

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

ELVIS LYNN LOGAN
and SUE W. LOGAN,

Case No. 99-27815-L
Chapter 7

Debtors.

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.

OPINION

In this adversary proceeding, the plaintiff seeks to establish and determine the dischargeability of a debt arising under § 499e(c)(4) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. §§ 499a) (“PACA”). Both the plaintiff and the defendants have filed motions for summary judgment alleging that there exist no genuine issues of material fact. At oral argument, however, counsel for the defendants sought to amend his motion to assert that, in the alternative, a genuine issue related to the application of payments made by the defendants to the plaintiff. The court has carefully reviewed each of the memorandums and affidavits supplied by the parties, as well as the oral arguments made, and concludes that summary judgment should be granted in part and

denied in part as to the plaintiff, and denied as to the defendants. This is a core proceeding.
28 U.S.C. § 157(b)(2)(A), (B), and (O).

I. FACTUAL BACKGROUND

The plaintiff, Flavor-Pic Tomato Company, Inc. (“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 debtors admit that the debt owed to Flavor-Pic is \$215,205.05, Schedule F - Creditors Holding Unsecured Claims, but Flavor-Pic has not filed a proof of claim. Flavor-Pic asserts that the amount owed is \$218,270.75, but admits that thirteen of the invoices evidencing this obligation do not contain language necessary to preserve a statutory trust in the proceeds derived from sale of the underlying commodities.

II. ISSUES TO BE DECIDED

The following issues are presented by these motions for summary judgment:

1. Whether a motion and order is required before matters set out in a Rule 36 Request for Admission are deemed admitted as a result of the defendants’ failure to timely respond?

2. Whether a material issue exists as to the amount of the debt owed by the corporate defendant to the plaintiff?

3. Whether the plaintiff provided to the defendants the requisite notice for creation of a PACA trust?

4. Whether the plaintiff has proven a breach of trust?

III. STANDARD FOR GRANTING SUMMARY JUDGMENT

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986) (“The burden on the moving party may be discharged by ‘showing’ . . . that there is an absence of evidence to support the non-moving party’s case.”). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to “go beyond the pleadings and by . . . affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Celotex Corp.*, 477 U.S. at 324. That burden is not discharged by “mere allegations or denials.” FED. R. CIV. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). Rule 56(c) mandates the entry of summary judgment “against a party who fails to make a showing sufficient to

establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

IV. ANALYSIS

A. Effect of the Defendant's Failure to Respond to Requests for Admission

Flavor-Pic served Requests for Admission to the defendant Sue W. Logan on March 23, 2000.¹ (Plaintiff's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment Against Corporate and Individual Defendants, Exhibit D.) The defendants admit that no answer was served by Mrs. Logan until well after thirty days after the requests were served. Counsel for the defendants maintains that it is necessary for the plaintiff to file a motion and obtain a court order before the matters contained within the request are deemed admitted.

Requests for Admission are governed by Rule 36 of the Federal Rules of Civil Procedure, as made applicable in adversary proceedings by Rule 7036 of the Federal Rules of Bankruptcy Procedure. That rule provides in pertinent part:

¹ At oral argument, the plaintiff asserted that requests for admission were served upon each of the three defendants and that none of the three timely responded. There is no evidence in the record that requests for admission were served on anyone other than Sue W. Logan.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission, signed by the party or the party's attorney.

Rule 29 is concerned with certain limitations upon the use of stipulations concerning discovery. There is no assertion by the defendant Sue W. Logan that a stipulation was reached concerning an extension of time to respond to the requests for admission. The defendant admits that her responses to the requests for admission were not served until well after thirty days after the requests were served.² The defendant contends that unless a motion is filed to enforce the provision of Rule 36, the outstanding admissions have no more effect than any other unanswered discovery.

The court is authorized to specify a period that is longer or shorter than thirty days for a party to respond to requests for admission. The court also has the power to grant additional time to respond even after the time fixed for response has expired. 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER AND RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE, § 2257, at 541 (West 1994). Further, the court may permit the withdrawal or amendment of an admission “when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.” FED. R. CIV. P. 36(b).

² Although the parties apparently agree that Sue W. Logan eventually responded to the requests for admission, the responses do not appear in the record.

