

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

PETER J. WALSH
CHIEF JUDGE

824 MARKET STREET
WILMINGTON, DE 19801
(302) 252-2925

June 22, 2000

Regina A. Iorii, Esq.
Christopher S. Sontchi, Esq.
Ashby & Geddes
One Rodney Square
P.O. Box 1150
Wilmington, DE 19899

Laura Davis Jones, Esq.
Michael R. Seidl, Esq.
Pachulski, Stang, Ziehl,
Young & Jones, P.C.
919 N. Market Street,
16th Floor
P.O. Box 8705
Wilmington, DE 19899-8705

James H.M.Sprayregen, Esq.
Matthew N. Kleiman, Esq.
Geoffrey A. Richards, Esquire
Timothy D. Elliott, Esquire
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601

RE: Cavendish Farms vs. Ameriserve Food Distribution,
Inc.
Adversary Proceeding No. A-00-615

Dear Counsel:

Before the Court is Plaintiff Cavendish Farms' ("Cavendish") motion (the "Motion") (Doc. # 4), pursuant to 28 U.S.C. § 157(b)(3), for determination that this adversary proceeding by which Cavendish seeks payment of its claim under the Perishable Agricultural Commodities Act ("PACA") is a non-core proceeding. For the reasons stated below, I find that the

Regina A. Iorii, Esq.
Christopher S. Sontchi, Esq.
Laura Davis Jones, Esq.
Michael R. Seidl, Esq.
James H. M. Sprayregen, Esq.
Matthew N. Kleiman, Esq.
Geoffrey A. Richards, Esq.
Timothy D. Elliott, Esq.
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adversary proceeding is a non-core proceeding and grant Cavendish's Motion.

FACTS

Debtor, AmeriServe Food Distribution, Inc. ("AmeriServe") is in the business of supplying food and other supplies to restaurants and, in that capacity, acts as a national wholesale dealer in, among other things, perishable agricultural commodities. Cavendish is engaged in the business of selling frozen potato products to purchasers, including AmeriServe, who then resell those products. On January 31, 2000, AmeriServe filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. On February 1, 2000, the remaining debtors (together with AmeriServe, the "Debtors") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The cases were procedurally consolidated and Debtors continue to operate their businesses as debtors in possession. Prior to January 31, 2000, Cavendish had sold more than \$740,000 worth of frozen potato products to AmeriServe. AmeriServe has yet to pay for the products delivered by Cavendish.

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A significant number of PACA claims were filed in Debtors' Chapter 11 proceedings and AmeriServe is confronted by nearly \$40 million in alleged PACA claims. On May 5, 2000, pursuant to a Court order, Debtors submitted a report (the "Report") identifying the claims they deemed to be valid PACA claims. Cavendish was not identified in the Report among the holders of valid PACA claims. Cavendish filed an objection to its omission from Debtors' Report although Cavendish has not, to date, submitted a proof of claim in Debtors' Chapter 11. A final claims bar date has yet to be established in Debtors case.

DISCUSSION

At present, I am only asked to address the core versus non-core issue of Cavendish's adversary proceeding. I am not asked to determine the validity of that claim. However, in determining whether the claim under PACA is a core proceeding, I must at least consider, to a limited extent, the implications of a PACA claim in the context of Debtors' bankruptcy proceeding.

PACA, enacted in 1930, regulates relationships between merchants, dealers, and brokers in perishable commodities moved in interstate commerce. See 7 U.S.C. § 499a et seq. Pursuant to an

