

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

In re:

CAFE HOLDINGS CORP., *at el.*,¹

Debtors.

Chapter 11

Case No. 18-_____()

(Joint Administration Requested)

**DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING
THE DEBTORS TO PAY CERTAIN PREPETITION CLAIMS (A) ARISING UNDER
THE PERISHABLE AGRICULTURAL COMMODITIES ACT AND SIMILAR TRUST
FUND STATUTES, (B) OF OTHER LIEN CLAIMANTS, AND (C) OF CERTAIN
CRITICAL VENDORS AND (II) GRANTING CERTAIN RELATED RELIEF**

The above-captioned debtors and debtors in possession (collectively, the “**Debtors**”) hereby submit this motion for the entry of interim (the “**Interim Order**”) and final (the “**Final Order**”) orders, substantially in the forms attached hereto, (a) authorizing, but not directing, the Debtors, in their sole discretion, to pay, in the ordinary course of business as such claims come due: (i) all prepetition claims arising under the Perishable Agricultural Commodities Act of 1930 (as amended, modified, or supplemented from time to time, “**PACA**”), and any all state statutes of similar effect,² of protected vendors (collectively, the “**PACA Vendors**,” whose claims shall be identified herein collectively as the “**PACA Claims**”); (ii) prepetition claims upon which a lien may arise as a result of a possessory lien (collectively the “**Lien Claims**,” the holders of which shall be identified herein as the “**Lien Claimants**”); and (iii) certain prepetition claims of critical vendors (collectively, the “**Critical Vendors**,” whose claims shall be identified herein as the

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: Cafe Holdings Corp. (7910); Cafe Enterprises, Inc. (4946); CE Sportz LLC (2009); and CES Gastonia LLC (0863). The location of the Debtors’ corporate headquarters is 4324 Wade Hampton Blvd., Suite B, Taylors, South Carolina 29687.

² Some states have enacted statutes granting protection similar to that of PACA. Accordingly, the relief requested in the Motion with respect to PACA Vendors and PACA Claims is also requested with respect to the goods, claims and claimants under those state statutes having an effect and purpose similar to PACA.

“**Critical Vendor Claims**”) that are essential to the Debtors’ business operations, (b) authorizing the Debtors’ banks and financial institutions (collectively, the “**Banks**”) to receive, process, honor, and pay all checks and electronic payment requests relating to the foregoing, and (c) granting related relief. In support of this motion, the Debtors rely on the *Declaration of Eric Easton in Support of Chapter 11 Petitions and First Day Relief* (the “**First Day Declaration**”) and the declaration of Eric Easton in support of this Motion (the “**Easton Declaration**”), which is filed contemporaneously with this Motion. In further support of this Motion, the Debtors respectfully state as follows.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and Local Civil Rule 83.IX.01, D.S.C. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). The Debtors confirm their consent, pursuant to Rule 7008 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), to the entry of a final order by the Court in connection with this motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

2. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The bases for the relief requested herein are sections 101(2), 105(a), 363, 1107(a), and 1108 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “**Bankruptcy Code**”) and Rules 1015(b) and 6003 of the Bankruptcy Rules.

BACKGROUND

4. On the date hereof (the “**Petition Date**”), each of the Debtors commenced with this Court a voluntary case under chapter 11 of the Bankruptcy Code. Each Debtor is authorized to

continue to operate its business and manage its properties as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Concurrently with the filing of this motion, the Debtors filed a motion requesting procedural consolidation and joint administration of these chapter 11 cases pursuant to Bankruptcy Rule 1015(b). As of the date hereof, no trustee, examiner, or statutory committee has been appointed in these chapter 11 cases.

5. Additional information regarding the Debtors, including their business operations, corporate and capital structure, and the events leading to the Petition Date, is more fully set forth in the First Day Declaration.³

RELIEF REQUESTED

6. By this Motion, the Debtors seek entry of an interim order, substantially in the form attached to this Motion as **Exhibit B** (the “**Interim Order**”), and, following a final hearing, entry of a final order substantially in the form attached to this Motion as **Exhibit C** (the “**Final Order**”) and collectively with the Interim Order, the “**Proposed Orders**”) authorizing, but not directing, the Debtors, in their sole discretion, to pay the PACA Claims, Lien Claims, and Critical Vendor Claims, (each, a “**Claim**,” and collectively, the “**Claims**”), subject to the terms, conditions, and limitations set forth herein.

THE CLAIMS

7. As described in detail below, it is critical to the Debtors’ business operations that the Debtors continue to receive goods and services, as applicable, from the PACA Vendors, the Lien Claimants, and the Critical Vendors, (each a “**Vendor**,” and collectively, the “**Vendors**”). The Debtors believe that without the relief requested herein, many of the Vendors may cease

³ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the First Day Declaration.

delivering goods and providing services to the Debtors, which could have devastating consequences for the Debtors' business operations and their efforts to reorganize in these chapter 11 cases.

A. PACA Claims

8. To ensure that the Debtors continue to receive a constant supply of fresh fruits and vegetables post-petition, the Debtors seek authority, but not direction, in their sole discretion, to continue to pay, in the ordinary course of business and consistent with their historical practices, prepetition claims that are subject to protection under PACA, as determined by the Debtors in their sole discretion.

9. Congress enacted PACA to regulate the sale of “perishable agricultural commodities.” 7 U.S.C. § 499a; *see Endico Potatoes, Inc. v. CIT Group/Factoring*, 67 F.3d 1063, 1067 (2d Cir. 1995). Under PACA, the term “perishable agricultural commodity” is generally defined as “fruits and fresh vegetables of every kind and character” “whether or not frozen or packed in ice.” 7 U.S.C. § 499a(b)(4). PACA provides various protections to fresh fruit and vegetable sellers, including the establishment of a statutory constructive trust (a “**PACA Trust**”), consisting of a purchaser’s entire inventory of food or other derivatives of perishable agricultural commodities, the products derived therefrom and the proceeds related to any sale of the commodities or products (collectively, the “**PACA Trust Assets**”). *See* 7 U.S.C. § 499e(c)(2). Assets subject to a PACA Trust are preserved as a non-segregated floating trust and may be commingled with non-trust assets. *See Nickey Gregory Co., LLC v. AgriCap, LLC*, 597 F.3d 591, 595 (4th Cir. 2010). However, bankruptcy courts have held that PACA Trust Assets are not property of a debtor’s estate. *See id., In re CFP Liquidating Estate*, 405 B.R. 694 (Bankr. D. Del.

2009); *In re Long John Silver's Restaurants, Inc.*, 230 B.R. 29, 32 (Bankr. D. Del. 1999); *Morris Okun, Inc. v. Harry Zimmerman, Inc.*, 814 F. Supp. 346, 348 (S.D.N.Y. 1993).

10. PACA requires that certain procedural steps be taken by a seller of perishable agricultural commodities in order to preserve its rights as a trust beneficiary. Specifically, a PACA Vendor must provide written notice (a “**PACA Notice**”) to the purchaser of such goods and its intent to preserve the benefits of the PACA Trust. *See In re HR. Hindle & Co.*, 149 B.R. 775, 785 (Bankr. E.D. Pa. 1993); *In re Richmond Produce Co.*, 112 B.R. 364 (Bankr. N.D. Cal. 1990). Written notice under PACA may be accomplished by either (a) including the statutorily-mandated language on the face of the vendor’s invoices or (b) providing written notice to the purchaser of the PACA goods within 30 days after the time payment is due. Beneficiaries of a PACA Trust that adhere to the statutory notice requirements are entitled to prompt payment from the PACA Trust Assets ahead of secured and unsecured creditors of a debtor’s estate. *See “R” Best Prod., Inc. v. 646 Corp.*, No. 00-CV-8536, 2002 WL 31453909, at *1 (S.D.N.Y. Oct. 31, 2002). However, a PACA Vendor’s failure to comply with the notice requirements renders its claim a general unsecured claim in a debtor’s chapter 11 case. *See In re HR. Hindle*, 149 B.R. at 786.