The defendant has not requested an extension of the time to respond to the requests, nor has she requested that she be permitted to amend or withdraw her response (in this case, her lack of response). The defendant has not pointed to any particular admission that she would not have made; that is, the positive statements that the defendant has made in her affidavits do not appear to contradict any of the factual matters that the plaintiff requested her to admit. Sue W. Logan's own affidavits admit the following matters that were inquired about in the requests for admission: that she was an officer of the defendant North Mississippi Wholesale Produce, d/b/a The Green Grocer; that she received notice on the original invoices from Flavor-Pic regarding its intent to preserve the PACA trust; and that she wrote most of the checks to pay produce suppliers. *See* Affidavits of Sue W. Logan dated June 26 and July 13, 2000. The only exceptions to this are the final two requests for admission, which are not directed to factual matters, but rather to the ultimate liability of the defendant to the plaintiff.³

It is clear that from at least May 26, 2000, the defendant knew that the plaintiff intended to rely upon her failure to respond to the requests for admission in support of its motion for summary judgment, yet the defendant filed no motion for additional time to respond, or to amend or withdraw her admissions, at any time, up to and including the day of oral argument, September 11, 2000. At

³ "The Principal is liable to Plaintiff for the full amount sought in the Complaint. The Principal has no defenses to the Plaintiff's action and is personally liable for the deficiency in the PACA trust the Company was to maintain for the benefit of all unpaid suppliers of Produce such as the Plaintiff here." (Pl's First Set of Req. for Admis. To Def., Sue W. Logan ¶¶ 16,17).

oral argument, counsel for the defendant offered no explanation for her failure to timely respond. The court is at a loss to know what factual matters the defendant would deny if given the opportunity because the defendant has not made her late-filed responses part of the record. While it is true that the court has some discretion to relieve a party from the consequences of its failure to timely respond to requests for admission, it is not the case, as the defendant asserts, that the party requesting that matters be admitted must file a motion with the court before matters not timely responded to are deemed admitted. In this case, the plaintiff has relied upon the defendant's failure to answer in support of its motion for summary judgment. It would be unjust at this point to allow the defendant to deny factual matters set forth in the requests for admission.

This does not mean, however, that the defendant will not be permitted to defend herself because of her failure to respond to the final two requests for admission, each of which goes to the ultimate questions for decision by the court. The purpose of Rule 36 is "to establish matters to be true for purposes of trial when there is not a real controversy concerning them yet their proof may be difficult or expensive." *Essex Bank v. Capital Res. Corp.*, 432 A.2d 936, 941 (N.J. Ct. App. 1981) (citations omitted); *see also Demmert v. Demmert*, 115 F. Supp. 430, 433 (D. Alaska 1953) (concluding that "the purpose of . . . rule [36 is] to compel admission of matters which ought to be admitted in the interest of expedition, so that all issues as to which there can be no controversy in good faith, may be eliminated"). Thus, the rule "should not be used to cover the entire case, or to permit one to request admissions as to the controversial facts *particularly where they constitute the*

principal issues in a case.” Alaska Credit Bureau of Juneau v. Stevenson, 15 F.R.D. 409, 410 (D. Alaska 1954) (emphasis added); *see also Driver v. Gindy Mfg. Corp.*, 24 F.R.D. 473, 475 (E.D. Pa. 1959) (opining that “[i]f a real dispute as to the facts does exist, Rule 36 may not be used.”); *Maryland Cas. Co. v. Green*, 167 F. Supp. 226, 227 (E.D. Pa. 1958) (reasoning that “[f]acts which are in real dispute are not proper subjects for a request for admissions”); *Essex Bank*, 432 A.2d at 942 (stating that “a request for admissions should not be used in an attempt to establish the ultimate fact at issue”). Rule 36 “can be employed only in respect to questions of fact.” *Driver* 24 F.R.D. at 475. The matters which are the subject of Flavor-Pic’s Request Nos. 16 and 17 are questions of law, not questions of fact, and thus are not properly the subject of a request for admission.

B. Liability of Corporation

The corporate defendant is not separately represented by counsel and did not file a separate answer to the complaint or response to the motion for summary judgment. The corporate defendant is not a debtor in bankruptcy. Even if it were, a corporate debtor cannot receive a discharge of its debts if its assets are to be liquidated. *See* 11 U.S.C. §§ 727(a)(1) and 1141(d)(3). Thus the court need not determine the dischargeability of any debt owed by the Green Grocer to Flavor-Pic.

