

**United States Bankruptcy Court
District of New Mexico**

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
GARDEN FRESH FRUIT MARKET, INC.
Debtor.

No. 7-99-16182 SA

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON
MOTION FOR CONTEMPT**

This matter came before the Court on the Motion for Contempt (docket #81) filed by Creditors Produce America, Inc. and Mesa Produce, Inc. ("Creditors"), and the objection thereto filed by Garden Fresh Fruit Market, Inc. ("Debtor"), and Robert Roberti, Sr., Carol A. Roberti and Lori Ann Roberti ("Robertis"). Produce America, Inc. appeared through its attorney Hensley, Shanor & Martin, L.L.P. (Stanley K. Kotovsky, Jr.). Mesa Produce, Inc. appeared through its attorney The New Mexico Law Group, P.C. (Robert N. Singer). The Debtor and the Robertis appeared through their attorney Charles E. Anderson. Creditors ask the Court to find Debtor and the Robertis in contempt of court for willfully failing to abide by this Court's November 16, 1999 Order (docket #16, Order Denying Motion for Permission to Use Cash Collateral), and seek their attorney's fees and costs.

FACTS

On October 28, 1999, the United States District Court for the District of New Mexico issued a Temporary Restraining

Order in Civ 99-1243-LH, reciting that plaintiff claimed to be a creditor of Debtor under Section 5(c) of the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. § 499e(c), and prohibiting Debtor, its agents, officers and banking institutions from making any payments until Produce America was paid \$240,731.45, the amount of its PACA lien. On November 3, 1999, Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code. On November 4, 1999, Debtor filed an emergency motion for permission to use cash collateral. Produce America responded with a motion for turnover of PACA trust funds. The Court heard and denied the cash collateral motion on November 5, 1999, effectively shutting down operations of the Debtor. On January 27, 2000, the Court entered an Order converting the case to Chapter 7. Yvette J. Gonzales was appointed Chapter 7 Trustee, and on March 7, 2000 she filed her Report of No Distribution and Abandonment of Assets. The case was closed on April 2, 2001. On April 26, 2001, Produce America filed a motion to reopen the case to file the contempt motion, which was reopening motion granted.

The contempt motion alleges that Debtor and the Robertis issued checks on one of Debtor's checking accounts during the month of January, 2000 totaling \$21,387.29. The Debtor and

the Robertis filed a Response to the contempt motion (docket #85), claiming that in January, 2000, Robert Roberti, Sr. attempted to restart the debtor's operations. To reopen the store, he deposited a worker's compensation rebate check payable to Debtor in the amount of \$19,799 in the Bank First account, and then in January expended \$19,400 for inventory and miscellaneous expenses. Two days after the store had been restocked, the New Mexico Taxation and Revenue Department closed it down. Carol Roberti, wife of Robert Roberti, and Lori Ann Roberti, daughter of Robert Roberti, were not actively involved in the business and had no knowledge of the business. Lori Ann signed checks, but had no other knowledge or involvement with the business. The Debtor and Robertis claim that they were involved in a workout with their PACA creditors and taxing authorities, and that Mr. Roberti "jumped the gun" by reopening the store prematurely, and that no party acted willfully or intentionally in disregard of the Court's order. Finally, they claim that they did not benefit from the use of the funds, and in fact lost the \$19,000 that was put into the account.

Produce America filed a supplemental brief (docket #98) that argues the following points: 1) PACA creates a statutory trust over produce-related assets and receivables or proceeds;

2) failure to maintain a PACA trust is unlawful; 3) the trust extends to all inventory of the purchaser gained from a comingled account and any other assets acquired with the trust funds; 4) the party challenging the scope of the trust has the burden of proof, and 5) Debtor cannot meet its burden of proving that the insurance check was not a PACA asset.

Mesa Produce filed a supplemental brief (docket #97) that adopts the arguments of Produce America, but also argues that no evidence was presented at the hearing that the insurance proceeds were not PACA assets. Mesa Produce asks the Court to fashion appropriate sanctions including an award of damages, costs, and attorney fees.

Debtor and the Robertis also filed a brief (docket #99). Their main argument is that PACA trust assets are not property of a bankruptcy estate and therefore PACA trust assets can never be cash collateral, so there was no violation of the cash collateral order. They also argue that there is nothing in the record that proves that Creditors are qualified PACA creditors entitled to the PACA assets. Debtor also agrees that no evidence was presented on whether the insurance check was a PACA asset, and asks the Court to reopen the hearing to take additional evidence. They also argue that the funds were

expended in an attempted workout and that the Creditors acquiesced in the use of the proceeds.

The Creditors, Debtor, and the Robertis filed a stipulation of facts for the contempt hearing in lieu of testimony. Some of the relevant facts were as follows: The Robertis were aware of the issuance of the temporary restraining order at the time it was issued. Debtor maintained accounts in local banks including Bank First in Albuquerque. Debtor and Robert Roberti were aware of the entry of the Order denying permission to use cash collateral; Carol Roberti and Lori Ann Roberti were either aware of the order or should have been aware of the order. Carol Roberti was president of Debtor. Robert Roberti, Sr. was the chief operating officer of Debtor. Lori Ann Roberti was an officer of the Debtor. Attached to the Motion for Contempt was an affidavit of attorney Robert Singer, and the facts in that affidavit are true and correct.

