IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

IN RE: VEG LIQUIDATION, INC. f/k/a ALLENS, INC.
and ALL VEG, LLC, Debtors **No. 5:13-bk-73597**
Jointly Administered
Ch. 11

ORDER DENYING MOTION TO ENFORCE SALE ORDER

Before the Court are Bank of America, N.A.'s [BOA] *Motion to Enforce Sale Order* filed on July 16, 2015 [doc. 1376], and a brief in support of its motion; the *PACA Creditors' Opposition to Bank of America's Motion to Enforce Sale Order* filed on August 7, 2015 [doc. 1395], by D&E Farms, Inc., H.C. Schmieding Produce Co., Inc., and Hartung Brothers, Inc. [collectively, PACA Creditors]; and *Bank of America's Reply Brief in Support of its Motion to Enforce Sale Order* filed on August 17, 2015 [doc. 1401]. The Sale Order to which the parties refer is the Court's *Order (A) Authorizing and Approving the Sale of Substantially All of the Assets of Debtor Allens, Inc. Free and Clear of All Liens, Claims, Encumbrances, and Interests; (B) Authorizing and Approving the Asset Purchase Agreement; (C) Approving the Assumption and Assignment of Certain of the Debtor's Executory Contracts and Unexpired Leases; and (D) Granting Related Relief* [Sale Order] entered on February 12, 2014 [doc. 644]. In its Sale Order, the Court specifically retained jurisdiction "to interpret and enforce the provisions of the APA [Asset Purchase Agreement], the Bidding Procedures and this Sale Order . . . ." (Sale Order ¶ 42.) Based on the record before it, the Court denies BOA's *Motion to Enforce Sale Order* for the reasons stated below.

Positions of the Parties

The PACA statute provides that proceeds from the sale of perishable agricultural commodities shall be held in trust for the benefit of unpaid suppliers or sellers of those commodities "until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents." 7 U.S.C. § 499e(b). The Court has already determined that the PACA Creditors have a right to payment of all

sums owed in connection with their respective PACA claims, including interest and attorney fees if provided for in the initial contract. Hence, until the PACA Creditors are paid in full, they have a right to payment from the PACA trust, which encompasses all "'receivables or proceeds from the sale of such commodities and food or products.'" *In re Lombardo Fruit & Produce Co.*, 12 F.3d 806, 809 (8th Cir. 1993) (quoting 7 U.S.C. § 499e(c)(1) (1988) and citing 7 C.F.R. § 46.46(c)). Liability for that payment can extend to any party that received PACA entrusted funds from Allens to the extent those funds were PACA entrusted assets. *See e.g. Nickey Gregory Co., LLC v. AgriCap, LLC*, 597 F.3d 591, 599-600 (4th Cir. 2010) (recognizing that third-party transferee of PACA assets required to disgorge those assets unless it can establish a defense).

BOA's primary argument is that because the Sale Order provides that "all proceeds and payments received by the DIP Agent" were received free and clear of all claims, "including, without limitation, any PACA Claims," that the PACA Creditors should be enjoined from pursuing collection of alleged PACA trust assets from the DIP Agent. BOA is identified as the "DIP Agent" in the Court's December 2013 *Final Order Pursuant to 11 U.S.C. Sections 105, 361, 362, 363 and 364 and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (1) Authorizing Incurrence by the Debtors of Post-Petition Secured Indebtedness with Administrative Superpriority, (2) Granting Liens, (3) Authorizing Use of Cash Collateral by the Debtors Pursuant to 11 U.S.C. Section 363 and Providing for the Adequate Protection and (4) Modifying the Automatic Stay* [Financing Order].[1]

BOA also argues that the Sale Order effectuated a full assumption by Sager Creek Acquisition Corp. [Sager Creek] of any remaining PACA liability pursuant to the terms of the Asset Purchase Agreement [APA] between Allens and Sager Creek, which was attached as an exhibit to the Court's Sale Order. Based on the assumption of PACA

[1] Although the Court refers to the December 2013 order as the "Final Order" within the order itself, for clarity the Court will refer to the "Final Order" as the "Financing Order" in this Order Denying Motion to Enforce Sale Order.

liability by Sager Creek, BOA argues that the PACA Creditors should be further enjoined from their collection activities against BOA.

