UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| "R" BEST PRODUCT, INC., Plaintiff, | : | |
| - v – | : | 00 Civ. 8536 |
| 646 CORP., a/k/a BRAVO SUPERMARKET – IRVINGTON, et al., Defendants. | : | OPINION & ORDER |

Hon. HAROLD BAER, JR., District Judge:[1]

646 Food Corporation a/k/a Bravo Supermarket - Irvington[2] ("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

[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.

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.

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[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).

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.

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.

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 plaintiffs 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

> 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.

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.

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.[5]

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

[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.

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.**

**New York, New York**
**October 29, 2002**

**U.S.D.J.**