The amount of the debt owed by the Green Grocer to Flavor-Pic will be determined pursuant to contract, without reference to PACA. PACA is relevant to the corporate defendant only to the

extent that it has assets to which a PACA trust can be traced. There is no evidence before this court that such assets exist.⁴ Indeed, while the court has the impression that the corporation is no longer doing business, there is no proof of this fact in the record. The plaintiff relies upon the Affidavit of Eulus Leon Johnson, President of Flavor-Pic, which states that the outstanding debt owed by the defendants to Flavor-Pic is \$218,270.75. The defendants have not submitted evidence that the overall debt owed by the corporate defendant is anything other than the amount set forth in Mr. Johnson's affidavit. The plaintiff, on the other hand, has not alleged that the individuals failed to respect the corporate separateness of the Green Grocer. Thus, were there no PACA issues, the court would enter summary judgment against the Green Grocer in the amount of \$218,270.75, and in favor of the individual defendants, based solely on the affidavit of Mr. Johnson.⁵ As the court has not been provided any information concerning the assets of the corporation, no conclusions can be drawn concerning the impression of a PACA trust on those assets. The plaintiff's motion for summary judgment should be granted as to the corporation only, in the amount of \$218,270.75.

⁴ See Answer, ¶ 16, denying allegation that defendants are in possession of PACA trust assets.

⁵ The complaint alleges that the Green Grocer was incorporated on January 21, 1998. (Adversary Complaint to Enforce PACA Trust Obligations, etc., ¶ 27.) That allegation is denied. Some of the invoices attached to the complaint are dated prior to January 21, 1998, but neither the plaintiff nor the defendants have attempted to separate the contractual liability of the corporation from that of the individuals. As stated earlier, the plaintiff has not filed a proof of claim in the individuals' bankruptcy case. The court has determined that the entire obligation is owed by the corporation based on the Affidavit of Mr. Johnson.

C. Liability of Individuals

In order for the plaintiff to prevail on its motion against the individual defendants, the plaintiff must demonstrate (1) that a PACA trust was created and attached to some assets of the corporation; (2) that the individuals are personally liable for the dissipation of those assets; and (3) that the individuals' debt is not dischargeable.

(1) Notice Required for Preservation of PACA Trust

With respect to the individual defendants, the complaint essentially alleges that (1) Flavor-Pic shipped produce to the Green Grocer; (2) Flavor-Pic's invoices contained language necessary to preserve a PACA trust; (3) Flavor-Pic has not been paid; (4) therefore, there must have been a breach of trust. (5) The individual defendants are controlling persons of the Green Grocer; thus (6) the individuals are liable for the debt of Green Grocer.

The crux of the defendants' response to the plaintiff's motion for summary judgment is the legal argument that no PACA trust was created because the plaintiff failed to give notice of its intent to preserve the trust after payments were due. The defendants admit that the plaintiff properly included required language in its invoices, but assert that this without more was not sufficient to preserve the trust. The plaintiff asserts that under PACA there are alternative methods for preserving

a trust in perishable commodities and that one of those alternatives requires only the notation of its intent to preserve a trust on its invoices or billing statements. The plaintiff is correct.

The Perishable Agricultural Commodities Act (PACA) 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).⁶ In order to preserve trust benefits, the supplier must comply with the notice requirements set forth in § 499e(c):

(3) The unpaid supplier, seller, or agent shall lose the benefits of such trust unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or broker [and has filed such notice with the Secretary]⁷ within thirty calendar

⁶ Congress modeled the trust provisions of PACA after the Packers and Stockyards Act (PSA), 7 U.S.C. § 196, and intended for courts to use PSA precedents when analyzing PACA causes of action. H.R.Rep. No. 543, 98 at 12, U.S.C.C.A.N. 1984. Subsection (c) of the act was added in 1984 to create the statutory trust which further protects produce suppliers. *Driscoll Potatoes, Inc. v. Robinson Potato Supply Co., of Kansas City, Kan.*, 1 F. Supp. 2d 1268, 1270 (D. Kan. 1998). The act requires a purchaser to hold the produce and any proceeds in trust for the unpaid supplier. *Tom Lange Co., Inc. v. Kornblum & Co., Inc. (In re Kornblum)*, 81 F.3d 280, 284 (2d Cir. 1996). The unpaid obligation then “becomes a trust obligation . . . , prior to and superior to any lien or security interest in inventory held by the [buyer’s] secured lender.” *Sanzone-Palmisano Co., v. M. Seaman Enter., Inc.*, 986 F.2d 1010, 1012 (6th Cir. 1993).

⁷ The section in brackets was deleted in the 1995 amendment.

days (i) after expiration of the time prescribed by which payment must be made, as set forth in regulations issued by the Secretary, (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction, or (iii) after the time the supplier, seller, or agent has received notice that the payment instrument promptly presented for payment has been dishonored. The written notice to the commission merchant, dealer, or broker shall set forth information in sufficient detail to identify the transaction subject to the trust. 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.

