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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA – FRESNO DIVISION**

10 ONIONS, ETC., INC. and DUDA FARM
FRESH FOODS, INC.

CASE NO. 1:09-CV-00906-OWW-MJS

13 Z&S FRESH, INC. fdba Z&S
14 DISTRIBUTING CO., INC., MARTIN J.
15 ZANINOVICH, LOREN SCHOENBURG,
AND MARGARET aka MARGE
SCHOENBURG

Hearing Date: December 4, 2009
Hearing Time: 1:00 p.m.
Courtroom: 3
Judge: Hon. Oliver W. W.

16 Defendants
17 AND INTERVENING ACTIONS
18 AND CROSS-COMPLAINTS
19 AND COUNTER CLAIMS

Memo, Decision Filed: June 25, 2010

On December 4, 2009, at 1:00 p.m., the above entitled Court heard the Motion to Determine Validity of and Objections to a PACA Claim filed by Intervening Plaintiff I.G. Fruit, Inc. in the above entitled matter (Docket No. 259.) Appearing personally was Norman D. Morrison IV of Walter & Wilhelm Law Group, a Professional Corporation, counsel for Defendants Z&S Fresh, Inc. and Martin J. Zaninovich ("Z&S"). Appearing telephonically was Leonard Kreinces, counsel for Intervening Plaintiff I.G. Fruit, Inc. ("I.G.") Also appearing telephonically were Katy Koestner Esquivel of the Meuers Law Group representing the "Mueuers Group" and local counsel for I.G. Fruit, Inc.; Jan Perkins of Perkins, Mann & Everett, a Professional Corporation, counsel for Intervening

1 Plaintiff Frank A. Logoluso Farms; and John P. Flynn of McLeod, Witham & Flynn, LLP,
2 counsel for defendants Loren Schoenburg and Margaret "Marge" Schoenburg.

3 Following oral arguments by counsel for I.G. Fruit, Inc. and Defendants Z&S
4 Fresh, Inc. and Martin J. Zaninovich, and upon consideration of the moving papers, this
5 Court directed parties to file supplemental briefing regarding whether or not Congress
6 intended the statutory PACA Trust to apply to the situation presented. Intervening
7 Plaintiff I.G. Fruit, Inc. submitted its responsive briefing on December 9, 2009 (Docket
8 No. 396); and Defendant Z&S Fresh, Inc. and Martin J. Zaninovich submitted their
9 responsive briefing on December 11, 2009 (Docket Nos. 397 and 398.) The matter was
10 thereafter deemed submitted for decision. On Friday, June 25, 2010, this Court issued
11 a Memorandum Order (Docket No. 494.)

12 I.G. Fruit, Inc. makes three arguments in support of its position that "sell-side
13 brokers" are beneficiaries of the PACA statutory trust. I.G. first argues that the term
14 "broker" and "agent" are interchangeable under §499e(c)(2), and therefore "sell-side"
15 brokers have the same PACA rights as agents. I.G. next asserts the term "in
16 connection with" contained in §499e(c)(2) includes not only the price of produce sold to
17 the original purchaser, but also additional related expenses including broker fees
18 connected to the secondary or "to market" transaction. Finally, I.G. contends that the
19 decision in *Eastside Food Plaza, Inc. v. "R" Best Produce, Inc.*, No. 03-CV-106-SAS,
20 2003 WL 21727788 (S.D.N.Y. July 23, 2003) controls the facts of this case.

21

22 **1. "Broker" and "agent" as synonymous/interchangeable:**

23 I.G.'s arguments with respect to the connection between the term "agents" and
24 "brokers" are without merit. As discussed in the Memorandum Order (DN 494), under
25 PACA these terms do not share a common meaning, nor are they incorporated into one
26 another; they do not have the same PACA rights or responsibilities. The PACA statute
27 itself belies I.G.'s contention, as the term "broker" is specifically defined in 7 U.S.C. §
28 499a(b)(7); and section 499a(12) delineates the differences between brokers and
agents. Congress drafted the statute to provide an additional layer of protection to the

1 sellers, suppliers, and agents of the original produce transaction; Congress did not
2 include brokers within this ambit of protection. A broker has an entirely different
3 function from an agent, who acts on behalf of the grower.

