

1 **FACTUAL BACKGROUND**

2 Wagon Wheel alleges that it sold and/or delivered to Ballantine Produce Co.
3 (“Ballantine”), a packer and commission merchant, perishable agricultural commodities. See
4 Wagon Wheel Proof of Claim dated July 24, 2009. Wagon Wheel alleges that it was not licensed
5 by the United States Department of Agriculture (“USDA”) as a PACA licensee during the period
6 applicable to the transactions. Wagon Wheel alleges that Ballantine acted as a grower’s agent for
7 Wagon Wheel. Wagon Wheel alleges that it delivered harvested tree fruit to Ballantine, who
8 would then sell the fruit on behalf of Wagon Wheel (as its commission merchant). Wagon
9 Wheel shipped produce to Ballantine between October 16 and December 3, 2008. See
10 Kingsburg Opposition at page 5. Wagon Wheel alleges that Ballantine received and accepted the
11 produce. Wagon Wheel appears to have received an accounting from Ballantine for those
12 shipments on or about April 13, 2009. See Kingsburg Opposition at page 5. The accounting
13 reflected commodities sold and the amount outstanding. See Kingsburg Opposition at page 5.
14 Wagon Wheel contends that a May 1, 2008 letter (“May 1, 2008 Letter”) from Craig Sorensen,
15 President for Wagon Wheel, addressed to Ballantine and David Albertson, served as a Notice of
16 Intent, preserving its PACA trust interest pursuant to 7 U.S.C. §499e(c)(3). The May 1, 2008
17 Letter, provides, in pertinent part:

18 You have asked my family to deliver our 2008 Tree Fruit crop to Ballantine
19 Produce Co... My family (Wagon Wheel Farms) now gives you, David Albertson
20 and Ballantine Produce, this written notice to preserve Wagon Wheel Farms’
21 P.A.C.A. trust benefits for the 2008 harvest. Please inform your staff and banking
institutions about Wagon Wheel Farms’ high priority P.A.C.A. lien to proceeds
from the sale of Wagon Wheel Farms’ fruit. This lien will exist indefinitely until
Wagon Wheel Farms is paid in full.

22 See Exhibit A to Wagon Wheel Motion to Determine Validity of PACA Claims. Wagon Wheel
23 alleges that the total amount past due and unpaid from Ballantine totals \$1,018,306.22, all of
24 which qualifies for PACA trust protection.

1 **DISCUSSION**

2 I. PACA

3 Congress enacted PACA in 1930 with the intent of “preventing unfair business practices
4 and promoting financial responsibility in the fresh fruit and produce industry.” Sunkist Growers,
5 Inc. v. Fisher, 104 F.3d 280, 282 (9th Cir. 1997). Under PACA, a statutory trust is created in
6 favor of all unpaid suppliers or sellers of perishable agricultural commodities upon receipt of
7 such goods by a “commission merchant, dealer, or broker.”¹ The PACA trust “was established
8 by Congress to protect sellers and suppliers of perishable agricultural commodities until full
9 payment of sums due have been received.” In re Southland + Keystone, 132 B.R. 632, 639 (9th
10 Cir. BAP 1991), (quoting In re Milton Poulos, Inc., 94 B.R. 648, 650 (Bankr. C.D. Cal. 1988)).

11 The statute provides, in relevant part:

12 Perishable agricultural commodities received by a commission merchant, dealer,
13 or broker in all transactions, and all inventories of food or other products derived
14 from perishable agricultural commodities, and any receivables or proceeds from
15 the sale of such commodities or products, shall be held by such commission
16 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.

17 7 U.S.C. §499e(c)(2). The PACA trust is a “nonsegregated floating trust” that applies to the
18 perishable “commodities, products derived therefrom, and any receivables or proceeds from their
19 sale in the hands of the commission merchant, dealer, o[r] broker.” H.R. REP. NO. 98-98-543,
20 at 2 (1983), reprinted in 1984 U.S.C.C.A.N. 405, 406.

21 Any supplier or seller of agricultural commodities who gives proper notice of its interest
22 in the PACA trust has a claim against the trust. In re Southland, 132 B.R. at 639. PACA requires
23 the beneficiary to preserve its trust right by providing written notice of its intent to preserve the
24 trust within thirty days after the time payment is due. The PACA trust preservation provision

25 _____
26 ¹The term “received” means at “the time when the buyer, receiver, or agent gains
27 ownership, control, or possession of the perishable agricultural commodities.” See 7 C.F.R.
§46.36(a)(1).

1 provides:

2 The unpaid supplier, seller, or agent shall lose the benefits of such trust unless
3 such person has given written notice of intent to preserve the benefits of the trust
4 to the commission merchant, dealer or broker within thirty calendar days (i) after
5 expiration of the time prescribed by which payment must be made, as set forth in
6 regulations issued by the Secretary, (ii) after expiration of such other time by
7 which payment must be made, as the parties have expressly agreed to in writing
8 before entering into the transaction, or (iii) after the time the supplier, seller, or
9 agent has received such 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.

