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CLERK U.S. BANKRUPTCY COURT
Central District of California
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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:

WILLIAM R. GERARD,

Debtor.

Case No. 2:12-bk-28780 ER

Chapter 7

GUIMARRA BROTHERS FRUIT COMPANY,
INC., RIO VISTA LIMITED, VAL VERDE
VEGETABLE CO., INC.,

Plaintiffs,

v.

WILLIAM R. GERARD,

Defendant.

Adv. No. 2:12-ap-02017 ER

MEMORANDUM OF DECISION RE
SUMMARY JUDGMENT IN FAVOR OF
DEFENDANT

Date: December 3, 2013

Time: 11:00 a.m.

Place: Courtroom 1568
255 E. Temple St.
Los Angeles, CA

On December 3, 2013, the Court held a hearing on Defendant's Motion to Dismiss Complaint by Giumarra Brothers Fruit Company, Inc., and Rio Vista Limited, d/b/a Giumarra Companies with Prejudice and Without Leave to Amend ("Motion"). Appearances were as set forth on the record. Prior to the hearing, the Court issued a tentative ruling ("Tentative Ruling") which treated the Motion as one for summary judgment and granted summary judgment in favor of Defendant. A copy of the Tentative

1 Ruling is attached hereto and incorporated herein by reference. The Court took this matter under
2 submission to consider arguments made by counsel for Giumarra Brothers Fruit Company, Inc. and Rio
3 Vista Limited (collectively “Plaintiffs”) at the hearing. For the reasons set forth fully herein, the Court
4 adopts the Tentative Ruling as its final order and grants summary judgment in favor of Defendant.

5
6 **I**
SUMMARY OF PLAINTIFFS’ ARGUMENTS

7
8 At the hearing, counsel for Plaintiffs argued that the most important fact is that no party has ever
9 asserted that there are express agreements for a payment period different from the ten day period set forth
10 in 7 C.F.R. § 46.2(aa)(5) of the Perishable Agricultural Commodities Act (“PACA”) regulations;
11 therefore, “the statute does not kick in requiring the payment term to be on the invoice.” Consequently,
12 without such express agreements, Plaintiffs appear to contend that there are no extended payment terms
13 which required a writing. Plaintiffs also took issue with the Court’s statement in the Tentative Ruling
14 that

15 [a]ccepting these payment notations on the invoices [i.e., “Net 21 days”] as irrelevant
16 would essentially allow seller/suppliers to put any payment term less than thirty day[s]
17 on invoices and still maintain their PACA trust rights, and would allow non-
compliance with the writing requirement set forth in § 46.46(e)(1).
Tentative Ruling at 7.

18 Plaintiffs argued that this statement creates a circular reasoning trap, because under the
19 commercial code, agreements can be gleaned from multiple documents, course of dealings and
20 transactions. Consequently, if the Court accepts that there was an extension based on the invoices, the
21 invoices and the course of dealing between the parties constituted the writing required for extended
22 payment terms. Therefore, the Plaintiffs conclude that there was strict compliance with the PACA trust
23 requirements.

24
25 **II**
DISCUSSION

26 Plaintiff’s first argument regarding the lack of express agreements for extensions does not
27 accurately reflect the record before the Court. As noted in the Tentative Ruling, there are pages of copies
28 of invoices attached to the Motion as Exhibit A which show a “[n]et 21 days” payment term. Moreover,

1 the Declaration of Aaron Bedoy in Support of the Opposition to the Motion (“Bedoy Declaration”)
2 expressly provides that “[i]n most circumstances” Plaintiffs require new customers to sign a written
3 application for a twenty-one day payment term, implying that it is Plaintiffs’ custom to have a payment
4 term beyond the PACA ten day term. Bedoy Declaration at ¶ 7 (emphasis added) . The Bedoy
5 Declaration further states that Plaintiffs sent the credit application with the twenty-one day payment term
6 to United Potato Distributors, Inc. (“United Distributors”), but that this agreement was not executed or
7 returned to them. Bedoy Declaration at ¶ 9.

