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. 7**

R. RAY FULMER, II — **Plaintiff**

v. — **No. 5:14-ap-07090**

JOSHUA C. ALLEN, NICHOLAS E. ALLEN, and RODERICK L. ALLEN — **Defendants**

. . . .

R. RAY FULMER, II — **Plaintiff**

v. — **No. 5:14-ap-07103**

GREENBERG TRAURIG, LLP — **Defendant**

. . . .

R. RAY FULMER, II — **Plaintiff**

v. — **No. 5:14-ap-07112**

ALVAREZ & MARSAL NORTH AMERICA, LLC — **Defendant**

ORDER ON MOTIONS TO DISMISS

Before the Court are three motions to dismiss filed respectively in each of the above-captioned adversary proceedings. The three motions were set for hearing on March 19, 2015, and at the conclusion of the hearing and after accepting post-trial briefs, the Court took the matters under advisement. For the reasons stated below, the Court grants in part and denies in part the defendants' motions to dismiss.

The Court has jurisdiction over this matter under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2). The following order constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

STATEMENT OF GENERAL FACTS AND ISSUES

The chapter 7 trustee filed the three adversary proceedings presently before the Court within approximately one month's time: against Joshua C. Allen, Nicholas E. Allen, and Roderick L. Allen [the Allens] on November 10, 2014; against Greenberg Traurig, LLP [Greenberg Traurig] on November 24, 2014; and against Alvarez & Marsal North America, LLC [Alvarez & Marsal] on December 12, 2014. Each of the defendants responded with a motion to dismiss within the requisite time period. On March 17, 2015, the trustee filed an omnibus response to the three motions to dismiss. The parties also submitted post-trial briefs following the hearing.

The trustee's complaints assert three common causes of action against the Allens, Greenberg Traurig, and Alvarez & Marsal: (1) that the defendants interfered with the receipt of Perishable Agricultural Commodities Act [PACA] trust assets; (2) that the defendants converted and unlawfully retained PACA trust assets; and (3) that, as a result of the first two allegations, the defendants were unjustly enriched. For the Allens only, the trustee alleges two additional causes of action: (1) that the Allens breached a fiduciary duty related to the PACA trust, and (2) that the Allens caused the debtor to make fraudulent transfers to themselves. According to the complaint filed against the Allens, each of them held the position of "officer, director, shareholder or member" of the debtor. The law firm Greenberg Traurig advised the debtor prior to bankruptcy and represented the debtor in its chapter 11 case. Alvarez & Marsal, a financial restructuring firm, was hired by the debtor to restructure the company and mitigate its losses at least 10 months prior to it filing bankruptcy. Alvarez & Marsal placed Jonathan Hickman into the position of Chief Restructuring Officer during that period.

The complaints assert that all of the defendants "either intentionally or negligently" received funds impressed with the PACA trust for various services with knowledge of the debtor's precarious financial state and that, as a result, caused the debtor to breach the PACA trust because it did not have sufficient funds to pay all of its produce suppliers. The complaint against the Allens also asserts that the Allens breached their fiduciary duties by failing to prevent the dissipation of PACA trust assets.

The defendants' respective motions to dismiss each raise substantially similar defenses because of the overlap in allegations pleaded by the trustee against the defendants. Those defenses may be condensed to three arguments: (1) that the trustee does not have standing to pursue claims related to PACA trust assets; (2) that the trustee failed to state a claim under Federal Rule of Civil Procedure 12(b)(6) (made applicable here by Federal Rule of Bankruptcy Procedure 7012(b)); and (3) that, in relation to the fraudulent transfer claim against the Allens, the trustee failed to plead fraud with particularity as required under Federal Rule of Civil Procedure 9 (made applicable here by Federal Rule of Bankruptcy Procedure 7009). The Court will address each of these arguments, in turn. The first two arguments are related and will be addressed together.

LAW AND ANALYSIS

1. The trustee's lack of standing and failure to state a claim

The defendants argue that each of the trustee's complaints, with the possible exception of a portion of the trustee's fraudulent transfer claim against the Allens, is fundamentally flawed because the trustee lacks standing to bring the asserted claims. All five causes of action allege harm done to unpaid produce suppliers–all creditors of the debtor–as the result of the defendants receiving funds impressed with the PACA trust. The complaints each state that the trustee seeks to recover those funds, which are PACA trust assets, for the benefit of the harmed produce creditors, who remain unpaid. Specifically, the trustee "seeks the entry of an Order directing the Defendant[s] to immediately turn over to the Trustee all assets impressed with the PACA trust for the benefit of all of the Debtors' unpaid suppliers of Produce, such as the Produce Suppliers herein, thereby creating a fund for the common benefit of said Produce Suppliers."