The Singer affidavit stated that he had obtained copies of bank records at Bank First pursuant to a subpoena, that between January 3, 2000 and January 24, 2000 deposits were made into the account of \$21,496.80, and that between January 2, 2000 and January 27, 2000, seven checks cleared, and the payees were Bob Roberti (3 checks), cash (2 checks), Fruit Stand (1 check), and

an illegible payee (1 check). On August 22, 2000 Debtor instructed Bank First to issue a cashier's check for the remaining balance of \$1,104.08. During the time when the principals of Debtor were issuing checks, Mesa Produce and other produce suppliers were unpaid and Debtor maintained insufficient PACA trust funds.

The parties further stipulated that each Roberti knew or should have known at the time the checks were issued that the issuance was violative of the Bankruptcy Court's Order denying permission to use cash collateral.

LAW

1. Bankruptcy Code section 541(d) provides that property in which the debtor holds only legal title, and not an equitable interest, becomes property of the estate only to the extent of the debtor's legal title but not to the extent of any equitable interest. 11 U.S.C. § 541(b).

2. The Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499a-499s creates a trust for the benefit of commodity suppliers. In re Morabito Bros., Inc., 188 B.R. 114, 116 (Bankr. W.D. N.Y. 1995).

3. PACA assets are not property of a bankruptcy estate. Dairy Fresh Foods, Inc. v. Ramette (In re Country Club Market,

Inc.), 175 B.R. 1005, 1009 (D. Minn. 1994); In re Morabito Bros., Inc., 188 B.R. 114, 116 (Bankr. W.D. N.Y. 1995).

4. The burden of proof is on the PACA debtor to show that a disputed asset is from a non-trust source. Tom Lange Co., Inc. v. Kornblum & Co., Inc. (In re Kornblum & Co., Inc.), 81 F.3d 280, 287 (2nd Cir. 1996)(citing cases.) See also Sanzone-Palmisano Company v. M. Seaman Enterprises, Inc., 986 F.2d 1010, 1014 (6th Cir. 1993)("We hold that a purchaser, or PACA debtor, has the burden of showing that disputed assets were not acquired with proceeds from the sale of produce or produce-related assets.")

5. Debtor and the Robertis have not met their burden of proof to establish that the insurance rebate check was not a PACA asset.

6. Cash collateral is cash, deposit accounts, or cash equivalents in which the estate and an entity other than the estate have an interest. 11 U.S.C. § 363(a). The Court finds that the deposits in January were cash collateral because, even if they represented PACA assets, the Debtor claimed at least bare legal title, and Creditors claimed equitable title. Therefore, both parties had an interest.

7. The narrow issue in this case is not whether the insurance check was a PACA asset or whether the insurance check was

property of the estate. Rather, the issue is whether the Debtor and Robertis violated the explicit terms of the Court's Order Denying Permission to Use Cash Collateral.

8. Creditors have made a prima facie case that Debtor and the Robertis intentionally used funds that were on deposit at Bank First, without permission or Court order. Furthermore, they knew or should have known that use of the money was in actual violation of the Court's order, regardless of the then status of the evidentiary proof that Produce America, Inc. and Mesa Produce were qualified PACA creditors.

9. The Robertis should be found in contempt for their violation of the Bankruptcy Court's Order. The actions complained of took place during the Chapter 11 phase of this case. The Debtor has since converted to chapter 7, however, and at this point is an empty shell. Therefore, nothing would be served by finding the Debtor in contempt.

10. To the extent that the funds used were PACA assets, it also appears that the Debtor and the Robertis violated the terms of the October 28, 1999, United States District Court's Temporary Restraining Order.

11. The Bankruptcy Court may not have jurisdiction over claims to the PACA funds. See Rajala v. Guaranty Bank & Trust (In re United Fruit & Vegetable, Inc.), 191 B.R. 445, 453 (Bankr. D.

Ka. 1996). However, it is not necessary to decide that issue in this case. The District Court has independent federal question jurisdiction over rights to a PACA trust¹. Id. In fact, there is a pending case regarding this Trust, which provides a larger context for determining the rights of all the various parties vis-a-vis each other and the funds they are contending over. This Court believes therefore that this matter should be "transferred" to the Federal District Court for consideration.

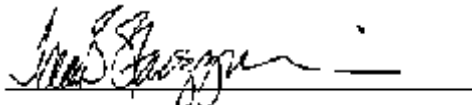
12. The Bankruptcy Court does have jurisdiction over enforcing its orders, however. The Court finds that the Robertis should be fined \$1,000.00 for their intentional violation of the Court's cash collateral order, and should be liable for reasonable attorney fees incurred by the Creditors for bringing this motion.

CONCLUSION

An appropriate order will be entered assessing a \$1,000.00 fine against the Robertis as a joint and several liability. Within 14 days of the entry of this Order, creditors' attorneys should submit copies of billing statements that detail the time spent and tasks performed in pursuing this relief. The Court

¹ The District Court may also have jurisdiction over other PACA claimants which are not before the Bankruptcy Court but are proper parties to a PACA dispute.

retains jurisdiction pending entry of an Order on attorney fees. Creditors' attorneys will further be instructed to submit a copy of these findings and conclusions to the Federal District Court. The request for an award of damages is denied without prejudice.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on April 12, 2002, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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