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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re)	Bankruptcy Case
)	No. 97-35024DM
ROBERT PATRICK EARLY,)	
)	Chapter 7
Debtor.)	
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LINDEN ASSOCIATED GROWERS, INC.,)	Adversary Proceeding
EMERALD INTERNATIONAL TRADE, LTD.,)	No. 98-3106DM
FELIX COSTA & SONS, and BREWSTER)	
HEIGHTS PACKING, INC.,)	
)	
Plaintiffs,)	
)	
v.)	
)	
ROBERT PATRICK EARLY,)	
)	
Defendant.)	
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MEMORANDUM DECISION

A hearing was held on February 12, 1999, on Plaintiffs Linden Associated Growers, Inc., Brewster Heights Packing, Inc., Felix Costa & Sons, and Emerald International Trade Ltd. ("Plaintiffs") Motion for Summary Judgment ("the Motion") against debtor and defendant, Robert Patrick Early ("Debtor"), on their claims under the Perishable Agricultural Commodities Act ("PACA")¹, and 11

¹ 7 U.S.C. § 499a-499q.

1 U.S.C. § 523(a)(4).² Marion I. Quesenbery, Esq. appeared on
2 behalf on Plaintiffs; Drew Henwood, Esq. appeared on behalf of
3 Debtor.

4 Having considered the Motion, Debtor's opposition to the
5 Motion, Plaintiffs' reply in support of the Motion, all other
6 papers filed herein in support and in opposition to the Motion,
7 and the arguments of counsel, for the reasons that follow, the
8 MOTION is GRANTED.

9 I. FACTS

10 Debtor was a one of three shareholders, a director, the
11 treasurer, and the chief financial officer of Golden Phoenix
12 Trading, Inc. ("GPT"). The agricultural division of GPT was in
13 the business of buying and selling fresh fruits and vegetables; as
14 a United States Department of Agriculture licensed dealer of
15 perishable agricultural commodities, GPT was subject to PACA. In
16 May and June 1997, Plaintiffs sold, delivered and invoiced to GPT
17 over one million dollars worth of fresh fruits and vegetables.
18 Immediately upon delivery of these commodities, Plaintiffs became
19 the beneficiaries of a statutory trust under PACA, the res of
20 which consisted of the commodities, and any products and proceeds
21 stemming from the commodities. 7 U.S.C. § 499e(c)(2)³; In re

22
23 ² Unless otherwise indicated, all section references are to
24 the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

25 ³ This section states, in relevant part, that "Perishable
26 agricultural commodities received by a . . . dealer, . . . in all
27 transactions, and all inventories of food or other products
28 derived from perishable agricultural commodities, and any
receivables or proceeds from the sale of such commodities or
products, shall be held by such . . . dealer . . . in trust for the
benefit of all unpaid suppliers or sellers of such commodities . .
. , until full payment of the sums owing in connection with such

1 Richmond Produce Co., Inc., 112 B.R. 364, 368 (Bankr. N.D. Cal.
2 1990). As required by PACA, Plaintiffs took all actions necessary
3 to perfect their rights to the PACA trust assets.⁴ GPT has not
4 paid for commodities delivered under these invoices and GPT has
5 since ceased operations. The corporation is now in a Chapter 7
6 bankruptcy case in the Western District of Washington.

7 The Debtor is not licensed under PACA. However, he oversaw
8 GPT's agricultural division. In this capacity his
9 responsibilities included managing the cash flow, making decisions
10 regarding what bills were to be paid, instructing the cash
11 disbursement clerk to prepare checks, and signing those checks.

12 On October 31, 1997, Debtor filed a petition for relief in
13 this court under Title 11, Chapter 11. Thereafter the case was
14 converted to a Chapter 7 case. Plaintiffs' complaint for
15 nondischargeability followed.

16 II. ISSUES

17 The questions presented are (1) whether Debtor is
18 individually liable under PACA; and (2) if so, whether this
19 liability is nondischargeable as a debt for ". . . defalcation
20 while acting in a fiduciary capacity . . ." under section
21 523(a)(4).

22 III. SUMMARY JUDGMENT STANDARD

23 A party is entitled to summary judgment "if the pleadings,
24 _____
25 transactions has been received by such unpaid suppliers, sellers,
26 . . ."

