

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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|-------------------------------|---|--------------|
| BOTMAN INTERNATIONAL, B.V., | : | CIVIL ACTION |
| Plaintiff, | : | |
| | : | NO. 99-5088 |
| v. | : | |
| | : | |
| INTERNATIONAL PRODUCE | : | |
| IMPORTS, INC.; DIRK J. KEIJER | : | |
| and CLARE A. KEIJER, | : | |
| Defendants. | : | |

MEMORANDUM

BUCKWALTER, J.

November 4, 1999

On October 25, 27 and 29, 1999, this court conducted hearings on plaintiff Botman International B.V.'s (Botman) Motion for Preliminary Injunction, having previously entered a Temporary Restraining Order (TRO) on October 15, 1999 against the defendants International Imports, Inc. (IPI), Dirk A. Keijer and Clare C. Keijer.

My findings follow:

A. FACTS

1. Botman is engaged in the sale of perishable agricultural commodities to merchants and dealer.

2. IPI is a dealer and commission merchant of agricultural commodities in the Commonwealth of Pennsylvania and subject to the terms and conditions of the Perishable Agricultural Commodities Act (PACA), U.S.C. § 499e(c), as amended, and the regulations issued pursuant thereto.

3. At all relevant times, Dirk A. Keijer was a shareholder and officer of IPI and in a position to control PACA trust assets.

4. Until May 5, 1999, Clare C. Keijer was a shareholder and officer of IPI. Thereafter, she remained as general counsel to IPI and had sufficient managerial functions with respect to financial matters as to be in a position of control, together with Dirk Keijer, over the corporate entity, IPI, now through her legal services, a Delaware Corporation. Both Keijers are residents of Pennsylvania.

5. Between May 12, 1999 and August 30, 1999, Botman sold and shipped to IPI in interstate commerce various wholesale lots of produce as set forth in Exhibit 1 of Botman's complaint. By letter dated September 29, 1999, IPI by Dirk J. Keijer, President, confirmed the undisputed balance of outstanding and unpaid invoices due and payable to Botman as being \$1,464,233.75.

6. Terms agreed upon between Botman and IPI required payment within 21 days of invoice. All wholesale lots of produce sold to IPI by Botman were subject to these payment terms as evidenced by a letter from Botman to IPI dated July 15, 1998 and IPI's acceptance of those terms by placing a written guarantee with Rabobank. Every invoice contained the "payment within 21 days" term.

7. IPI, through the Keijers, claim that there was an agreement to change the payment terms to 60 days. (See Defendant Exhibit D-3). D-3 is clearly not an agreement and Botman clearly refused any effort by IPI to so characterize it. See Plaintiff's Exhibit 1 to its reply certification, being a letter dated May 19, 1999 from Botman to IPI.

8. Botman sent IPI Notices of Intent to Preserve Trust Benefits on September 9, 1999 covering invoices between July 20, 1999 up to and including August 25, 1999, said invoices totaling \$433,079.54.

9. Botman, in addition to requesting the court to impose a PACA trust on the above \$433,079.54 also requests that a constructive trust be imposed on accounts not subject to the PACA trust to prevent unjust enrichment.

10. As previously mentioned, all goods sold to IPI were pursuant to contract terms providing for payment within 21 days as stated on each invoice.

11. While Botman has alleged that that produce was obtained by fraud, I do not find evidence to support that contention.

12. The profit and loss statements that Botman claims are false have not been proven at the hearings I held to be incorrect. Moreover, it is clear that Botman was not relying upon them. Botman was quite familiar with the poor financial condition of IPI but continued to ship produce despite this knowledge.

13. IPI made a loan to Dirk Keijer, personally, in the amount of \$210,000 in May of 1999, when the amount owing to Botman was growing substantially.

14. IPI has offered no credible explanation as to why its accounts receivable are substantially less than the amount owed Botman.

15. The financial exhibits of IPI demonstrate general financial instability of IPI.

B. LAW

Section 5 of the PACA, 7 U.S.C. § 499e, creates a statutory trust for the benefit of unpaid sellers or suppliers of perishable agricultural commodities.