The PACA Creditors respond by arguing that *if* BOA was absolved of any liability for payment of the PACA claims as a result of the Sale Order, the release of liability was limited to any payments or proceeds that BOA received as a result of the sale of Allens's assets that were not subject to the PACA trust; the release could not and did not alter the PACA Creditors' right to pursue any third party, including BOA, for the payment of the allowed PACA claims. Further, to the extent the APA references the exclusivity of payment of PACA claims from the PACA Escrow and the PACA Claims Commitment Letter (as those terms are defined in the modified APA), the PACA Creditors argue that the term "DIP Obligations" is ambiguous and may refer to the pre-petition obligations of BOA, the post-petition obligations of BOA, or both. Although the Court agrees that the Sale Order and the APA may not be "a model of clarity," the Court finds that neither the Financing Order (discussed below) nor the Sale Order and attached APA release BOA from PACA liability to the extent BOA received proceeds or payments from PACA trust assets.

Financing Order

The Court's Financing Order was entered on December 16, 2013, and defined what were known as the "DIP Obligations." One of the documents identified as a DIP Obligation is a *Senior Secured, Super-Priority Debtor-in-Possession Credit Agreement* [Credit Agreement] between, among others, Allens and BOA. The Credit Agreement was attached as an exhibit to the Court's Financing Order. The Credit Agreement states unequivocally that "the Pre-Petition Revolving Credit Loans shall be deemed funded by the Lenders under and be Revolving Credit Loans for all purposes under, this Credit Agreement and the other Loan Documents as of the Closing Date upon the entry of the Interim Order and *shall be deemed to replace all Pre-Petition Revolving Credit Loans*." (Credit Agreement, Section 2.1.1 Revolving Credit Loans (emphasis added).) Hence, according to the Credit Agreement, the *pre-petition* credit loans are deemed funded by

the post-petition Credit Agreement (which, according to BOA, makes the receipt of pre-petition money from Allens not subject to PACA liability because of the Sale Order).

Regardless, according to the Financing Order, the DIP Agent's (BOA) superpriority administrative claim as a result of its credit loans is still subject to PACA. (Financing Order, Section 2. Superpriority Admin. Claim Status (*l*), p. 23.) Plus, according to the Financing Order, pre-petition first liens, which BOA holds, are subject to Permitted Prior Liens. Permitted Prior Liens include "Allowed PACA Claims." (Financing Order, Section 2. DIP Lien Priority (i), pp. 21-22.) Based on the Financing Order, the Court finds that BOA's claim (and any payments it may have received) is subject to any allowed PACA claims, according to the Court's Financing Order.

Sale Order

However, one of the issues before the Court is whether the Court's Sale Order changed the PACA Creditors' priority status as recognized in the Financing Order and Credit Agreement. The Court's Sale Order was entered on February 12, 2014, and Allens's and Sager Creek's APA was included as an exhibit. The Sale Order includes two paragraphs that appear at first blush to alter the PACA Creditors' priority: paragraph 63, which modifies the terms of the APA between Allens and Sager Creek, and paragraph 61, which appears to remove the conditions contained in the Financing Order with regard to BOA's receipt of funds from Allens.

Paragraph 63

Paragraph 63 enumerates modifications to the APA between Allens and Sager Creek. According to the modifications, Sager Creek agreed to assume the PACA liabilities for which Allens would otherwise be responsible. However, this does not mean that if Allens or Sager Creek were not able to pay their respective statutory obligations under PACA that the PACA Creditors would be without other recourse for payment of their allowed PACA claims.