10 7 U.S.C. §499e(c)(3). If a beneficiary does not comply with the notice requirements, it loses the
11 benefits of the PACA trust. See In re Marvin Properties, Inc., 854 F.2d 1183, 1186 (9th Cir.
12 1988) (“The language of section 499e(c)(3) is unambiguous on its face. It clearly states that the
13 seller shall lose the trust benefits unless ‘such person has given written notice of intent to
14 preserve benefits of the trust to the commission merchant, dealer, or broker and has filed such
15 notice with the Secretary....’”); see also In re Fresh Approach, Inc., 51 B.R. 412, 423 (Bankr.
16 N.D. Tex. 1985) (“Use of the words ‘shall lose’ and ‘preserve’ plainly refer to rights or interests
17 existing prior to perfection. The clear meaning of the preservation provisions is that a
18 beneficiary’s pre-existing beneficial interest would evaporate absent affirmative steps by such a
19 beneficiary to protect such interests. In short, the beneficial interest arises, by operation of law,
20 upon delivery to a dealer of qualifying produce, and said interest exists unless and until either the
21 claim is satisfied or the beneficiary fails to take the necessary steps to perfect.”).

22 Thus, under the statutory language, a PACA trust is created, in favor of unpaid suppliers,
23 sellers, or their agents at the time the perishable commodities are received by a commission
24 merchant, dealer, or broker but, in order to preserve the PACA trust, the beneficiaries are further
25 required to provide written notice to the commission merchant, dealer, or broker in receipt of
26 those commodities within a specified time period. See 7 U.S.C. §§499e(c)(2), (c)(3). If the
27
28

1 beneficiary, however, is a licensee, then it may perfect its PACA trust rights by including certain
2 statutory language on its invoices. See 7 U.S.C. §§499e(c)(4). Under the plain language of the
3 statute, it does not appear that a beneficiary that is not also a licensee can rely on invoices to
4 preserve its trust rights. See In re Enoch Packing Company, Inc. v. Joe Flores, 2007 WL
5 1589537, *4 (E.D. Cal. June 1, 2007).

6 II. Wagon Wheel's Arguments

7 Wagon Wheel contends that it perfected its PACA trust rights when it sent the May 1,
8 2008 letter to Ballantine. Wagon Wheel argues that the letter complied with PACA's statutory
9 timing requirements under 7 U.S.C. §499e(c)(3) and regulations under 7 C.F.R. §46.46(f)(1)².
10 Wagon Wheel asserts that the requirements of 7 U.S.C. §499e(c)(3) that the trust notice be issued
11 within thirty days after expiration of when payment from buyer is due merely establishes the last
12 day when such notice may be given, and that there is no requirement that a seller must wait until
13 payment default by the buyer before issuing its Notice of Intent. See Wagon Wheel Reply at
14 page 2.

15 Wagon Wheel also argues that Kingsburg Group's interpretation of the PACA statute
16 and regulations means that a grower's trust rights would depend on arbitrary elements of timing.
17 Wagon Wheel contends that this interpretation would create a situation "where a grower using
18 the 'invoice' method of preserving his PACA trust rights (under 499e(c)(4) could have its rights
19 vitiated simply because the invoice he provided (with the requisite PACA trust language) arrived
20

21 ²⁷ C.F.R. §46.46(f)(1) provides that a Notice of Intent must include information, which
establishes for each shipment:

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

1 at the commission merchant hours, or even moments, before the commission merchant actually
2 took possession or control of the fruit itself.” See Wagon Wheel Reply at page 3.

3 Lastly, Wagon Wheel argues that nothing in the PACA statute requires that the Notice of
4 Intent contain all the information set forth in the regulations and that the purpose of the notice
5 requirement was served because Ballantine was on notice that all of its transactions with Wagon
6 Wheel would be subject to PACA trust protection.

7 III. Resolution

8 The court finds that Wagon Wheel failed to properly preserve its prospective trust rights
9 because their Notice of Intent/May 1, 2008 letter was sent five months before the creation of its
10 beneficial interests in the PACA trust assets.

11 [U]nder the statutory language, a PACA trust is created in favor of unpaid
12 suppliers, sellers, or their agents at the time the perishable commodities are
13 received by a commission merchant, dealer, or broker but, in order to preserve the
14 PACA trust, the beneficiaries are further required to provide written notice to the
15 commission merchant, dealer or broker in receipt of those commodities within a
16 specified time period.

