

Friday, March 17, 2017

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State Bar
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INSTITUTE OF CONTINUING LEGAL EDUCATION

Publication No.
179556

FOREWORD

The Institute is especially grateful to our outstanding Seminar Chairperson(s) for providing the necessary leadership, organization, and supervision that has brought this program into a reality. Indeed a debt of gratitude is particularly due our articulate and knowledgeable faculty, without whose untiring dedication and efforts this seminar would not have been possible. Their names are listed on the brochure for this program and their contributions to the success of this seminar are immeasurable.

I would be remiss if I did not extend a special thanks to each of you who are attending this seminar and for whom the program was planned. All of us hope your attendance will be most beneficial as well as enjoyable. Your comments and suggestions are always welcome.

March, 2017

Tangela S. King
Interim Director, ICLE

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Materials Were Not Submitted for the Following Presentations at the Time of Printing/Duplication:

DEVELOPMENTS IN ANTITRUST: MARKET DEFINITION MATTERS

B. Parker Miller, Alston & Bird LLP, Atlanta



The Perishable Agricultural Commodities Act: Preserving and Enforcing the Statutory Trust

Joel L. McKie

Hall Booth Smith, P.C.

Atlanta, Georgia

***The Perishable Agricultural Commodities Act: Preserving and Enforcing
the Statutory Trust***

Agriculture Section of Georgia Bar Association 2017 CLE

By: Joel L. McKie, Hall, Booth, Smith, P.C.

*All information provided in this paper is for informational purposes only and does not
constitute legal advice.*

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I. Introduction.

In 1930, Congress enacted the Perishable Agricultural Commodities Act, 7 U.S.C. § 499e ("PACA") "to promote fair trading practices in the produce industry." Baiardi Food Chain v. United States, 482 F.3d 238, 240 (3d Cir. 2007). The PACA "was enacted to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct." Zwick v. Freeman, 373 F.2d 110, 116 (2d Cir. 1967). In 1984, to further protect the interests of the suppliers of perishable agricultural commodities, Congress amended the PACA by providing for a statutory trust. Specifically, 7 USC § 499e(c)(2) provides:

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. Payment shall not be considered to have been made if the supplier, seller, or agent receives a payment instrument which is dishonored. . . .

7 USCS § 499e(c)(2) (2017).

While the PACA creates other rights and obligations for persons involved in the produce industry, this paper will focus on the statutory PACA trust and the other key components of the PACA that impact the preservation and enforceability of the statutory trust.

II. The Nature of the Statutory PACA Trust.

A. *The Statutory Trust Was Intended to Make Claims of Unpaid Produce Suppliers Superior to Claims of Other Creditors.*

To understand the scope of the PACA statutory trust, it is important to understand the Congressional intent that led to the trust's creation.

In the early 1980s, . . . Congress noted that, as a result of the exigencies of the perishable commodities business, sellers were typically required to sell their produce quickly and frequently found themselves in the position of unsecured creditors of buyers whose creditworthiness could not be verified. If buyers defaulted, sellers could look only to the commodities (which would have perished) or to the sales proceeds of the commodities. Since sellers were typically unsecured creditors, they generally stood in line behind banks and other lenders who had obtained security interests in the defaulting purchaser's inventories, proceeds, and receivables. As a result, sellers were often unable to collect monies owed to them. Congress viewed this instability as a burden on commerce and contrary to the public interest. *As a remedy, Congress amended PACA in 1984 to make the sellers' interests in the commodities and sales proceeds superior to those of the buyers' creditors, including secured creditors.*

Am. Banana Co. v. Republic Nat'l Bank of N.Y., N.A., 362 F.3d 33, 37 (2d Cir. 2004) (citations omitted) (emphasis added).

Congress contemplated that banks would consider their loss of "secured" status relative to trust beneficiaries prior to extending credit to PACA trustees. C.H. Robinson Co. v. Trust Co. Bank, N.A., 952 F.2d 1311, 1315 (11th Cir. 1992). While the PACA and corresponding regulations do not prohibit a produce supplier "from granting a secured interest in trust assets, they make it clear that the secured interest is secondary and specifically voidable in order to satisfy debts to unpaid PACA beneficiaries in perishable agricultural commodity transactions." D.M. Rothman & Co. v. Korea Commer. Bank, 411 F.3d 90, 94 (2d Cir. 2005).

B. Generally, All of Debtor's Assets Are to Be Considered PACA Trust Assets unless and until the Debtor Can Prove such Assets were not Acquired with the Proceeds of the Debtor's Transactions in Produce.

In enacting enabling regulations for the PACA, USDA has defined "trust assets" to mean:

The trust is made up of perishable agricultural commodities received in all transactions, all inventories of food or other products derived from such perishable agricultural commodities, and all receivables or proceeds from the sale of such commodities and food or products derived therefrom. *Trust assets are to be preserved as a nonsegregated "floating" trust. Commingling of trust assets is contemplated.*

7 CFR 46.46(b) (emphasis added).

Therefore, "[a]ny assets purchased by the buyer during the existence of the trust will be assumed to be purchased with trust assets and will become part of the trust fund assets, available to satisfy the claims of the qualified, unpaid seller." Bear Mt. Orchards, Inc. v. Mich-Kim, Inc., 2007 U.S. Dist. LEXIS 88983 (E.D. Pa. Nov. 30, 2007). Thus, a purchaser of perishable agricultural commodities, as well as entities who receive the proceeds from the sale of such commodities by the purchaser, may avoid having their assets subjected to PACA's statutory trust only by showing either that:

(1) no PACA trust existed when the [disputed assets] were purchased; (2) even though a PACA trust existed at that time, the [disputed assets] were not purchased with trust assets; or (3) although a PACA trust existed when the [disputed assets] were purchased and the [disputed assets] were purchased with trust assets, [the purchaser] thereafter paid all unpaid sellers in full prior to the transactions involving the Creditors, thereby terminating the trust.

Tom Lange Co. v. Kornblum & Co. (In re Kornblum & Co.), 81 F.3d 280, 287 (2d Cir. N.Y. 1996).¹

As to the first point, a PACA statutory trust is created the moment a commission merchant, dealer, or broker receives perishable agricultural commodities and remains in existence until the debt associated with the transactions is paid in full." Driscoll Potatoes v. Robinson Potato Supply Co., 1 F. Supp. 2d 1268, 1271 (D. Kan. 1998). Therefore, a PACA trust could be in continuous existence throughout the life of an agricultural commodity purchaser. Id.

One commonly litigated issue in the PACA context is whether a holder of a disputed asset can prove the asset was purchased with non-PACA trust assets. The House Report which accompanied passage of the PACA provides:

The trust impressed by section 5(c)(2) is a nonsegregated "floating trust" made up of all a firm's commodity related liquid assets, under which there may be commingling of trust assets. Under this provision there is no necessity to specifically identify all of the trust assets through each step of the accrual and disposal process.