The defendants base their standing argument on the disconnect between the role of a chapter 7 trustee under 11 U.S.C. § 704(a)(1), to recover property of the bankruptcy estate for the benefit of the debtor's creditors, and the fact that PACA trust assets do not become property of the estate upon the filing of bankruptcy. The defendants assert that the trustee is attempting to recover assets that are not property of the estate, for which he has no standing to pursue. The defendants also argue that the trustee has no standing to assert third-party claims belonging to PACA creditors.

Case law makes clear that PACA trust assets are not property of the estate. *Nickey Gregory Co., LLC v. AgriCap, LLC*, 597 F.3d 591, 595 (4th Cir. 2010) ("Indeed, in the event of bankruptcy, trust assets do not even become a part of the bankruptcy estate."); *Bowlin & Son, Inc. v. San Joaquin Food Serv., Inc.* (*In re San Joaquin Food Serv., Inc.*), 958 F.2d 938, 939 (9th Cir. 1992) ("There is no dispute that when a party establishes an interest in a PACA trust, the trust proceeds are separate from a PACA trustee's bankruptcy estate."). The trustee concedes this without reservation. Nevertheless, the trustee's counsel argues that standing exists to bring the three adversary proceedings because the debtor's estate has suffered damages as a result of the defendants' actions.

The trustee attempts to quantify harm to the estate and prove the basis for the trustee's standing by asserting two separate sources of damages to the debtor: first, the future damage to the estate if or when the Secretary of Agriculture assesses civil penalties against the debtor pursuant to 7 U.S.C. § 499h(e) for failing to maintain the PACA trust; and second, the indirect damages to the estate through the harm to unsecured produce sellers as a result of the debtor's pre-petition failure to pay for 4,680 loads of fresh produce. As to this first source of damages, any action by the trustee to recover damages resulting from a potential civil penalty appears to be, in essence, a contribution or subrogation claim against the defendants.[1] However, the three complaints do not seek contribution or subrogation but instead pursue recovery under PACA *on behalf of unpaid produce sellers*. As to the second source of damages, to the unpaid produce sellers, the trustee relies on a bankruptcy case in the Northern District of Illinois and its holding that a trustee has standing to bring an action if the injury caused by third parties is common to all creditors of the debtor's estate rather than personal to a particular creditor. *See Arenson v. Admin. Dist. Counsel of Ill. Int'l Union of Bricklayers and Allied Craftworkers et al.* (*In re Pierport Dev. & Realty, Inc.*), 502 B.R. 819 (Bankr. N.D. Ill. 2013). The trustee's counsel states that the Eighth Circuit has not yet ruled on the distinction between an injury personal to a creditor and an injury common to all creditors, and invites this Court to adopt the *In re Pierport Dev. & Realty, Inc.* court's analysis to find that the defendants' actions harm a *class* of creditors–the unpaid produce sellers–and thus, the trustee may pursue an action on behalf of the harmed class.

The Eighth Circuit appears to have not yet reached the question of what constitutes a claim personal to the creditor versus a claim of the estate. However, the underlying inquiry in the cited Illinois bankruptcy case–whether a bankruptcy trustee may bring an alter ego action on behalf of harmed creditors–has been decided by the Eighth Circuit. In *In re Ozark Restaurant Equipment Co., Inc.*, the Eighth Circuit Court of Appeals considered whether a chapter 7 trustee had standing to bring an alter ego action against the principals of a debtor corporation on behalf of its harmed creditors. *In re Ozark Rest. Equip. Co., Inc.*, 816 F.2d 1222 (8th Cir. 1987). The court began with the basic principle that causes of action belonging to the debtor at the commencement of the case are property of the estate under § 541 and become enforceable by the trustee under § 704(a)(1). *Id.* at 1225. The court stated that, conversely, where "'applicable state law makes such obligations or liabilities run to the corporate creditors personally, rather than

[1] In the trustee's omnibus objection to the motions to dismiss, he stated that a United States Department of Agriculture regulatory action has been pending against the debtor since May 8, 2014.