Regina A. Iorii, Esq.
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Michael R. Seidl, Esq.
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Timothy D. Elliott, Esq.
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amendment enacted in 1984, when a statutorily-defined dealer receives perishable commodities, as defined by PACA, from a statutorily-defined supplier, those commodities and proceeds from those commodities are deemed to be held in trust for unpaid suppliers. See id. Any unpaid suppliers, upon serving timely notice to the dealer and the Secretary of Agriculture, can qualify for a pro rata share of the PACA trust res on a priority basis. See id. In a bankruptcy context, traditional principles of trust law apply and property held in trust for another by a debtor in bankruptcy does not become part of the debtor's estate. See United States v. Whiting Pools, Inc. 462 U.S. 198, 205 n. 10 (1983). Thus, funds held in trust created pursuant to PACA are excluded from the bankruptcy estate and a perfected PACA trust beneficiary is entitled to priority payments in full from those trust assets before other creditors, both secured and unsecured, receive any payment from those sale proceeds. See Tom Lange Co., Inc. v. Kornblum & Co. (In re Kornblum & Co.), 81 F.3d 280, 284 (2d Cir. 1996); see also In re Long John Silver's Restaurants, Inc., 230 B.R. 29 (Bankr. D. Del. 1999).

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However, PACA places certain limitations on the types of commodities that fall within its definition of perishable commodities. See 7 U.S.C. § 499a(b)(4)(A). Moreover, and of particular relevance to the matter before me, PACA places restrictions on the manner and the extent to which perishable commodities can be treated and processed before sale to a dealer while still remaining within its statutory scheme. See 7 C.F.R. § 46.2(u). PACA and the regulations issued pursuant thereto define perishable commodities as "fresh fruits and vegetables of every kind and character" which are further defined to include:

all produce in fresh form generally considered as perishable fruits and vegetables, whether or not packed in ice or held in common or cold storage, but do not include those perishable fruits and vegetables which have been manufactured into articles of food of a different kind or character. The effects of the following operations shall not be considered as changing a commodity into a food of a different kind or character: Water, steam, or oil blanching, chopping, color adding, curing, cutting, dicing, drying for the removal of surface moisture; fumigating, gassing, heating for insect control, ripening and coloring; removal of seeds, pits, stems, calyx, husk, pods, rind,

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skin, peel, et cetera; polishing, precooling, refrigerating, shredding, slicing, trimming, washing with or without chemicals; waxing, adding of sugar or other sweetening agents; adding ascorbic acid or other agents used to retard oxidation; mixing of several kinds of sliced, chopped, or diced fruits or vegetables for packaging in any type of containers; or comparable methods of preparation.

See 7 U.S.C. § 499a(b)(4)(A) and 7 C.F.R. § 46.2(u). The restrictions imposed by the statute and its attendant regulations have generally been interpreted to limit PACA protections to unprocessed or minimally processed fruits and vegetables. See, e.g., Long John Silver's, 230 B.R. at 29; A&J Produce Corp. v. CIT Group/Factoring, Inc., 829 F.Supp. 651, 658 (S.D.N.Y 1993) aff'd in relevant part sub nom. Endico Potatoes, Inc. v. CIT Group/Factoring, Inc., 67 F.3d 1063 (2d. Cir 1995).

The dispute between Cavendish and Debtors in the matter sub judice centers on whether the steps Cavendish took in preparing its potatoes prior to sale to Debtors removed those perishable commodities from within the scope of PACA's definition of fruits and vegetables. If Cavendish so altered the potato products so as

Regina A. Iorii, Esq.
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to remove those products from the scope of the PACA definition, then those products and their proceeds would not be deemed held in trust by Debtors and Cavendish would be left with only a general unsecured claim based on Debtors' alleged prepetition failure to pay. However, if it were determined that Cavendish held valid perfected claims to PACA trust funds, those funds would not be property of the estate and any claim so asserted would be entitled to priority payments in accordance with traditional trust law in a bankruptcy context.

