

1 UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF CALIFORNIA  
3

4 ONIONS ETC., INC. and DUDA FARM  
5 FRESH FOODS, INC.,

6 Plaintiff,

7 v.

8 Z&S FRESH INC., a California  
9 corporation, fdba Z&S DISTRIBUTING  
10 COMPANY, INC., a California  
11 corporation; MARTIN J. ZANINOVICH,  
12 an individual; LOREN SCHOENBURG,  
13 an individual; MARGARET aka MARGE  
14 SCHOENBURG, an individual,

15 Defendants.

1:09-cv-00906 OWW MJS

MEMORANDUM DECISION AND ORDER  
RE (1) TRUSTEE'S MOTION FOR  
SUMMARY JUDGMENT OR, IN THE  
ALTERNATIVE, SUMMARY  
ADJUDICATION; AND (2)  
DEFENDANTS, LOREN  
SCHOENBURG'S AND MARGARET  
SCHOENBURG'S, MOTION FOR  
SUMMARY JUDGMENT, OR  
ALTERNATIVELY, ADJUDICATION  
OF ISSUES

(DOC. 689, 680)

14 I. INTRODUCTION

15 On May 22, 2009, two sellers of perishable agricultural  
16 commodities, Onions Etc., Inc. and Duda Farm Fresh Foods, Inc.,  
17 commenced this action against Z&S Fresh, Inc. fdba Z&S  
18 Distributing Co., Inc. ("Z&S"), Martin Zaninovich, Loren  
19 Schoenburg, and Margaret Schoenburg (together, "Defendants")  
20 pursuant to the Perishable Agricultural Commodities Act of 1930  
21 ("PACA"), 7 U.S.C. § 499a et seq. Doc. 1. On June 24, 2009, the  
22 parties stipulated to: (1) entry of a preliminary injunction; (2)  
23 appointment of Terence J. Long as trustee of the PACA trust  
24 ("Trustee"); (3) establishment of a PACA trust account; (4)  
25 liquidation of the PACA trust assets; and (5) establishment of a  
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1 PACA trust claims procedure by which PACA trust creditors could  
2 file claims and intervene in the lawsuit. Doc. 48.

3 Before the court is the Trustee's motion for summary  
4 judgment, or alternatively, adjudication of issues against  
5 Defendants. Doc. 689. L. Schoenburg and M. Schoenburg (together,  
6 "Schoenburgs") filed an opposition (Doc. 699), to which the  
7 Trustee replied (Doc. 719). Z&S and Zaninovich did not file  
8 oppositions.  
9

10 Also before the court is the Schoenburgs' motion for summary  
11 judgment, or alternatively, adjudication of issues of all claims  
12 asserted against them. Doc. 680. Plaintiffs in intervention Aron  
13 Margosian, Two Play Properties, LLC, Three Play Farms, Four Play  
14 Farms, George Margosian, and Margosian Bros (together,  
15 "Intervening Plaintiffs") and the Trustee filed oppositions (Doc.  
16 701 and 702, respectively), to which the Schoenburgs replied  
17 (Docs. 715, 716). Intervenor Plaintiff Peters Fruit Farms, Inc.  
18 joined in the Trustee's opposition. Doc. 704.  
19

20 The cross-motions for summary judgment were heard July 25,  
21 2011.  
22

## 23 II. FACTUAL BACKGROUND

### 24 A. Undisputed Facts

#### 25 1. Z&S

26 In December 1985, L. Schoenburg and Zaninovich incorporated  
27 Z&S. Schoenburg Statement of Undisputed Material Facts ("SSUMF")  
28 ¶ 7. Z&S was a California corporation engaged in the business of

1 marketing and selling produce in interstate commerce. Trustee  
2 Statement of Undisputed Facts ("TSUF") ¶ 1. ZM Fresh Special T's  
3 ("ZM") was a California corporation engaged in the handling,  
4 processing, and packaging of produce marketed by Z&S. TSUF ¶ 2.  
5 The United States Department of Agriculture's Agricultural  
6 Marketing Service ("USDA AMS") issued Z&S PACA license no.  
7 19860395. TSUF ¶ 3; SSUMF ¶ 60.