to the corporation, such rights of action'" are not property of the estate and are not enforceable by the trustee. *Id.* (quoting 4 Collier on Bankruptcy, ¶ 541.10[8], at 541-69 to 541-70 (15th ed. 1986)). Under Arkansas law, a corporate entity is not entitled to pursue an alter ego or veil piercing action. *Id.* at 1225 ("[T]he obligations and liabilities of an action to pierce the corporate veil in Arkansas do not run to the corporation, but to third parties, *e.g.*, creditors of the corporation."). Accordingly, the Eighth Circuit found that because a corporate debtor could not pursue this type of cause of action on its own behalf, a bankruptcy trustee has no authority to bring an alter ego cause of action against principals of a corporate debtor. Numerous cases in which a bankruptcy trustee has been found to have standing to pursue alter ego actions on behalf of creditors are not inconsistent with *Ozark Restaurant*–rather, those cases are based on prevailing state law that differs from Arkansas's law. *See Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 134 (2d Cir. 1993); *In re Bridge Info. Sys. Inc., et al.*, 325 B.R. 824, 833 (Bankr. E.D. Mo. 2005); *In re Buildings by Jamie, Inc.*, 230 B.R. 26, 43 (Bankr. D.N.J. 1998).[2]

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[2] The *Ozark Restaurant* court also rejected the alternative argument that § 544 broadens a bankruptcy trustee's authority to allow him to bring an alter ego action on behalf of injured creditors, an argument alluded to by the trustee in the present case in his omnibus response to the motions to dismiss. The Eighth Circuit relied, in part, on the legislative history following a Supreme Court case, *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), in which the Court effectively invited Congress to expand the scope of a bankruptcy trustee's authority.

> In 1978, six years after *Caplin* was decided, Congress overhauled the bankruptcy laws when it enacted the Bankruptcy Code. As part of the revision, Congress consolidated former sections 70c and 70e of the Act (11 U.S.C. §§ 110(c), (e) of former title 11) into Sections 544 (a) and (b) of the Code, respectively, which apply to both reorganization and liquidation trustees. Although Section 544 clarified and expanded the trustee's role with respect to creditors, in no way was it changed to authorize the trustee to bring suits on behalf of the estate's creditors against third parties. In fact, the legislative history suggests just the opposite.
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> As originally proposed by the House, Section 544 was to contain a subsection (c), which was intended to overrule *Caplin*. It is extremely noteworthy, however, that this provision was deleted before promulgation

Despite the fact that *Ozark Restaurant* is, for all practical purposes, based on the same underlying legal inquiry as the Illinois case relied on by the trustee (whether a trustee may file an alter ego case on behalf of creditors), the trustee's counsel summarily deemed *Ozark Restaurant* irrelevant in his omnibus response to the motions to dismiss "because the actions of the Allen Defendants and the A&M Defendants . . . constitute unfair trade practices" under PACA. To the extent this statement was an attempt to articulate that the Eighth Circuit's holding does not apply because the three adversary proceedings are brought under PACA law rather than state law application of alter ego and veil piercing, *Ozark Restaurant*'s general holding is, nevertheless, equally applicable.[3] As discussed below, like with an alter ego or veil piercing complaint under Arkansas law, the debtor does not possess the right to bring a cause of action against the defendants under PACA. Accordingly, neither does the trustee.

The purpose of PACA is to protect produce suppliers from non-payment and provide

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> of the final version of Section 544. Because subsection (c), as part of Section 544, would have applied to both reorganization and liquidation trustees, and because Congress refused to enact subsection (c), *we believe Congress' message is clear*–no *trustee, whether a reorganization trustee as in* Caplin *or a liquidation trustee as in the present case, has power under Section 544 of the Code to assert general causes of action, such as the alter ego claim, on behalf of the bankrupt estate's creditors.*

In re Ozark Rest. Equip. Co., Inc., 816 F.2d at 1227-28 (emphasis added).

[3] While courts appear to be tolerant of alter ego terminology used in the context of individual liability actions under PACA, the basis of individual liability under an alter ego action and a PACA action is different. Liability under PACA is based on a breach of fiduciary duty owed to beneficiaries that results in a tortious act, whereas in an alter ego or veil piercing action, "'the corporate form is disregarded because the individual has either committed fraud, or because the corporation is a 'shell' being used by the individual shareholders to advance their own purely personal rather than corporate ends.'" *Weis-Buy Serv., Inc. v. Paglia*, 411 F.3d 415, 421 (3d Cir. 2005) (quoting *Morris Okun. Inc. v. Harry Zimmerman, Inc.*, 814 F. Supp. 346, 348 (S.D.N.Y. 1993)).