11. PACA’s application is limited to sales to commission merchants, brokers, and dealers. 7 U.S.C. § 499e(c). “Dealer,” as such term is defined in PACA, is “any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce.” 7 U.S.C. § 499a(b).

12. The Debtors believe that a certain portion of the goods purchased from Vendors may qualify as “perishable agricultural commodities” under PACA.⁴ As a result, insofar as those

⁴ The Debtors do not believe that their vendors have sold them “livestock,” “poultry” or any other eligible goods covered by the Packers and Stockyards Act of 1921 as amended, 7 U.S.C. § 181 et seq. (“PASA”), which prescribes the conditions of operations for businesses dealing in livestock. In the unlikely event, however, that any supplier claims fall under PASA, the Debtors submit that it is in the best interests of the Debtors’ estates,

Vendors abide by the notice requirements of PACA, such Vendors will be eligible to assert PACA Claims granting them priority ahead of all other secured and unsecured creditors in the Debtors' chapter 11 cases. Accordingly, payment of PACA Claims at this time will not prejudice or affect the amount available for distributions to other creditors of the Debtors. To ensure that the supply of fresh produce continues unimpeded, it is imperative that the Debtors be authorized to pay all prepetition and post-petition PACA Claims in the ordinary of business and consistent with their historical practices.

13. As of the Petition Date, the Debtors estimate that PACA Vendors may hold PACA Claims in an amount up to \$254,000 in the aggregate for PACA goods delivered prior to the Petition Date. Pursuant to this Motion, the Debtors are seeking authority to pay up to \$50,000 of PACA Claims in the ordinary course of business upon entry of the Interim Order.

14. Any PACA Vendor who accepts payment from the Debtors in satisfaction of its valid PACA Claim will be deemed to have waived any and all claims of whatever type, kind, or priority, against the Debtors, their property, their estates, and any PACA Trust Assets, but only to the extent that payment has been received by such PACA Vendor on account of its PACA Claim.

B. Lien Claims

15. In connection with the day-to-day operations of their businesses, the Debtors utilize certain third-party freight carriers and warehousemen to transport and/or store goods necessary for the operation of their business. As a result, at any point in time, freight carriers or warehousemen may be in possession of certain of the Debtors' goods or equipment and may have claims for

creditors and parties in interest to treat such claims in a manner identical to the PACA Claims. PASA creates a statutory trust scheme that is virtually identical to PACA in respect of delivery of livestock and other eligible goods. *See In re W.L. Bradley Co.*, 75 B.R. 505, 509 (Bankr. E.D. Pa. 1987) ("The Legislative history expressly notes that the [PACA Trust] was modeled on the trust amendment to the Packers and Stockyards Act."). Accordingly, for the purposes of this Motion and any related orders, the PACA Procedures and the term "PACA Claims" shall also incorporate any claims arising under PASA.

transportation, storage, or services related thereto. The Lien Claimants could potentially assert possessory liens against the Debtors' property in their possession for amounts the Debtors owe to them.

16. Pursuant to section 362(b)(3) of the Bankruptcy Code, the act of perfecting such liens, to the extent consistent with section 546(b) of the Bankruptcy Code, is expressly excluded from the automatic stay. Under section 546(b) of the Bankruptcy Code, a debtor's lien avoidance powers "are subject to any generally applicable law that . . . 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). Additionally, the Lien Claimants will be in actual possession of the Debtors' goods and may withhold such goods pending a determination of their claim and adjudication of their lien rights.

17. If the Debtors are unable to pay the Lien Claims, they risk losing access to goods and equipment that are critical to the continued operation of their business, which could immediately and irreparably harm their business to the detriment of all stakeholders.

18. Accordingly, the Debtors seek authority, but not direction, in their sole discretion, to pay and discharge, on a case-by-case basis, Lien Claims that the Debtors believe have created, or could give rise to, a lien against the Debtors' property or equipment, regardless of whether such Lien Claimants have already perfected their interests, which would impair the Debtors' assets or ability to operate and where the Debtors believe satisfaction of such amounts is in the best interests of the Debtors' estates. The Debtors estimate that the Lien Claimants may have as much as \$50,000 in Lien Claims against the Debtors as of the Petition Date. Pursuant to this Motion, the Debtors are seeking authority to pay up to \$25,000 in Lien Claims upon entry of the Interim Order.

19. To the extent that the Debtors make any payments with respect to a Lien Claim, no such payment shall be deemed a waiver of the rights of the Debtors and their estates to challenge the extent, validity, perfection, or possible avoidance of such liens. Further, the Debtors reserve the right, but shall not be required, to require a Lien Claimant to enter into a Vendor Agreement (as defined herein) as a condition to receiving payment of its Lien Claim.

C. Critical Vendor Claims

20. In the ordinary course of business, the Debtors rely on certain Critical Vendors for the delivery of goods and services that are critical to the continued and uninterrupted operation of the Debtors' business. The Critical Vendors are generally those parties that (i) provide maintenance services and goods, software services, and other services and materials related to the health, safety, and general upkeep of business operations or (ii) supply, either directly or as a distributor, food, alcohol, and goods related to the preparation thereof for the Debtors' restaurants.

21. To operate their restaurants, each week, the Debtors receive a variety of food and non-food items and third-party services related to food preparation, health and safety of customers and employees, and general restaurant operations.⁵ If the delivery of these materials and services were stopped or delayed, the Debtors would be extremely disadvantaged in a highly competitive market segment and, more importantly, be unable to operate their restaurants.

22. The Critical Vendors include the products, materials and services that are absolutely critical to the Debtors' ability to operate its restaurants on a day-to-day basis. The Debtors believe the failure to pay the Critical Vendor Claims would, in the Debtors' business judgment, result in the Critical Vendors refusing to provide goods and/or services to the Debtors

⁵ Certain Critical Vendor Claims may also qualify as PACA Claims as described above. For purposes of this Motion and the Proposed Orders, Claims that the Debtors seek to pay as PACA Claims are not included in the amount estimated or sought to be paid as Critical Vendor Claims.

post-petition and cause an immediately devastating effect on the Debtors' ability to operate their restaurants. Moreover, the delay attendant to the Debtors changing from a Critical Vendor to another vendor of similar products (assuming one could be located) would very likely delay the Debtors' ability to operate its business which would be extremely detrimental to the Debtors' operations and more costly.

23. The Debtors and their advisors have critically examined whether the payment of Critical Vendor Claims is necessary, will ameliorate immediate and irreparable harm to the Debtors' business operations, and will ensure the Debtors have access to adequate trade credit post-petition. Specifically, the Debtors have undertaken a thorough review of their accounts payable and their list of prepetition vendors to identify those vendors who are essential to the Debtors' operations. The Debtors then considered the following aspects of the relationship with their vendors to determine which vendors should constitute Critical Vendors under this motion: (a) whether the vendor is likely to continue providing goods and/or services to the Debtors absent payment of prepetition amounts owed; (b) whether the vendor could be easily replaced with an alternative source for the goods and/or services provided; and (c) the length of time that would be required to find a replacement vendor.