27 ⁴ The beneficiaries of a PACA trust are required to take
28 certain steps to perfect their trust rights. 7 U.S.C. §
499e(c)(3). Defendant has not argued that Plaintiffs failed to
take the required steps.

1 depositions, answers to interrogatories, and admissions on file,
2 together with the affidavits, if any, show that there is no
3 genuine issue of material fact and that the moving party is
4 entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c);
5 Fed.R.Bankr.P. 7056; Anderson v. Liberty Lobby, Inc., 477 U.S.
6 242, 247, 106 S.Ct. 2505, 2509-2510 (1986).

7 IV. DISCUSSION

8 **A. Individuals Can Be Held Liable Under PACA**

9 Individual liability under PACA is controlled by the decision
10 of the Ninth Circuit Court of Appeals in Sunkist Growers, Inc. v.
11 Fisher, 104 F.3d 280, 283 (9th Cir. 1997), where the court held
12 that "individual shareholders, officers, or directors of a
13 corporation who are in a position to control PACA trust assets,
14 and breach their fiduciary duty to preserve those assets, may be
15 held liable under PACA." This liability is secondary to that of
16 the corporation. Id. The court considered the following factors
17 in determining individual liability under PACA: the closely-held
18 nature of the corporation, the individual's active management
19 role, and any evidence of the individual's acting for the
20 corporation. Id.

21 **B. Debtor Was In A Position To Control PACA Trust Assets**

22 The court agrees with Plaintiffs that Debtor was in a
23 position to control the PACA trust assets. As one-third owner,
24 chief financial officer and a GPT director, Debtor had overall
25 responsibility for the financial affairs of GPT, including its
26 agricultural division, the division to which the commodities in
27 this case were delivered. He also managed GPT's accounts payable
28 and receivable, and he decided what creditors were to be paid.

1 Debtor does not dispute these facts. Instead he argues that
2 because he was in Europe when some of Plaintiffs' commodities were
3 delivered to GPT, he was not in a position to control the PACA
4 trust assets.⁵ This argument is unpersuasive. First, while
5 Debtor was in Europe, Mr. Ron Preston acted as chief financial
6 officer of GPT. Debtor was in frequent contact with Mr. Preston
7 regarding the financial issues facing GPT, including decisions
8 about which creditors to pay. He did not direct Mr. Preston to
9 pay Plaintiffs' invoices. Second, Debtor did not resign as an
10 officer of GPT until shortly after he returned from a trip to Peru
11 in mid-July 1997. The commodity deliveries in this case took
12 place in May of that year. Thus, Debtor was GPT's chief financial
13 officer when Plaintiffs' commodities were shipped and invoiced,
14 and when those invoices became due.

15 Debtor does not deny that he was in a position to control the
16 PACA trust assets while he was away on these trips. He does,
17 however state in a declaration that he did not communicate with
18 any GPT employees while he was out of the country regarding
19 financial issues facing the company. For the reasons discussed
20 below, the court is disregarding this declaration. In any event,
21 Debtor offers no explanation as to how the trip to Europe removed
22 him from a position to control the PACA trust assets. He does not
23 argue that he was in a remote area where he did not have access to
24 any of the modern technology currently used to conduct business.

25 Additionally, the court will disregard this statement because
26 it directly contradicts statements Debtor made during a prior

27 ⁵ The European trip was a business trip as well as a
28 vacation.

1 deposition in connection with a PACA action in the United States
2 District Court, Western District of Washington. In that
3 deposition Debtor testified that while his was on the same trip to
4 Europe he communicated with Mr. Preston about GPT's cash flow
5 problems, and with his son, James Early, a GPT employee, about
6 people who had not been paid. "The general rule in the Ninth
7 Circuit is that a party cannot create an issue of fact by
8 affidavit contradicting his prior deposition testimony." Kennedy
9 v. Allied Mutual Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991).

10 Before applying this rule, however, the court must make a factual
11 determination that the contradiction was actually a "sham". Id.

12 The court finds that the contradiction created by Debtor's
13 declaration meets the "sham" standard. Debtor's financial
14 interest in GPT, the company's financial condition at the time he
15 was in Europe and Peru, and his status as chief financial officer
16 and head of the agricultural division convince the court that
17 Debtor cannot rely on his declaration to create a genuine issue of
18 material fact.