8 Moreover, Plaintiffs do not unequivocally state in the Bedoy Declaration that they gave no
9 extended payment term to United Distributors. The Bedoy Declaration simply provides that “[i]t is my
10 understanding that if there is no pre-transaction agreement to alter the payment terms, the terms remain 10
11 days under the PACA Regulations, regardless of what is stated on the invoices.” Bedoy Declaration at ¶
12 11. Plaintiffs further provide no explanation as to why the invoices, which were likely issued *after* it was
13 known there were no signed agreements regarding a twenty-one day payment term, were not amended to
14 indicate the PACA ten day payment term. Finally, contrary to Plaintiffs’ assertion, Defendant’s statement
15 that he does not recall a written agreement changing the ten day payment term is not an admission that
16 there was no agreement for an extension. Bedoy Declaration at ¶ 13. The basis for the relief sought by
17 Defendant is that Plaintiffs have no PACA trust protection because there is no written agreement;
18 Defendant is not stating at paragraph 6 of his declaration that there was no agreement to extend.
19 Consequently, it appears that it is Plaintiffs’ practice to extend the PACA ten day term to twenty-one
20 days, and they gave such a payment term to United Distributors. In short, the record indicates that there
21 was an extension.
22

23 The Court also disagrees with the Plaintiffs’ “circular reasoning trap” argument. As noted in the
24 Tentative Ruling, 7 C.F.R. § 46.46(e)(1) requires extensions of payment terms to be reduced to a writing,
25 a copy of which must be maintained in the parties’ records. Section 46.46(e)(1) further requires that
26 payment terms must be disclosed on invoices. In addition, 11 U.S.C. § 499e(c)(4) allows invoices to give
27 notice of a seller/supplier’s intent to preserve its trust benefits. Neither § 46.46(e)(1) nor § 499e(c)(4)
28

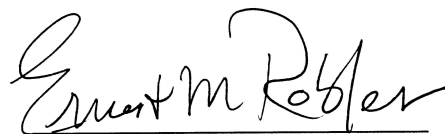
1 allow for an invoice to act as both the notice of the extension and the written agreement memorializing it.
2 Literal compliance with the PACA statute and regulations, which is the current standard in the Ninth
3 Circuit, requires a written agreement regarding an extension, *and* inclusion of the payment term on
4 invoices. Consequently, there is no “circular reasoning trap.”

5 **III**
6 **CONCLUSION**

7 Based on the foregoing, the Court adopts its Tentative Ruling as its final ruling and grants
8 summary judgment in favor of Defendant with respect to Plaintiffs. The Court shall prepare a judgment
9 consistent with this Memorandum of Decision.

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Date: December 12, 2013


Ernest M. Robles
United States Bankruptcy Judge

Tentative Ruling:

12/2/2013: For the reasons set forth below, Motion GRANTED.

Pleadings filed and reviewed:

1. Motion to Dismiss Complaint by Giumarra Brothers Fruit Company, Inc., and Rio Vista Limited d/b/a Giumarra Companies With Prejudice and Without Leave to Amend ("Motion").
2. Notice of Motion.
3. Proof of Service.
4. Response in Opposition to Motion ("Opposition").
5. Declaration of Aaron Bedoy in Support of Opposition ("Bedoy Declaration").

Facts and Summary of Pleadings:

On 7/30/13, Giumarra Brothers Fruit Company, Inc. ("Giumarra."), Rio Vista Limited d/b/a/ Giumarra Companies ("Rio Vista"), and Val Verde Vegetable Co., Inc. ("Val Verde") (collectively "Plaintiffs") filed a First Amended Complaint to Object to Discharge of Debt ("Amended Complaint") against Debtor. Pursuant to the Amended Complaint, Plaintiffs allege that Debtor is the president, director and sole shareholder of United Potato Distributors, Inc. ("United Distributors"). In a series of transactions, Plaintiffs sold and shipped produce in interstate commerce to United Distributors during the periods specified in the chart below, and United Distributors purchased the produce in the total amounts specified.