24. After evaluating the foregoing criteria, the Debtors estimated the total payments that would be necessary to ensure the continued supply of critical goods and services to the Debtors and, further, considered the Debtors' urgent need to continue to receive goods and services uninterrupted, their ability to find alternate sources and the likelihood that a vendor would extend trade terms post-petition despite the Debtors' failure to pay such vendors' pre-petition outstanding trade debt. Based on the foregoing considerations, the Debtors were able to identify the Critical Vendors whose cessation of deliveries or services could cripple the Debtors' restaurants and,

therefore, result in immediate and irreparable harm to these Debtors' estates. Additionally, due to the Debtors' prepetition payment terms with the Critical Vendors, certain Critical Vendor Claims will relate to goods supplied to the Debtors within the twenty day statutory period covered under section 503(b)(9) of the Bankruptcy Code.

25. The Debtors have identified approximately \$230,000 in amounts owed to Critical Vendors on account of prepetition Critical Vendor Claims, and they believe that approximately \$10,000 of these amounts relate to transactions involving the delivery of goods to the Debtors in the twenty-day period prior to the Petition Date. The Debtors are seeking authority to pay up to \$50,000 in Critical Vendor Claims upon entry of the Interim Order.

26. The Debtors have further developed certain procedures (for which they seek this Court's approval) that, when implemented, will ensure the Debtors derive value for payments to Critical Vendors such that vendors receiving payment of Critical Vendor Claims will continue to supply trade credit necessary to the Debtors' operations on a post-petition basis.

27. The Debtors will use their commercially reasonable efforts to condition payment of Critical Vendor Claims upon each Critical Vendor's agreement to continue supplying services and goods on "Customary Trade Terms."⁶ The Debtors request that the Court approve the form of a Critical Vendor's agreement to extend Customary Trade Terms and otherwise govern the terms of payment and post-petition relationship of the parties, which is attached hereto as **Exhibit D** (the "Vendor Agreement").

⁶ As used herein, "Customary Trade Terms" are defined as the normal and customary trade terms, practices and programs (including credit limits, pricing, cash discounts, timing of payments, allowances, rebates, normal product mix and availability, and other applicable terms and programs) that were most favorable to the Debtors and in effect between the applicable vendor and the Debtors on a historical basis for the period within 180 days of the Petition Date, or such other trade terms, practices, and programs that are at least as favorable to the Debtors as those that were in effect during such time.

28. Notwithstanding the Debtors' commercially reasonable efforts to the contrary, certain Critical Vendors may refuse to enter into a Vendor Agreement and/or honor Customary Trade Terms as a condition to payment of their Critical Vendor Claims. Therefore, the Debtors also request that they be granted the authority to pay Critical Vendor Claims held by such Critical Vendors without entry into a Vendor Agreement (or on terms that differ from the Vendor Agreement attached hereto as **Exhibit D**) if the Debtors conclude that such payment is necessary for the preservation of the Debtors' estates. For those Critical Vendors that have agreed to provide goods or services to the Debtors on terms different from their Customary Trade Terms, the Debtors will use reasonable efforts to document such terms in a written agreement, and such terms shall, for purposes of the remedies hereunder, be deemed a Vendor Agreement.

D. Breach of a Vendor Agreement

29. In addition, the Debtors request that if any party has entered into a Vendor Agreement and thereafter ceases to provide products or services in accordance with the Vendor Agreement: (a) the Debtors may take any and all appropriate steps to recover from such Vendor any payments made to it on account of its prepetition claim to the extent that such payments exceed the post-petition amounts then owing to such party; (b) upon recovery by the Debtors, any prepetition claim of such party shall be reinstated as if the payment on account thereof had not been made; and (c) if an outstanding post-petition balance is due from the Debtors to such party, (i) the Debtors may elect to re-characterize and apply any payment made pursuant to the relief requested by this Motion to such outstanding post-petition balance, and (ii) such party will be required to repay to the Debtors such paid amounts that exceed the post-petition obligations then outstanding without the right of any setoffs, claims, provisions for payment of any claims, or otherwise.

BASIS FOR RELIEF

A. Payment of the PACA Claims, Lien Claims, and Critical Vendor Claims Is Warranted Under the Doctrine of Necessity

30. Courts generally acknowledge that, under appropriate circumstances, they may authorize a debtor to pay (or provide special treatment for) certain prepetition obligations. *See, e.g., In re Just for Feet, Inc.*, 242 B.R. 821, 824–25 (Bankr. D. Del. 1999) (noting that, in the Third Circuit, debtors may pay prepetition claims that are essential to the continued operation of the debtor’s business); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (granting the debtor the authority to pay prepetition wages); *Armstrong World Indus., Inc. v. James A. Phillips, Inc.*, (*In re James A. Phillips, Inc.*), 29 B.R. 391, 398 (Bankr. S.D.N.Y. 1983) (granting the debtor the authority to pay prepetition claims of suppliers who were potential lien claimants). When authorizing payments of certain prepetition obligations, courts have relied upon several legal theories rooted in sections 363(b) and 105(a) of the Bankruptcy Code.

31. Consistent with a debtor’s fiduciary duties, where there is a sound business purpose for the payment of prepetition obligations, and where the debtor is able to “articulate some business justification, other than the mere appeasement of major creditors,” courts have authorized debtors to make such payments under section 363(b) of the Bankruptcy Code. *See, e.g., In re Ionosphere Clubs*, 98 B.R. at 175 (finding that a sound business justification existed to pay prepetition wages); *In re James A. Phillips, Inc.*, 29 B.R. at 397 (relying upon section 363 as a basis to allow a contractor to pay the prepetition claims of suppliers who were potential lien claimants).

32. Courts have also authorized payment of prepetition claims in appropriate circumstances pursuant to section 105(a) of the Bankruptcy Code. Section 105(a) of the Bankruptcy Code, which codifies the inherent equitable powers of the bankruptcy court, empowers the bankruptcy court to “issue any order, process, or judgment that is necessary or appropriate to

carry out the provisions of this title.” 11 U.S.C. § 105(a). Under section 105(a), courts may permit pre-plan payments of prepetition obligations when such payments are essential to the continued operation of the debtor’s business and, in particular, where nonpayment of a prepetition obligation would trigger a withholding of goods or services essential to the debtors’ business reorganization plan. *See In re UNR Indus.*, 143 B.R. 506, 520 (Bankr. N.D. Ill. 1992) (permitting the debtor to pay prepetition claims of suppliers or employees whose continued cooperation is essential to the debtors’ successful reorganization); *In re Ionosphere Clubs*, 98 B.R. at 177 (finding that section 105 empowers bankruptcy courts to authorize payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor).

33. In addition to the authority granted a debtor in possession under sections 363(b) and 105(a) of the Bankruptcy Code, courts have developed the “doctrine of necessity” or the “necessity of payment” rule, which originated in the landmark case of *Miltenberger v. Logansport, C. & S. W.R. Co.*, 106 U.S. 286 (1882). Since *Miltenberger*, courts have expanded their application of the doctrine of necessity to cover instances of a debtor’s reorganization. *See, e.g., Southern Ry. Co., v. Flournoy*, 301 F. 2d 847, 852 (4th Cir. 1962) (“The principle of necessity of payment [espoused in *Miltenberger*] has since been carried into different factual surroundings as the basis for granting superpriority to business-operating accounts.”); *In re United Am. Inc.*, 327 B.R. 776, 782 (Bankr. E.D. Va., 2005)(explaining that the “doctrine of necessity requires three prongs to be met: (1) the [prepetition creditor] must be necessary for the successful reorganization of the debtor; (2) the transaction must be in the sound business judgment of the debtor; and (3) the favorable treatment of the [prepetition creditor] must not prejudice other unsecured creditors.”); *Dudley v. Mealey*, 147 F.2d 268, 271 (2d Cir. 1945) (holding, in a hotel reorganization matter, that the court was not “helpless” to apply the rule to supply creditors where the alternative was the cessation of

operations); *In re Just for Feet*, 242 B.R. at 824–25 (noting that debtors may pay prepetition claims that are essential to continued operation of business); *In re Colum. Gas Sys., Inc.*, 171 B.R. 189, 191–92 (Bankr. D. Del. 1994) (same).