H.R. Rep. 98-543, at 5 1984 U.S. Code Cong. & Admin. News 407, 409. "Since commingling is contemplated, all trust assets would be subject to the claims of unpaid suppliers... to the extent of the amount owed to them." In re Atlantic Tropical Market, 118 B.R. 139, 142 (Bankr. S.D. Fla. 1990); In re Richmond Produce, 112 B.R. 364, 368 (N.D. Cal. 1990) ("[t]he unpaid sellers are not required to trace and the trust arises immediately upon delivery."). Accordingly, "a purchaser, or PACA debtor, has the burden of showing that disputed assets were not acquired with proceeds from the sale of

¹ As discussed below, a transferee of PACA trusts may also be able to assert a bona fide purchaser defense so as to avoid a disgorgement of PACA trust assets.

produce or produce-related assets." Sanzone-Palmisano Co. v. M. Seaman Enterprises, Inc., 986 F.2d 1010, 1014 (6th Cir. 1993).

It should be noted that a PACA trustee "is permitted to convert trust assets into other property, provided that the trustee honors its obligation to 'maintain trust assets in a manner that such assets are freely available to satisfy outstanding obligations to sellers of perishable agricultural commodities,' [7 CFR] § 46.46(d)(1)." Nickey Gregory Co., LLC v. AgriCap, LLC, 597 F.3d 591, 595 (4th Cir. 2010). A PACA trustee is "required to maintain trust assets in a manner that such assets are freely available to satisfy outstanding obligations to sellers of perishable agricultural commodities." 7 CFR 46.46(d)(1). In sum, "a produce dealer holds its produce-related assets as a fiduciary until full payment is made to the produce seller." Frio Ice, S.A. v. Sunfruit, Inc., 918 F.2d 154, 156 (11th Cir. 1990).

III. Preserving the Statutory Trust.

In order to preserve the statutory trust, a claimant must show:

- A. the goods in question were perishable agricultural commodities;
- B. the commodities were received by a commission merchant, a dealer or a broker;
- C. the claimant provided written notice of its intent to preserve its rights under PACA within thirty (30) days after payment became due.

In re Lombardo Fruit & Produce, 106 B.R. 593, (Bankr. E.D. Mo. 1989), *affd* 12 F.3d 110, (8th Cir. 1993). Similarly, a claimant may often be required to rebut arguments that it waived its PACA trust rights by a pre-default agreement to extend payment terms beyond 30 days. Each of these elements are addressed in turn below.

A. *The Goods In Question Must Be Perishable Agricultural Commodities.*

The PACA governs only transactions in "perishable agricultural commodities," which are statutorily defined as, "whether or not frozen or packed in ice: Fresh fruits and fresh vegetables of every kind and character." 7 U.S.C. § 499a(b)(4)(A). In its regulations ("PACA Regulations"), USDA provides:

(u) Fresh fruits and fresh vegetables include all produce in fresh form generally considered as perishable fruits and vegetables, whether or not packed in ice or held in common or cold storage, but does not include those perishable fruits and vegetables which have been manufactured into articles of food of a different kind or character. The effects of the following operations shall not be considered as changing a commodity into a food of a different kind or character: Water, steam, or oil blanching, battering, coating, chopping, color adding, curing, cutting, dicing, drying for the removal of surface moisture; fumigating, gassing, heating for insect control, ripening and coloring; removal of seed, pits, stems, calyx, husk, pods rind, skin, peel, et cetera; polishing, precooling, refrigerating, shredding, slicing, trimming, washing with or without chemicals; waxing, adding of sugar or other sweetening agents; adding ascorbic acid or other agents to retard oxidation; mixing of several kinds of sliced, chopped, or diced fruit or vegetables for packaging in any type of containers; or comparable methods of preparation.

7 CFR 46.2(u).

Applying these standards, it has been held coleslaw, potato salad, cream cheese with scallions, frozen onion rings, breaded cauliflower, zucchini sticks, and pickles do not qualify for PACA protection. Endico Potatoes v. CIT Group/Factoring, 67 F.3d 1063, 1071 (2d Cir. 1995). The distinction is often much nuanced, as explained in Endico:

Because . . . the regulations provide that water blanching will not take produce outside of PACA's protection, we find that Endico and McCain may recover for potatoes that are oil seared as part of the water blanching process. In contrast to the oil searing, . . . potato products that Endico treated with either an oil spray or a light breading do not qualify for protection under PACA. These treatments are not part of the freezing process, but are intended to prepare the potatoes for a certain type of cooking, thereby changing the character of the potatoes.

Id. at 1071.

It has been generally held that cider and juice are not subject to the PACA. Bear Mt. Orchards, Inc. v. Mich-Kim, Inc., 2007 U.S. Dist. LEXIS 88983 (E.D. Pa. Nov. 30, 2007). USDA has posted an illustrative list of covered commodities on its website at: <https://www.ams.usda.gov/sites/default/files/media/Commodities%20Covered%20by%20PACA.pdf>.

B. The Commodities Must Have Been Received.

A PACA claimant must show that the commodities were actually received by a commission merchant, a dealer, or broker. C&G Farms, Inc. v. Capstone Bus. Credit, LLC, 2011 U.S. Dist. LEXIS 25986 (E.D. Cal. Feb. 16, 2011). Since all commission merchants, dealers, and brokers must obtain a PACA license, 7 USC 499c(a), a portion of this element is often established through evidence the recipient of the produce was a PACA licensee. Proof of delivery is often established by bills of lading, however, in the absence of bills of lading, a fact question can exist on whether the product has actually been delivered. C&G Farms, Inc. v. Capstone Bus. Credit, LLC, 2011 U.S. Dist. LEXIS 25986 (E.D. Cal. Feb. 16, 2011).

C. Claimant Must Have Properly Preserved Trust Rights.

The PACA provides two ways to preserve PACA trust rights. The most common approach is regularly referred to as the invoice method. "A licensee may use ordinary and usual billing or invoice statements to provide notice of the licensee's intent to preserve the trust." 7 USC 499e(c)(4). If preserving using the invoice method, the usual billing and invoice statement must include the following language: "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." Id. Additionally, if the parties agree to payment terms other than "full payment promptly," as defined by USDA (usually 10 days from receipt), such modified terms of payment shall be disclosed on the billing statement or invoice.

Notably, the invoice method of preservation of the trust is only available to PACA licensees. Under the PACA, every dealer of perishable agricultural commodities of a certain size is required to be licensed by the Secretary of Agriculture. 7 U.S.C. § 499c. While growers can be licensed and licensed growers can preserve their PACA trust rights by giving notice via the invoice method, Derek & Matthew Bissett Farms v. Bissett Produce, Inc. (In re Bissett Produce, Inc.), 512 B.R. 528, 535 (Bankr. E.D.N.C. 2014), no grower is required to obtain a license if it is only selling commodities it raised. 7 USCS § 499a(b)(6).