The question before me is whether a determination of the validity of a PACA trust claim, when the applicability of the pertinent PACA definitions are at issue, is a core proceeding or non-core proceeding pursuant to § 157(b). Section 157 provides in relevant part:

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

Regina A. Iorii, Esq.
Christopher S. Sontchi, Esq.
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(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

* * *

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

28 U.S.C. 157. The list of core proceedings set out in § 157 are not exclusive. Furthermore, a court confronted with an action purported to be brought under one of the enumerated § 157 categories must examine the underlying nature of the action to

Regina A. Iorii, Esq.
Christopher S. Sontchi, Esq.
Laura Davis Jones, Esq.
Michael R. Seidl, Esq.
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Geoffrey A. Richards, Esq.
Timothy D. Elliott, Esq.
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determine if it is a core or non-core proceeding. See Northern Pipe Line Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Beard v. Braunstein, 914 F.2d 434, 443-45 (3d. Cir. 1990).

In making a determination as to the core nature of a proceeding, it is appropriate to apply established Third Circuit reasoning which holds that "a proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." See Allen v. Taylor (In re Reliance Acceptance Group, Inc.) A-98-398 (PJW) (Doc. # 54) and A-98-399 (PJW)(Doc.# 67) at 8 (Feb. 5, 1999) quoting Torkelson v Maggio (In re Guild & Gallery Plus, Inc.), 72 F.3d 1171, 1178 (3d. Cir. 1996) citing In re Marcus Hook Dev. Park Inc., 943 F.2d 261, 267 (3d. Cir. 1991). Following this established proposition, in order to be deemed a core proceeding, Cavendish's adversary complaint "must have as its foundation the creation, recognition, or adjudication of rights which would not exist independent of a bankruptcy environment." See id., quoting Hatzel & Buehler, Inc. v. Orange & Rockland Utils., Inc., 107 B.R. 34, 40 (Bankr. D. Del. 1989) citing

Regina A. Iorii, Esq.
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Acolyte Elec. Corp. v. City of New York, 69 B.R. 155, 173 (Bankr. E.D.N.Y. 1986).

Cavendish's claim is based upon substantive rights established by PACA, a federal statute. See 7 U.S.C. § 499a. Whether the potato products at issue in Cavendish's claim meet the appropriate statutory definition is a question answered solely and completely by application of non-bankruptcy law to the pertinent facts. See id. ; see also 7 C.F.R. § 46.2(u). As such, the rights at issue are not provided by Title 11. Nor is the proceeding one that could arise only in the context of a bankruptcy case. Although, as the present matter clearly indicates, PACA claims often arise in a bankruptcy setting, they by no means arise exclusively in bankruptcy. Surely, PACA claims arise when a dealer experiences financial difficulties that fall short of necessitating a filing seeking bankruptcy protection, or in the context of a simple breach of contract action between a supplier and a dealer in perishable commodities. At its essence, Cavendish's claim merely asks for a determination as to the applicability of PACA to those goods it sold to Debtors prepetition, goods for which it has not received payment. As such, the claim neither derives from Title 11

Regina A. Iorii, Esq.
Christopher S. Sontchi, Esq.
Laura Davis Jones, Esq.
Michael R. Seidl, Esq.
James H. M. Sprayregen, Esq.
Matthew N. Kleiman, Esq.
Geoffrey A. Richards, Esq.
Timothy D. Elliott, Esq.
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substantive rights nor arises solely in a bankruptcy context. Therefore, I find Cavendish's Motion seeking a declaratory judgment is not a core proceeding under relevant Third Circuit analysis.

Although the ultimate issue of allowance or disallowance of the Cavendish claim is important to Debtors in the context of the significant number of PACA claims at issue in this case, the law which serves as the basis for making a determination as to the validity of Cavendish's rights is non-bankruptcy law, the application of which may arise in non-bankruptcy settings. A cause of action that derives from non-bankruptcy law, "no matter how integral to the debtor's plan of reorganization, cannot be deemed a core proceeding merely because of such importance." See David Allen at 10; see also Caldor Corp. v. S. Plaza Assoc., L.P. (In re Caldor, Inc.-NY), 217 B.R. 121, 127-28 (Bankr. S.D.N.Y. 1998) quoting Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095, 1102 (2d Cir. 1993).