34. The necessity of payment doctrine is designed to foster the rehabilitation of a debtor in reorganization cases, which courts have recognized is “the paramount policy and goal of Chapter 11.” *In re Ionosphere Clubs*, 98 B.R. at 176; *In re Just For Feet*, 242 B.R. at 826 (finding that payment of prepetition claims to certain trade vendors was “essential to the survival of the debtor during the chapter 11 reorganization.”); *see also In re Quality Interiors, Inc.*, 127 B.R. 391, 396 (Bankr. N.D. Ohio 1991) (“[P]ayment by a debtor-in-possession of pre-petition claims outside of a confirmed plan of reorganization is generally prohibited by the Bankruptcy Code”, but “[a] general practice has developed . . . where bankruptcy courts permit the payment of certain prepetition claims, pursuant to 11 U.S.C. § 105, where the debtor will be unable to reorganize without such payment.”); *In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (approving payment of prepetition unsecured claims of tool makers as “necessary to avert a serious threat to the Chapter 11 process”); *Burchinal v. Cent. Wash. Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484, 1490 (9th Cir. 1987) (finding that it is appropriate to provide for the “unequal treatment of pre-petition debts when [such treatment is] necessary for rehabilitation”). The Debtors submit that the relief requested represents a sound exercise of the Debtors’ business judgment, and will benefit the Debtors’ estates and their creditors by allowing the Debtors’ business operations to continue without interruption.

35. The authority, but not direction, to satisfy the PACA Claims, Lien Claims, and Critical Vendor Claims in the initial days of these chapter 11 cases without disrupting their business operations will send a clear signal to the marketplace, including key suppliers and

customers, that the Debtors are willing and, importantly, able to conduct business as usual during their chapter 11 cases. *See In re Bi-Lo, LLC, C/A 09-02140-hb* (Bankr. D.S.C. April 9, 2009) (granting similar relief).

36. The Debtors' operations also require the seamless coordination of many unrelated third-parties at every stage in the supply chain. Collectively, the Debtors' supply chain ensures that the Debtors receive all of the food, products, and supplies necessary to operate their businesses and provide their customers with the high-quality food expected under their brand. Any significant disruption in the Debtors' supply chain, such as a vendor halting delivery of certain necessary goods and/or services, could result in the Debtors' not having sufficient food, products, and supplies to operate their business. Given the highly-competitive local and regional casual restaurant markets, such a result could cause a devastating impact on the Debtors' business and significantly impair their restructuring efforts.

37. Moreover, Lien Claimants may be entitled under applicable non-bankruptcy law to assert certain possessory or other liens on the Debtors' property (notwithstanding the automatic stay under section 362 of the Bankruptcy Code) in an attempt to secure payment of their prepetition claim. As described above, under section 362(b)(3) of the Bankruptcy Code, the act of perfecting such liens, to the extent consistent with section 546(b) of the Bankruptcy Code, is expressly excluded from the automatic stay. As a result, the Debtors anticipate that certain of the Lien Claimants may assert and/or perfect liens, simply refuse to turn over goods in their possession, or stop performing their ongoing obligations.

B. Payment of Allowed PACA Claims In the Ordinary Course of Business Is Warranted.

38. The prompt and full payment of PACA Claims should be authorized by this Court. As described above, assets governed by PACA do not constitute property of the Debtors' estates.

See Nickey Gregory Co., LLC, 597 F. 3d at 595. As a result, the distribution of assets to the holders of PACA Claims falls outside the priority scheme set forth in the Bankruptcy Code, and such holders are entitled to payment from the PACA Trust ahead of the Debtors' other creditors. *See id.* at 599 (noting "the commodities sellers' beneficial interest in the trust assets...is superior to secured creditors of the trustee"). Moreover, the disposition of PACA Trust Assets is subject to the jurisdiction of the bankruptcy court. *See Monterey Mushrooms, Inc. v. Carolina Produce Distribs., Inc.*, 110 B.R. 207, 209 (W.D.N.C. 1990); *Allied Growers Co-Op, Inc. v. United Fruit & Produce Co.*, 86 B.R. 14, 16 (Bankr. D. Conn. 1988). Accordingly, the relief requested herein does not prejudice the Debtors' creditors or any party in interest in the chapter 11 cases.

39. Furthermore, payment of allowed PACA Claims will inure to the benefit of the Debtors' estates by preserving goodwill between the Debtors and the PACA Vendors. Any delays in satisfying amounts owed to PACA Vendors could adversely affect the Debtors' ability to obtain fresh produce, thereby undercutting the Debtors' efforts in connection with these chapter 11 cases. Failing to pay allowed PACA Claims in the ordinary course of business could subject the Debtors to numerous claims and adversary proceedings, including motions by PACA Vendors for relief from the automatic stay and/or injunctive relief, which would result in the unnecessary expenditure of time, effort, and money by the Debtors, their management team, and their professional advisors.

40. Lastly, in certain circumstances, officers or directors of a corporate entity who are in a position to control trust assets but breach the fiduciary duty to preserve those assets may be held personally liable under PACA. *See Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280, 283 (9th Cir. 1997); *see also Golman-Hayden Co., Inc. v. Fresh Source Produce, Inc.*, 217 F.3d 348, 350 (5th Cir. 2000) (court will inquire (a) whether the individual's involvement with the corporation was sufficient to establish legal responsibility and (b) whether the individual, in failing to exercise

any appreciable oversight of the corporation's management, breached a fiduciary duty owed to the PACA creditors, to determine personal liability). Thus, to the extent that any valid obligations arising under PACA remain unsatisfied by the Debtors, the Debtors' officers and directors may be subject to lawsuits during the pendency of these chapter 11 cases. Any such lawsuit (and the ensuing potential liability) would distract the Debtors and their officers and directors in their attempt to implement a successful reorganization strategy and, moreover, could lead to the assertion of substantial indemnification claims under the Debtors' governing documents, employment agreements, and applicable laws, to the detriment of all of the Debtors' stakeholders.

C. Paying the PACA Claims, Lien Claims, and Certain Critical Vendor Claims Now Will Not Affect Creditor Recoveries.

41. Much of the relief requested herein will not affect the recovery of creditors in these chapter 11 cases. As stated above, assets governed by PACA do not constitute property of the Debtors' estates. Holders of PACA Claims are entitled to payment from the PACA Trust ahead of the Debtors' other creditors.

42. Additionally, in instances where the amounts owed to Lien Claimants is less than the value of the goods (and senior liens) that could be held to secure a Lien Claim, such parties are arguably fully-secured creditors of the Debtors' estates. Further, a portion of the Critical Vendor Claims relate to transactions where goods were received by the Debtors in the twenty-day period prior to the Petition Date, and holders of those claims who delivered goods to the Debtors in the ordinary course of the Debtors' business are entitled to an administrative expense claim for the value of those goods under section 503(b)(9) of the Bankruptcy Code. In such instances, payment now only provides such parties with what they would be entitled to receive under a plan of reorganization, only without any interest costs that might otherwise accrue during these chapter 11 cases.

43. Thus, payment of PACA Claims, the Lien Claims, and much of the Critical Vendor Claims affects the timing, but not the amount, of such payment. As a result, the Debtors respectfully submit that they should have the authority (but not the direction) to pay such claims, in the ordinary course of business, during the pendency of the chapter 11 cases, to the extent necessary to preserve the going-concern value of the chapter 11 estates.