Plaintiff	Period	Amount Owed
Guimarra.	2/15/11- 5/7/11	\$ 35,149.00
Rio Vista	4/2/11 – 5/17/11	\$141,466.16
Val Verde	8/31/10 – 10/2/10	\$ 59,392.00

Plaintiffs further allege that:

1. United Distributors accepted the produce.
2. Upon receipt of the produce, a statutory trust arose pursuant to 7 U.S.C. § 499(e)(c)(2). "The trust *res* consisted of all of United Distributors' inventories of Produce, all inventories of products derived from the Produce, any receivables or proceeds from the sale of Produce or products, and any assets commingled with the receivables or proceeds from the sale of Produce or products." Amended Complaint at 4. Plaintiffs are the beneficiaries of the statutory trust.
3. "At the time of the transactions identified [above], Plaintiffs held valid PACA licenses issued by the United States Department of Agriculture ("USDA")." *Id.*
4. "Plaintiffs gave written notice of their intent to preserve trust benefits to United Distributors in accordance with 7 U.S.C. § 499e(c)(4), by including the statutory trust language on each of their invoices and sending the invoices to United Distributors." *Id.*

- 1 5. United Distributors has not paid for the produce shipped and accepted.
- 2
- 3 6. "As the president, director, and sole shareholder, Debtor's failure to direct United
- 4 Distributors to pay Plaintiffs for the Produce amounted to reckless disregard of the
- 5 statutory and common law duties imposed by PACA." Amended Complaint at 5.
- 6
- 7 7. Plaintiffs have been damaged in the aggregate amount of \$236,007.16.

8 Debtor seeks dismissal of the claims of Giumarra and Rio Vista ("Claimants") because
9 they have produced no written agreement which would have extended the period for payment
10 beyond the requisite ten days provided for in PACA. Specifically, Debtor asserts:

11 "If the seller and the buyer use the default payment terms provided in the
12 regulations ('within 10 days after the day on which the produce is accepted.'),
13 this notice of intent to preserve benefits is all that is necessary. On the other
14 hand, if the parties agree to payment terms greater than 10 days after
15 acceptance, but in no event more than 30 days after acceptance, this agreement
16 must be in writing prior to the transaction. The seller must also disclose these
17 non-statutory payment terms 'on invoices, accountings, and other documents
18 relating to the transaction.' 7 U.S.C. § 499e(c)(3); 7 C.F.R. § 46.46(e)(1).

19 Motion at 3.

20 Debtor further contends that in discovery, he requested the written agreements extending the
21 10 day PACA term. However, Claimants produced no such agreements and this failure to do so
22 is an admission "to the non-existence of critical documentary evidence substantiating
23 [Claimants] have maintained requisites [sic] to PACA protection." *Id.*; Debtor's Declaration in
24 Support of Motion ("Debtor's Declaration") at ¶¶ 10-11. Debtor asserts that the "language of §
25 499e(c)(3) . . . requires that a copy of an agreement to extend the payment period be filed in the
26 records of each party to the transaction, i.e., § 499e(c)(3) requires a writing. Consequently, the
27 'clear command' of the language of § 499e(c)(3) is that a failure to memorialize an agreement to
28 extend a payment period in writing 'divests the seller of trust benefit[s].'" Motion at 4 (citation
omitted). "In the Ninth Circuit, substantial compliance with the PACA trust requirements is not
sufficient; **literal compliance is required**. *In re San Joaquin Food Service, Inc.*, 958 F.2d 938,
940 (9th Cir. 1992)." Motion at 4 (citations omitted) (emphasis in original).

In opposition, Claimants contend that:

Debtor does not argue that the payment terms were actually extended or agreed upon by the parties, thereby, requiring pre-transaction, written agreements to be executed and produced. Defendant simply argues that pre-transaction, written agreements were necessary, because the payment terms stated on the invoices were 21 days.

. . . [However,] [n]either the PACA statute nor the Regulations disqualify a seller or supplier of perishable agricultural commodities ("Produce") from trust benefits under Subsection 499d(c) when the payment terms on its invoices

1 differ from the 10-day regulatory terms if there is no pre-transaction, written
2 agreement for such change. A pre-transaction, written agreement is only
relevant to determine what is considered prompt payment for an invoice.

3 It is undisputed that neither Guimarra nor Rio Vista entered into pre-
4 transaction, written agreements with United [Distributors] to extend the
5 regulatory payment term for their transactions. The mere fact that Guimarra's
and Rio Vista's invoices stated payment terms different from the 10-day
6 regulatory payment terms has no effect on preservation of their PACA trust
benefits.

