

**IN THE UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION**

**In re: VEG LIQUIDATION, INC. f/k/a ALLENS, INC.  
and ALL VEG, LLC, Debtors**

**No. 5:13-bk-73597  
Jointly Administered  
Ch. 11**

**ALLENS, INC. and ALL VEG, LLC  
v.  
CENTRAL PRODUCE SALES, LLC**

**Objection to PACA Claim**

**ORDER**

On January 13, 2014, Allens, Inc. [the debtor] filed *Debtors' Omnibus Objection to PACA Claims* which included three grounds for objection to the PACA claim of Central Produce Sales, LLC [Central Produce]: (1) inclusion of freight costs, which are not subject to PACA trust protection; (2) inclusion of contemplated expenses which should have been deducted; and (3) Central Produce's alleged violation of fiduciary duties related to procurement of a secret profit. The debtor's objection to Central Produce's PACA claim was set for hearing and ultimately heard on May 19 and 20. At the conclusion of the debtor's case on May 19, the debtor made an oral motion to amend *Debtors' Omnibus Objection to PACA Claims* to conform with the evidence presented at the trial, pursuant to Federal Rule of Civil Procedure 15(b). Specifically, the debtor sought to include an additional objection to Central Produce's PACA claim on the basis that the pre-sale contractual payment terms agreed upon by Allens and Central Produce, which differ from those set forth by the PACA statute, were not disclosed on the sale invoices related to the debt in question. The debtor alleged that this is in violation of 7 U.S.C. § 499e(c)(3)(iii) and results in Central Produce failing to preserve its PACA trust rights as to its entire claim amount. The Court took the debtor's oral motion under advisement in addition to the debtor's three grounds for objection set forth in the debtor's written omnibus objection. The debtor and Central Produce filed supporting briefs related to the oral motion to amend on May 20 and June 3, respectively.

In its brief in support of the oral motion to amend, the debtor alleges that the additional basis for objection only became apparent through information received during the discovery process, which was concluded after the deadline to file written objections had passed. In addition, the debtor alleges that Central Produce suffers no surprise from this additional objection because the debtor advised Central Produce's counsel of its intent to pursue the additional objection approximately one month before the hearing date, by a letter dated April 25, 2014. In response, Central Produce opposes the debtor's oral motion and re-characterizes the debtor's request as being under Federal Rule of Civil Procedure 16(b)(4), which allows a Court to modify its previously ordered pre-trial schedule only for good cause. For the reasons stated below, the Court grants the debtor's oral motion pursuant to Rule 15(b) and sustains the debtor's objection to Central Produce's PACA claim pursuant to the new ground for objection.

## **LEGAL ANALYSIS**

### **1. The Debtor's Rule 15(b) Oral Motion**

There are two preliminary matters the Court must address. First, the debtor seeks to amend its written objection under Rule 15, which Federal Rule of Bankruptcy Procedure 7015 designates as applicable in adversary proceedings. The debtor's objection to Central Produce's PACA claim is not an adversary proceeding but rather a contested matter under Federal Rule of Bankruptcy Procedure 9014. While Rule 9014(c) provides a list of rules that are designated for adversary proceedings but also are applicable in contested matters, Rule 7015 is not listed among those rules. Nevertheless, many courts find that Rule 7015 is applicable in contested matters, at a court's discretion, because of Rule 9014(c)'s language stating that "[t]he court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply." See *In re MK Lombard Group I, Ltd.*, 301 B.R. 812, 816 (Bankr. E.D. Penn. 2003) ("The trend of the cases appear to apply Rule 7015 to contested matters."). This Court follows that reasoning and finds that it is appropriate to apply Rule 7015—and, accordingly, Rule 15—in this matter.