As to the second method of preservation of the statutory trust, any "unpaid supplier, seller, or agent," whether a licensee or not, can preserve its trust rights by giving:

written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or broker within thirty calendar 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.

7 USC 499e(c)(3).

The written notice must include the statement that it is the sender's intent to preserve trust benefits and must include information which establishes for each shipment:

- (i) The names and addresses of the trust beneficiary, seller-supplier, commission merchant, or agent and the debtor, as applicable,
- (ii) The date of the transaction, commodity, invoice price, and terms of payment (if appropriate),
- (iii) The date of receipt of notice that a payment instrument has been dishonored (if appropriate), and
- (iv) The amount past due and unpaid.

7 CFR 46.46(f).

D. There Must Be No Pre-Default Agreement to Extend Payment Terms Beyond 30 days.

Pursuant to the PACA regulations, “[t]he maximum time for payment for a shipment to which a seller, supplier, or agent can agree, prior to the transaction, and still be eligible for benefits under the trust is 30 days after receipt and acceptance of the commodities.” 7 C.F.R. § 46.46(e)(2). The reason for this rule finds its roots in PACA’s legislative history, which is succinctly explained as follows:

To be entitled to trust protection the sellers were required to extend only short-term credit; and, in the event of defaults, promptly to pursue administrative and judicial remedies. The sellers’ prompt resort to administrative remedies was intended to isolate and to put pressure on financially insecure buyers to meet their obligations or to be forced from the business. The sellers who complied were, in turn, afforded a highly unusual trust beneficiary status that permitted them, in the case of defaults, to trump the buyers’ other creditors, including secured ones. But nothing in the text of PACA, in its legislative history, or in its implementing regulations indicates that PACA’s super-priority was intended to benefit sellers who dealt in other than short-term credit in accordance with PACA’s regulations.

American Banana Co., Inc. v. Republic Nat. Bank of New York, N.A., 362 F.3d 33, 36 – 38 (2d Cir. 2004) (citations omitted). See also Greg Orchards & Produce, Inc.v

Roncone, 180 F.3d 888, 891 (7th Cir. 1999) (citing House Report: "The Committee does not intend the trust to apply to any credit transaction that extends beyond a reasonable period. Under the bill the Secretary is required to establish, through rulemaking, the time by which, the parties to a transaction must agree payment on a transaction must be made, to qualify it for coverage under the trust. An agreement for payment after such time will not be eligible to receive the benefits of the trust." H.R. Rep. No. 543, 98th Cong., 2d Sess. 7, reprinted in 1984 U.S.C.C.A.N. 410.).² One federal judge in Georgia has observed that "[a]lthough PACA provides extraordinary protections for produce sellers, it also has strict eligibility requirements." See Paris Foods Corp. v. Foresite Foods, Inc., 2007 WL 568841, *6-7 (N.D. Ga. Feb. 20, 2007)(Duffey, J.), *aff'd*, 278 Fed. Appx. 873, 875 (11th Cir. 2008).

1. **Post-Default Agreement Does Not Invalidate Trust Rights.**

Prior to 2011, the precise legal effect of post-default agreements to extend payment terms beyond 30 days on a seller's PACA trust rights was a long disputed issue. See, e.g., American Banana Co., v. Republic National Bank of New York, N.A., 362 F.3d 33, 38 (2d Cir. 2004); Patterson Frozen Foods, Inc. v. Crown Foods Int'l, Inc., 307 F.3d 666, 671 (7th Cir. 2002); Hiller Cranberry Products, Inc. v. Koplowsky, 165 F.3d 1 (1st Cir. 1999); Greg Orchards & Produce, Inc. v. P. Roncone J., 180 F.3d 888, 892 (7th Cir.

² The American Banana Court continued: If "[a] PACA licensee is in financial difficulty (i.e., not able to pay the agreed purchase prices of perishable agricultural commodities promptly), the loss to the perishable agricultural commodities industry as a whole is frequently much less if the PACA licensee's license is revoked promptly. Allowing a PACA licensee that is in financial difficulty to remain in business increases financial risks to others. Frequently, a PACA licensee in financial difficulty increases its volume significantly, perhaps taking imprudent risks. If the PACA licensee's efforts to regain financial stability are unsuccessful, many other unsuspecting persons are exposed to the risk of nonpayment."

1999); Idahoan Fresh v. Advantage Produce, Inc., 157 F.3d 197, 205 (3d Cir. 1998); In re Lombardo Fruit and Produce Co., 12 F.3d 806, 809 (8th Cir. 1993); Hull Co. v. Hauser's Foods, Inc., 924 F.2d 777, 781-82 (8th Cir. 1991). However, in 2011, USDA amended 7 CFR § 46.46 to clarify the impact of post-default agreements. In its 2011 rulemaking, USDA stated:

[USDA] is amending the regulations under the Perishable Agricultural Commodities Act (PACA) to allow, if there is a default in payment as defined in the regulations, a seller, supplier, or agent who has met the PACA trust eligibility requirements to enter into a scheduled agreement for payment of the past due amount without foregoing its trust eligibility. USDA is also amending 7 CFR 46.46(e)(2) by adding the words "prior to the transaction." This change clarifies that the 30-day maximum time period for payment to which a seller can agree and still qualify for coverage under the trust refers to pre-transaction agreements.

"Perishable Agricultural Commodities Act: Impact of Post-Default Agreements on Trust Protection Eligibility." 76 F.R. 20217.

2. **Pre-Default Course of Conduct Can Establish Payment Terms Beyond 30 Days Even in the Absence of a Written Agreement.**

Prior to the 2011 amendments, there was a split among the circuits as to whether course of conduct could establish an agreement to extend payment terms beyond 30 days. The Seventh and Eighth Circuits held that a written -- but not an oral-post -- default agreement between a seller and a dealer that extends the dealer's time for payment beyond thirty days results in the loss of the seller's trust protection. Patterson Frozen Foods v. Crown Foods Int'l, 307 F.3d 666, 669 (7th Cir. Ill. 2002); Hull Co. v. Hauser's Foods, Inc., 924 F.2d 777, 781-82 (8th Cir. 1991).

The rationale for these decisions is based on the statutory requirement that when the parties expressly agree to a payment time period different than "full payment promptly" as defined by USDA (which is generally ten days), 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.” 7 USCS § 499e(c)(3); See 7 CFR 46.46(f)(3)(ii) (“The terms of payment if they differ from prompt payment set out in section 46.2(z) and (aa) of this part, and the parties have expressly agreed to such terms in writing before the affected transactions occur.”); 7 CFR 46.2(aa)(11) (“Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records.”).