9 On January 24, 1986, the Schoenburgs were issued fifty  
10 percent (50%) of the shares of stock in Z&S as joint tenants.  
11 SSUMF ¶ 8. Zaninovich received the other fifty percent (50%) of  
12 the issued shares. SSUMF ¶ 9. From at least as early as 2006 and  
13 continuing through 2009, there were three directors of Z&S:  
14 Zaninovich, L. Schoenburg, and M. Schoenburg.<sup>1</sup> TSUF ¶ 4.

16 In 2008 and 2009, Z&S transferred assets to ZM or to third  
17 parties on behalf of ZM. TSUF ¶ 31. The assets that were  
18 transferred to ZM were all assets protected by a PACA statutory  
19 trust, meaning that the source of the funds transferred from Z&S  
20 to ZM was from the sales of perishable agricultural commodities  
21 that were subject to the PACA statutory trust. TSUF ¶ 32. The  
22 assets transferred directly to ZM or to third-party vendors on  
23 behalf of ZM amounted to \$4,319,241.23: \$3,040,000.00 in direct  
24 transfers to ZM and \$1,279,241.23 in transfers to third-party

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27 <sup>1</sup> The Schoenburgs do not dispute this fact, but contend that it is incomplete.  
28 According to the Schoenburgs, they remained listed as directors because  
Zaninovich "never changed it," and they only signed documents following L.  
Schoenburg's retirement at Zaninovich's direction.

1 vendors on behalf of ZM. TSUF ¶ 33. Z&S became insolvent and  
2 unable to pay shippers and growers who had valid claims for debts  
3 covered by PACA. TSUF ¶ 34.

4 A court order dated June 24, 2009 ("Order") appointed  
5 Terence J. Long as Trustee of the assets of Z&S; required him to  
6 identify, take possession and control, and liquidate all assets  
7 of Z&S; and authorized him to "bring and prosecute all proper  
8 actions for the collection of contract proceeds due, or for the  
9 protection of the PACA trust assets, or to recover possession of  
10 the PACA trust assets from any person." TSUF ¶ 35. Pursuant to  
11 the Order, the Trustee calculated the total amount of the PACA  
12 claims after resolutions and settlements of objections and  
13 disputes regarding the PACA claims as \$7,176,731.94, though this  
14 was later reduced to \$6,978,264.59 after the Court issued an  
15 order invalidating I.G. Fruit, Inc.'s claim for \$198,467.35. TSUF  
16 ¶ 36. Pursuant to the Order, the Trustee has distributed a total  
17 of \$3,436,344.84, leaving the amount of \$3,541,919.75 still owing  
18 to the PACA beneficiaries. TSUF ¶ 37.

21 2. Zaninovich

22 Zaninovich was the sole shareholder of Z&S during the  
23 relevant period. TSUF ¶ 5. Zaninovich owned 50% of the shares in  
24 ZM. TSUF ¶ 6. Zaninovich was President of both Z&S and ZM. TSUF ¶  
25 7. Zaninovich oversaw the operations of Z&S. TSUF ¶ 8. Zaninovich  
26 had no other significant independent sources of income other than  
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1 from Z&S and considered all of his personal assets, at least to  
2 the extent PACA trust monies were distributed to him, to be PACA  
3 trust assets. TSUF ¶ 9. The records of the USDA AMS show that  
4 Zaninovich was identified as a "Reported Principal" on the PACA  
5 license issued by the USDA AMS. TSUF ¶ 10.

6  
7 3. The Schoenburgs

8 a) Claims against the Schoenburgs

9 The operative complaints, complaints-in-intervention,  
10 cross-claims and counterclaims assert the following causes of  
11 action against the Schoenburgs: (1) violation of PACA: failure to  
12 account and pay promptly; (2) breach of fiduciary duty/non-  
13 dischargeability; (3) conversion and/or unlawful retention of  
14 PACA trust assets; (4) violation of PACA: false and/or misleading  
15 statement relating to a PACA transaction; (5) injunctive relief -  
16 to compel turnover and disgorgement of PACA trust assets; (6)  
17 failure to maintain trust assets, and/or pay trust claims/funds;  
18 (7) declaratory relief; (8) enforcement of payments from/  
19 dissipation of trust assets; (9) creation of common fund; (10)  
20 interest and attorneys fees; (11) enforcement of statutory trust  
21 provisions of PACA; (12) injunctive relief - temporary  
22 restraining order; (13) fraudulent conveyance of PACA trust  
23 assets; (14) unjust enrichment; (15) constructive fraud; (16)  
24 constructive trust and accounting; (17) failure to maintain  
25 trust; (18) breach of contract; (19) breach of statutory duties:  
26 Cal. Food & Ag. Code §§ 56611, 56615, 56623, 56620; (20) quiet

1 title; and (21) unfair business practices under Cal. Bus. & Prof.  
2 Code § 17200, et seq. No other theories of liability are asserted  
3 against the Schoenburgs. SSUMF ¶ 1.