44. As explained above, it is critical to the Debtors' chapter 11 efforts that they continue to receive goods and services, as applicable, from the Vendors on an uninterrupted basis throughout the chapter 11 process. The Debtors believe that without the relief requested herein, many Vendors may cease delivering goods and providing services to the Debtors, which could have devastating consequences for the Debtors and their estates.

45. Accordingly, for all of the foregoing reasons, the Debtors submit that cause exists for granting the relief requested herein.

D. The Court Should Authorize the Debtors' Banks to Honor Payments in respect of the Claims.

46. The Debtors also request that the Court authorize the Debtors' Banks, when requested by the Debtors in their sole discretion, to receive, process, honor, and pay any and all checks or electronic fund transfers drawn on the Debtors' bank accounts to pay all prepetition obligations described herein, whether such checks or other requests were submitted prior to or after the Petition Date. The Debtors further request that the Banks be authorized to rely on the Debtors' designation of any particular check or electronic payment request as approved pursuant to any order of the Court granting the relief requested in this Motion.

47. Courts in this and other jurisdictions have recognized the importance of critical vendors to certain debtors and granted relief similar to the relief requested herein. *See, e.g., In re Merit Group, Inc.*, C/A 11-03216-hb (Bankr. D.S.C. June 9, 2011); *In re BI-LO, LLC*, C/A 09-

2140-hb (Bankr. D.S.C. April 9, 2009); *In re Polymer Group*, No. 02-05773-jw (Bankr. D.S.C. June 19, 2002); *In re Tropicana Entm't LLC*, No. 08-40856 (Bankr. D. Del. May 30, 2008); *In re Buffets Holdings, Inc.*, No. 08-10141 (Bankr. D. Del. Feb. 13, 2008).

RESERVATION OF RIGHTS

48. Nothing herein or the Proposed Orders (when and if entered), nor as a result of any payment made pursuant to the Proposed Orders (when and if entered), shall be deemed or construed as (a) an admission as to the validity, priority, or amount of any claim against the Debtors or their estates or an approval or assumption of any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code, or (b) a waiver of any of the rights of the Debtors and their estates, or shall impair the ability of the Debtors and their estates, to contest the validity, priority, and amount of any claim or any payment made pursuant to the Proposed Orders (when and if entered).

THE REQUIREMENTS OF BANKRUPTCY RULE 6003 ARE SATISFIED

49. Under Bankruptcy Rule 6003, the Court may authorize the Debtors to satisfy the Claims because such relief is necessary to avoid immediate and irreparable harm. Immediate and irreparable harm exists where the absence of relief would impair a debtor's ability to reorganize or threaten the debtor's future as a going concern. *See In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 36 n.2 (Bankr. S.D.N.Y. 1990) (discussing the elements of "immediate and irreparable harm" in relation to Bankruptcy Rule 4001(c)(2)).

50. As described above, and in the First Day Declaration, the continuity and viability of the Debtors' business operations relies heavily on the uninterrupted delivery of essential food, products, and supplies. The failure of any Vendor to deliver essential food, products, or supplies or to render services to the Debtors would have immediate and detrimental consequences to the

Debtors' businesses and would decrease value to the detriment and prejudice of all of the Debtors' stakeholders. The Debtors cannot risk even the perception that their restaurants will offer anything but the highest level of food and beverage quality and quantity for the duration of these chapter 11 cases. Moreover, it is the Debtors' business judgment that continuation of their positive relationship with the Vendors is critical to their continued operations and greatly increases the likelihood of successfully prosecuting these chapter 11 cases.

51. Accordingly, the Debtors respectfully submit that the relief requested herein is necessary to avoid immediate and irreparable harm and, therefore, Bankruptcy Rule 6003 is satisfied.

WAIVER OF BANKRUPTCY RULE 6004(A)

52. To successfully implement the forgoing, the Debtors seek a waiver of the notice requirements under Bankruptcy Rule 6004(a).

NOTICE

53. Notice of this motion has been provided to the following parties: (i) the Office of the United States Trustee for the District of South Carolina; (ii) the Office of the United States Attorney General for the District of South Carolina; (iii) the Internal Revenue Service; (iv) Atalaya Administrative LLC; (v) ACM Fatz VII LLC; (vi) Midtown Madison Management LLC; (vii) Shrayne Capital, LLC; (viii) Benefit Street Partners; (ix) Milestone Partners; (x) Old Mill Stream, LLC; (xi) Triangle Mezzanine Fund LLLP; (xii) Sysco; (xiii) the holders of the thirty (30) largest unsecured claims against the Debtors on a consolidated basis; (xiv) all parties who, as of the filing of this motion, have filed a notice of appearance and request for service of papers pursuant to Bankruptcy Rule 2002; and (xv) all applicable government agencies to the extent required by the

Bankruptcy Rules and the Local Rules. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

NO PRIOR REQUEST

54. No prior request for the relief sought in this Motion has been made to this or any other court.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Debtors respectfully request that the Court (a) enter the Interim Order, substantially in the form attached hereto as **Exhibit B**, granting the relief requested herein, and (b) grant such other and further relief as is just and proper.

McNAIR LAW FIRM, P.A.

November 15, 2018

/s/ Michael H. Weaver
Michael H. Weaver (S.C. Dist. Ct. ID # 9847)
Robin C. Stanton (S.C. Dist. Ct. ID # 7438)
Weyman C. Carter (S.C. Dist. Ct. ID # 5218)
1221 Main Street, 18th Floor
Post Office Box 11390
Columbia, South Carolina 29211
Tel: (803) 799-9800
Fax: (803) 753-3277
mweaver@mcnair.net
rstanton@mcnair.net
wcarte@mcnair.net
*Proposed Counsel to the Debtors and
Debtors in Possession*

- AND -

HAYNES AND BOONE, LLP

/s/ Ian T. Peck
Ian T. Peck (*pro hac vice* admission
pending) (TX Bar No. 24013306)
J. Frasher Murphy (*pro hac vice* admission
pending) (TX Bar No. 24013214)
David L. Staab (*pro hac vice* admission
pending) (TX Bar No. 24093194)
2323 Victory Avenue, Suite 700
Dallas, Texas 75219
Tel: (214) 651-5000
Fax: (214) 651-5940
Email: ian.peck@haynesboone.com
Email: frasher.murphy@haynesboone.com
Email: david.staab@haynesboone.com
*Proposed Counsel for the Debtors
and Debtors in Possession*

Exhibit A

TABLE OF AUTHORITIES PURSUANT TO LOCAL RULE 9013-2(a)

1. *In re “R” Best Products, Inc. v. 646 Corp., a/k/a Bravo Supermarket – Irvington, et al.*, No. 00-CV-8536, 2002 WL 31453909 (S.D.N.Y. Oct. 31, 2002)

2002 WL 31453909

Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

“R” BEST PRODUCT, INC., Plaintiff,
v.
646 CORP., a/k/a Bravo Supermarket—
Irvington, et al., Defendants.

No. 00 Civ. 8536(HB).
|
Oct. 31, 2002.

Synopsis

Supplier of fresh fruits and vegetables brought action against supermarket and its principal, alleging violation of the Perishable Agricultural Commodities Act (PACA). Defendants moved to dismiss. Supplier cross-moved for imposition of sanctions and for contempt for defendants’ repeated violation of court’s orders. The District Court, Baer, Jr., J., held that: (1) supplier showed by a preponderance of the evidence that defendants were PACA “dealers” over whom the court had subject matter jurisdiction; (2) if, following an evidentiary hearing, the court found that defendants failed to comply with supplier’s document requests and/or failed to comply with court’s payment order, they would be fined and/or otherwise sanctioned accordingly; and (3) supermarket’s principal could be held personally liable for dissipation of trust assets.

