") and the U.S. Department of Justice ("DOJ") over the Debtors' alleged employment of unauthorized workers. EFI, ICE and the DOJ have engaged in extensive negotiations regarding the liability, if any, of EFI arising

as a result of these allegations. All employees involved in the actions giving rise to the allegations no longer work for the Debtors.

37. The Debtor is also currently the subject of an investigation by the U.S. Department of Labor (the “**DOL**”). As described above, the Debtor for a period of time relied upon a mix of both H2A guest workers and contract labor to overcome labor shortages, particularly at the Willcox Facility. In July of 2008 the Debtor was informed that the DOL was investigating whether the Debtor violated the restrictions of the H2A program under 8 U.S.C. § 1188 by paying guest workers under the H2A program less than contract workers. The DOL is currently alleging conduct that could give rise to civil damages and penalties, though no formal proceedings have been commenced. The Debtor believes that the DOL’s interpretation of the law is mistaken.

NOTEHOLDER TERM SHEET

38. In order to avoid damage to the Debtors’ business and loss of critical customers, stabilization of the Debtors’ operations and business is critical. Accordingly, the Debtors believe that they must move aggressively towards confirmation of a plan that significantly reduces the debt of the company. To this end, the Debtors engaged in significant prepetition negotiations with a group of senior noteholders representing more than 66 2/3% in amount of the Senior Notes and subordinated noteholders representing in excess of a majority in amount of the Subordinated Notes (together, the “**Signing Noteholders**”), and on April 20, 2009, a term sheet was executed by the Debtors, the Signing Noteholder and Johan Van Den Berg (the “**Noteholder Term Sheet**”). The Noteholder Term Sheet provides for the conversion of approximately \$210 million in debt to equity, along with the infusion of \$10 million in new money, \$7.5 million of

which will go to pay down the amounts owing under the Credit Facility. A copy of the Noteholder Term Sheet is being filed substantially contemporaneously herewith.

Dated this 21st day of April, 2009.

SQUIRE, SANDERS & DEMPSEY L.L.P.

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