4 Common among all of the charging documents is the allegation  
5 that the Schoenburgs were either owners, shareholders, members,  
6 partners, officers or directors of one of the named defendant  
7 business entities. SSUMF ¶ 2.

8  
9 Intervening Plaintiffs' claims against the Schoenburgs are  
10 for quantities of perishable agricultural commodities allegedly  
11 sold and delivered to Defendants throughout the 2006-2007 and  
12 2007-2008 growing seasons for which claimants contend they have  
13 not been paid. SSUMF ¶ 4.

14  
15 b) Defendant Business Entities Other than Z&S  
16 and ZM

17 The Schoenburgs played no role in and are not and have never  
18 been owners, shareholders, members, partners, officers or  
19 directors in the following business entity Defendants: Fresno-  
20 Madera Federal Land Bank Association, FLCA, Bank of the West,  
21 Belknap Pump Company, Inc., Jerry E. Robinson dba Sierra Fire  
22 Protection, Two Play Properties, LLC, Two Play Properties  
23 Arizona, LLC, Three Play Farms, Four Play Farms, and Four Play  
24 Ranch. SSUMF ¶ 5. As to these parties, none of whom assert claims  
25 against the Schoenburgs and against whom the Schoenburgs do not  
26 assert claims, these facts are confirmed.

1 c) Loren Schoenburg

2 L. Schoenburg was one of the original applicants for Z&S'  
3 PACA license in 1985. TSUF ¶ 11. L. Schoenburg was listed as a  
4 Principal on Z&S' PACA license for the years 2008 and 2009.<sup>2</sup> TSUF  
5 ¶ 12. From at least 2006, L. Schoenburg was the Vice-President of  
6 Z&S and was never removed from that office.<sup>3</sup> TSUF ¶ 13. From at  
7 least 2000, L. Schoenburg was a director of Z&S and was never  
8 removed from that office.<sup>4</sup> TSUF ¶ 14.

10 L. Schoenburg, individually, has never received, bought or  
11 sold any perishable agricultural commodities from any of the  
12 claimants in this action. SSUMF ¶ 47. L. Schoenburg has never  
13 entered into a contract, personally, on his own behalf, for the  
14 purchase or sale of any perishable agricultural commodities with  
15 any of claimants in this action. SSUMF ¶ 48.

17 Starting in 2007 and continuing into 2009, L. Schoenburg  
18 picked up Z&S checks in amounts between \$6,500.00 and \$9,000.00  
19 at Z&S' office, cashed them at a bank, and returned the cash to  
20 Zaninovich. L. Schoenburg always only cashed one check at each  
21 financial institution to avoid the \$10,000.00 IRS reporting  
22 requirement. TSUF ¶ 15. L. Schoenburg cashed the checks as a  
23 favor to Zaninovich pursuant to Zaninovich's request, always  
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25 <sup>2</sup> The Schoenburgs do not dispute this fact, but provide evidence that L.  
26 Schoenburg did not become aware that he was listed on Z&S's PACA license,  
notwithstanding his retirement, until April 2009.

27 <sup>3</sup> The Schoenburgs do not dispute this fact, but do contest the extent of L.  
Schoenburg's duties and responsibilities following his retirement.

28 <sup>4</sup> The Schoenburgs do not dispute this fact, but do contest the extent of L.  
Schoenburg's duties and responsibilities following his retirement.

1 returned the funds to Zaninovich, and never kept any of the  
2 funds. SSUMF ¶ 40.

3 From 2000 to 2009, L. Schoenburg was on the payroll of Z&S.<sup>5</sup>  
4 TSUF ¶ 16. L. Schoenburg received a credit card that he used for  
5 personal expenses that were billed to and paid by Z&S. TSUF ¶ 17.  
6 L. Schoenburg, as an officer of Z&S, executed loan documents in  
7 2007 and 2008 on behalf of Z&S that purported to make Z&S a  
8 guarantor for loans made by the bank to ZM. TSUF ¶ 19.

