

**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**

ALLENS, INC. and ALL VEG, LLC

v.

D&T FARMS, INC.

Objection to PACA Claim

ORDER

Before the Court are the *Debtor's Omnibus Objection to PACA Claims* filed on January 13, 2014, and *D&T Farms, Inc.'s Response to Debtor's Omnibus Objection to PACA Claims* filed on February 3, 2014. The Court heard the objection and response on March 24, 2014, and at the conclusion of the hearing gave the parties 15 days to file post-trial briefs. For the reasons stated below, the Court sustains the debtor's objection in part and overrules the objection in part.

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)(B). The following order constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052, made applicable to this proceeding under Federal Rule of Bankruptcy Procedure 9014.

The debtor objected to the claim of D&T Farm, Inc. [D&T] on two grounds. First, the debtor alleged that D&T did not meet the notice requirements of the Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499a–499s [PACA] and, therefore, failed to preserve D&T's rights under PACA. Second, the debtor alleged that D&T's claim was for an amount in excess of the amount shown in the debtor's records. D&T responded to the objection and argued that D&T preserved its PACA rights by either substantially

complying with the PACA provisions § 499e(c)(3) concerning notice or by using the invoice method of notice under § 499e(c)(4). It also argued that the amount of D&T's claim was correct and any discrepancy was the result of the debtor's own clerical error.

To be protected by PACA, D&T needs to show that "(1) the goods in question were perishable agricultural commodities, (2) the commodities were received by a commissioned merchant dealer or broker; and (3) they provided written notice of their intent to enforce PACA." *Cox v. Decas Cranberry Prods., Inc. (In re Meyer's Bakeries, Inc.)*, 402 B.R. 314, 319 (Bankr. W.D. Ark. 2009). The parties do not dispute that the goods in question were perishable agricultural commodities—sweet potatoes—that were received by a commissioned merchant dealer or broker. The first issue before the Court is whether D&T provided written notice of its intent to enforce its claim under the PACA provisions as required by statute.

The PACA notice requirements are found in § 499e. Liability to persons injured. More specifically, subsection (c) establishes a trust for the benefit of all unpaid suppliers or sellers of perishable agricultural commodities. Under this provision, a dealer must hold any proceeds from the sale of the commodities in trust "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(c)(2). However, "[t]he unpaid supplier, seller, or agent shall lose the benefits of such trust unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or broker" 7 U.S.C. § 499e(c)(3). The notice must be given to the dealer within 30 calendar days from one of three events:

- (i) after expiration of the time prescribed by which payment must be made, as set forth in regulations issued by the Secretary, (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction, or (iii) after the time the supplier, seller, or agent has received notice that the payment instrument promptly presented for payment has been dishonored.

7 U.S.C. § 499e(c)(3).

Under (i), the time for payment of produce that is purchased by a buyer is “within 10 days after the day on which the produce is accepted.” 7 C.F.R. § 46.2(aa)(5).¹ If the parties elect to use a different time of payment, they are required to reduce their agreement to writing and maintain a copy of the agreement. 7 C.F.R. § 46.2(aa)(5). Any party claiming the existence of such agreement has the burden of proving its existence. 7 C.F.R. § 46.2(aa)(11). Because such written agreement was not introduced by the parties, the Court finds that the time for payment by the debtor to D&T was 10 days after the day the produce was delivered to and accepted by the debtor. To preserve its PACA claim, D&T was required by statute and federal regulation to give its notice of intent to preserve its PACA claim to the debtor within 40 days after the day each respective shipment was delivered to and accepted by the debtor.

D&T also argued that it had additional rights under § 499e(c)(4). Subsection (c)(4) provides an additional method of preserving PACA trust benefits for licensees. Timmy McLamb, president of D&T, testified that D&T did not hold a PACA license at the time the deliveries were made and did not receive its PACA license until January 2014. D&T provided the debtor with its last shipment of sweet potatoes on October 28, 2013, the same day the debtor filed its chapter 11 bankruptcy petition. Because D&T was not a licensee until January 2014, the Court finds that subsection (c)(4) is not applicable in this instance.²

According to McLamb, D&T had been delivering sweet potatoes to the debtor for approximately 15 years. Until 2013, the debtor had always paid D&T in a timely

¹ Because neither party introduced a written agreement setting forth a different payment time or a notice of a dishonored payment instrument, the Court finds that the provisions contained in (ii) and (iii) are not applicable.