The specific language that is before the Court is set forth in BOA's *Brief in Support of Motion to Enforce Sale Order*:

> With respect to PACA Claims (such claims, the "Disputed PACA Claims") other than those PACA Claims that, as of the Closing, have been allowed by an order of the Bankruptcy Court that shall have become final and non-appealable or, subject to Section 6.1(f), by stipulation between Seller and the relevant PACA claimant (such allowed claims as of the Closing, the "Allowed PACA Claims"), Buyer shall assume such Disputed PACA Claims (all of which PACA Claims shall be deemed to be Assumed Liabilities for purposes of this Agreement) (the "Assumed PACA Claims"), and all unpaid Post-Petition Assumed PACA Liabilities (as defined below);
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> . . .
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> Upon the Closing, the Assumed PACA Claims and Post-Petition Assumed PACA Liabilities shall be secured by, and to the extent such Assumed PACA Claims become Resolved PACA Claims or, in respect of a Post-Petition Assumed PACA Liability, as, when and to the extent a Post-Petition PACA Payment Obligation arises in respect thereof (a "PACA Claims Payment Event"), shall be paid exclusively from, the proceeds of (A) the PACA Escrow (as defined below) and (B) the PACA Claims Commitment Letter (as defined below) in accordance with section (iii) below.

At issue are the provisions that state that the PACA claims are to be assumed by Sager Creek and paid by Sager Creek exclusively from the proceeds of the PACA Escrow and the PACA Claims Commitment Letter. What is not included in BOA's brief is subparagraph v. of paragraph 63 of the APA modification in which Sager Creek and Allens state that "in no event shall [Sager Creek] become responsible for, *or be deemed to assume*, PACA Claims under this Agreement in excess of the PACA Claims Cap." (emphasis added) The PACA Claims Cap is approximately $19,000,000.

BOA argues that the Court should interpret the modified language referenced in paragraph 63 as limiting the PACA creditors' ability to recover funds only from Sager Creek based on the "exclusive" language in the modification. However, the Court finds that the limiting language contained in paragraph 63 refers only to an agreement between Allens and Sager Creek. Allens and Sager Creek agreed that Sager Creek would only be liable for PACA claims up to the PACA Claims Cap (which, presumably, at the time the

agreement was made would have satisfied all PACA claims). There are no other parties to this agreement. Thus, if Sager Creek has paid its assumed obligation under PACA–and it appears that it has based on the negotiated and unequivocal settlement between the PACA creditors and Sager Creek–and the PACA Creditors have not been paid in full, then the PACA Creditors are entitled to collect the remainder of their claim from some other recipient of the PACA entrusted funds. Based on the terms of the Financing Order and Credit Agreement, BOA may be one of those recipients.

Paragraph 61

BOA also argues that paragraph 61 altered the PACA creditors' right to proceed against BOA. That paragraph states that,

> All proceeds and payments received by the DIP Agent and/or the DIP Lenders on account of the DIP Obligations, including, without limitation, upon the Closing of the Sale, the disbursement of the proceeds therefrom in respect of the DIP Obligations, the DIP Agent and the DIP Lenders will be deemed to have received such proceeds and payments free and clear of all liens, claims, security interests, encumbrances, interests, setoffs, withholdings or other deductions, including, without limitation, any PACA Claims (whether allowed or not, and whether arising pre-petition or post-petition) and such proceeds will not be subject to disgorgement, surrender, turnover, return, reimbursement, indemnity or other claim whatsoever, and any and all persons or entities are forever barred, estopped and permanently enjoined from asserting, prosecuting or otherwise pursuing any such action with respect to such proceeds.

On its face, this provision appears to remove PACA liability from the funds BOA received from Allens–in effect, a waiver of the PACA Creditors' rights provided for by PACA. The brings before the Court the question of whether the PACA Creditors have waived their right to payment from BOA in accord with the PACA provisions.