(4) In addition to the method of preserving the benefits of the trust specified in paragraph (3), a licensee may use ordinary and usual billing or invoice statements to provide notice of the licensee's intent to preserve the trust. The bill or invoice statement must include the information required by the last sentence of paragraph (3) and contain on the face of the statement the following: "The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains 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."

7 U.S.C. 499e(c). Prior to November 15, 1995, PACA required simultaneous notice to the commission merchant, dealer, or broker, and the Secretary of Agriculture after the expiration for time for payment. The 1995 amendment struck the requirement of notice to the Secretary of Agriculture and introduced what is now subparagraph (4) providing for notice to be given in ordinary and usual

billing or invoice statements. The courts have uniformly interpreted the language in paragraph (4) to establish an alternative method of notifying a merchant of a seller's intent to preserve trust assets. *See Goldman-Hayden Co., Inc. v. Fresh Source Produce Inc.*, 217 F.3d 348, 352 n.20 (5th Cir. 2000) (stating that an ordinary bill or invoice which contains the appropriate language found in the statute may provide notice of intent to preserve trust assets); *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 206-07 (3d Cir. 1998) (noting that the purpose of the 1995 amendment was to remove from the Department of Agriculture the task of administrating PACA trusts by allowing a seller to preserve trust assets through the use of an invoice).

The defendants argue that the statute now requires two forms of notice: notice by invoice under § 499e(c)(4) and notice by some other unspecified form after expiration of the time for payment under § 499e(c)(3). The defendants' reading is strained to say the least. Subsection (4) very clearly states that it is a method of preserving the trust "in addition to the method of preserving the benefits of the trust specified in paragraph (3)." The only paragraph (3) in § 499e is the subparagraph immediately preceding subparagraph 499e(c)(4). As set out above, that subparagraph sets forth one method for preserving the PACA trust. Subparagraph (4) provides an additional "method" of preserving the trust, not an additional requirement for preserving the trust. Flavor-Pic properly relied upon the alternative method of preserving trust benefits in the commodities it sold to Green Grocer. The Court will grant summary judgment to the plaintiffs on the legal issue of what

notice is required to preserve a PACA trust. This is a hollow victory, however, because, as discussed, there remain substantial unresolved issues, both legal and factual.

(2) Breach of the PACA Trust

PACA was designed to protect unpaid sellers of produce from blanket liens granted by produce merchants in favor of third-party lenders. *See* 7 U.S.C.S. §499e(c)(1). It does this by impressing a floating trust upon the produce, accounts and proceeds derived from the sale of produce in the hands of merchants for the benefit of unpaid suppliers. In this case, the plaintiff has not proved that there are such assets. There is no trust res to divide among unpaid suppliers of produce. Thus, the plaintiff is attempting to hold the individual principals secondarily liable for the failure of the corporation to pay for the produce. The leading case permitting this result is *Morris Okun, Inc. v. Harry Zimmerman, Inc.*, 814 F. Supp. 346, 349 (S.D.N.Y. 1993), which states:

PACA establishes a statutory trust for the benefit of sellers and suppliers. This trust arises from the moment perishable goods are delivered by the seller. An individual who is in the position to control trust assets and who does not preserve them for the beneficiaries has breached a fiduciary duty, and is personally liable for the tortious act. This legal framework is to be distinguished from the piercing the veil doctrine, where the corporate form is disregarded because the individual has either committed a fraud, or because the corporation is a “shell” being used by the individual shareholders to advance their own purely personal rather than corporate ends.

Id. at 348. Two circuit courts of appeals, as well as a number of lower courts, have agreed with the analysis of *Zimmerman* imposing individual liability upon persons in control of corporate PACA trustees. *See, e.g., Golman-Hayden Co., Inc. v. Fresh Source Produce, Inc.*, 217 F.3d 348, 351-52 (5th Cir. 2000); *Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280 (9th Cir. 1997); *Shepard v. K.B. Fruit & Vegetable*, 868 F. Supp. 703 (E.D. Pa. 1994); *Strube Celery v. Zois (In re Zois)*, 201 B.R. 501, 507 (Bankr. N.D. Ill. 1996); *N.P. Deoudes, Inc. v. Snyder (Matter of Snyder)*, 184 B.R. 473, 475 (Bankr. D. Md. 1995). One district court has called into question the judge-made extension of PACA. *See Farm-Wey Produce, Inc. v. Wayne L. Bowman Co., Inc.*, 973 F.Supp. 778 (E.D. Tenn. 1997). In *Farm-Wey Produce*, Judge Edgar points out that “there is no indication in the statute itself, the associated regulations, or the legislative history that Congress intended to abrogate substantial portions of state corporation law by making a large class of individuals sureties on the contracts of produce buyers.” *Id.* at 783. There appears to be no controlling precedent in the Sixth Circuit, and although the court is favorably impressed by the thorough analysis of Judge Edgar in *Farm-Wey Produce*, it need not decide at this stage between *Zimmerman* and *Farm-Wey*. Even under the *Zimmerman* extension to PACA, a plaintiff must first prove a failure to preserve trust assets by the corporate trustee before the controlling persons of the corporation can be held secondarily liable. This the plaintiff has failed to do.

