

E-Filed 10/8/10

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

HIGASHI FARMS, INC., a corporation; K&S FARMS, LLC, a limited liability company; M. NISHIMORI FARMS, INC., a corporation; MANN PACKING CO., INC., a corporation; MARTIN JEFFERSON & SONS, a partnership; MERRILL FARMS, LLC; a limited liability company; NEW STAR FRESH FOODS, LLC, a limited liability company; TAYLOR FARMS CALIFORNIA, INC., a corporation;

Plaintiffs,

v.

BANK OF THE WEST, a California banking corporation, as administrative agent for itself; AGSTAR FINANCIAL SERVICES, PCA/FLCA, and FCS FINANCIAL, PC; STEVE FRANSON, as receiver for SALYER AMERICAN FRESH FOODS, a California corporation; SALYER AMERICAN FRESH FOODS, a corporation,

Defendants.

Case No. 5:09-cv-04983-JF/PVT

ORDER¹ GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

[Docket No. 73]

Plaintiffs Higashi Farms, Inc.; K&S Farms, LLC; M. Nishimori Farms, Inc. ("Nishimori"); Mann Packing Co., Inc.; Martin Jefferson & Sons; Merrill Farms, LLC; New Star

¹This disposition is not designated for publication and may not be cited.

1 Fresh Foods, LLC, and Taylor Farms California, Inc. (collectively, “Plaintiffs”) move pursuant to
2 Federal Rule of Civil Procedure 15(a)(2) for leave to file a second amended complaint, seeking
3 (1) to add an additional defendant, Scott Salyer (“Salyer”), and (2) to add \$50,737.50 to
4 Nishimori’s claim. Intervener Green Star Produce Marketing, Inc. (“Green Star”) joins the
5 motion, and Defendants Bank of the West, AgStar Financial Services PCA/FLCA, and FCS
6 Financial, PCA (collectively, “the Bank”); Steven Franson (“Franson”); and Salyer American
7 Fresh Foods (“Salyer American”) (collectively, “Defendants”) have not filed opposition to the
8 motion. For the reasons set forth below, the motion will be granted.

9 I. BACKGROUND

10 Plaintiffs, together with Intervening Plaintiffs Green Star; G&H Farms, LLC; John S.
11 Tamagni & Sons, Inc.; Pedrazzi Farms, Inc.; Ed Mehl; C&G Garms, Inc.; Greenheart Farms,
12 Inc.; and Sabor Farms, LLC (collectively, “Intervenors”), allege that Salyer American has not
13 paid for produce supplied by them. As a result of a complaint filed against Salyer American by
14 the Bank, the Monterey Superior Court appointed Franson as the receiver of Salyer American.
15 Plaintiffs and Intervenors assert claims pursuant to the Perishable Agricultural Commodities Act
16 (“PACA”), 7 U.S.C. § 499a, *et seq.*, seeking to enforce their PACA trust rights. In an order
17 dated July 19, 2010, the Court ordered the Bank to establish a segregated PACA account and
18 established a PACA claims procedure. Plaintiffs filed a first amended complaint on October 28,
19 2009 and now seek leave to file a second amended complaint. Defendants have filed opposition
20 to the PACA claims of Plaintiffs and Intervenors, but they do not oppose the instant motion.

21 II. DISCUSSION

22 Leave to amend a pleading before trial should be “freely give[n] ...when justice so
23 requires.” Fed. R. Civ. P. 15(a)(2). In the Ninth Circuit, this policy is applied with “extreme
24 liberality.” *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001)
25 (citation omitted). However, When considering whether to grant leave to amend, a district court
26 may consider four factors: (1) existence of bad faith; (2) whether the amendment will cause
27 undue delay; 3) prejudice to the opposing party; and (4) futility. *Id.* Undue delay on its own
28 does not justify denial of a motion for leave to amend. However, if undue delay is accompanied

1 by prejudice to the defendant, denial of a motion for leave to amend may be justified. *See, e.g.,*
2 *Bowles v. Reade*, 198 F.3d 752, 758-59 (9th Cir. 1999). In the absence of prejudice or other
3 negative factors, the party opposing the motion to amend has the burden of showing why
4 amendment should not be granted. *See DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th
5 Cir. 1987).

6 Plaintiffs assert that Salyer is an officer, director, and/or shareholder in Salyer American
7 and that he therefore is liable individually for Salyer American's alleged failure to preserve
8 PACA trust assets. *See Sunkist Growers v. Fisher*, 104 F.3d 280, 283 (9th Cir. 1997) (quoting
9 *Morris Okun, Inc. v. Harry Zimmerman, Inc.*, 814 F. Supp. 346, 348 (S.D.N.Y. 1993) ("An
10 individual who is in the position to control the trust assets and who does not preserve them for
11 the beneficiaries has breached a fiduciary duty, and is personally liable for that tortious act.")).
12 Nishimori contends that Salyer American agreed to make ten equal payments of \$50,737.50 to
13 purchase fifty percent of a celery crop and that Salyer American made only nine such payments.
14 Nishimori alleges that Defendants distributed net proceeds of the sale of the celery to Nishimori
15 based upon an assumption that Salyer owned fifty percent of the crop rather than forty-five
16 percent of the crop. As a result, Nishimori now claims that Defendants either are liable for an
17 additional \$50,737.50 or must remit an additional five percent of the sales proceeds of the celery
18 crop.

19 While nearly a year has passed since Plaintiffs previously amended their complaint, and
20 Plaintiffs do not offer an explanation for the delay, there is no evidence of bad faith. Plaintiffs
21 have explained their legal theories in support of the proposed amended claims, and the amended
22 claims do not appear to be futile. The issue is whether the amendment will cause undue delay
23 that will create unfair prejudice to Defendants. Under the schedule set by the Court's order of
24 July 19, 2010, the last day to file and serve an intervening complaint was September 1, 2010, and
25 the last day to for Defendants to object to the PACA claims was October 1, 2010. Plaintiffs now
26 seek to amend their complaint, potentially delaying the remaining case schedule. However, by
27 not responding to the instant motion, Defendants have not demonstrated that any delay would
28 result in undue prejudice, and mere delay standing alone is an insufficient basis for denying a

1 motion to amend. *See, e.g., Bowles*, 198 F.3d at 758-59. Accordingly, the motion will be
2 granted. *See Owens*, 244 F.3d at 712.

3 The Court will modify the case schedule as set forth herein. Plaintiffs must file their
4 amended complaint by 4:00 p.m., October 12, 2010. Defendants' objections to the amended
5 claims must be filed on or before October 18, 2010. The schedule otherwise remains unchanged.

6 IT IS SO ORDERED.

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8 DATED: 10/8/10


JEREMY FOGEL
United States District Judge