10 For a month each summer season in 2007 and 2008, L.  
11 Schoenburg traveled to Nogales, Arizona for Z&S to inspect grapes  
12 crossing the border. SSUMF ¶¶ 42, 43. While L. Schoenburg's  
13 expenses were paid, he received no significant compensation for  
14 his limited inspection services for Z&S. SSUMF ¶ 44.

16 From 2000 to 2009, L. Schoenburg never asked for any  
17 financial reports for Z&S. TSUF ¶ 20. L. Schoenburg did not  
18 discover that Z&S was in financial trouble until April 2009. TSUF  
19 ¶ 21. L. Schoenburg was not involved with the operations of Z&S  
20 following his retirement in 1999. TSUF ¶ 22.

21 While L. Schoenburg was listed as a director of ZM, he was  
22 unaware of such status and neither of the Schoenburgs was  
23 actually involved in any way, shape or form with the actual  
24 management or operation of ZM. SSUMF ¶ 6. Zaninovich did not  
25

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26  
27 <sup>5</sup> The Schoenburgs do not dispute this fact, but provide evidence that  
28 continued health insurance was a component of L. Schoenburg's retirement  
package, and that the Schoenburgs received paychecks at minimum wage to  
satisfy the minimum hours required under Z&S's health insurance policy.



1 consult with L. Schoenburg regarding any of ZM's activities.  
2 SSUMF ¶ 26. L. Schoenburg was never involved with ZM, and did not  
3 know whether ZM ever received any monies from Z&S. TSUF ¶ 22.

4 Following L. Schoenburg's retirement sometime between 1999  
5 and 2001<sup>6</sup>, M. Schoenburg gave a Mercedes sedan, which the  
6 Schoenburgs owned outright, to Aron Margosian for his wife,  
7 pursuant to Zaninovich's request. In exchange, M. Schoenburg  
8 received a Mercedes convertible from Zaninovich, which had been  
9 leased by Z&S. SSUMF ¶ 16. After Zaninovich explained that he  
10 could no longer make the payments on the lease, the Schoenburgs  
11 returned the Mercedes convertible to Z&S. SSUMF ¶ 17. Zaninovich  
12 also purchased an Acura from the Schoenburgs which L. Schoenburg  
13 bought following his retirement. SSUMF ¶ 18. L. Schoenburg took  
14 the money he received from Zaninovich in exchange for his Acura  
15 and bought a Mercedes SUV. SSUMF ¶ 19. L. Schoenburg kept the  
16 Mercedes SUV until Zaninovich requested it in exchange for a BMW,  
17 which Z&S leased. SSUMF ¶ 20. When the lease on the BMW came to  
18 an end, Zaninovich replaced it with a Range Rover, which Z&S  
19 leased and L. Schoenburg eventually purchased. SSUMF ¶ 21.

22 L. Schoenburg does not claim any interest in the property  
23 located at 39303 Road 56 in Dinuba, California 93618. SSUMF ¶ 58.

24  
25 d) Margaret Schoenburg

26 From at least 2000 and through 2009, M. Schoenburg was both

27  
28 <sup>6</sup> The degree of L. Schoenburg's retirement is disputed. See Disputed Facts,  
below.

1 a director and the Secretary/Treasurer of Z&S. TSUF ¶ 24.  
2 In 2008 and 2009, M. Schoenburg cashed at least thirteen Z&S  
3 checks at the request of L. Schoenburg, who Zaninovich had asked  
4 to cash the checks. TSUF ¶ 25. In 2008 and 2009, M. Schoenburg  
5 received a salary from Z&S.<sup>7</sup> TSUF ¶ 26. M. Schoenburg received a  
6 credit card that was billed to Z&S.<sup>8</sup> TSUF ¶ 27. M. Schoenburg  
7 received a Mercedes-Benz convertible that was leased by Z&S. TSUF  
8 ¶ 28. M. Schoenburg, as an officer of Z&S, executed loan  
9 documents in 2007 and 2008 on behalf of Z&S that purported to  
10 make Z&S a guarantor for loans made by the bank to ZM. TSUF ¶ 29.