² Further, even if D&T was a licensee, D&T did not include the information required under subsection (c)(4) until it filed its proof of claim on December 20, 2013, which is beyond the statutory notice period of 30 days from the time payment of the produce is due (in other words, 40 days from the date the produce was accepted).

manner, typically within two weeks from when the debtor received a shipment from D&T. D&T made its first delivery to the debtor in 2013 on September 18. Between September 18 and October 28, D&T made approximately 25 additional deliveries to the debtor. McLamb testified that D&T received its first (and only) payment from the debtor on October 28 by a wire transfer in the amount of \$11,250.75. The payment was not accompanied by a settlement sheet with which D&T could identify the specific deliveries that were covered by the payment.

Under the PACA regulations stated above, payment was due within 10 days after the debtor accepted the shipment of produce. If D&T did not receive its payment, D&T was required to provide the debtor with written notice of its intent to preserve benefits under the PACA trust within 30 calendar days. 7 U.S.C. § 499e(c)(3). This means that for its September 18 shipment to the debtor, the last day for D&T to provide its notice of intent to the debtor was October 28, 2013, 40 days after the debtor accepted the produce. The last delivery that D&T made to the debtor before the debtor filed its bankruptcy petition occurred on the morning of the filing, October 28. This means that the last day for D&T to provide its notice of intent to the debtor for that delivery was December 7, 2013, again, 40 days after the acceptance of the produce by the debtor. McLamb testified that D&T did not provide the debtor with notice of its intent to preserve its PACA benefits until it filed its proof of claim on December 20. Based on the facts before it, the Court finds that D&T did not provide the debtor with timely notice of its intent to preserve its PACA benefits.

D&T offered two explanations for the untimely filing of its notice of intent to preserve benefits. First, McLamb testified that it was D&T's understanding that D&T was not to contact the debtor after the debtor filed its bankruptcy petition. Because of this, D&T was not able to receive its settlement sheets from the debtor so that it could determine the correct amount of its claim against the debtor after taking into consideration the price Allen paid per hundredweight, the dockage (or setoff/reduction) per load, and the October 28 payment. Second, D&T argues that it substantially complied with the statute

when it filed its proof of claim. According to McLamb, D&T filed its proof of claim to give an accurate and honest account of the money D&T was owed. McLamb also testified that it was D&T's intent to provide the debtor with D&T's PACA notice with the filing of the proof of claim.

However, both arguments fail. The regulations require a notice of intent to be in writing and include the statement that it is a notice of intent to preserve trust benefits. 7 C.F.R. § 46.46(f). The notice must also include four specific pieces of information:

- (i) The names and addresses of the trust beneficiary, seller-supplier, commission merchant, or agent and the debtor, as applicable,
- (ii) The date of the transaction, commodity, invoice price, and terms of payment (if appropriate),
- (iii) The date of receipt of notice that a payment instrument has been dishonored (if appropriate), and
- (iv) The amount past due and unpaid.

7 C.F.R. § 46.46(f)(1). McLamb testified that D&T knew the buyer, the produce or commodity, the gross weight of the delivery, the date the delivery was "on dock" at the debtor's canning facility, and the method of transport. He also testified that he never had a check from the debtor be dishonored. The only information that D&T did not have was the price to be paid after figuring the dockage for each specific load. D&T argued that without that final information, which is contained on the settlement sheets, it was not able to file its PACA notice.

The Court appreciates D&T's recognition that the automatic stay under 11 U.S.C. § 362 is effective in most instances upon the filing of a bankruptcy petition. The automatic stay is far reaching and covers property of the estate, property of the debtor, and the debtor. D&T's argument seems to fit squarely within § 362(a)(6)'s prohibition against "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(6). In order to assess its prepetition PACA claim against the debtor, D&T argues that it needed the settlement sheets, but was stayed from obtaining that information upon the debtor's filing its bankruptcy petition.