Motion to dismiss denied; cross-motion for sanctions and contempt denied pending evidentiary hearing.

OPINION & ORDER

BAER, J.¹

*1 646 Food Corporation a/k/a Bravo Supermarket—Irvington² (“Bravo”) and Gary Shaw, Bravo’s principal (collectively, “defendants”),³ move to dismiss the complaint of “R” Best Produce, Inc. (“plaintiff” or “R” Best”) for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. (“FRCP”) 12(b)(1). Specifically, defendants argue that Bravo is not subject to the Perishable Agricultural Commodities Act, 7 U.S.C. § 499(a) (“PACA”). In addition, plaintiff cross-moves to impose sanctions pursuant to Rule 37 and to punish defendants for their contempt of this Court’s June 13, 2001 order. For the reasons detailed more fully below, defendants’ motion is denied and plaintiff’s motion for contempt is denied

pending an evidentiary hearing.

I. BACKGROUND

PACA provides suppliers of agricultural commodities—in this case, “R” Best—with a statutory trust to enforce the payment obligations of commission merchants, dealers and brokers. Specifically, PACA’s trust provision gives the unpaid supplier an interest in the trust superior to the interest of any other lien or secured creditor. A dealer—in this case, Bravo—must hold all assets in trust until full payment of the sums owed in connection with transactions in perishable agricultural commodities has been received by the unpaid suppliers, sellers or agents. See [7 U.S.C. § 499e\(c\)\(2\)](#).⁴

Bravo, a New Jersey corporation, purchased \$53,984.46 worth of fresh fruits and vegetables from “R” Best, a New York corporation, from approximately August to October, 2000. However, Bravo failed to pay its debt and plaintiff consequently sought injunctive relief as a trust beneficiary to enforce payment of the trust. On November 21, 2000, this Court entered an order restraining defendants from alienating, dissipating, paying over or assigning any of their assets or those of their subsidiaries or related companies except for payment to “R” Best, pending determination at trial on the merits of this action or until the sum of \$53,984.46 and attorneys fees in the amount of \$13,496 were paid in full. The order provided that Bravo would pay “R” Best \$2,000 a week in cash starting on November 24, 2000. Both parties agreed to and signed that order. However, by February 2001, Bravo had started to bounce checks to “R” Best and its payments became erratic. Bravo’s principal, Shaw, contended that he did not need to make payments because, in his estimation, he was not subject to PACA. Consequently, in May 2001, plaintiff served defendants with a demand for documents to determine whether they were in fact subject to PACA; defendants never complied with this demand. The issue was temporarily resolved as of June 13, 2001, when I signed an order agreed to by the parties modifying the November 21, 2000 order and establishing a new schedule of payments. Specifically, that order provided that Bravo would pay “R” Best \$500 a week for the first three months from the date of the order; \$1,000 a week for the six months following that initial three-month period; and \$2,000 a week thereafter until defendants had satisfied their debt to “R” Best, which as of June 13, 2001 totaled \$34,160 as well as attorneys’ fees totaling \$13,496. However, later in 2001, Bravo again violated this Court’s order by failing to make the required payments and was again in default in its payments to “R” Best. Upon

being questioned by plaintiff, defendants again argued that they were not subject to PACA and therefore not even subject to the jurisdiction of this Court. In addition, Bravo continued to refuse to comply with “R” Best’s demand for documents—which, according to “R” Best, would confirm that defendants were subject to PACA—claiming that all of its own records were “missing” as a result of burglaries at the store. On February 22, 2002, I entered an order requiring Bravo to comply with “R” Best’s document requests—which Bravo has failed to do and which prompted plaintiff to seek sanctions pursuant to [FRCP 37](#).

*2 Defendants now move under Rule 12(b)(1) on the ground that they are not subject to PACA, and, therefore, that “R” Best should stand in the same position as defendants’ other creditors. Bravo has since closed its doors and claims that it will soon be filing for bankruptcy. “R” Best, on the contrary, maintains that Bravo is indeed subject to PACA, and consequently must pay plaintiff first before paying any other creditors unless its debt to plaintiff is paid in full. To date, Bravo has paid approximately \$19,000 toward the amount it owes, excluding attorneys’ fees.

II. DISCUSSION

1. Lack of Subject Matter Jurisdiction

District courts have original jurisdiction over all civil actions arising under the federal laws of the United States. *See* [28 U.S.C. § 1331](#). Rule 12(b)(1) provides that a motion to dismiss may be made on the ground of “lack of jurisdiction over the subject matter.”

PACA, [7 U.S.C. § 499e\(c\)\(5\)](#), reads, in pertinent part, that “[t]he several district courts of the United States are vested with jurisdiction specifically to entertain (i) actions by trust beneficiaries to enforce payment of the trust.” Here, plaintiff, the supplier of perishable goods, alleges that it is the trust beneficiary under PACA, and that defendants, the alleged PACA dealers, are subject to the trust. With respect to dealers, [7 U.S.C. § 499a\(b\)\(6\)](#) states, in pertinent part, that

[t]he term “dealer” means any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce, except that ... (B) no person buying any such commodity solely for sale at retail shall be considered as a “dealer” until the invoice cost

of his purchases of perishable agricultural commodities in any calendar year are in excess of \$230,000. *Id.* (emphasis added).

[Section 499a\(b\)\(4\)\(a\)](#) defines “perishable agricultural commodity” as “[f]resh fruits and vegetables of every kind and character,” regardless of “whether or not frozen or packed in ice.” It is the debtor’s burden to show, by a preponderance of the evidence, that the disputed assets are not subject to a PACA trust. Accordingly, in this case, Bravo, the alleged PACA debtor, has the burden of establishing that the funds owed to plaintiff are not subject to the trust.

Defendants argue that they do not meet the definition of a “dealer” under PACA and are therefore not subject to PACA and, by extension, to this Court’s jurisdiction. Specifically, defendants contend that they fall under the second exception to the term “dealer” because their purchases of perishable agricultural commodities have allegedly not exceeded \$230,000 in any calendar year. Bravo does not argue that the facts, viewed in the light most favorable to the plaintiff, are insufficient to invoke jurisdiction. Instead, it denies that it is subject to PACA altogether, and questions this Court’s power to hear the case.

*3 Under a 12(b)(1) motion to dismiss, the court may refer to evidence outside the pleadings. Utilizing that opportunity, I find that “R” Best has shown by a preponderance of the evidence that Bravo has made purchases of agricultural commodities in excess of \$230,000 in a calendar year. Accordingly, I find that defendants are subject to PACA and consequently that this Court has subject matter jurisdiction. Specifically, defendants have submitted invoices from several suppliers that totaled \$171,601 in purchases of fresh fruits and vegetables—including approximately \$50,000 from “R” Best—over a two-month period. Although defendants maintain that they spent this amount over a twelve-month period, invoices from the only two suppliers which defendants produced—Zubi and Ricosu—tend to show that defendants spent well over \$230,000 in the year 2000. For instance, some statements evidence approximately \$10,000 a week in produce expenditures (Zubi Invoices 11/27, 11/28, 11/30 & 12/1/2000) and one day’s produce inventory at \$2,185.25 (Zubi Invoice 10/13/2000). Projecting these amounts to reflect a twelve-month calendar year would bring Bravo’s purchases of fresh fruits and vegetables to well over the minimum to come within the strictures of the statute. In addition, plaintiff argues that purchases from “R” Best alone totaled over \$50,000 in just two months. It is hard to imagine that

Bravo is not subject to PACA. If this action were not commenced and comparable invoices were accepted they may well have reached \$300,000 a year from one supplier alone. This figure does not include purchases of frozen produce also covered under PACA. See [7 U.S.C. § 499a\(b\)\(4\)\(a\)](#). Coupled with Bravo's virtual non-compliance with document production and no evidence to the contrary, plaintiff has met its burden.