12 M. Schoenburg, individually, has never received, bought or  
13 sold any perishable agricultural commodities from any of the  
14 claimants in this action. SSUMF ¶ 47. M. Schoenburg has never  
15 entered into a contract, personally, on her own behalf, for the  
16 purchase or sale of any perishable agricultural commodities with  
17 any of the claimants in this action. SSUMF ¶ 48.

19 M. Schoenburg was never involved with ZM, was not involved  
20 in the management, operations or day-to-day activities of Z&S,  
21 and had no knowledge of whether, and in what amounts if any, of  
22 any moneys received by ZM from Z&S. TSUF ¶ 30.

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25 <sup>7</sup> The Schoenburgs do not dispute this fact, but provide evidence that  
26 continued health insurance was a component of L. Schoenburg's retirement  
27 package, and that the Schoenburgs received paychecks at minimum wage to  
28 satisfy the minimum hours required under Z&S' health insurance policy.

<sup>8</sup> The Schoenburgs do not dispute this fact, but provide evidence that the  
credit card was a component of L. Schoenburg's retirement package. No evidence  
has been presented as to the amount of the credit card charges.

1 M. Schoenburg does not claim any interest in the property  
2 located at 39303 Road 56 in Dinuba, California 93618. SSUMF ¶ 58.

3 B. Disputed Facts

4 1. Claims against the Schoenburgs

5 The Schoenburgs contend that, except for the claims by  
6 Intervening Plaintiffs, all of the other claimants' claims  
7 asserted against the Schoenburgs are for quantities of perishable  
8 agricultural commodities allegedly sold and delivered to  
9 Defendants after January 1, 2008 for which claimants contend they  
10 have not been paid. SSUMF ¶ 3. The Trustee rejoins that the  
11 claims asserted against the Schoenburgs are broader than just  
12 violations of PACA for failure to pay for perishable agricultural  
13 commodities.  
14

15 2. ZM Fresh Special T's

16 The Schoenburgs contend that as to ZM, while L. Schoenburg  
17 was listed as a director, he was unaware that he held that  
18 position and neither of the Schoenburgs were actually involved in  
19 any way, shape or form with the actual management or operation of  
20 ZM. SSUMF ¶ 6. The Schoenburgs contend that Zaninovich did not  
21 consult with L. Schoenburg regarding any of the activities that  
22 occurred with ZM. SSUMF ¶ 26.  
23

24 The Trustee rejoins that: (1) L. Schoenburg, as director and  
25 vice-president of Z&S, authorized Z&S to guarantee loans provided  
26 to ZM; and (2) M. Schoenburg, as director and secretary/treasurer  
27 of Z&S, authorized Z&S to guarantee loans provided to ZM.  
28

1                   3.    Loren Schoenburg

2           The Schoenburgs contend that sometime prior to 2001, L.  
3   Schoenburg agreed to retire from his position with the company  
4   upon being paid an unspecified sum by Z&S (SSUMF ¶ 12), and that  
5   L. Schoenburg retired sometime prior to 2001 (SSUMF ¶ 13). The  
6   Schoenburgs argue that unknown to L. Schoenburg, Z&S continued to  
7   list him as a director and vice president of Z&S on its PACA  
8   license after his retirement. SSUMF ¶ 22. The Schoenburgs argue  
9   that L. Schoenburg did not become aware until April 2009 that he  
10   was listed on Z&S's PACA license, notwithstanding his retirement.  
11   SSUMF ¶ 23.

12  
13           The Schoenburgs assert that after L. Schoenburg's retirement  
14   from Z&S:

- 15           • He relinquished all authority, power and control so that  
16           neither of the Schoenburgs had the ability to or exercised  
17           any duties and/or responsibilities as director, officer  
18           and/or employee of Z&S, other than signing papers as  
19           directed by Zaninovich, and L. Schoenburg's limited stint as  
20           an inspector in Nogales for a month each year in 2007 and  
21           2008. SSUMF ¶ 24.  
22  
23           • The only documents the Schoenburgs signed, were signed at  
24           Zaninovich's direction. SSUMF ¶ 25.  
25  
26           • L. Schoenburg did not have or exercise any authority or  
27           control over purchases, sales or payment for perishable  
28

1 agricultural commodities or any other financial matters  
2 involving Z&S. SSUMF ¶ 27.