For the second preliminary matter, Central Produce argues that the Court must analyze the debtor's request for amendment under Rule 16 before making a determination under Rule 15. Rule 16 addresses pre-trial procedure, including pretrial conferences and scheduling orders that set forth deadlines for joining parties, amending pleadings, completing discovery, and filing motions. Rule 16(b)(4) states that deadlines established in a scheduling order "may be modified only for good cause and with the judge's consent." Central Produce asserts that the debtor is seeking to amend a deadline listed in the *Order (I) Approving PACA Procedures, Including a PACA Claims Bar Date; (II) Authorizing the Debtors to Pay Allowed PACA Claims; and (III) Granting Related Relief* that was entered on the Court's docket on November 27, 2013. That order establishes deadlines related to PACA claims, including the filing of claims and subsequent objections and responses, as well as deadlines related to discovery.

Central Produce cites to *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709 (8th Cir. 2008) to support its argument that the debtor must first meet the rigorous burden of good cause under Rule 16(b)(4) before being entitled to the more discretionary standard of Rule 15. In *Sherman*, a scheduling order was issued by the district court pursuant to Rule 16 and included two relevant deadlines—a deadline for filing a pleading and a separate deadline for amending that same pleading. When a party in that case sought to amend the pleading seventeen months after the scheduling orders's amendment deadline passed, the issue became whether the moving party was subject to the good cause standard under Rule 16 or the "more liberal standard" of Rule 15(a). *Id.* at 715-16. The Eighth Circuit found that the good cause standard took precedent because the moving party was seeking to amend a deadline—specifically, the amendment deadline—within the scheduling order. *Id.* at 716.

There are several reasons why the *Sherman* case—and the good cause standard under Rule 16(b)(4)—is inapplicable to the debtor's request to amend its objection currently before the Court. In *Sherman*, the Eighth Circuit's focus was on the interplay between Rule 15(a) and Rule 16. Subpart (a) of Rule 15 addresses the amendment of pleadings before

trial. However, the debtor here has moved to amend the pleadings under Rule 15(b), which addresses amendments during and after trial. More importantly, *Sherman* had a distinctly different set of facts than the facts currently before the Court. In the present case, the most fundamental question is whether a scheduling order under Rule 16 exists. It is not this Court's general practice to enter scheduling orders pursuant to Rule 16. Even assuming that the November 27 order establishing PACA deadlines was entered in the general spirit of Rule 16, the order did not establish a deadline for the debtor to amend its own PACA claim objections. Therefore, the debtor's request to amend its PACA claim objection is not a request to amend any deadline within the November 27 order, but instead is a straight-forward request to amend the PACA claim objection itself. The Court finds that the debtor properly sought amendment under Rule 15(b), and the "good cause" standard of Rule 16 is inapplicable.

Turning to the debtor's oral motion itself, Rule 15(b) addresses the amendment of pleadings during and after the trial:

(1) **Based on an Objection at Trial.** If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence will prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) **For Issues Tried by Consent.** When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. —But failure to amend does not affect the result of the trial of that issue.

The Eighth Circuit has stated that "[t]he goal of Rule 15(b) is to promote the objective of deciding cases on the merits rather than on the relative pleading skills of counsel." *Am. Family Mut. Ins. Co. v. Hollander*, 705 F.3d 339, 348 (8th Cir. 2013). For this reason, amendments pursuant to Rule 15(b) are to be "liberally granted where necessary to bring about the furtherance of justice and where the adverse party will not be prejudiced." *Id.*

(quoting *Am. Fed'n of State, County, and Mun. Employees v. City of Benton, Ark.*, 513 F.3d 874, 883 (8th Cir. 2008)).

Rule 15(b) contemplates two forms of consent: express and implied. Central Produce did not expressly consent to trying the additional ground for objection now raised by the debtor. Counsel for Central Produce stated throughout the hearing—in his opening statement and closing argument, as well as in response to the debtor's Rule 15(b) oral motion—that the Court should not consider any grounds for disallowance of its PACA claim other than those listed in the debtor's written objection. The debtor argues that Central Produce nevertheless implicitly consented when it did not object at the hearing to the entry of any of the evidence needed to support the debtor's additional basis for objection.