methods of redress in the event a commission merchant, dealer, or broker (here, collectively referred to as a dealer) fails to pay a produce supplier. The statute expressly identifies two entities who may pursue a dealer for violations of PACA: (1) injured PACA trust beneficiaries, and (2) the Secretary of Agriculture. Section 499e(a) of PACA establishes a dealer's liability to PACA trust beneficiaries, stating that if a dealer "violates any provision of section 499b of this title he shall be liable to the person or persons injured thereby for the full amount of damages . . . sustained in consequence of such violation." Under § 499e(b), PACA trust beneficiaries may bring an action against a dealer either by a lodging a complaint to the Secretary of Agriculture or by a lawsuit in a court of competent jurisdiction, in addition to any other common law or statutory remedy the PACA trust beneficiaries may have. Separately, § 499h of PACA outlines the actions that the Secretary of Agriculture may take against a dealer who has failed to pay a produce seller: suspension or revocation of the dealer's PACA license under subpart (a); a lawsuit brought in court to enjoin the dealer from continuing to engage in business under subpart (d); or "assess[ment of] a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues" under subpart (e).

Other than PACA trust beneficiaries and the Secretary of Agriculture, the statute names no other parties–such as a dealer–entitled to bring legal action under its provisions. "The question [of] whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). Based on a plain reading of the statute, the Court finds that PACA does not expressly confer a cause of action on the debtor, who is neither a PACA trust beneficiary nor the Secretary of Agriculture.

Whether a statute instead creates an implied cause of action is determined based on Congressional intent. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 13 (1981). The Supreme Court has stated that "[w]e look first, of course, to the statutory language, particularly to the provisions made therein for enforcement and relief. Then we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent." *Id.* According to the Court, four factors are considered relevant in the determination of whether Congress intended to created an implied cause of action within a federal statute:

> First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted'–that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78 (1975) (internal citations omitted). From these factors, the ultimate inquiry is "whether Congress intended to create a private right of action." *California v. Sierra Club*, 451 U.S. 287, 293 (1981). "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Without evidence of statutory intent, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87.

In the present case, nothing gives rise to the implication that Congress intended for entities such as the debtor to bring actions under the provisions of PACA. As previously discussed in the context of the lack of an express cause of action, PACA was specifically enacted to benefit and protect produce sellers from produce dealers such as the debtor. The Court can discern no indication from either the plain language of the statute or its legislative history that entities other than PACA trust beneficiaries or the Secretary of Agriculture were intended to bring causes of actions or proceedings under its provisions. This is consistent with Congress's purpose of creating a law to protect produce sellers by establishing liability against the dealer, providing the produce seller with methods of recourse, and also providing a third party, the Secretary of Agriculture, with separate means to enforce the terms of PACA. Accordingly, the Court finds that PACA provides no implied right of action to a dealer such as a the debtor.

Two other courts have reached the same conclusion. In *Sweet Ones, Inc. v. Mercantile Bank of Michigan*, the United States District Court of the Western District of Michigan found that a dealer has neither an express nor implied private right of action under PACA to sue third parties accused of causing the dealer to breach a PACA trust. *Sweet Ones, Inc. v. Mercantile Bank of Michigan*, No. 1:09-CV-1092, 2010 WL 1658205 (W.D. Mich. April 23, 2010). A dispute arose when the third party, a bank, set off a sum of money from the dealer's bank account after a loan between the parties became due, despite the dealer's warning that the set-off would leave the dealer with insufficient funds to pay produce sellers and would cause it to breach its obligations to "valid PACA trust beneficiaries." *Id.* at *1. The dealer subsequently filed suit against the bank in district court alleging that the bank had caused it to breach the PACA trust, and the bank responded with a motion to dismiss for failure to state a claim. *Id.* Noting that both parties agreed that PACA provides no express private right of action to the dealer, the Michigan court applied the four-factor *Cort* test to conclude that PACA also did not grant the dealer an implied right. *Id.* at *4. Further, the court observed that "[t]he parties have identified no case in which a court has implied a private right of action for buyers under PACA's trust provisions, nor has the Court found any such case. [. . .] The absence of case law recognizing an implied private right of action for persons other than trust beneficiaries under PACA's trust provisions reinforces the argument that no such implied private right of action exists." *Id.* This Court's own extensive search of case law–in addition to the trustee's failure to provide cases on point–causes the Court to reach the same conclusion.