Congress enacted PACA in 1930 "'to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable commodities.'" *Hull Co. v. Hauser's Foods, Inc.*, 924 F.2d 777, 780 (8th Cir. 1991) (quoting *Chidsey v. Guerin*, 443 F.2d 584, 587 (6th Cir. 1971)). As stated earlier, the PACA statute provides that proceeds from the sale of

perishable agricultural commodities shall be held in trust for the benefit of unpaid suppliers or sellers of those commodities "until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents." 7 U.S.C. § 499e(b). This is known as the PACA trust fund.

When Congress enacted PACA, it left a number of specific details to the regulatory discretion of the USDA. *Hull Co.*, 924 F.2d at 781 (leaving the task of prescribing the time "by which payment must be made" under 7 U.S.C. § 499e(c)(3) to USDA); *Wilson Mushroom Co. v. Davis Dist., Inc.* (*In re Davis Dist.*), 861 F.2d 416, 417 (4th Cir. 1988) (recognizing "a number of procedural and substantive prerequisities to securing the protection of a PACA trust, the specifics of which the statute leaves largely to the regulatory discretion" of USDA). When Congress leaves details to the regulatory agency, "'there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'" *In re Old Fashioned Enterprises, Inc.*, 236 F.3d at 425 (quoting *Chevron USA, Inc.*, 467 U.S. at 843-44); *see also* 7 U.S.C. § 499*o* ("The Secretary may make such rules, regulations, and orders as may be necessary . . . ."). With regard to waiver, the regulatory language states that

> [p]ersons acting as agents also have the responsibility to negotiate contracts which entitle their principals to the protection of the trust provisions: *Provided*, That a principal may elect to waive its right to trust protection. To be effective, the waiver must be in writing and separate and distinct from any agency contract, must be signed by the principal prior to the time affected transactions occur, must clearly state the principal's intent to waive its right to become a trust beneficiary on a given transaction, or a series of transactions, and must include the date the agent's authority to act on the principal's behalf expires.

7 C.F.R. § 46.46(c)(2). This regulatory provision applies to the waiver of a principal's right to become a trust beneficiary. The Court likewise finds that the waiver of an established PACA trust beneficiary's rights under PACA would have the same conditions for a waiver that are set forth in the PACA regulations. Paragraph 61 does not meet the requirements for an express waiver in this instance. Regardless of whether counsel for

the PACA Creditors objected vociferously or remained silent and voiced no objection to the provisions in paragraph 61, without an express, written waiver by the principals, the Court finds that the Court's Sale Order did not extinguish the rights of the PACA Creditors to pursue the proceeds and payments received by BOA *to the extent those proceeds and payments are PACA trust assets.*

BOA has the burden of proving that assets it received from Allens were not assets encumbered with PACA trust liability. *Atlantic Tropical Produce Corp. v. AFS Capital, LLC*, 356 Fed. Appx. 491, 492 (2nd Cir. 2009). To meet its burden, BOA must prove either that (1) no PACA trust existed, (2) the funds BOA received were not PACA assets, or (3) the PACA Creditors have been paid in full. *See A&J Produce Corp. v. Bronx Overall Econ. Dev.* Corp., 542 F.3d 54, 59 (2nd Cir. 2008). The existence of a PACA trust has already been established and it seems apparent to the Court that the PACA Creditors have not been paid in full. Because the resolution of whether the funds BOA received are PACA trust assets will have no effect on the bankruptcy estate and involves two non-debtor third parties, the Court denies BOA's *Motion to Enforce Sale Order*. The PACA Creditors are not enjoined from continuing their litigation in the United States District Court, Southern District of New York.

IT IS SO ORDERED.

cc: Judy Simmons Henry and Morgan R. Hirst, attorneys for Bank of America
Stan Bond and Gregory Brown, attorneys for the PACA Creditors

The Honorable William Pauley
United States District Court for the Southern District of New York