By contrast, the Second Circuit concluded:

[A] failure to reduce to writing an agreement that violates PACA, should not result in the preservation of the trust, where the same agreement, if memorialized, would have resulted in forfeiture of such protection. To hold otherwise would yield the unacceptable result of preserving trust protection for a seller who reaches an agreement containing a payment period exceeding thirty days and performs thereunder so long as the seller does not reduce the agreement to writing. Accordingly, we hold that where, as here, a seller agrees--orally or in writing--to a payment period exceeding thirty days, it forfeits trust protection.

Am. Banana Co. v. Republic Nat'l Bank of N.Y., N.A., 362 F.3d 33, 46-47 (2d Cir. N.Y. 2004). This view was adopted by at least one federal judge in the Northern District of Georgia. Paris Foods Corp. v. Foresite Foods, Inc., 2007 WL 568841, *6-7 (N.D. Ga. Feb. 20, 2007)(Duffey, J.), *aff'd*, 278 Fed. Appx. 873, 875 (11th Cir. 2008).

Since 2011, four (4) courts have concluded that the 2011 Amendment only applies to post-default payment arrangements and thus allowed evidence of course of conduct to be considered as evidence of a pre-default extension of payment terms. Heeren, LLC v. Cherry Growers, Inc., 2015 U.S. Dist. LEXIS 171068 (W.D. Mich. Dec. 23, 2015); Muir Enters. v. Deli Nation LLC, 2015 U.S. Dist. LEXIS 4612 (D. Utah Jan. 13, 2015); Spada

Props. v. Unified Grocers, Inc., 38 F. Supp. 3d 1223, 1231 (D. Or. 2014) ("Spada I");
Spada Props. v. Unified Grocers, Inc., 121 F. Supp. 3d 1070 (D. Or. 2015) ("Spada II");
A&J Produce Corp. v. City Produce Operating Corp., 2011 U.S. Dist. LEXIS 148719
(S.D.N.Y. Dec. 22, 2011).

In granting summary judgment to the defendant, the Spada II Court explained the impact of course of dealing on preservation of the PACA trust:

[E]ach shipment of PACA good stands as a separate unit or transaction for the purposes of PACA protection. If a PACA seller, like Plaintiff, however, agrees with a buyer to only apply future payments to the oldest then-outstanding invoice, the PACA seller has virtually guaranteed that the buyer cannot meet PACA compliant net-10 or net-30 payment terms as to subsequent shipments. The formal stated invoice terms for subsequent shipments then would directly contradict the parties' other agreement to apply future payments to old invoices. The parties have thus effectively turned a series of shipments, which should function as separate individual transactions for PACA purposes, into a revolving line of credit. Such arrangements, however, amount to pre-default agreements to extend payment terms beyond PACA-compliant terms in violation of 7 C.F.R. § 46.46(e)(2).

Spada Props. v. Unified Grocers, Inc., 121 F. Supp. 3d 1070, 1087 (D. Or. 2015).

Notably, in Spada II, the court rejected the claimant's position that the invoice payment terms control regardless of the parties' conduct. There, Plaintiff issued invoices that ostensibly called for payment within 10 days of delivery of the produce. However, the parties' course of dealing showed an agreement that allowed the buyer to pay beyond 30 days after delivery. The Spada II Court rejected Plaintiff's argument that the payment terms stated on the invoice were conclusive of the validity of its PACA claim, noting; "[i]n effect, Plaintiff's argument in this case amounts to a claim that, as long as PACA buyers and sellers include PACA-compliant language in their invoices, any *de facto* agreements to other than short-term credit arrangements based on a longstanding course of conduct, are still protected by PACA." Id. at 1087. The Spada II Court

continued: “This is not so, and in fact violates the core purposes of PACA.” Id.; see also Heeren, LLC v. Cherry Growers, Inc., 2015 U.S. Dist. LEXIS 171068 (W.D. Mich. Dec. 23, 2015) (rejecting the argument that the invoice controls).

Citing an agreement to apply all payments to the oldest outstanding invoices and the fact no payments were made within 30 days for eight years, the Spada II Court granted summary judgment for the Defendant, explaining that “[a] course of dealing between Plaintiff and [Defendant] reflecting an implicit agreement to accept payment more than 30 days after receipt of produce waives Plaintiff’s PACA protections because it would result in a pre-default ‘agreement’ to longer payment terms that are in violation of 7 C.F.R. § 46.46(e).” 121 F. Supp. 3d at 1085, 1089; See Nature Quality Vine Ripe Tomatoes v. Rawls, Inc., 536 F. Supp. 2d 1259, 1263 (N.D. Ala. 2005) (payment terms on invoices alone are not dispositive.).

IV. Enforcing the Statutory Trust.

A. ***Proceedings against Entities Primarily Liable under PACA.***

“The several district courts of the United States are vested with jurisdiction specifically to entertain (i) actions by trust beneficiaries to enforce payment from the trust and actions by the Secretary [of Agriculture] to prevent and restrain dissipation of the trust.” 7 USCS § 499e(c)(5). Often PACA cases begin with the simultaneous filing of a complaint and a motion for a preliminary injunction. The Eleventh Circuit has explained:

Upon a showing that the trust is being dissipated or threatened with dissipation, a district court should require the PACA debtor to escrow its proceeds from produce sales, identify its receivables, and inventory its assets. It should then require the PACA debtor to separate and maintain

these produce-related assets as the PACA trust for the benefit of all unpaid sellers having a bona fide claim. 7 U.S.C.A. § 499e(c)(3). Each beneficiary would then be entitled to its pro rata share.

Frio Ice, S.A. v. Sunfruit, Inc., 918 F.2d 154, 159 (11th Cir. 1990).

Any act inconsistent with maintaining the trust, including "dissipation" of trust assets, is deemed unlawful and a violation of PACA. See 7 U.S.C. § 499b; 7 C.F.R. § 46.46(d)(1). "Dissipation" is defined as "any act or failure to act which could result in the diversion of trust assets or which could prejudice or impair the ability of unpaid suppliers, sellers, or agents to recover money owed in connection with produce transactions." 7 C.F.R. § 46.46(a)(2).

In many cases, a district court will enter a claims procedure order which establishes: a) the process by which the debtor collects any outstanding receivables (including compensation for this collection activity); and b) a procedural framework, including a claims bar date, to review and establish PACA claims. Notably, in the bankruptcy context, any PACA trust claim is outside of the normal marshaling scheme under Title 11. Courts are unanimous in finding the corpus of an express trust created under the provisions of the PACA is not "property of the estate" within the scope of § 541 of the Bankruptcy Code. 11 U.S.C. §541(d). See In re Super Spud, 77 B.R. 930, 931 (Bankr. M.D. Fla. 1987) citing, In re Fresh Approach, 51 B.R. 412, 419 (Bankr. N.D. Tex. 1985).