Similarly, in *Jacobs Silver K Farms, Inc. v. Taylor Produce, LLC*, the United States District Court of Idaho held that PACA only provides a private right of action to the Secretary of Agriculture and PACA trust beneficiaries. *Jacobs Silver K Farms, Inc. v. Taylor Produce, LLC*, No. 4:13-cv-535-EJL-CWD, 2015 WL 1467258 at *2-3 (D. Idaho, March 30, 2015). In making this finding, the court dismissed the third-party complaint of a defendant who sought contribution or subrogation against an additional party in the event the defendant was held liable for breach of the PACA trust. The court noted that while the defendant could not bring the action directly under PACA, the remedies expressly provided for under PACA are non-exclusive, leaving the defendant the right to seek other remedies available under state statute or common law. *Id.* at *5. The court indicated that a claim for subrogation or contribution is one such alternative remedy but found that the defendant had failed to properly plead its claim. *Id.* at *7. Accordingly, the court dismissed the third-party complaint in whole.

Based on this Court's finding, as well as the holdings in *Sweet Ones, Inc.* and *Jacobs Silver K Farms, Inc.*, the debtor does not have a private right of action, and thus, no standing, to bring a cause of action against the defendants under PACA. Under the Eighth Circuit Court of Appeals's general holding in *In re Ozark Restaurant Equipment Co., Inc.*, the trustee is limited to pursue those causes of action possessed by the debtor at the commencement of the case (which are property of the estate) or those causes of action granted to him under the bankruptcy code. With the exception of the fraudulent conveyance action against the Allens (addressed later in this opinion), the claims pleaded in all three of the trustee's complaints do not fall under either category.

As the trustee's arguments against the motions to dismiss have evolved, the trustee has emphasized his intersecting roles as both a bankruptcy trustee and a PACA trustee of the debtor, which encompasses Arkansas state trust laws. The trustee cites to his statutory obligation under Arkansas Code Annotated section 28-73-801 through section 28-73-816 to perform such duties as protect trust property, compel a former trustee to deliver trust property, and to prosecute as necessary to protect trust property. The trustee argues that these statutes expressly mandate his standing to bring the three adversary complaints. However, "[t]he United States Circuit Courts of Appeal, in construing PACA, have uniformly held that '[t]he interpretation of PACA trust interests is guided by general trust principles *to the extent there is no conflict with the statute*.'" *Skyline Potato Co., Inc. v. Hi-Land Potato Co., Inc.*, 909 F. Supp. 2d 1225, 1244-45 (collecting cases and quoting *In* *re Arctic Exp. Inc.*, 636 F.3d 781, 798 (6th Cir. 2011)) (emphasis added). Based on the Court's finding that the PACA statute neither expressly nor impliedly grants the debtor a private right of action, the Court finds that creation of that right under Arkansas trust law would be in direct conflict.

Standing is a "threshold inquiry" of who may allege wrongful conduct, distinct from a determination of the merits of the alleged wrongful conduct itself. *McCarney v. Ford Motor Co.*, 657 F.2d 230, 232-33 (8th Cir. 1981). As the Supreme Court has stated, "[a]lthough standing in no way depends on the merits of the plaintiff's contention that a particular conduct is illegal, it often turns on the nature and source of the claim asserted. [...] Essentially, the standing question in such cases is whether the constitutional or statutory provision in question implies a right of action in the plaintiff." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Based on the debtor's, and, thus, the trustee's, lack of a private right of action under PACA, the Court finds that the trustee lacks standing. PACA specifically designates the trust beneficiaries as the appropriate parties to pursue the wrongful conduct alleged in the trustee's complaint. Accordingly, the Court finds that dismissal of the trustee's complaints against Greenberg Traurig and Alvarez & Marsal is appropriate in whole. In addition, the Court also finds that dismissal of the trustee's complaint against the Allens for Count 1 (breach of fiduciary duty), Count II (interference with receipt of trust assets), Count IV (conversion and unlawful retention of PACA trust assets), and Count V (unjust enrichment) is appropriate.