19 In accordance with the foregoing, the court finds that Debtor
20 was in a position to control the PACA trust assets.

21 **C. Defendant Breached His Fiduciary Duty To Preserve the**
22 **PACA Trust Assets**

23 Upon delivery to GPT the Plaintiffs' commodities, and any
24 proceeds and products stemming from them, were impressed with a
25 statutory trust for Plaintiffs' benefit. 7 U.S.C. § 499e(c)(2).
26 Under the Sunkist decision, Defendant owed Plaintiffs a fiduciary
27 duty to preserve the trust assets.

28 Defendant engaged in several affirmative acts and omissions

1 which resulted in a breach of this fiduciary duty. Before
2 Defendant departed for Europe he was fully aware that GPT was
3 experiencing a financial crisis. The company had a negative bank
4 balance of approximately \$100,000. At the same time GPT received
5 hundreds of thousands of dollars from the sale of Plaintiffs'
6 commodities. All of this money was gone by the time Defendant
7 left for Europe, and none of it was used to pay Plaintiffs'
8 invoices. Additionally, while he was in Europe, Debtor was
9 informed by both Mr. Preston and his son, James Early, that GPT
10 was experiencing severe cash flow problems and that as a result
11 creditors were not being paid. Despite this knowledge Defendant
12 chose to stay in Europe instead of returning home to try and
13 salvage the business. Finally, upon returning from overseas
14 Debtor was aware that GPT had depleted substantially all of its
15 cash flow. What little money was left went to pay individuals and
16 other companies in which Debtor has a financial interest.⁶ Because
17 the invoices evidencing Plaintiffs' delivery of the commodities to
18 GPT remain unpaid and the PACA trust assets have are unaccounted
19 for, Debtor is liable under PACA.

20 **D. Defendant's PACA Liability Is Nondischargeable Under**
21 **Section 523(a)(4)**

22 Pursuant to section 523(a)(4), a debt for defalcation while
23 acting in a fiduciary capacity is nondischargeable. The fiduciary
24 capacity contemplated by this section exists only in relation to
25 express or statutory trusts, which exist independent of any
26 wrongdoing by the debtor. In re Moore, 186 B.R. 962, 974 (Bankr.

27 ⁶ In late June there was a \$300,000 check written to a
28 company named Norwood. This is a company in which Defendant has an
ownership interest.

1 N.D.Cal. 1995). Constructive, implied and resulting trusts will
2 not support the requisite fiduciary relationship under section
3 523(a)(4). Id. The statutory trust established by PACA is valid
4 and enforceable in bankruptcy proceedings. In re Milton Poulos,
5 Inc., 94 B.R. 648, 650 (Bankr. C.D. Cal. 1988), *aff'd*, 107 B.R.
6 715 (9th Cir. BAP 1989), *aff'd in part, rev'd in part* 947 F.2d
7 1351 (9th Cir. 1991).

8 Defalcation under section 523(a)(4) consists of the
9 misappropriation of trust funds or money held in any fiduciary
10 capacity as well as the failure to account for such funds. In re
11 Lewis, 97 F.3d 1182, 1186 (9th Cir. 1996). It includes innocent
12 defaults by a fiduciary who fails to account fully for money
13 received and does not require the intent to defraud. Id.
14 Plaintiffs have established that over one million dollars of
15 perishable commodities were delivered and received by GPT.
16 Neither the commodities, GPT's accounts receivable, nor any
17 proceeds from these commodities are available to satisfy
18 Plaintiffs' claims. Consequently, the PACA trust assets are
19 unaccounted for. Debtor was in a position to control those
20 assets. Thus, Debtor is liable for defalcation while acting in a
21 fiduciary capacity under section 523(a)(4) and this liability is
22 nondischargeable.

23 V. CONCLUSION

24 In accordance with the foregoing, Plaintiffs' Motion for
25 Summary Judgment on their PACA and section 523(a)(4) claims is
26 granted. Within twenty days of service of this Memorandum
27 Decision counsel for Plaintiffs should prepare an order and
28 judgment consistent with this disposition and should comply with

1 B.L.R. 9021-1 and B.L.R. 9022-1.

2 Dated: March __, 1999

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Dennis Montali
United States Bankruptcy Judge

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