

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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In re

ELVIS LYNN LOGAN  
and SUE W. LOGAN,

Case No. 99-27815-L  
Chapter 7

Debtors.

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FLAVOR-PIC TOMATO COMPANY, INC.,

Plaintiff,

v.

Adv. Proc. No. 99-0810

ELVIS LYNN LOGAN, SUE W. LOGAN,  
and NORTH MISSISSIPPI WHOLESALE  
PRODUCE, INC., d/b/a THE GREEN  
GROCER,

Defendants.

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**OPINION**

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BEFORE THE COURT is the second motion for summary judgment filed by the plaintiff Flavor-Pic Tomato Company, Inc. (“Flavor-Pic”), on January 2, 2002, against the defendants Elvis Lynn Logan and Sue W. Logan. On November 8, 2000, the court granted summary judgment for the plaintiff against the defendant Mississippi Wholesale Produce, Inc. (“Green Grocer”), but denied summary judgment against defendants Elvis Lynn Logan and Sue W. Logan. In this adversary proceeding, Flavor-Pic seeks to establish and determine the dischargeability of a debt arising under § 499e(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. §§ 499a) (“PACA”). The court denied summary judgment as to the individuals because the plaintiff (1) failed to prove a

failure to preserve trust assets by the corporate trustee; (2) failed to prove receipt of produce by the company; and (3) failed to prove the amount of any proceeds derived by the defendants from the sale of produce. In addition, the court declined to decide the legal issue of whether Congress intended to impose personal liability upon individuals in control of corporate PACA trustees. In its second motion for summary judgment, the plaintiff asserts that it has obtained the required proof with respect to the individual defendants to establish breach of a PACA trust. The court has carefully reviewed the Supplemental Statement of Undisputed Material Facts in Support of Plaintiff's Second Motion for Summary Judgment as well as the memorandums filed by the plaintiff and the defendants and concludes that the motion should be denied. The defendant has not filed a competing motion. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A), (B), and (O).

## **I. FACTUAL BACKGROUND**

Flavor-Pic sold fresh or frozen fruits and vegetables to the defendants for which it has not received payment in an amount in excess of \$200,000.00. The individual defendants filed a joint petition for relief under Chapter 7 of the Bankruptcy Code on July 1, 1999. The court has previously established that the corporate defendant is indebted to Flavor-Pic in the amount of \$218,270.75. Mr. and Mrs. Logan were the only shareholders of the corporation. They deposited proceeds from the sale of produce into the company's operating accounts. The accounts contained only proceeds from the sale of produce, but the company purchased produce from vendors other than Flavor-Pic. The plaintiff has not offered proof of the amount of proceeds received from the sale of produce

supplied by it during the relevant time period. From the operating accounts, the individuals paid the company's operating expenses, made payments to the company's lenders, and paid themselves about \$1,500 per month.

## II. ANALYSIS

The standards for granting summary judgment are set forth in the court's previous opinion. In this second motion for summary judgment, Flavor-Pic persists in equating non-payment of invoices with a breach of trust and has failed to establish the facts essential to its recovery. The plaintiff misunderstands the import of the court's prior opinion. The court held that Green Grocer is indebted to Flavor-Pic on the basis of contract. Flavor-Pic shipped goods to Green Grocer for which Flavor-Pic was not paid; therefore, Green Grocer is indebted to Flavor-Pic. In its prior opinion the court specifically declined to find the existence of a PACA trust because the plaintiff failed to show that Green Grocer retained any assets to which a PACA trust could attach. Thus the plaintiff's statement that "the Court's determination that Plaintiff is a perfected PACA trust beneficiary is thus the law of the case," is simply incorrect.

In order to establish that it is a PACA trust beneficiary, Flavor-Pic must demonstrate that PACA applies to the business formerly operated by Green Grocer. Flavor-Pic relies upon section 499e(c) of PACA as authority for the establishment of an express trust in its favor upon commodities sold to Green Grocer. That section provides in pertinent part:

(2) Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents.