Notwithstanding the foregoing, the disposition of PACA trust assets is properly within the jurisdiction of the bankruptcy court. See Monterey Mushrooms, Inc. v. Carolina Produce Distribs., Inc., 110 B.R. 207, 209 (W.D.N.C. 1990); Allied Growers Co-Op, Inc. v. United Fruit and Produce Co., 86 B.R. 14, 16 (Bankr. D. Conn. 1988). Therefore, bankruptcy courts also often issue PACA claims procedure orders.

B. Trustees Can Be Individually Liable for Breach of the Trust.

Several circuits have held that corporate employees, officers, directors and agents may be held secondarily liable under PACA trust provisions. Bear Mt. Orchards, Inc. v. Mich-Kim, Inc., 623 F.3d 163, 167 (3d Cir. 2010) (noting that the 1st, 2nd, 3rd, 4th, 5th, 7th and 9th circuits have all found some form of secondary individual liability for employees, officers, and directors of commission merchants, dealers, and brokers); see also Nickey Gregory Co. , LLC v. AgriCap, LLC, 597 F.3d 591, 595 (4th Cir. 2010); Sunkist Growers, Inc. v. Fisher, 104 F.3d 280, 283 (9th Cir. 1997). Individual liability arises not from the statutory language of PACA, but from an employee's, officer's, director's, or agent's breach of trust principles. Weis-Buy Servs., Inc. v. Paglia, 411 F.3d at 421 (3rd Cir. 2005). The Second Circuit has explained:

PACA imposes liability on a trustee who uses the trust assets for any purpose other than repayment of the supplier, including the use of trust assets for legitimate business expenditures, such as the payment of rent, payroll, or utilities.

Coosemans Specialties, Inc. v. Gargiulo, 485 F.3d 701, 707 (2d Cir. 2007) (quotations omitted).

In the event a corporate employee or officer violates a fiduciary duty to maintain PACA trust assets, the employee or officer becomes secondarily liable to the extent that PACA trust assets are insufficient to satisfy amounts owed to an injured party. Id. Notably, a claimant does not have to wait until the conclusion of the debtor's collection efforts before pursuing claims against persons who were responsible for dissipating the trust assets. Coosemans Specialties, Inc. v. Gargiulo, 485 F.3d 701, 707 (2d Cir. 2007) Georgia Courts have ruled that under these circumstances a traditional "piercing of the corporate veil" analysis is unnecessary. See Collins Bros. Corp. v. Perrine (In re Perrine),

2006 Bankr. LEXIS 2516 (Bankr. N.D. Ga. Aug. 8, 2006) ("the plaintiff is not required to pierce the corporate veil in order to hold a controlling individual personally liable"). Although some circuits have slightly differing standards for attributing individual liability, the majority test appears to have three (3) elements: (a) the remaining PACA trust assets are insufficient to satisfy the amount owed to the injured party; (b) the individual was in a position to control PACA trust assets; and (c) the individual breached a duty to preserve those assets. Bear Mountain Orchards, Inc., 623 F.3d at 167-168. All three (3) elements are necessary to assert liability against an officer, director, employee, or agent under the PACA trust provisions. Id.

C. Subject to the Bona Fide Purchaser Defense, Transferees of PACA Trust Assets Can Be Required to Disgorge Such Assets.

"General principles of trust law govern the PACA trust." Gargiulo v. G.M. Sales, Inc., 131 F.3d 995, 999 (11th Cir. 1997). "Thus, when trust assets are held by a third party, resulting in the failure of the trustee to pay unpaid sellers of perishable agricultural commodities, the third party may be required to disgorge the trust assets unless the third party can establish that it has some defense, such as having taken the assets as a bona fide purchaser without notice of the breach of trust." Nickey Gregory Co., LLC v. AgriCap, LLC, 597 F.3d 591, 595-596 (4th Cir. 2010) (citing Restatement (Second) of Trusts § 284.).

A "bona fide purchaser" receives assets otherwise subject to the PACA trust free of the trust. Gargiulo v. G.M. Sales, Inc., 131 F.3d 995, 999 (11th Cir. 1997). A transferee may retain assets where it has "show[n] that any trust property [it] received was

transferred 'for value' and 'without notice of the breach of trust.'" C.H. Robinson Co. v. Trust Co. Bank, N.A., 952 F.2d 1311, 1314 (11th Cir. 1992).

"If money is paid or other property is transferred or services are rendered as consideration for the transfer of trust property, the transfer is for value." Restatement (Second) of Trusts § 298. By contrast, "the transfer of trust assets in satisfaction of an antecedent debt is not for value." C.H. Robinson Co., 952 F.2d at 1314. Thus, if a debtor transfers its produce inventory to a lender in satisfaction of its loans, the banks would have taken the inventory subject to the trust. Id. If the property transferred is money, trust law recognizes an exception to this general principle. Id.

As to the second element of the bona fide purchase defense, a transferee must establish he neither knew nor should have known of the breach of trust. Id. Notably, the Eleventh Circuit has concluded:

The bank's being aware of [debtor's] financial troubles only raised a duty of inquiry on the part of the bank. Before the court could decide whether the bank should have known of the breach of the trust, the court had to first determine whether the bank conducted a reasonable inquiry into [debtor's] financial condition, and whether such inquiry would have revealed the breach of the trust.

Gargiulo v. G.M. Sales, Inc., 131 F.3d 995, 1000 (11th Cir.1997).

V. Contractual Attorneys' Fees and Interest May Be Recoverable under Trust Protection.

7 U.S.C. § 499e(c)(2) provides that a PACA claimant may recover the "*full payment of the sums owing in connection with [commodities] transactions.*" The Eleventh Circuit has held that language "unambiguously encompasses not only the price of commodities but also additional related expenses. Such related expenses include attorney fees and interest that buyers and sellers have bargained for in their contracts."

Country Best v. Christopher Ranch, LLC, 361 F.3d 629, 632 (11th Cir. 2004). By contrast, if the invoice or other contractual documents do not create a contractual right to such fees, attorneys' fees are not recoverable under the PACA trust. Middle Mt. Land & Produce, Inc. v. Sound Commodities, Inc., 307 F.3d 1220, 1225 (9th Cir. Wash. 2002).

"[S]tate law continues to govern the relationship between sellers and buyers [of produce] to the extent that the PACA does not address an issue in dispute...." HAAC Chile, S.A. v. Bland Farms, LLC, 2008 U.S. Dist. LEXIS 81859 (S.D. Ga. Aug. 26, 2008). Therefore, the critical issue regarding inclusion of attorneys' fees or interest within the statutory PACA claim turns on, under applicable state law, the terms included within the parties' contract.