7 Opposition at 2-3

8 Claimants argue that the Ninth Circuit's decision in San Joaquin is distinguishable from
the instant case, because "neither Guimarra nor Rio Vista entered into pre-transactions, written
9 agreements with United [Distributors]." Opposition at 5-6. Claimants further contend that
Debtor "acknowledges in paragraph 6 of his Declaration that the terms were not changed,
10 wherein he state that he 'recall[s] no written agreement changing the [PACA] net 10 day terms to
an term longer than 10 days.'" Opposition at 6. Nevertheless, Debtor "argues that this Court
11 should ignore his own Declaration, wherein he admits that the parties did not alter the regulatory
payments terms, and instead look only at the invoices and demand that Guimarra and Rio Vista
12 produce written agreements that do not exist." Id.

13 Claimants rely on an unpublished decision, A.V. Thomas Produce, Inc. v. Cal-O
Vegetable Exchange, Inc. (2012), by a District Court for the Central District of California,
14 which holds that "a PACA licensee produce seller does not forfeit its trust rights when it lists
payment terms different from the default 10-day period without a prior written agreement to alter
15 those terms." Memorandum attached as Exhibit A to Opposition ("Memorandum") at 3. There,
the Couty distinguished San Joaquin on the grounds that San Joaquin involved a pre-transaction,
16 written agreement; therefore, disclosure of the extended term on the invoices was mandated.
17 A.V. Thomas further provides that

18 **[t]he lack of a prior written agreement is dispositive.** This Court finds that
19 the Plaintiffs and Intervenor Plaintiffs at issue here have literally complied
with the PACA regulations and statutes in providing the required PACA
20 disclosure statement and language as required by 7 U.S.C. § 499e(c)(4) and 7
C.F.R. § 46.46(f)(3)(ii) on the face of their invoices. They were not required to
21 provide any payment term language under 7 U.S.C. § 499e(c)(3-4) and 7
C.F.R. § 46.46(f)(3)(ii). **The inclusion of any payment term is immaterial**
22 **to PACA trust claims validity.**

23 Opposition at 9 (emphasis added by Opposition), citing, Memorandum.

24 **The Court finds and concludes as follows:**

25 In the instant case, Debtor simply requests dismissal, and does not identify any
26 basis/authority for such relief. However, since the Court is considering matters outside of the
27 pleadings, including case law, the Court shall treat the Motion as one for summary judgment
with respect to Claimants. No party has raised any genuine issues of material fact. Specifically,
28 Debtor does not dispute that produce was received from Claimants, and Claimants do not dispute

1 that their respective invoices designate a payment term beyond the PACA ten day term and that
2 there is no written agreement regarding any extension. The sole issue herein is whether
3 Claimants have lost their PACA trust rights, because there is no pre-transaction, written
4 agreement extending the PACA ten day payment term.

5 The Court first notes that A.V. Thomas, which Guimarra appears to have been a party in, is
6 not binding on this Court. The Ninth Circuit's decision in San Joaquin is, however, clearly
7 binding. The Court relies on San Joaquin for the general proposition that substantial compliance
8 with the PACA trust requirements is not sufficient; literal compliance is required. San Joaquin,
9 958 F.2d at 940; In re Tanimura Distributing, Inc., 2011 WL 3299933 *7 (9th Cir. BAP). While
10 the Court understands the factual distinction made by the A.V. Thomas decision and Claimants,
11 the Court does not believe that this distinction nullifies the applicability of the Ninth Circuit's
12 mandate of literal compliance with PACA's trust requirements.

13 Consequently, the Court respectfully disagrees with the holding of A.V. Thomas.
14 Specifically, while the court in A.V. Thomas refers to 7 C.F.R. § 46.46(f), it does not address the
15 language in subsections (c)(1) and (e)(1) and (3) of this same regulation. These provisions refer
16 to the eligibility requirements for PACA trust benefits and provide in relevant part:

17 (c) Trust Benefits.

18 (1) When a seller . . . **who has met the eligibility requirements of paragraphs (e)(1) . .**
19 **. of this section**, transfers ownership . . . of goods to a commission merchant, dealer, or
20 broker, **it automatically becomes eligible to participate in the trust.** . . .