“Consent may be implied if evidence to support the claim was introduced at trial without objection.” *Pummill v. Ameristeel, Inc. (In re Richards & Conover Steel, Co.)*, 267 B.R. 602, 610 (B.A.P. 8th Cir. 2001). However, the Eighth Circuit has held that “the admission of evidence bearing on a pleaded issue cannot form the basis for an amendment under Rule 15(b) unless the defendant knew of the plaintiff's intent to inject the unpleaded issues.” *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1063 (8th Cir. 1997) (quoting *McLaurin v. Prater*, 30 F.3d 982, 986 (8th Cir. 1994)). Some of the evidence supporting the debtor's new objection—including Central Produce's two invoices and the pre-sale written contract between the parties—is so elementary to proving the existence of the claim and the underlying debt that the evidence would have been entered into the record to support the debtor's other grounds for objection.<sup>1</sup> For that reason, the Court will not infer that by Central Produce's failure to object to the entry of that evidence, it was acquiescing to the debtor trying the additional ground for objection—regardless of the

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<sup>1</sup> Specifically, Central Produce's invoices are at the heart of the debtor's first and second written objections. The pre-sale contract is also implicated in those objections because it provides the agreed upon terms for the separate cost of freight and produce.

fact that Central Produce knew in advance that the debtor intended to “inject the unpleaded issues.” The debtor also elicited testimony from Victor Shank, president of Central Produce, regarding the lack of payment terms in the invoices. This evidence is central to the debtor’s additional ground for objection, and Central Produce did not object. Even so, the Court is hesitant to deem this, in and of itself, implied consent under Rule 15(b) in the face of Central Produce’s unequivocal *non-consent* expressed in opening statement and closing argument, as well as in response to the oral motion at the hearing and in its post-trial brief.

In situations where a court determines that no express or implied consent exists, a Rule 15(b) motion may still be granted if the non-moving party will not be prejudiced. *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 457 (10th Cir. 1982). To determine whether an amendment would cause prejudice, courts consider “whether (the party has) had a fair opportunity to defend and whether (the party) could offer any additional evidence if the case were to be retried . . . .” *Nielson v. Armstrong Rubber Co.*, 570 F.2d 272, 276 (8th Cir. 1978) (quoting *Monod v. Futura, Inc.*, 415 F.2d 1170, 1174 (10th Cir. 1969)). While it is apparent that Central Produce opposes the debtor’s request to amend the pleadings to conform with the evidence, it is also apparent that Central Produce was not surprised by the debtor’s oral Rule 15(b) motion. The debtor’s counsel advised Central Produce’s counsel by letter almost a month before trial that the debtor intended to pursue the additional ground for objection to Central Produce’s PACA claim. The debtor’s three-page letter included legal argument and citations of relevant case law and statutes to support the debtor’s new ground for objection to Central Produce’s PACA claim, as well as the reason why the debtor did not previously include these arguments in its timely-filed written objection.<sup>2</sup> Counsel for Central Produce clearly anticipated the

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<sup>2</sup> The debtor alleges that only after discovery was completed in April 2014 was it able to determine that the documents titled as “receiving plant payment reports”—which were attached to Central Produce’s PACA proof of claim and assumed by the debtor to be summaries of invoices—were the actual invoices utilized by Central Produce. Once the debtor determined this, it was able to identify the additional ground for objection. In

debtor's Rule 15(b) motion when he asked in his opening statement that the Court consider no issues other than those stated in the written objection. In addition, Central Produce did not seek a continuance prior to the hearing or once the debtor made its oral Rule 15(b) motion. The Court finds that Central Produce had a fair opportunity to defend the new ground for objection based on its advance knowledge that the debtor would pursue the issue at the hearing.

Central Produce also asserted in its brief that amendment of the debtor's written objection would require discovery to be re-opened "so that Central Produce could discover the facts behind the Debtor's new 4th Objection." However, the evidence entered into the record at the hearing is sufficient for the Court to make a legal determination on the question of statutory compliance. Because Central Produce had a fair opportunity to defend and no additional evidence is needed to make a determination, the Court finds that Central Produce is not prejudiced by an amendment under Rule 15(b). Granting the debtor's request to proceed with its additional ground for objection under Rule 15(b) "promote[s] the objective of deciding cases on the merits." As shown in the next section, if the Court did not allow the debtor to proceed with its new ground for objection, Central Produce potentially could succeed on its claim of PACA trust benefits when it is not so entitled.