- 3 • He was not responsible for and did not make any decisions in  
4 the day-to-day operations of the company. SSUMF ¶ 28.
- 5 • L. Schoenburg has not received, bought nor sold perishable  
6 agricultural commodities for Z&S at any time since his  
7 retirement (sometime between 1999 and 2001). SSUMF ¶ 29.
- 8 • Neither of the Schoenburgs approved or had access to the  
9 financial records of Z&S. SSUMF ¶ 30.
- 10 • The Schoenburgs made no representations regarding the  
11 amounts contained in grower accounts at Z&S. SSUMF ¶ 31.
- 12 • L. Schoenburg did not have any access to Z&S's banking  
13 dealings. SSUMF ¶ 32.
- 14 • L. Schoenburg did not have any access to Z&S's books and  
15 records. SSUMF ¶ 33.
- 16 • L. Schoenburg did not have or exercise any responsibility or  
17 duties as an officer of Z&S, but Z&S continued to identify  
18 him as an officer of Z&S because Zaninovich understood more  
19 than one officer was needed to be a corporation. SSUMF ¶ 34.
- 20 • All management decisions at Z&S were made by Zaninovich,  
21 such that Zaninovich was in total control of the business.  
22 SSUMF ¶ 39.

- 1 • Neither of the Schoenburgs had any authority to and did not  
2 sign any checks that drew on any accounts belonging to Z&S.  
3 SSUMF ¶ 41.
  - 4 • L. Schoenburg never had or exercised any control over the  
5 perishable agricultural commodities at Z&S or the proceeds  
6 realized from their sale. SSUMF ¶ 49.
  - 7 • The Schoenburgs had no knowledge of how the proceeds  
8 realized from the sale of perishable agricultural  
9 commodities at Z&S were being handled, so that neither had  
10 any knowledge that such proceeds were not being forwarded to  
11 claimants. SSUMF ¶ 51.
  - 12 • L. Schoenburg's only employment with Z&S since his departure  
13 occurred in 2007 and 2008, when he traveled to Nogales to  
14 inspect grapes crossing the border for Z&S during the summer  
15 seasons. SSUMF ¶ 42. L. Schoenburg did not have any  
16 authority or control over the operations of Z&S while he  
17 worked as an inspector for Z&S in Nogales in the summers of  
18 2007 and 2008.
  - 19 • L. Schoenburg has not worked for Z&S since 2008. SSUMF ¶ 45.
- 20 As part of L. Schoenburg's retirement, the Schoenburgs  
21 received health insurance and credit cards from Z&S. SSUMF ¶ 14.  
22 The Schoenburgs contend that in order for the Schoenburgs to  
23 receive the health insurance benefits that were part of L.  
24 Schoenburg's retirement package, it was their understanding that  
25

1 they were listed as employees on the payroll of Z&S and received  
2 pay checks at minimum wage for the minimum number of hours  
3 required under Z&S' health insurance. SSUMF ¶ 15.

4 The Trustee rejoins that the degree of L. Schoenburg's  
5 retirement is disputed since, among other facts, he: (1) never  
6 retired from his position as a director of Z&S; (2) never retired  
7 from his position as vice-president of Z&S; (3) continued to be a  
8 salaried employee on the payroll of Z&S and to receive employment  
9 related benefits; (4) was listed as a principal of Z&S on its  
10 PACA license during relevant time periods; and (5) in his  
11 capacity as an officer of Z&S, authorized Z&S to guarantee loans  
12 provided to ZM. Intervening Plaintiffs add that starting in 2007  
13 and continuing into 2009, L. Schoenburg picked up Z&S checks, in  
14 amounts between \$6,500.00 and \$9,000.00, at Z&S' office, cashed  
15 them at a bank, and returned the cash to Zaninovich.

16 The Trustee further contends that L. Schoenburg had  
17 constructive and actual knowledge of being listed as a director  
18 and vice president of Z&S on its PACA license because the license  
19 is a matter of public record, he was an original applicant for  
20 and principal of the license, and continued to be listed as a  
21 director and vice president on the license in 2008 and 2009.