7 U.S.C. § 499e(c)(2). Although the defendants have not questioned the applicability of PACA to their business, the court cannot help notice that the complaint is deficient in alleging facts sufficient to demonstrate that PACA applies to the business of Green Grocer. By its terms, PACA only applies to “commission merchants,” “dealers,” and “brokers,” each of which is a defined term. A commission merchant is “a person engaged in the business of receiving in interstate commerce or foreign commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another.” 7 U.S.C. § 499a(b)(5). A dealer is a “person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary [of Agriculture], any perishable agricultural commodity in interstate or foreign commerce, except that . . . (B) no person buying any such commodity solely for sale at retail shall be considered as a ‘dealer’ until the invoice cost of his purchases of perishable agricultural commodities in any calendar year are in excess of \$230,000.” 7 U.S.C. § 499a(b)(6). A broker is a “person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for

or on behalf of the vendor or the purchaser . . . .” 7 U.S.C. § 499a(b)(7). The defendants deny that they were licensed PACA dealers, thus this case is distinguishable from *Zimmerman* in which the corporate defendant was a licensed PACA dealer while the individual defendant was not. *See Morris Okun, Inc. v. Harry Zimmerman, Inc.*, 814 F. Supp. 346, 347 (F. Supp. 1993). Although the defendants admit that they were purchasers of produce in wholesale or jobbing quantities, this alone is not sufficient to constitute any of them a dealer for purposes of PACA. The plaintiff has not alleged that the defendants were in the business of buying or selling perishable agricultural products in interstate commerce and, if the defendants were engaged solely in retail sales, that the invoice cost of their purchases in any calendar year exceeded \$230,000. The plaintiff has failed to plead or prove these elements essential to its recovery, and thus cannot prevail on a motion for summary judgment.

If the plaintiff were able to establish that sales to Green Grocer were covered by PACA, the measure of any recovery for breach of trust would be based upon the difference between the value of trust assets and the amount of payments actually made to the plaintiff from trust assets. The Logans have admitted that invoices containing the language required to preserve a PACA trust totaling \$184,308.50 were submitted to Green Grocer for the period May 28, 1997 through December 30, 1998. Mr. Logan has submitted as an exhibit to his affidavit a list of all payments made to Flavor-Pic during the period January 5, 1993 through May 16, 1999. Mr. Logan indicates that at some point in 1999, the company’s account with Flavor-Pic was put on COD terms. The court cannot determine from the exhibit when this occurred and whether it would have any bearing on the

court's analysis. The court has focused only on those payments made after the PACA trust is alleged to have been established, May 28, 1997. From May 28, 1997 until May 16, 1999, Green Grocer made payments to Flavor-Pic totaling \$175,411.20. The difference between the amount of the invoices covered by the alleged PACA trust and the payments made to Flavor-Pic from assets potentially covered by that trust is \$8,897.30. This is true only if the produce supplied by Flavor-Pic was sold at cost or more. Flavor-Pic has failed to demonstrate what proceeds were obtained upon sale of its produce by Green Grocer. It is possible that the Flavor-Pic produce was sold for no more than \$175,411.20, in which case there would be no breach of trust by Green Grocer. If the court determined that PACA applies to Green Grocer, and if Green Grocer sold the Flavor-Pic produce for cost or more, and if it had assets available for distribution to creditors, Flavor-Pic would be entitled to priority of distribution from the assets of Green Grocer in the amount of \$8,897.30.

Green Grocer apparently has no assets, however. Thus Flavor-Pic seeks to recover from the principals of Green Grocer on the theory that they, as responsible persons for the corporate trustee, breached the PACA trust. In addition to each of the elements missing from Flavor-Pic's claim against Green Grocer, the assertion of personal liability against the individual defendants raises two additional legal questions: whether an individual corporate officer may be liable for breach of a PACA trust and, if so, whether the resulting obligation is nondischargeable in bankruptcy. The court discussed the diverging views concerning individual liability under PACA in its prior opinion. The court has been made aware of no case in which an individual was held liable for a related

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corporation's breach of a PACA trust and that obligation was determined to be nondischargeable in bankruptcy. Clearly there is no direct precedent in the Sixth Circuit. Thus it would be imprudent for the court to decide these legal issues given the plaintiff's failure to prove the applicability of PACA to Green Grocer and failure to prove its breach of trust.

For the foregoing reasons, the plaintiff's motion for summary judgment will be denied. The court will enter a separate order consistent with this opinion.

BY THE COURT,

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JENNIE D. LATTA,  
United States Bankruptcy Judge

Date: August 2, 2002

cc: Plaintiff  
Attorney for Plaintiff  
Defendants  
Attorneys for Defendants  
United States Trustee