A. Recovery of Attorneys' Fees under the PACA Trust.

In the PACA context, "pursuant to O.C.G.A. § 13-1-11 attorney's fees are appropriate when (1) the evidence of indebtedness provides for attorney fees and (2) a demand letter is sent informing the debtor that a failure to satisfy the account will render the debtor liable for attorney's fees." Cee Bee Produce, Inc. v. Tucker, 2007 U.S. Dist. LEXIS 67339, * 7 (M.D. Ga. Sept. 12, 2007). "Once these preconditions are established, a contractual provision to pay attorney fees in connection with a creditor's efforts to collect "shall be valid and enforceable." Id.

Under Georgia law, when invoices do not set forth a percentage of recoverable attorneys' fees, the PACA creditor's right, if any, to attorneys' fees is capped at "15 percent of the first \$500.00 of principal and interest owing [on each Invoice] and 10 percent of the amount of principal and interest owing thereon in excess of \$500.00." O.C.G.A. § 13-1-11(a)(2). By contrast, where the evidence of indebtedness "specifies that

a collecting party may only recover attorney fees actually incurred, the collecting party must establish that it has actually incurred fees in that amount in order to recover the maximum . . ." allowed pursuant to O.C.G.A. § 13-1-11(a)(2). Hamilton State Bank v. Kelly Capital Invs., LLC, 335 Ga. App. 252, 265 (2015) (citations omitted).

In addition to controlling the types of attorneys' fees permitted under O.C.G.A. § 13-1-11, the claimant must send a demand letter "informing the debtor that a failure to satisfy the account will render the debtor liable for attorney's fees." Cee Bee Produce, Inc. v. Tucker, 2007 U.S. Dist. LEXIS 67339, * 7 (M.D. Ga. Sept. 12, 2007). Georgia Courts are clear that a notice to the debtor "is a statutory prerequisite to collecting an otherwise valid obligation to pay attorney fees incurred in the collection on a note." Core LaVista, LLC v. Cumming, 308 Ga. App. 791, 798-799 (2011). The claimant must at a minimum inform the debtor that he has 10 days from receipt of the notice within which to pay principal and interest "*without incurring any liability for attorney fees.*" Id. Notably, "[t]he burden is on the entity seeking to collect attorney fees on a note in default to prove that all the conditions of [O.C.G.A. 13-1-11] have been met." Tobler v. Yoder & Frey Auctioneers, Inc., 620 F.2d 508, 511 (5th Cir. Ga. 1980).

If Georgia law is selected, the below invoice language would be one option for creating appropriate contractual attorneys' fees rights:

NOTICE: In the event any amounts due from the Buyer are collected through an attorney, the Buyer shall pay to the Seller, in addition to all other amounts owed to Seller by the Buyer, an amount equal to 15% percent of the amount owed (inclusive of interest) as attorney's fees, plus any costs of collection. Except where PACA controls, Georgia law shall govern the transaction(s) evidenced by this invoice without application of any conflicts of law principles.

B. Recovery of Interest May Be Allowed under the PACA Trust.

Most circuits that have considered the question have concluded that a district court may “award reasonable prejudgment interest to PACA claimants if such an award is necessary to protect the interests of PACA claimants, and that such an award absent contract is discretionary.” Middle Mt. Land & Produce, Inc. v. Sound Commodities, Inc., 307 F.3d 1220, 1226 (9th Cir. 2002). Therefore, much emphasis should be placed on establishing the correct amount of interest in the contractual documents.

Pursuant to O.C.G.A. § 7-4-16, “the owner of a commercial account may also charge interest on that portion of a commercial account which has been due and payable for 30 days or more at a rate not in excess of 1 1/2 percent per month calculated on the amount owed from the date upon which it became due and payable until paid.” Cee Bee Produce, Inc. v. Tucker, 2007 U.S. Dist. LEXIS 67339, 7-8 (M.D. Ga. Sept. 12, 2007). However, while there is no case directly on point, it appears O.C.G.A. § 7-4-2 must be read *in pari materia* with O.C.G.A. § 7-4-2(a) (2), which provides in pertinent part:

Where the principal amount involved is \$3,000.00 or less, such rate shall not exceed 16 percent per annum simple interest on any loan, advance, or forbearance to enforce the collection of any sum of money unless the loan, advance, or forbearance to enforce the collection of any sum of money is made pursuant to another law.

Therefore, if in fact O.C.G.A. § 7-4-2 limits interest to 16% and the invoice purports to allow the maximum (1.5 percent per month) permitted under O.C.G.A. § 7-4-16, one must be concerned about forfeiting all available interests. Specifically, O.C.G.A. § 7-4-10(a) (a) provides: “[A]ny person, company, or corporation violating the provisions of Code Section 7-4-2 shall forfeit the entire interest so charged or taken or contracted to be reserved, charged, or taken.” One federal bankruptcy court has

suggested such forfeiture is preempted by the PACA, but that issue has likely not been finally resolved. Allens, Inc. v. H.C. Schmieding Produce Co., Inc. (In re Veg Liquidation, Inc.), 516 B.R. 555, 559 (Bankr. W.D. Ark. 2014).

The below invoice language would be one option for addressing contractual interest rates:

NOTICE: Past due amounts shall accrue monthly interest at the rate of 1.5% per month or at the maximum legal rate, whichever is lower. Except where PACA controls, Georgia law shall govern the transaction(s) evidenced by this invoice without application of any conflicts of law principles.



The Nuts and Bolts of Chapter 12

Walter W. Kelley

Kelley, Lovett, & Blakey
Albany, Georgia

Alexander D. Sanders

Kelley, Lovett, & Blakey
Macon, Georgia

THE NUTS AND BOLTS OF CHAPTER 12

MACON, GEORGIA MARCH 17,2017

OUTLINE

Introduction: History of Chapter 12, plight of the family farmer, where to find Chapter 12 provisions in the Code.

Pre-filing issues for the debtor:

Question: What issues must a debtor's attorney identify before filing a Chapter 12?

Pre-filing issues for the creditor:

Question: Does the creditor have concerns before filing a Chapter 12?

Eligibility of the Family Farmer:

Question: How does a debtor become eligible for relief under Chapter 12?

Eligibility of the Family Fisherman:

Question: How does a debtor become eligible for relief under Chapter 12?

Duties, rights, and powers of the debtor under 11 U.S.C. 1203:

Question: What are the duties of the debtor and what happens if a debtor fails to perform the duties?

When may a Chapter 12 case be converted to Chapter 7?

Duties of the Chapter 12 Trustee:

Question: What does the Chapter 12 Trustee do?

Case Issues: Automatic Stay, Use of Cash Collateral,

Plan provisions, Objections to the Plan, Confirmation:

Questions: How does the automatic stay work? Is there a co-debtor stay? Must permission be received to use cash collateral? What must be in the plan? How does a debtor respond to plan objections? How does the debtor's plan get confirmed over objections?