22 4. Margaret Schoenburg

23 Pointing to Z&S's Articles of Incorporation and M.  
24 Schoenburg's deposition, the Trustee contends that M. Schoenburg  
25

1 was one of the incorporators of Z&S. TSUF ¶ 23. Pointing to the  
2 Schoenburgs' declarations and depositions and Zaninovich's  
3 deposition, the Schoenburgs contend that L. Schoenburg and  
4 Zaninovich actually formed Z&S and that M. Schoenburg was not  
5 involved in its formation.  
6

7 The degree of M. Schoenburg's duties and responsibilities  
8 with respect to Z&S is in dispute. The Schoenburgs contend that:  
9 (1) M. Schoenburg never had any duties or responsibilities at  
10 Z&S, other than signing papers when Zaninovich requested or  
11 directed (SSUMF ¶ 35); (2) M. Schoenburg has neither received,  
12 bought nor sold perishable agricultural commodities for Z&S at  
13 any time (SSUMF ¶ 36); (3) M. Schoenburg was never involved in  
14 running the operations of Z&S (SSUMF ¶ 37); (4) M. Schoenburg did  
15 not have or exercise any responsibility or duties as an officer  
16 of Z&S, but was identified as such because it was Zaninovich's  
17 understanding that more than two people were needed to be  
18 officers to be a corporation (SSUMF ¶ 38); (5) M. Schoenburg  
19 never had or exercised any control over the perishable  
20 agricultural commodities at Z&S or the proceeds realized from  
21 their sale (SSUMF ¶ 50); and (6) M. Schoenburg never had any  
22 authority or control over purchases, sales or payment for  
23 perishable agricultural commodities or any other financial  
24 matters involving Z&S (SSUMF ¶ 59).  
25  
26

27 The Trustee rejoins that M. Schoenberg, among other facts:  
28



1 (1) was both a director and secretary/treasurer of Z&S; (2)  
2 continued to be a salaried employee of Z&S; and (3) in her  
3 capacity as a loan officer, authorized Z&S to guarantee loans  
4 provided to ZM. Intervening Plaintiffs add that: (1) in 2008 and  
5 2009, M. Schoenburg cashed at least thirteen Z&S checks at the  
6 request of her husband L. Schoenburg, who was himself asked by  
7 Zaninovich to cash checks; and (2) M. Schoenburg received a  
8 credit card that was billed to Z&S.  
9

### 10 III. LEGAL STANDARD

11 Summary judgment is proper if "the pleadings, the discovery  
12 and disclosure materials on file, and any affidavits show that  
13 there is no genuine issue as to any material fact and that the  
14 movant is entitled to judgment as a matter of law." Fed. R. Civ.  
15 P. 56.  
16

17 The moving party bears the initial burden of "informing the  
18 district court of the basis for its motion, and identifying those  
19 portions of the pleadings, depositions, answers to  
20 interrogatories, and admissions on file, together with the  
21 affidavits, if any, which it believes demonstrate the absence of  
22 a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477  
23 U.S. 317, 323, 106 S.Ct. 2548 (1986) (internal quotation marks  
24 omitted). A fact is material if it could affect the outcome of  
25 the suit under the governing substantive law; "irrelevant" or  
26 "unnecessary" factual disputes are not considered. *Anderson v.*  
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1 *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986).

2       If the moving party would bear the burden of proof on an  
3 issue at trial, it must "affirmatively demonstrate that no  
4 reasonable trier of fact could find other than for the moving  
5 party." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9<sup>th</sup>  
6 Cir. 2007). In contrast, if the non-moving party bears the burden  
7 of proof on an issue, the moving party can prevail by "merely  
8 pointing out that there is an absence of evidence" to support the  
9 non-moving party's case. *Id.*

11       If the moving party meets its burden, the "adverse party may  
12 not rest upon the mere allegations or denials of the adverse  
13 party's pleadings, but the adverse party's response, by  
14 affidavits or as otherwise provided in this rule, must set forth  
15 specific facts showing that there is a genuine issue for trial."  
16 Fed. R. Civ. P. 56(e). If the moving party does not meet its  
17 burden, "[s]ummary judgment may be resisted and must be denied on  
18 no other grounds than that the movant has failed to meet its  
19 burden of demonstrating the absence of triable issues." *Henry v.*  
20 *Gill Indus.*, 983 F.2d 943, 950 (9<sup>th</sup> Cir. 1993).