The defendants correctly argue that the plaintiff offers no proof that any produce shipped by the plaintiff was actually received by the defendant Green Grocer. The affidavit of Eulus Leon Johnson makes reference to receipt of produce by the defendants, but does so by incorporating a chart and copies of invoices that are not attached to the affidavit. The defendants deny allegations in the complaint related to receipt of produce. *See Answer* ¶¶ 8, 9, 12. The affidavits of Sue and Elvis Logan contain no admissions of the receipt of produce. The Requests for Admission directed to Sue W. Logan contain no statements with respect to receipt of produce by the defendants.

The defendants further correctly argue that plaintiff has failed to prove the amount of any proceeds derived by the defendants from the sale of produce. The point is important because even if the Green Grocer had received all shipments of produce alleged by Flavor-Pic, this fact would not conclusively prove that the produce was thereafter sold by Green Grocer, or what Green Grocer received from any sales. The produce could have been sold, for example, for far less than the invoice amounts, with the result that the res of the PACA trust would likewise be valued at far less than the face amount of the invoices. In the alternative, the produce received by the defendants could have spoiled before it could be sold. If so, “the trust res disappears as the perishable goods perish.” *Strube Celery v. Zois (In re Zois)*, 201 B.R. 501, 509 (Bankr. N.D. Ill. 1996). If the commodities no longer exist, even under the *Zimmerman* extension to PACA, the plaintiff must show that commodities were sold by the defendant and the proceeds of sale were used for some purpose other

than payment of the plaintiff. *See, e.g., Mid-Valley Produce Corp v. 4-XXX Produce Corp.*, 819 F. Supp. 209-10 (E.D. N.Y.) (President of defendant corporation wrote large checks to his wife and to a related company from PACA trust assets). No depositions or records of the company were filed in support of the plaintiff's motion for summary judgment. There is no evidence of the disposition of any proceeds from the sale of produce, other than an Affidavit of E. Lynn Logan, late-filed on October 5, 2000, listing payments by Green Grocer of \$645,204.56 to Flavor-Pic over the period between January 1, 1993, and May 16, 1999. The plaintiff has failed to prove that the Green Grocer received proceeds in any amount from the sale of produce and, more importantly, has failed to prove that Green Grocer did anything with proceeds it did receive other than pay them over to its produce suppliers. The mere fact that Green Grocer has not been paid for produce sold to it by Flavor-Pic does not establish a breach of trust by the Green Grocer or by any individual connected with the Green Grocer. The plaintiff's motion for summary judgment as to the individual defendants will be denied.⁸

⁸ Although the plaintiff's memorandum in support of its motion for summary judgment deals only with the secondary liability of the individuals, the complaint indicates that the individuals may be primarily liable for some portion of the debt owed to Flavor-Pic. *See supra* n.5. Because the issue was not argued or briefed, the court has made no determination of any contractual liability of the individuals. The court notes, however, that whether the individuals are primarily or secondarily liable, the dischargeability issue depends on proof of a breach of trust.

In re Elvis Lynn Logan and Sue W. Logan
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V. CONCLUSION

For the foregoing reasons, summary judgment will be entered against the corporate defendant, North Mississippi Wholesale Produce, Inc., d/b/a The Green Grocer in the amount of \$218,270.75. The defendant's motion for partial summary judgment with respect to the legal issue of notice required for attachment of a PACA trust will be denied. The plaintiff's motion for summary judgment as to the individual defendants, Elvis Lynn Logan and Sue W. Logan, also will be denied. The court will enter a separate judgment consistent with this opinion.

BY THE COURT,

_____/s/_____
JENNIE D. LATTA,
United States Bankruptcy Judge

Date: November 8, 2000

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