Discharge and Final Decree:

Question: Does the debtor receive a discharge and if so, when? May a debtor receive a hardship discharge?

INSTRUCTIONS

To: Debtor/Attorney for Chapter 12 Debtor
From: Walter W. Kelley, Chapter 12 Trustee

You filed a petition for relief for a Family Farmer or Family Fisherman under Chapter 12 of the Bankruptcy Code. I am notifying the debtor and you as attorney for the debtor of the following:

A. Financial/Information Reports

The debtor must provide the Chapter 12 Trustee with these financial and information reports:

1. **Summary of Operations** - The enclosed form, (Exhibit A) is an informational report showing the debtor's acreage, results from last year's operation, and estimates or projections for the current or next crop year. This form should be completed and received in the Chapter 12 Trustee's office at least five days prior to the 341(a) Meeting of Creditors.

2. **Monthly Cash Receipts and Disbursements Statements** - The enclosed form, (Exhibit B) is self-explanatory. The debtor must report by the 15th day following the end of the month all receipts or income, in cash or by check, received during the month. The receipts should be itemized by the kind, quantity, and dollar amount: "Sold 2,000 bushels of corn - \$2,000", "Sold 10 beef cattle - \$4,000", Sold 5 tons of hay - \$275". Likewise, all expenses paid in cash or by check should be itemized. All cash received must be deposited in the Debtor-in-Possession bank account and all payments should be made by check. If cash is paid by the debtor, a written receipt must be obtained and kept. As indicated, household or family living expenses need not be itemized but the lump-sum of cash used or spent for household or family living expenses should be shown. Operating expenses should be itemized under headings such as fuel, feed, veterinary expense, repairs, etc. Be sure the debtor knows how to complete that part of the form which calls for a monthly reconciliation of cash.

3. **Tax Deposit Statement** - If the debtor is a family farm corporation or if the debtor has employees for which he must withhold

income taxes or pay social security taxes, he must complete the tax deposit statement (Exhibit C) and provide evidence of payment.

4. **Insurance Statement** - Within ten days after this letter, the debtor must provide the Chapter 12 Trustee with a verified statement or written evidence from his insurance carrier or broker he has fire and extended coverage on his buildings and equipment and motor vehicle insurance on all vehicles operated on public highways. If no such insurance is in effect, the debtor must explain why it is not in force. The debtor shall immediately notify the Chapter 12 Trustee of any lapse, cancellation, or proposed cancellation of any insurance coverage.

B. Debtor-in-Possession

Under Section 1231 of Chapter 12 of the Bankruptcy Code, a separate taxable entity is created for state and local tax purposes commencing on the day the Chapter 12 petition was filed. Therefore, the debtor must commence keeping books and records for the new separate taxable entity. This means that the debtor should:

1. The books and records of the debtor are to be closed by the date of filing the bankruptcy petition, and a new set of books and records must be kept thereafter for the debtor-in-possession under Chapter 12.

2. All of the debtor's bank accounts must be closed immediately upon filing the Chapter 12 petition, and new bank accounts opened. All amounts from the old accounts and all receipts are to be deposited in the new bank accounts, and all disbursements should be made by check. The new accounts must be in the name of the debtor as "Chapter 12 Debtor-in-Possession", and this description should also appear on the new bank pre-numbered blank checks and deposit slips for his checking account.

3. The debtor must keep a file (or envelope) in which to keep a copy of all bills, invoices and sales slips for purchases or payments he makes after the petition is filed.

C. 341(a) First Meeting Of Creditors

You will receive a separate notice of the date, time and place for the First Meeting of Creditors under Section 341a of the

Bankruptcy Code. Both the debtor and the debtor's attorney must attend that meeting, at which time the debtor will be examined under oath by the Chapter 12 Trustee and by any creditors who may attend. The debtor must bring to that meeting a copy of his last year's income tax returns, including 1040 and all schedules filed with the return, including Schedule F. The copy of the income tax returns must be filed with the Chapter 12 Trustee at the First Meeting of Creditors as an exhibit.

D. Taxes

Besides the Monthly Cash Receipts and Disbursements Statement, within 60 days after the end of a calendar year (or fiscal year), the debtor must complete and file with the Chapter 12 Trustee a Schedule F with all supporting schedules of Schedule F, and Form 4835 of IRS Form 1040 for any part of the first calendar or taxable period ending after the date on which the Chapter 12 petition was filed. The Schedule F and Form 4835 must report all income and all expenses to the end of the calendar (or fiscal) year. The debtor is responsible for filing and paying all federal taxes as usual. The debtor is responsible for filing all state, federal and local, if applicable, tax returns. Failure to file tax returns could cause the Trustee ask the Court for dismissal of the Chapter 12.

E. Applicable Provisions of Bankruptcy Code

Since Congress specified that Chapter 1, 3 (except for Section 361) and 5 of the Bankruptcy Code also apply to cases under Chapter 12 of the Bankruptcy Code, emphasize to your client he may not:

1. Retain or employ attorneys, accountants, appraisers, auctioneers or other professional persons without court approval. This includes employing the attorney who filed the petition to provide services after the filing. See 11 U.S.C. Section 327.

2. Compensate any attorney, accountant, appraiser, auctioneer or other professional except as allowed by the court. See U.S.C. Section 330.

3. Use cash collateral (or cash equivalent) without the consent of the secured creditor or court authorization. See 11 U.S.C. Section 363(c)(2). Cash collateral includes proceeds, products, offspring, rents, or profits of property subject to a security interest when reduced to cash.

4. Obtain credit or incur unsecured debt other than in the ordinary course of business without court authorization. See 11 U.S.C. Section 364(b).

5. Incur secured debt without court authorization. See 11 U.S.C. Section 364(c).

6. Pay any creditor for goods or services provided before filing the petition except as provided for in a confirmed plan. See 11 U.S.C. Section 549.

F. Chapter 12 Plan

A Chapter 12 plan must be filed within 90 days of the date the petition was filed, unless the court extends the time. See 11 U.S.C. Section 1221. Failure to comply is cause for dismissal under 11 U.S.C. Section 1208. The statement of current income and current expenditures required to be filed under 11 U.S.C. Section 521(a) should be accurate and should be reviewed and modified if necessary prior to the Section 341 meeting. Failure to provide an accurate statement may cause denial of confirmation, dismissal, or conversion to a Chapter 7 liquidation.

G. Plan Payments

1. Plan payments are to be made to the Trustee's Office in certified funds or money orders. Please include the case name and number. If the payment is for a particular creditor, note the name of the creditor.