17 See In re Enoch Packing Company, 2007 WL 1589537 at *4 (citing to 7 U.S.C.
18 §499e(c)(2), (c)(3)).

19 Wagon Wheel’s letter did not comply with 7 U.S.C. §499e(c) because it was prematurely
20 sent to Ballantine before a PACA trust interest had arisen given that Wagon Wheel had not
21 delivered the fruit, and Ballantine had not received the produce, at the time the letter was sent.
22 Simply put, Wagon Wheel could not preserve an interest in a trust claim that did not exist.
23 Additionally, Wagon Wheel did not preserve its trust assets after they delivered the produce to
24 Ballantine, because they did not serve a Notice of Intent within 30 days of the relevant payment
25 term as required by 7 U.S.C. §499e(c)(3). Because Wagon Wheel did not send any Notice of
26 Intent after the creation of its trust interest, Wagon Wheel lost the benefit of the PACA trust. See
27 In re Enoch Packing Company, 2007 WL 1589537 at *4; see also In re Fresh Approach, 51 B.R.
28 at 423.

Wagon Wheel cites to In re Richmond Produce, 112 B.R. 364, 369-370 (Bankr. N.D. Cal.

1 1990) and In re W.L. Bradley Company, Inc., 75 B.R. 505, 511-512 (Bankr. E.D. Pa. 1987) for
2 the proposition that trust notices issued prior to any delinquent payments by the buyer are not
3 premature and are valid. See Wagon Wheel Reply at page 2. In re Richmond and In re W.L.
4 Bradley are distinguishable from the facts of this case because in both of those cases, the supplier
5 issued their trust notices after the delivery of their produce, but before the deadline for payment
6 by the buyer. Both courts found that a supplier's beneficial interest in the PACA trust was
7 created upon delivery of the produce to the buyer, not when payment was due. See In re
8 Richmond, 112 B.R. at 369-370; In re W.L. Bradley, 75 B.R. at 511, 512. Once the suppliers'
9 interests were created in the PACA trust assets (i.e. the delivery of the produce), they had 30 days
10 from the applicable payment term to issue a Notice of Intent to preserve their PACA trust rights.
11 Id. Because both suppliers served their Notices of Intent after the delivery of produce, their
12 claims were ruled valid PACA trust claims despite the fact that their Notices of Intent were
13 served before the applicable payment term expired. Id.

14 In contrast, it is undisputed that Wagon Wheel served its Notice of Intent around five
15 months before Ballantine actually received the produce. Wagon Wheel could not preserve trust
16 rights that did not exist. Thus, Wagon Wheel failed to properly perfect its trust rights pursuant to
17 the applicable PACA statutes and regulations.³

18 Wagon Wheel argues that to interpret 7 U.S.C. §499e to mean that a grower's rights do
19 not arise until the buyer takes possession of the produce means that a grower's trust rights would
20 depend on arbitrary elements of timing. Wagon Wheel contends that this interpretation would
21 create a situation "where a grower using the "invoice" method of preserving his PACA trust
22 rights could have its rights vitiated simply because the invoice he provided (with the requisite
23 PACA trust language) arrived at the commission merchant hours, or even moments, before the
24 commission merchant actually took possession or control of the fruit itself." See Wagon Wheel

25
26 ³The court notes that Wagon Wheel has not cited, and this Court's research did not
27 uncover, any case law that holds that a grower can preserve its trust rights before the rights are
28 created.

1 Reply at page 3.

2 The court is not persuaded by Wagon Wheel's argument. Wagon Wheel's example is
3 irrelevant because it does not address circumstances under which a non-licensed PACA grower
4 seeks to perfect its trust rights. Rather, Wagon Wheel is citing to 7 U.S.C. §499e(c)(4), which
5 provides for an alternate method of preserving PACA trust rights for licensees. Licensees are
6 entities that hold a valid license issued under PACA. See 7 U.S.C. §499c(a). Essentially,
7 licensees may preserve their trust benefits by using ordinary and usual billing or invoice
8 statements to provide notice of the licensee's intent to preserve the trust, which include certain
9 PACA trust language.⁴ See 7 U.S.C. §499e(c)(4). Here, Wagon Wheel has admitted that it was
10 not a PACA licensee, at the time in question. Therefore, Wagon Wheel's argument is
11 inapplicable to the facts of this case.

12 IV. Insufficient Information Argument

13 Because the court has found that Wagon Wheel did not timely serve a Notice of Intent
14 and failed to preserve their trust benefits, it is unnecessary for the court to address Bank of the
15 West's and Kingsburg Group's objections that Wagon Wheel's Notice of Intent contained
16 insufficient information regarding the transactions subject to PACA.

17
18 **ORDER**

19 The Court finds that the notice provided and filed by Wagon Wheel was inadequate to
20 preserve the trust benefits created by PACA and the court determines that Wagon Wheel does not
21 have a valid PACA claim.

22 IT IS SO ORDERED.

23 **Dated:** February 9, 2010

/s/ Anthony W. Ishii
CHIEF UNITED STATES DISTRICT JUDGE

24
25 _____
26 ⁴The court notes that under the plain language of 7 U.S.C. §499e(c)(4), it does not appear
27 that a beneficiary that is not also a licensee can rely on invoices to preserve its trust rights. See In
re Enoch Packing Company, Inc. v. Joe Flores, 2007 WL 1589537 (E.D. Cal. June 1, 2007).