The defendants separately allege that the trustee's complaints should be dismissed for failure to state a claim. The Court agrees. Even if the trustee had standing to proceed and ultimately succeeded in proving that the defendants are liable for the actions alleged, the trustee is not entitled to the relief he requests. In each of the three complaints, the trustee "seeks the entry of an Order directing the Defendant[s] to immediately turn over to the Trustee any and all assets impressed with the PACA trust for the benefit of *all* the Debtors' unpaid suppliers of Produce, such as the Produce Suppliers herein, thereby *creating a fund for the common benefit of said Produce Suppliers"* (emphasis added). The trustee's Exhibit A attached to each of the three complaints shows a net outstanding amount due to the unpaid produce sellers in the amount of $24,850,743.05. However, with the exception of three valid PACA claims, this amount is composed of general unsecured claims that are not valid PACA claims and have no established priority over other general unsecured claims in this bankruptcy.[4]

The status of these claims was determined through a lengthy claims litigation process that included (1) a PACA claims bar date and other PACA procedures established by an order entered on November 27, 2013, that required that all PACA claimants to file claims by December 23, 2013, or otherwise be deemed forever barred from asserting a claim under PACA; (2) the debtor's omnibus objection to 52 PACA claims filed on January 13, 2014; (3) resolutions of the omnibus objection by stipulations between the debtor and some produce sellers; and (4) findings made by this Court in multiple written opinions as to the PACA claims of other produce sellers. The trustee may not now seek funds for a priority distribution to creditors who are not entitled to priority under either PACA or the bankruptcy code and this Court's prior proceedings. Federal Rule of Civil Procedure 8(a)(2) requires that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." On its face, the complaints seek collective relief for which nearly all of the listed unpaid produce sellers are not entitled. Accordingly, the Court finds that dismissal under Rule 12(b)(6), made applicable by Federal Rule of Bankruptcy Procedure 7012(b), is also appropriate.

2. Fraudulent transfer claim against the Allens

The Defendants also argue that the Trustee has failed to meet the pleading requirements under Federal Rules of Civil Procedure 8 and 9(b) as to Count III (fraudulent transfers) of the complaint against the Allens. The trustee alleges in Count III that during the period

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[4] Those unpaid produce sellers listed in Exhibit A with valid PACA claims are D&E Farms, H.C. Schmieding Produce Co., and Hartung Brothers.

the debtor was insolvent, the Allens made multiple transfers to themselves in the form of wages, bonuses, and other forms of economic benefit for which the debtor did not receive fair, adequate, or reasonably equivalent value. The trustee brings this claim under § 548 and the Arkansas Fraudulent Transfer Act, Arkansas Code Annotated section 4-59-201, *et seq*. The trustee's Count III provides no other factual allegations, although Count VI (conversion and unlawful retention of PACA trust assets) alleges that at the time the transfers were made, the "Defendants knew or should have known that the Debtors had outstanding accounts payable to the various Produce Suppliers."

Generally, the heightened pleading standards of Rule 9(b) apply to actual fraud under either § 548 or the Arkansas Fraudulent Transfer Act. The rule states that "a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. Pro. 9(b). Constructive fraud under either provision only requires the general pleading standard of Rule 8(a)(2): " a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. Pro. 8(a)(2). The Allens allege that while the trustee failed to specify whether he was pursuing actual or constructive fraud, Count III fails under either pleading standard, regardless.

In the context of a bankruptcy trustee bringing a fraud claim, some courts adopt a more liberal approach to the pleading standards. *Davidson v. Twin City Bank* (*In re Hollis & Co.*), 83 B.R. 588, 590 (Bankr. E.D. Ark. 1988). A bankruptcy trustee occupies the unique position of being authorized to bring a fraud claim without having been a party to the interactions that gave rise to the claim. *Id.* Thus, at the time the trustee files a fraud complaint, he may not have knowledge of the particular details that are ordinarily required to be plead under Rule 9(b) or even Rule 8, such as the amounts and dates of the alleged transfers in the present case. Based on these considerations, but with the belief that the trustee is nevertheless obligated to set forth those facts now in his possession so that the Allens have an opportunity to respond, the Court orders the trustee to file an amended complaint to comply with the pleadings standard of Rule 8 and Rule 9(b), to the extent the trustee is pursuing both actual and constructive fraud.

Conclusion

For the reasons stated above, the trustee's complaints against Greenberg Traurig and Alvarez & Marsal are dismissed in whole. The trustee's complaint against the Allens is dismissed as to all counts except Count III. The trustee shall filed an amended complaint within 28 days to cure pleading deficiencies related to Count III, as stated above.

IT IS SO ORDERED.

Ben Barry

Ben Barry
United States Bankruptcy Judge
Dated: 06/18/2015

cc: R. Ray Fulmer, II
Jason Ryan Klinowski
Jeffrey Mark Chebot
Grant E. Fortson
Lucas T. Regnier
Greg E. Garman
Woodson William Bassett, III
Gordon D. Todd
U.S. Trustee