The corpus of this trust consists of the perishable agricultural commodities received, all inventories of food or other products derived from those commodities received, any receivables or proceeds from the sale of such commodities, and any non-produce related assets purchased with trust monies.

Under the statute, Botman automatically becomes a beneficiary of the PACA trust upon transfer of the commodities to IPI, 7 C.F.R. § 46.46(d)(1).

Botman properly reserved its rights in the statutory trust by sending the notice as set forth in Finding No. 8.

It is clear that Botman will succeed on the merits of his complaint with regard to the money due and owing it and its entitlement to the PACA trust in invoices totaling \$433,079.54.

I cannot find from the record at the hearing that there is a likelihood of success on the fraud and unjust enrichment claims.

I do find that irreparable harm will result from failing to grant injunctive relief because there is a likelihood that IPI and the Keijers will dissipate the PACA trust assets based on Findings 14, 15 and 16.

In JSG Trading Corp. v. Tray-Wrap, Inc., 917 F.2d 75 (2nd Cir. 1990), the court stated:

If the likelihood of dissipating trust assets -- here the tomatoes or the proceeds derived from their sale -- is shown, a preliminary injunction could issue enjoining defendant from such dissipation and directing it to keep adequate records regarding the trust *res*. Further, we see nothing in the Act that would prohibit the court from exercising its traditional equity powers to grant a preliminary injunction at the instance of a private litigant if the normal standards for such relief are met. *See Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 108 (2d Cir. 1987); *but see Frio Ice*, 724 F.Supp. at 1378.

Finally, there has been no evidence introduced to suggest that granting the relief requested would be an undue hardship. In fact, IPI apparently is out of business. *See* Botman certification at paragraph 38(a). The benefit to the public from granting the relief sought is satisfactorily set forth in Botman's memorandum of law (p. 23) which the court accepts.

An order follows.

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ORDER OF PRELIMINARY INJUNCTION

On October 15, 1999, this Court issued a Temporary Restraining Order, restraining defendants herein from taking certain actions more particularly described therein, and as a part of said Order, this Court issued an order to the defendants to Show Cause why a preliminary injunction should not be issued, *pendente lite*, as prayed for in the complaint. The Temporary Restraining Order and the hearing on the order to show cause was continued by the Court until October 25, 1999, at which time a hearing was held.

AND NOW, this 4th day of November, 1999, upon consideration of the hearing testimony and the certifications, pleadings and briefs filed herein, the Court finds:

1. That the Court has jurisdiction of the subject matter of this cause;
2. That plaintiff is a statutory trust creditor of defendants under Section 5(c) of the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. § 499e(c)(4), in the amount of \$433,079.54;

3. That plaintiff will suffer immediate and irreparable injury in the form of dissipation of trust assets if a Preliminary Injunction is not issued.

It is therefore **ORDERED, ADJUDGED AND DECREED**, that the defendants International Produce Imports, Inc. (IPI), Dirk A. Keijer and Clare C. Keijer, their agents, servants, employees, officers, successors, assigns, banking institutions and attorneys and all other persons in active concert and participation with them be, and they hereby are:

- (i) preliminarily enjoined from violating the provisions of the Perishable Agricultural Commodities Act 7 U.S.C. § 499a et seq. (hereinafter PACA) and the regulations promulgated thereunder; and
- (ii) preliminarily enjoined from, in any way, directly or indirectly, in whole or in part, absolutely or as security, paying, withdrawing, transferring, assigning or selling any and all existing PACA trust assets, until further orders of this court or until defendants pay plaintiff the amount due under the PACA trust plus interest.

This preliminary injunction will take effect upon a bond being filed with, or cash deposited with the Clerk of Court by the plaintiff in the amount of \$10,000 as security for the payment of such costs and damages as may be incurred by any party who is found to have been wrongfully enjoined or restrained.

BY THE COURT:

RONALD L. BUCKWALTER, J.