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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GENERAL PRODUCE CO., LTD., a
California limited partnership,

Plaintiff,

v.

WAREHOUSE MARKETS, LLC, a
California limited liability company;
MICHAEL A. WEBB, an individual;
NYCOLE WARREN, an individual; and
C & S WHOLESALE GROCERS, INC.,
a Vermont corporation,

Defendants.

No. 2:13-cv-0750-MCE-DAD

ORDER

Plaintiff General Produce Co., Ltd. ("General Produce") filed the present lawsuit on April 17, 2013, for enforcement of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499e et seq. ("PACA") against Defendants Warehouse Markets, LLC, Michael Webb, Nycole Warren and C&S Wholesale Grocer, Inc. (collectively referred to as "Defendants" or "Warehouse Markets"). According to Plaintiff's complaint, between February 5, 2013, and April 4, 2013, General Produce sold perishable agricultural commodities to Defendants, totaling \$70,636.79 in value, but has not been paid for those products. Compl., ¶¶ 9, 13, ECF No. 1. Freshko Produce Services, Inc. ("Freshko"),

1 now moves to intervene as a matter of right under Federal Rule of Civil Procedure
2 24(a)(2)¹ on grounds that Defendants owe it \$41,869.50, plus interest and fees, for the
3 purchase, on credit, of perishable agricultural commodities from April 26, 2013, to
4 November 21, 2013. Alternatively, Freshko seeks permissive intervention under Rule
5 24(b). Plaintiff General Produce has filed a Statement of Non-Opposition to Freshko's
6 Motion. ECF No. 21. Defendants, however, oppose Freshko's Motion on grounds that it
7 is untimely, that Freshko lacks any legitimate interest in the property of the trust created
8 under PACA, and that there is no commonality of fact or law between Plaintiff's claim
9 and the claim now asserted by Freshko. As set forth below, Freshko's Motion to
10 Intervene will be granted under Rule 24(a).

11 An intervenor as a matter of right must meet all requirements of Rule 24(a)(2) by
12 showing:

13 (1) it has a significant protectable interest relating to the
14 property or transaction that is the subject of the action; (2) the
15 disposition of the action may, as a practical matter, impair or
16 impede the applicant's ability to protect its interest; (3) the
17 application is timely; and (4) the existing parties may not
18 adequately represent the applicant's interest.

19 In evaluating whether these requirements are met, courts
20 "are guided primarily by practical and equitable
21 considerations." Further, courts generally "construe [the
22 Rule] broadly in favor of proposed intervenors." "A liberal
23 policy in favor of intervention serves both efficient resolution
24 of issues and broadened access to the courts. By allowing
25 parties with a practical interest in the outcome of a particular
26 case to intervene, we often prevent or simplify future litigation
27 involving related issues; at the same time, we allow an
28 additional interested party to express its views before the
court."

23 United States v. City of Los Angeles, 288 F.3d 391, 397-98 (9th Cir. 2002) (citations
24 omitted).

25 Applying those criteria to the present matter, it cannot realistically be disputed that
26 Freshko has the requisite property interest. PACA provides for the establishment of a

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28 ¹ All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure unless
otherwise indicated.

1 statutory trust in favor of unpaid suppliers of perishable agricultural commodities.
2 Provided that such unpaid suppliers properly perfect their claims, they have a priority
3 right to share in the corpus of the PACA trust. 7 U.S.C. § 499e(c)(4). Like General
4 Produce, Freshko has unpaid invoices for perishable agricultural commodities and is
5 entitled to participate in distribution of the PACA trust res.

6 While Plaintiff argues that Freshko fails to provide adequate written notice of its
7 intent to preserve the benefits of the PACA trust within thirty days as required by
8 7 U.S.C. § 499e(c)(3), that contention is misplaced. As Freshko points out, its invoices
9 for the subsequent transactions uniformly include the following language, which, under
10 the terms of the 1995 PACA Amendments at 7 U.S.C. § 499e(c)(4), is sufficient for
11 purposes of perfecting its PACA trust rights:

12 The perishable agricultural commodities listed on this invoice
13 are sole subject to the statutory trust authorized by section
14 5(c) of the Perishable Agricultural Commodities Act, 1930
15 (7 U.S.C. § 499e(c)). The seller of these commodities retains
16 a trust claim over these commodities, all inventories of food
or other products derived from these commodities, and any
receivables or proceeds from the sale of these commodities
until full payment is received.

17 See Freshko invoices, Ex. 1 to Decl. of Joseph Austin.

18 The second prerequisite for intervention as a matter of right, which examines
19 whether disposition of the present matter without Freshko's participation would impair its
20 interests, is also easily met. Given the likelihood that available trust assets will be limited
21 and thus insufficient to pay all PACA claims, if Freshko cannot intervene its ability to
22 collect what it is owed will be directly hindered. As a PACA claimant, it is entitled to
23 participate in an equitable pro-rata distribution of trust assets along with Plaintiff and any
24 other PACA creditors.

25 The same considerations also apply to satisfy the fourth requirement for
26 intervention as a matter of law, which asks whether Freshko's interests will be
27 adequately represented by the existing party parties. As stated above, since the trust

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1 res may well be insufficient to satisfy the PACA claims of all qualified beneficiaries, the
2 existing Plaintiff, General Produce, and Freshko have potentially adverse interests.

3 That leaves only the question of whether Freshko's application to intervene is
4 timely. While General Produce's lawsuit was filed on April 17, 2013, Defendants'
5 opposition, and the Court's own docket, make clear that following commencement of the
6 action a tentative settlement agreement with payment terms was reached, as a result of
7 which the instant proceedings were stayed by Order filed June 10, 2013, ECF No. 13.²
8 The problem resurfaced only when Warehouse Markets recently shut down and was not
9 able to continue honoring the agreed upon repayment terms. A Notice of Default was
10 subsequently entered on December 10, 2013, and the stay was vacated on December
11 23, 2013, ECF No. 18. Freshko's claims relate to unpaid invoices between April 26,
12 2013 and November 21, 2013, and, accordingly, fall largely within the stayed period.
13 Because the present intervention request was filed on January 14, 2014, less than a
14 month after the stay was lifted, Freshko's application was timely. While Defendants
15 appear to argue that Freshko should not be permitted to jeopardize that settlement, any
16 argument in that regard runs counter to the purpose of a PACA trust, which is designed
17 to protect the interest of all unpaid sellers of perishable agricultural commodities.
18 Moreover, Defendants have already defaulted on the terms of their settlement with
19 Plaintiff. See ECF No. 16.

20 In sum, Freshko is entitled to intervene as a matter of right under Rule 23(a)(2),
21 and its Motion seeking such intervention (ECF No. 19) is GRANTED.³ Because the
22 Court finds intervention appropriate under Rule 23(a)(2), it need not consider whether

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26 ² While Defendants request that the Court judicially notice this document and other documents
27 contained within the Court's own docket, it is not necessary to judicially notice filings made in the course of
28 this lawsuit itself.

³ Because the Court determined that oral argument was not of material assistance, this matter
was submitted on the briefs. E.D. Local Rule 230(g).

1 intervention is alternatively appropriate under Rule 23(b). Freshko is directed to file its
2 proposed Complaint in Intervention not later than ten (10) days following the date of this
3 Order.

4 IT IS SO ORDERED.

5 Dated: April 9, 2014

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MORRISON C. ENGLAND, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT

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