4 For the foregoing reasons, as addressed in more detail in the Memorandum
5 Decision (DN 494); this Court finds that I.G.'s arguments with respect to the connection
6 between agents and brokers are without merit, and that "broker" is not synonymous
7 and/or interchangeable with "agent" for purposes of PACA.

8

9 **2. "In connection with" language.**

10 I.G.'s arguments that the "in connection with" language contained in §499e(c)(2)
11 includes broker fees for selling produce held by the purchaser are without merit. I.G.
12 did not sell or supply produce to Z&S, but instead brokered a number of produce
13 transactions between Z&S and several grocery outlets. These transactions were
14 performed pursuant to a written contract between I.G. and Z&S, and did not include
15 PACA-intended beneficiaries, the original growers/suppliers.

16 As the Ninth Circuit noted in *Middle Mountain Land & Produce v. Sound*
17 *Commodities*, 307 F.3d 1220, 1224 (9th Cir. 2002), Congress enacted §499e(c) to give
18 sellers and suppliers a right to recover against buyers superior to that of all other
19 creditors, including brokers. While the Courts have held that sellers and suppliers have
20 the right to recover contractually based attorneys' fees and interest under PACA, the
21 critical distinction is that in such cases it was the PACA beneficiary that sought to
22 recover the legal expenses and interest; here I.G. is not a PACA trust beneficiary as it is
23 not a "supplier, seller or agent" and I.G. does not seek to recover administrative costs in
24 addition to unpaid charges for the produce itself.

25 No Court has held that brokers are one of the classes intended to be protected
26 by the PACA Trust. Moreover, allowing I.G.'s claim opens the door to other creditors
27 asserting similar claims and subverts Congress' intent to protect sellers as the exclusive
28 beneficiaries of the PACA trust.

For the foregoing reasons, as addressed in more detail in the Memorandum

1 Decision (DN 494); this Court finds that the provisions and intent of PACA cannot be
2 interpreted to allow I.G. to recover its broker fees prior to the distribution of trust funds to
3 the qualified beneficiaries.

4

5 **3. Eastside Food Plaza, Inc. v. "R" Best Produce, Inc.**

6 I.G. Fruit argues that the decision of the United States District Court in and for
7 the Southern District of New York in *Eastside Food Plaza, Inc. v. "R" Best Produce, Inc.*,
8 No. 03-CV-106-SAS, 2003 WL 21727788 (S.D.N.Y. July 23, 2003) controls the facts of
9 this case. This Court finds that the *Eastside Food Plaza* decision is distinguishable.
10 The issue in *Eastside* was whether a broker of produce sales has standing to advance
11 an unfair conduct claim under PACA. The holding in *Eastside* was limited to whether an
12 unpaid broker could properly raise an unfair conduct claim under 7 U.S.C. § 499b.
13 *Eastside* never addressed whether an unpaid broker is a PACA beneficiary pursuant to
14 7 U.S.C. §499e(c)(2). Additionally, §499b and §499e(c)(2) are two different statutory
15 schemes that do not apply to or interrelate to one another.

16

17 For the foregoing reasons, as more fully discussed in the Memorandum Decision
18 (DN 494) filed on June 24, 2010, this Court finds that I.G. Fruit is not one of the classes
19 intended to be protected by the PACA Trust; and that I.G. Fruit does not have a PACA
20 claim against defendants. Accordingly, I.G. Fruit, Inc.'s Motion to Determine Validity of
21 and Objections to Proofs of Claim is DENIED.

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25 IT IS SO ORDERED.

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 Dated: July 2, 2010

/s/ Oliver W. Wanger
 UNITED STATES DISTRICT JUDGE