Shaw, Bravo's principal, claims that he mistakenly signed the November 21, 2000 order stipulating defendants as beneficiaries of a PACA trust. Specifically, he claims ignorance as to PACA's existence at that time. However, in [Debruyn Produce Co., v. Richmond Produce Co., Inc., 112 B.R. 364, 368 \(N.D.C.1990\)](#), the court put this argument to rest when it wrote:

[t]he only factual defense advanced by the [defendant] is its ignorance of the existence of PACA. It is clear, however, that the statutory scheme would be defeated if mere ignorance of the existence of PACA were sufficient to defeat the trust rights of the claimants protected thereunder, and the court holds that this is not a valid defense.

Furthermore, although Shaw claimed to have signed the November 21, 2000 order in ignorance, there is evidence that plaintiff's attorney negotiated its terms with Shaw's attorney who surely knew, or should have known about, PACA and its implications.

2. Motion to Compel and for Sanctions

Plaintiff cross-moves to impose sanctions pursuant to [Rule 37](#) and to punish defendants for their contempt of this Court's June 13, 2001 order. Specifically, plaintiff moves to (1) compel production of the documents set forth in plaintiff's first set of document requests, plaintiff attorney's September 26, 2001 letter to defendant, and this Court's February 22, 2002 order; (2) award such other costs, expenses and sanctions as the Court deems just in connection with said discovery motion; (3) adjudge said parties (Bravo and Shaw) guilty of contempt of the Court; (4) require said parties to pay damages for such contempt; and (5) such other relief, including assessment of attorneys fees and expenses, as the Court deems just. However, in ¶ 14 of its declaration in opposition to defendants' motion to dismiss and in support of its cross-motion to compel

disclosure and to punish for contempt, "R" Best states that

*4 R Best is more concerned about learning from Mr. Shaw which of Bravo's large creditors, such as Krasdale Foods, Inc., Bravo's wholesale grocery Supplier, and Banco Popular, Bravo's lender, and Bravo affiliated companies, Park Avenue Food Corp. and MDG Food Corporation, all of whom were on notice of R Best's rights, received payments or the transfer of Bravo's assets subsequent to Bravo's default of the June Stipulation and Order or payments or the transfer of assets, outside the ordinary course of Bravo's business, made after November 9, 2000, in violation of the November 9, 2000 TRO, the November 21, 2000 Stipulation and Order or the June 2001 Stipulation and Order. R Best may be entitled to seek disgorgement of amounts paid to creditors, even if they were secured parties. (Pl.'s Declaration ¶ 14).

As mentioned *supra*, defendants claim that most of their records were destroyed during a burglary that allegedly took place at the store subsequent to plaintiff's disclosure demand. However, defendants have not offered copies of a police report, an insurance claim, or any other evidence in support of, or as a written explanation to, their failure to comply with disclosure, nor does it appear that defendants have attempted to obtain or produce copies of the requested tax returns from Shaw's accountant or that they made an effort to 'back up' or preserve records subsequent to plaintiff's disclosure requests. After repeated requests, Court orders, and a telephonic conference in which I personally informed Shaw of his obligations and options in order to comply with disclosure, very little documentation was produced and no detailed explanation or affidavits with respect to the missing documents, as required under Rule 26, was forthcoming. Accordingly, defendants have repeatedly violated this Court's orders for which contempt may be the only remedy.

With respect to plaintiff's motion for sanctions under

[Rule 37](#), the court may hold a party in contempt for failing to “obey any orders.” [Rule 37\(2\)\(D\)](#). In addition, the Rule provides the following panoply of other sanctions which may be awarded in combination with a finding of contempt:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party. [Rule 37\(2\)\(A\)-\(C\)](#).

In addition,

[i]n lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

*5 Plaintiff alleges that defendants have failed to comply with this Court’s February 22, 2002 order requiring Bravo to comply with “R” Best’s document requests. Specifically, that order provided that “Bravo shall comply with R Best’s first set of document requests dated May 2, 2001, by March 1, 2002 or show cause by motion filed with this Court and served on Plaintiff by 03/01/02 as to why it should not be compelled to so comply.” If, following a hearing, I find that defendants have failed to comply with “R” Best’s requests, then I might sanction them in any manner permitted under [Rule 37](#)—including the imposition of monetary sanctions.

With respect to plaintiff’s motion for contempt, a party

moving to hold another party in civil contempt under Rule 70 must establish the following: (1) that the order that the contemnor failed to comply with is clear and unambiguous; (2) that proof of noncompliance is clear and convincing; and (3) that the contemnor has not diligently attempted to comply in a reasonable manner. [King v. Allied Vision, Ltd.](#), 65 F.3d 1051, 1059 (2d Cir.1995); [N.A. Sales Co., Inc. v. Chapman Indus. Corp.](#), 736 F.2d 854, 857 (2d Cir.1984). Intentional or willful disobedience need not be shown to establish civil contempt. Upon a finding that a party is in civil contempt, a district court is vested with “broad discretion to fashion an appropriate coercive remedy ... based on the nature of the harm and the probable effect of alternative sanctions.” [Equal Employment Opportunity Comm’n v. Local 28 of the Sheet Metal Workers Int’l Assoc.](#), 247 F.3d 333, 336 (2d Cir.2001) (quoting [N.A. Sales Co., Inc.](#), 736 F.2d at 857). Two kinds of remedies or sanctions are available in civil contempt proceedings: (1) those that seek to compensate the victim for contempt; and (2) those that “seek[] to force prospective compliance with [the court’s] own order.” [Weitzman v. Stein](#), 98 F.3d 717, 719 (2d Cir.1996). In shaping such a remedy, the court must consider the “character and magnitude of the harm threatened, and the probable effectiveness of any suggested sanction in bringing about the result desired.” [Powell](#), 643 F.2d at 934–35; see also [Perfect Fit Indus., Inc. v. Acme Quilting Co., Inc.](#), 673 F.2d 53, 57 (2d Cir.1981) (stating that in fashioning a coercive remedy, the court should take into account the magnitude of the harm, the seriousness of the burden on the contemnor, and the relative “willfulness” of the contempt); *id.* at 56–57 (a district court has broad discretion in the context of contempt to fashion a coercive remedy). Remedies or sanctions that are meant to ensure future compliance may include, but are not limited to, monetary fines. See [Swift v. Blum](#), 502 F.Supp. 1140 (S.D.N.Y.1980); see also [Berger v. Heckler](#), 771 F.2d 1556, 1569 n. 18 (2d Cir.1985) (stating that “[i]n acting to bring a noncompliant party into compliance with a prior order, the district courts adopted a variety of approaches,” including the imposition of monetary fines). If, following a hearing on this issue, I find that plaintiff has provided clear and convincing proof of defendants’ failure to comply with this Court’s June 13, 2001 order with respect to the payment schedule, I will fine defendants accordingly.