In making a determination as to the core nature of a proceeding, Third Circuit law instructs that the relevant inquiry is to the source and nature of the rights at issue, not simply an inquiry based on the possible allowance or disallowance of the

Regina A. Iorii, Esq.
Christopher S. Sontchi, Esq.
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Timothy D. Elliott, Esq.
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claim or focused on concerns for the administration of the estate. Thus, I find that § 157(b)(2)(A), (B) and (O) are inapplicable in the present analysis and do not, by their language alone, bring the Cavendish claim within the ambit of core proceedings. None of the opinions relied upon by Debtors show the courts engaging in the type of § 157 analysis suggested by Third Circuit precedent. See, e.g., In re Long John Silvers, 230 B.R. at 29 (stating without explication that the court had jurisdiction of the matter as a core proceeding pursuant to § 157)¹; In re L. Natural Foods Corp., 199 B.R. 882, 885 (Bankr. E.D. Pa 1996) (addressing the PACA claim without making a § 157 determination); In re Super Spud, Inc., 77 B.R. 930, 931 (Bankr. M.D. Fla. 1987)(same); In re Fresh Approach, Inc., 51 B.R. 412, 414 (Bankr. N.D. Tex. 1985) (same); see also In re Southland + Keystone, 132 B.R. 632, 637 (B.A.P. 9th Cir. 1991) (finding adjudication of an alleged PACA claim priority dispute to be a core proceeding without engaging in the type of analysis urged by the Third Circuit). In re United Fruit & Vegetable, Inc. is the

¹ Cavendish points out that the core versus non-core issue was not presented to the court - neither party having addressed it in their motion papers which simply debated whether the particular product--processed french fries--fell within the PACA definition of "fresh fruits and vegetables."

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only case cited by either party that applies the appropriate § 157 standard to a PACA-related dispute. See 191 B.R. 445, 452 (Bankr. D. Kan. 1996). In that case, the court, after undergoing the relevant § 157 analysis, found that funds held in a PACA trust were not property of the estate and therefore the court had no jurisdiction as to the disposition of the trust res. See id. While it is true, as Debtors point out, that the court in United Fruit & Vegetable was not asked to make an initial determination as to the applicability of PACA to the produce at issue, the court nevertheless did apply the appropriate analysis in arriving at its decision to treat the matter before it as a non-core proceeding. See id. It is this same analysis that I must apply to the matter sub judice, despite the factual and legal distinctions between the present matter and that confronting the court in United Fruit & Vegetable. See id.

CONCLUSION

Regina A. Iorii, Esq.
Christopher S. Sontchi, Esq.
Laura Davis Jones, Esq.
Michael R. Seidl, Esq.
James H. M. Sprayregen, Esq.
Matthew N. Kleiman, Esq.
Geoffrey A. Richards, Esq.
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For the reasons set forth above, pursuant to 28 U.S.C. § 157(b)(3), I find that this adversary proceeding seeking a declaratory judgment regarding the validity of a claim under PACA and payment of that claim is a non-core proceeding and Cavendish's Motion is therefore granted.

Very truly yours,

Peter J. Walsh

PJW:ipm

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:) Chapter 11
AMERISERVE FOOD DISTRIBUTION,) Case No. 00-358 (PJW)
INC., et al.) Jointly Administered
)
Debtors.)

CAVENDISH FARMS,)
)
Plaintiff,)
)
v.) Adv. Proc. No. A-00-615
)
AMERISERVE FOOD DISTRIBUTION,)
INC.,)
)
Defendant.)

ORDER

For the reasons set forth in the Court's letter ruling of this date, pursuant to 28 U.S.C. § 157(b)(3), this adversary proceeding seeking a declaratory judgment regarding the validity of a claim under the Perishable Agricultural Commodities Act and payment of that claim is a non-core proceeding and Plaintiff's motion (Doc #4) is therefore GRANTED.

Peter J. Walsh
United States Bankruptcy Judge

Date: June 22, 2000