2. In your proposed plan of reorganization, please prepare a synopsis showing each secured creditor, the allowed amount of the secured claim, the allowed amount of the unsecured claim, and the amount you wish to repay and whether that amount is with or without

interest. Tell the Trustee exactly how you want each claim paid. Also, please tell the Trustee exactly how you want each unsecured creditor paid.

3. The Trustee's percentage fee to be collected on all payments under plans has been set at 10% on the first \$450,000 paid under the plan, and 3% on the overage. The percentage fee may vary from time to time as set by the Attorney General.

H. Liquidation Analysis

Under Section 1225(a)(4) of Chapter 12, you must be able to prove at the confirmation hearing of the plan that the amount distributed under the plan for each allowed unsecured claim is not less than the amount that would be paid on the claim if the debtor were liquidated under Chapter 7. A claim filed by an unsecured creditor is allowed unless the debtor or the Chapter 12 Trustee files an objection to it in court and the court sustains the objection. I suggest that you consider the early preparation of an accurate analysis of the liquidation value of all of the property of the debtor's estate and be prepared to offer an exhibit at the confirmation hearing, or the court may not confirm your plan.

I. Failure to Comply

Failure of the debtor to comply with these instructions may be grounds for dismissal of this Chapter 12 case under Section 1208 of the Bankruptcy Code.

J. Section 506 - Valuation Motions

If it is a possibility there may be a conflict between your values of farm land, equipment or other collateral as opposed to the values assigned to the land and equipment by Farm Service Agency or any other secured creditor, you should file your motion to determine secured status as early as possible. This will allow you to know exactly how you must treat each secured creditor in your plan of repayment. It will also allow the confirmation hearing to go much

quicker where we do not get bogged down in valuations. It is very difficult, if not impossible, for the Trustee to determine feasibility prior to confirmation where no valuation hearings have been held or stipulations entered.

If you or the debtor have questions regarding these instructions, please write or call me.

2539 Lafayette Plaza Drive
Albany, Georgia 31707
(229)888-2257

ahudson@kelleylovett.com

cc: Chapter 12 Debtor

Updated October 4, 2016

Addendum to Instructions

Please be sure the Trustee has the following information 5 days prior to 341(a) meeting or meeting will be rescheduled 1 time for

information not being provided as requested. If Trustee does not have the following information within 5 days of the rescheduled 341(a) meeting Trustee will file a Motion to Dismiss your case for failure to provide information to Trustee as requested.

- 1.) Copy of state issued ID or driver's license.
- 2.) Copy of social security card if individual filing, if business, corporation or entity filing provide a copy of the IRS letter issuing Employer Identification Number.
- 3.) Bank statements and cancelled checks requested in the letter attached to these instructions. If you would prefer, I get these statements directly from your bank please fill out and execute the enclosed Authorization form and I will have them emailed directly to my office.
- 4.) Proof of the DIP account.
- 5.) Proof of Insurance information.
- 6.) Summary of Operations form completed attached to these instructions.
- 7.) Receipts and Disbursement form completed attached to these instructions for the month prior to you filing bankruptcy.

Debtor: Nathan B. Lane
Case No. 16-70670-JTL

Chapter 12
Eligibility Checklist for Individual Farmers

- | | Yes | No |
|--|--------------------------|--------------------------|
| 1. Individual or individual and spouse Family Farmer - 11 U.S.C. 101(19) | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. Engaged in a farming operation on date of filing - 11 U.S.C. 101(21) | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. Aggregate debts are less than \$4,153,150 (4/1/16) 101(18) | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. Not less than 50% of debts (excluding residence) arise out of a farming operation | <input type="checkbox"/> | <input type="checkbox"/> |
| 5. More than 50% of gross income arises from farming operation in the taxable year before filing | <input type="checkbox"/> | <input type="checkbox"/> |

Or

- | | | |
|---|--------------------------|--------------------------|
| More than 50% of the gross income arises from farming operation in each of the 2d and 3d taxable years preceding filing | <input type="checkbox"/> | <input type="checkbox"/> |
|---|--------------------------|--------------------------|

Eligibility Checklist for Corporate or Partnership Farmers
(Note: Not based on income at all)

- | | Yes | No |
|---|--------------------------|--------------------------|
| 1. More than 50% of o/s stock or equity is held by one family, or by one family and the relatives of the members of such family | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. Such family or such relatives conduct the farming operation | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. More than 80% of the value of the assets consists of assets related to the farming operation | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. Aggregate debts do not exceed \$4,153,150 (4/1/16) 101(18) | <input type="checkbox"/> | <input type="checkbox"/> |
| 5. Not less than 50% of aggregate noncontingent, liquidated debts (excluding dwelling used by shareholder or partner as principal residence) arise out of a farming operation | <input type="checkbox"/> | <input type="checkbox"/> |
| 6. If a corporation issues stock, the stock is not publicly traded. | <input type="checkbox"/> | <input type="checkbox"/> |

Chapter 12
Eligibility for Individual Family Fisherman

- | | Yes | No |
|---|--------------------------|--------------------------|
| 1. Individual or individual and spouse engaged in a commercial fishing operation (11 U.S.C. 101 (7A)) | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. Aggregate debts do not exceed \$1,924,450 (4/1/16) 101(19)(A) | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. Not less than 80% of debts (excluding principal residence) arise out of commercial fishing operation owned or operated by debtor | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. More than 50% of gross income for the taxable year preceding filing arise from the commercial fishing operation | <input type="checkbox"/> | <input type="checkbox"/> |

Eligibility for Corporate or Partnership Fishermen
(Note: Not based on income at all)

- | | Yes | No |
|---|--------------------------|--------------------------|
| 1. 50% or more of the o/s stock is held by | <input type="checkbox"/> | <input type="checkbox"/> |
| a. 1 family that conducts the fishing operation | | |
| or | | |
| b. 1 family and the relatives of the members of such family, and such family or relatives conduct the fishing operation | <input type="checkbox"/> | <input type="checkbox"/> |
| and | | |
| 2. More than 80% of the value of its assets consists of assets related to the commercial fishing operation | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. Aggregate debts do not exceed \$1,924,550 (4/1/16) 101(19)(A) | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. Not less than 80% of debts are related to the commercial fishing operation | <input type="checkbox"/> | <input type="checkbox"/> |
| 5. If a corporation, none of the stock is publicly traded. | <input type="checkbox"/> | <input type="checkbox"/> |

Debtor(s): WILLIAM DENNIS HOUSE, JR.
 Chapter 12 Case No. 16-71307-JTL

Date & Time of 341(a): 1/10/2017 @ 2:00 PM

Information Needed:	Received	Comments:
Schedules		
Summary of Operations		
Latest Tax Return		
Proof of Insurance		
Monthly Reports		
Bank Statements		
Debtor-in-Possession Bank Acct. Proof		
Form 1		
Credit Counseling Proof		
Domestic Support Obligations?		