*6 Shaw claims that he is neither an agent nor an officer of the defendant corporation and therefore cannot be held personally responsible for it. However, this court has held otherwise. “An individual who is in the position to control the trust assets and who does not preserve them for the beneficiaries has breached a

fiduciary duty, and is personally liable for that tortious act.” [Morris Okun, Inc., v. Zimmerman, Inc.](#), 814 F.Supp. 346, 348 (S.D.N.Y.1993). Clearly, Shaw was in a position of control of the trust assets, as he signed the checks paying the corporation’s creditors. Indeed, Shaw fails to clarify precisely who *is* an agent or officer, if not he. He has declined to submit any names of the corporation’s president, agents or officers, if any, as requested by plaintiff. He was obviously in charge of the corporation’s daily operation. He has admitted to paying other creditors despite court orders instructing him not to pay other debtors unless payments to “R” Best continued as agreed and modified in the June 13, 2001 order. He thereby dissipated trust assets and can be held personally liable. In *Morris Okun, Inc.*, this court recognized that PACA imposes liability on a trustee, whether a corporation or a controlling person of that corporation, who uses the trust assets for any purpose other than repayment of the supplier. See [814 F.Supp. at 348](#).³

In order to be sure that plaintiff and the individual defendant are *fully* aware of the sanctions I may invoke and the penalties for continued failure to comply with plaintiff’s document requests and to pay his debt to

plaintiff in accordance with this Court’s June 13, 2001 order, I am scheduling a hearing for November 12 at 9:30 A.M. in Courtroom 23B. This hearing will include, but not be limited to, testimony of Shaw and the production of all records reflecting purchases for the calendar years 2000 and 2001 and payment to other creditors during that year and thereafter. Failure to appear or to produce the requisite records may result in a finding of contempt and/or other sanctions permitted under the Federal Rules.

CONCLUSION

For the foregoing reasons, defendants’ motion to dismiss plaintiff’s complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) is denied, and plaintiff’s cross-motion for sanctions and a finding of contempt is denied pending an evidentiary hearing.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2002 WL 31453909

Footnotes

- [1](#) This opinion was written with the assistance of Shulamis Peltz, a second-year law student at the Cardozo School of Law.
- [2](#) Bravo is the supermarket’s trade name, which holds 646 as its principal purchasing corporation. Defendants are proceeding *pro se*.
- [3](#) Shaw argues that he is not the “principal” of 646 and therefore cannot be personally sanctioned for failing to make payments, on behalf of 646, to plaintiff. For reasons set forth in detail *infra*, at II.B, I agree with plaintiff that Shaw, as the day-to-day manager of Bravo and as the person who signed all the checks that were made out to “R” Best, is the acknowledged principal of 646.
- [4](#) Specifically, that section provides, in pertinent part, that
[p]erishable agricultural commodities received by a commission merchant, dealer or broker in all transactions ... shall be held by such commission merchant, dealer or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents. Payment shall not be considered to have been made if the supplier, seller, or agent receives a payment instrument which is dishonored. [7 U.S.C. § 499e\(c\)\(2\)](#).
- [5](#) Defendants should note that a PACA trust does not become part of a bankrupt debtor’s estate. “In the event of the Produce Debtor’s bankruptcy, the Bankruptcy Code excludes PACA trust assets from the bankruptcy estate.” [Morris Okun Inc.](#), [814 F.Supp. at 348](#).

EXHIBIT D

Form of Vendor Agreement

CAFE HOLDINGS CORP.

[], 2018

TO: **[Vendor]**
[Name/Title]
[Address]

Dear Valued Vendor/Service Provider:

On [DATE] (the “**Petition Date**”), Cafe Holdings Corp. and certain of its affiliates (collectively, “**Cafe**,” or the “**Debtors**”) filed voluntary petitions under chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of South Carolina (the “**Bankruptcy Cases**” and the “**Bankruptcy Court**,” respectively).

On the Petition Date, the Debtors also requested authority from the Bankruptcy Court to pay certain critical suppliers or service providers in recognition of the importance of our relationship with such suppliers and service providers. On [], 2018, the Bankruptcy Court entered an order (the “**Order**”) authorizing this relief, a copy of which is enclosed.

In accordance with the Order, Cafe is prepared to enter into this letter agreement (the “**Vendor Agreement**”) in accordance with the following terms:

1. The estimated balance of your prepetition claim (net of any setoff, credits or discounts) (the “**Claim**”) is \$[_____]. **Your Claim does not constitute a claim allowed by the Bankruptcy Court in the Bankruptcy Cases. Furthermore, signing this Vendor Agreement does not excuse you from any requirement of filing a proof of claim in the Bankruptcy Cases on account of prepetition amounts that may remain unpaid.**

2. The Debtors will provisionally pay you \$[_____] (the “**Claim Payment**”) of your Claim, subject to the terms and conditions of this Vendor Agreement, and this payment will be applied, and shall be deemed for all purposes to apply, to your most recent invoices, in reverse chronological order. It is understood by you and the Debtors that the remaining amount of your Claim is \$[_____].

The Claim Payment will be disbursed on the following schedule: [_____].

3. In consideration for the Claim Payment, you agree not to file or otherwise assert, directly or indirectly, against any or all of the Debtors, their estates, or any of their respective assets or property (real or personal), any lien (a “**Lien**”), a claim for reclamation (a “**Reclamation Claim**”), or a claim under Section 503(b)(9) of the Bankruptcy Code (a “**503(b)(9) Claim**”), regardless of the statute or other legal authority upon which such Lien, Reclamation Claim, or 503(b)(9) Claim may be asserted, related in any way to any remaining prepetition amounts allegedly owed to you by the Debtors arising from agreements or other arrangements entered into prior to the Petition Date. The Debtors may apply the Claim Payment to any 503(b)(9) amounts owed. Furthermore, if you have taken steps to file or otherwise assert such a Lien, Reclamation Claim, or 503(b)(9) Claim prior to entering into this Vendor Agreement, you agree to take the necessary steps to remove such Lien, Reclamation Claim, or 503(b)(9) Claim as soon as possible.

4. In consideration of the Claim Payment, you agree to continue providing and/or supplying goods/or services to the Debtors based on Customary Trade Terms (as defined in the Order), which shall be no less favorable than the most favorable terms that you provided to the Debtors for the period within 180 days of the Petition Date. For purposes of this Vendor Agreement, Customary Trade Terms consist of the following terms and conditions (if more space is required, attach continuation pages):

5. Payment of your Claim in the manner set forth in this Vendor Agreement may only occur upon the execution of this Vendor Agreement by a duly authorized representative of your company and the return of this Vendor Agreement to the Debtors. Your execution of this letter agreement and return of the same to the Debtors constitutes an agreement by you and the Debtors:

- a) to the Customary Trade Terms and, subject to the reservations contained in the Order, to the amount of the Claim set forth above;
- b) that, for a period of 180 days after the entry into this Agreement (or such longer period that the parties have previously committed to such trade terms), you will continue to supply the Debtors with goods or services pursuant to the Customary Trade Terms and that the Debtors will pay for such goods or services in accordance with the Customary Trade Terms;

- c) that you have reviewed the terms and provisions of the Order and that you consent to be bound by such terms and provisions;
- d) that you will not separately seek payment for reclamation and similar claims outside of the terms of the Order and this Vendor Agreement;
- e) if you receive the Claim Payment and you do not extend to the Debtors all Customary Trade Terms, or fail to perform in accordance with this Vendor Agreement, you are required to return the Claim Payment to the Debtors immediately upon notice, and the Debtors may take any of the remedial actions described in the Order.

6. The Debtors and you also hereby agree that any dispute with respect to this Vendor Agreement or the Order shall be determined by the Bankruptcy Court, and you expressly waive any right to trial by jury and withdrawal of the reference for decision by a district court.

7. All terms of this Vendor Agreement (including the existence of this Vendor Agreement) are confidential between you and the Debtors; *provided, however*, that the Debtors may disclose this Vendor Agreement in accordance with the terms of the Order, and both you and the Debtors may disclose this Vendor Agreement as required by any federal or state securities laws or any other court order.

If you have any questions about this agreement or our financial restructuring, do not hesitate to call _____ at _____.

Sincerely,

Cafe Holdings Corp.

By: _____

Title: _____

Date: _____, 2018

Agreed and Accepted by:

[NAME OF VENDOR]

By: _____

Title: _____

Dated: _____, 2018