21 . . .
22 (e) Prompt payment and eligibility for trust benefits.

23 (1) The times for prompt accounting and prompt payment are set out in § 46(z) and (aa).
24 Parties who elect to use different times for payment **must** reduce their agreement to
25 writing before entering into the transaction and maintain a copy of their agreement in
26 their records, and the times of payment **must** be disclosed on invoices, accountings, and
27 other documents relating to the transaction.

28 . . .
(3) If there is a default in payment . . . , the seller . . . **who has met the eligibility**
requirements of paragraphs (e)(1) and (2) of this section will not forfeit eligibility
under the trust by agreement in any manner to a schedule for payment of the past due
amount or by accepting a partial payment

7 C.F.R. §46.46 (emphasis added).

22 Section 46.46(e)(1) clearly mandates a writing if there is a payment extension beyond the
23 PACA ten day term, and §§ 46.46(c)(1) and (e)(3) refer to paragraph (e)(1) as having "eligibility
24 requirements" for trust benefits. No specific part of § 46.46(e)(1) is identified as the "eligibility
25 requirements;" consequently, it appears all the requirement of this provision qualifies as the
26 "eligibility requirements" for PACA trust benefits, including the writing mandate. A.V. Thomas,
27 however, finds that if there is no writing extending the terms, there is no extension, despite any
28 extension language on the face of invoices. Memorandum at 7 ("None of the Plaintiffs . . . at
issue here have satisfied the section 46.2(11(aa) [sic] [writing] requirements. No payment terms
have changed. The listing of payment terms other than 10 days on invoices is irrelevant and has
no legal effect."). Although not expressly stated, such a finding appears to lead to the conclusion
that if there is no extension, no writing is required.

1 Such reasoning is circular and requires this Court to disregard the pages of copies of invoices
2 attached as Exhibit A to the Motion, which clearly state a payment term beyond the PACA ten
3 day term, i.e., net 21. Accepting these payment notations on the invoices as irrelevant, would
4 essentially allow sellers/suppliers to put any payment term less than thirty day on invoices and
5 still maintain their PACA trust rights, and would allow non-compliance with the writing
6 requirement set forth in § 46.46(e)(1). The Court is unwilling to ignore the invoices and find that
7 there was no payment extension between Claimants and United Distributors/Debtor.

8 Consequently, since the record evidences that there were extended payment terms, a writing
9 was required for strict compliance with PACA. Since there admittedly are no writing(s)
10 extending the payment terms, there is no PACA trust in favor of Claimants. Since there is no
11 trust, Claimants cannot meet their burden of proving that Debtor was a fiduciary for purposes of
12 defalcation under U.S.C. § 523(a)(4). The Court, therefore, grants summary judgment in favor
13 of Debtor with respect to the Claimants.

14 No appearance is required if submitting on the court's tentative ruling. If submitting on
15 the tentative, please contact the judge's law clerks, Jessica Vogel or Helene Kaya at 213-894-
16 1522. Should an opposing party file a late opposition or appear at the hearing, the court will
17 determine whether further hearing is required and Applicant will be so notified. If you wish to
18 make a telephonic appearance, contact Court Call at 888-882-6878, ext. 188 no later than one
19 hour before the hearing.
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NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) MEMORANDUM OF DECISION RE SUMMARY JUDGMENT IN FAVOR OF DEFENDANT was entered on the date indicated as Entered on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (ANEF) Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of December 12, 2013, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

Rosendo Gonzalez (TR) rgonzalez@ecf.epiqsystems.com,
dgomez@gonzalezplc.com

Lawrence H Meuers lmeuers@meuerslawfirm.com,
snurenberg@meuerslawfirm.com; sdefalco@meuerslawfirm.com; lrogers@meuerslawfirm.com

United States Trustee (LA) ustpregion16.la.ecf@usdoj.gov

☐ Service information continued on attached page

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by U.S. Mail to the following person(s) and/or entity(ies) at the address(es) indicated below:

William R. Gerard
1015 Gayley Avenue
Suite 1177
Los Angeles, CA 90024

☐ Service information continued on attached page

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an Entered stamp, the party lodging the judgment or order will serve a complete copy bearing an Entered stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s) and/or email address(es) indicated below:

☐ Service information continued on attached page