When a PACA trust is established, the funds that are available to pay growers under PACA are not property of the estate until all eligible suppliers are paid in full. *In re Meyer's Bakeries, Inc.* 402 B.R. at 319 (citing numerous cases in support); *see also Dairy Fresh Foods, Inc. v. Ramette (In re Country Club Mkt., Inc.)*, 175 B.R. 1005, 1009 (D. Minn. 1994). Because the funds are not property of the estate, the automatic stay does not alter the statutory filing requirements of PACA. *St. Joseph Bank & Trust Co. v. DeBruyn Produce Co. (In re Prange Foods, Corp.)*, 63 B.R. 211, 217-18 (Bankr. W.D. Mich. 1986) (holding that PACA claimant need not obtain relief from stay prior to filing claim and that the 30 day period for filing a claim is not tolled). Further, § 362(b)(3) states that the automatic stay does not stay “any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee’s rights and powers are subject to such perfection under section 546(b)” 11 U.S.C. § 362(b)(3). Under § 546(b), the rights and powers of a trustee are subject to “any generally applicable law that—(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection” 11 U.S.C. § 546(b)(1)(A). Section 362(b)(3) is the exception to § 362(a)(6)’s prohibition against “any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.” 11 U.S.C. § 362(a)(6). To the extent D&T needed to inquire about the missing settlement sheets so that it could perfect its PACA claim, the Court finds that D&T would not have violated the automatic stay provisions.

In the alternative, D&T also had the option of filing an incomplete claim. During closing arguments, D&T argued that it had substantially complied with the notice requirements when it filed its claim after it had all the required information. In support of its argument, D&T cited to *In re Superior Tomato-Avocado, Ltd.*, 481 B.R. 866 (Bankr. W.D. Tex. 2012) and *Dubin v. Carlton Fruit Co., Inc. (In re Carlton Fruit Co., Inc.)*, 84 B.R. 810 (Bankr. M.D. Fla. 1988). Both of those courts held that substantial compliance with the information required to be included with a PACA notice is sufficient to place the produce recipient on notice of the supplier’s intent to preserve its PACA rights. The Eighth Circuit is in agreement that substantial compliance with the regulation is sufficient

to put the debtor on notice of a PACA claimant's claim: "as long as the . . . debtor may derive the necessary information from the notice, it should suffice to preserve the trust." *Hull Co. v. Hauser's Foods, Inc.*, 924 F.2d 777, 783 (8th Cir. 1991). However, each of these cases analyze a notice that, although deficient in some manner, was timely filed within the notice period.³ In the present case, the first notice that D&T provided to the debtor was on December 20, 2013. The notice period for the last shipment from D&T ended on December 7, 2013. Even if the Court agreed with D&T's argument that it had substantially complied with the PACA provisions concerning the content of its notice, the Court cannot, and will not, extend the time period under which the notice is required to be filed under the PACA statute. Accordingly, the Court sustains the debtor's objection to D&T's PACA claim relating to the notice requirements.

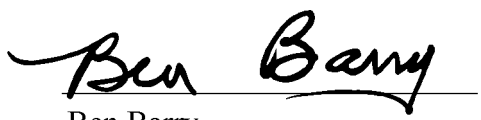
The debtor's second objection is that D&T filed its claim for more than is owed by the debtor. According to the debtor, D&T's claim should have been \$85,015.00. According to D&T, its claim is correct in the amount of \$86,505.96. The Court agrees with D&T. Debtor's Exhibit A-0020 is a weigh ticket given to D&T's driver after D&T delivered a load of sweet potatoes on September 20, 2013. Debtor's Exhibit B-02-0002 is a copy of the same weigh ticket that reflects a gross weight of 81,960 pounds. When the gross weight of the delivery was transferred to the settlement sheets, it was entered as 30,860 pounds rather than 81,960 pounds. It appears that the tare weight should have been entered as 30,860 pounds which would have resulted in a load of 51,100 pounds. Taking into account an 8% dockage for that particular load (as reflected on the debtor's weigh ticket), the load should have resulted in a net weight of 47,012 pounds, not 28,391 pounds as shown on the settlement sheets. The difference between the two loads, at \$8.00 per hundredweight, is approximately \$1490.00, which is also the amount of D&T's claim to which the debtor objected. Based on the evidence presented, the Court overrules

³ In *In re Carlton Fruit Co., Inc.*, timeliness of the notice filing was not an issue. In *In re Superior Tomato-Avocado, Ltd.*, the court ratified the parties' agreement that only those claims that fell within the notice period were entitled to treatment under PACA.

the debtor's objection to the total amount of D&T's claim and finds that D&T's claim is in the amount of \$86,505.96.

For the reasons stated above, the Court sustains the debtor's objection to D&T's PACA claim based on D&T's untimely filing of the required notice of intent and overrules the debtor's objection to the amount of D&T's claim against the estate. The Court makes no determination concerning the validity of D&T's § 503(b)(9) claim at this time.

IT IS SO ORDERED.


Ben Barry
United States Bankruptcy Judge
Dated: 04/14/2014

cc: Special Service List