## **2. Noticing Requirements of 7 U.S.C. § 499e(c)**

At the heart of this Rule 15(b) determination is the debtor's additional basis of objection to Central Produce's PACA claim, which is a relatively straight-forward legal analysis of whether Central Produce complied with the noticing requirements of 7 U.S.C. § 499e(c)

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response, Central Produce points to the fact that the debtor did not object to Central Produce's PACA claim for lack of proper documentation, which implies that the debtor either knew or suspected that the documents were invoices. Regardless, the debtor exhibited caution in its treatment of the payment reports as early as January 31, 2014, when it responded to Central Produce's Requests for Admission, in part, by denying that Central Produce had attached invoices to its PACA proof of claim.

in its two invoices subject to this inquiry. The regulation promulgated by the Secretary of Agriculture specifies that for the sale of produce entitled to PACA trust protection, the default payment term is that the buyer shall pay the seller within 10 days after it accepts the produce. 7 C.F.R. § 46.2(aa)(5). However, the regulation permits the parties to vary that payment term, up to a maximum of 30 days. 7 C.F.R. § 46.46(e)(2). The required process for doing so is outlined as follows:

Parties who elect to use different times for payment must reduce their agreement to writing before entering into the transaction and maintain a copy of their agreement in their records, and the times of payment must be disclosed on invoices, accountings, and other documents relating to the transaction.

7 C.F.R. § 46.46(e)(1). The controlling statute, upon which the regulation is based, similarly states:

When the parties expressly agree to a payment time period different from that established by the Secretary, a copy of any such agreement shall be filed in the records of each party to the transaction and the terms of payment shall be disclosed on invoices, accountings, and other documents relating to the transaction.

7 U.S.C. § 499e(c)(3).

For the 2013 growing season, the debtor and Central Produce entered into a one-page written contract for the sale and delivery of snap beans. The contract was signed by Victor Shank on behalf of Central Produce on May 18, 2013; and by Steve Brown on behalf of the debtor on June 3, 2013. In addition to setting forth pricing terms, the contract listed the payment term of 30 days for both the freight costs and the beans. Shank testified that the contract was negotiated in person between himself, Steve Brown, and Josh Allen before it was reduced to writing.

Pursuant to § 499e(c)(3), the written pre-sale contract between the debtor and Central Produce, which provided the payment term of 30 days, triggered the additional requirement that the payment term be included in the invoices created by Central Produce and provided to the debtor. However, both invoices for the two 2013 shipments of beans

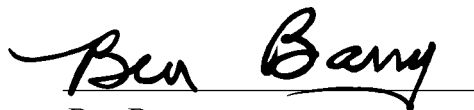


to the debtor failed to list any payment terms. Substantial compliance is not applicable because the statute explicitly states that differing payment terms must be disclosed in the seller's invoices. *Bowlin & Son, Inc. v. San Joaquin Food Service, Inc. (In re San Joaquin Food Service, Inc.)*, 958 F.2d 938, 940 (9th Cir. 1992). In addition, as the Ninth Circuit noted in *San Joaquin Food Service, Inc.*, the debtor's actual knowledge of the varied payment term is irrelevant. *Id.* at 941. Accordingly, the Court finds that Central Produce failed to preserve its PACA trust rights when it did not include the 30-day payment term in its invoices and sustains the debtor's fourth objection to Central Produce's PACA claim. *See San Joaquin Food Service, Inc.*, 958 F.2d at 940; *G & G Peppers, LLC v. Ebro Foods, Inc. (In re Ebro Foods, Inc.)*, 449 B.R. 759, 763-64 (N.D. Ill. 2011). The Court need not consider the debtor's other three grounds for objection.

### **Conclusion**

For the foregoing reasons, the Court grants the debtor's oral Rule 15(b) motion and sustains the debtor's additional ground for objection to Central Produce's PACA claim.

IT IS SO ORDERED.

  
Ben Barry  
United States Bankruptcy Judge  
Dated: 09/03/2014

cc: Jason Ryan Klinowski  
Elizabeth L. Janczak  
Michael J. Keaton