22       In ruling on a motion for summary judgment, a court does not  
23 make credibility determinations or weigh evidence. See *Anderson*,  
24 477 U.S. at 255. Rather, "[t]he evidence of the non-movant is to  
25 be believed, and all justifiable inferences are to be drawn in  
26 his favor." *Id.* Only admissible evidence is considered in  
27  
28

1 deciding a motion for summary judgment. *Soremekun*, 509 F.3d at  
2 984. "Conclusory, speculative testimony in affidavits and moving  
3 papers is insufficient to raise genuine issues of fact and defeat  
4 summary judgment." *Id.*

5  
6 IV. TRUSTEE'S MOTION FOR SUMMARY JUDGMENT

7 The Trustee moves for summary judgment or, in the  
8 alternative, summary adjudication against Z&S, Zaninovich, and  
9 the Schoenburgs. Doc. 689. The Schoenburgs oppose the motion; Z&S  
10 and Zaninovich did not file oppositions.

11 A. Count II: Enforcement of Statutory Provisions of PACA;  
12 Count III: Violation of PACA

13 1. PACA

14 PACA was enacted in 1930 to prevent unfair business  
15 practices and promote financial responsibility in the fresh fruit  
16 and produce industry. *Sunkist Growers v. Fisher*, 104 F.3d 280,  
17 282 (9<sup>th</sup> Cir. 1997). PACA requires all brokers and dealers in  
18 perishable agricultural commodities to obtain licenses from the  
19 Secretary of Agriculture. *Id.*; 7 U.S.C. §§ 499c, 499d. "Dealers  
20 violate PACA if they do not pay promptly and in full for any  
21 perishable commodity in interstate commerce." *Sunkist Growers*,  
22 104 F.3d at 282; 7 U.S.C. § 499b(4).

24 Congress amended PACA in 1984 "'to remedy [the] burden on  
25 commerce in perishable agricultural commodities and to protect  
26 the public interest' caused by accounts receivable financing  
27 arrangements that 'encumber or give lenders a security interest'  
28

1 in the perishable agricultural commodities superior to the  
2 growers." *Boulder Fruit Express & Heger Organic Farm Sales v.*  
3 *Transp. Factoring, Inc.*, 251 F.3d 1268, 1270 (9<sup>th</sup> Cir. 2001)  
4 (quoting 7 U.S.C. § 499e(c)(1)). Section 499e(c) created the PACA  
5 trust:

6  
7 Perishable agricultural commodities received by a commission  
8 merchant, dealer, or broker in all transactions, and all  
9 inventories of food or other products derived from  
10 perishable agricultural commodities, and any receivables or  
11 proceeds from the sale of such commodities or products,  
12 shall be held by such commission merchant, dealer, or broker  
13 in trust for the benefit of all unpaid suppliers or sellers  
14 of such commodities or agents involved in the transaction,  
15 until full payment of the sums owing in connection with such  
16 transactions has been received by such unpaid suppliers,  
17 sellers, or agents.

18 7 U.S.C. § 499e(c)(2).

19 "Commission merchants, dealers and brokers are required to  
20 maintain trust assets in a manner that such assets are freely  
21 available to satisfy outstanding obligations to sellers of  
22 perishable agricultural commodities." 7 C.F.R. § 46.46(d)(1).  
23 Dissipation of trust assets, defined as "any act or failure to  
24 act which could result in the diversion of trust assets or which  
25 could prejudice or impair the ability of unpaid suppliers,  
26 sellers, or agents to recover money owed in connection with  
27 produce transactions", is unlawful. *Id*; 7 C.F.R. § 46.46(a)(2).  
28 Failure to maintain the trust or make full payment promptly to  
the trust beneficiary is unlawful. 7 U.S.C. § 499b(4).

1                   2.     Z&S

2             The undisputed facts establish that Z&S was subject to PACA.  
3     Z&S was a California corporation that was engaged in the business  
4     of marketing and selling produce in interstate commerce. TSUF ¶  
5     1. Z&S was therefore a "dealer" within the meaning of PACA. 7  
6     U.S.C. § 499a(b)(6) (defining a "dealer" as "any person engaged  
7     in the business of buying and selling in wholesale . . . any  
8     perishable agricultural commodity in interstate or foreign  
9     commerce. . ."). The USDA AMS issued Z&S PACA license no.  
10    19860395. TSUF ¶ 3; SSUMF ¶ 60.

12            The undisputed facts establish that Z&S violated PACA. In  
13    2008 and 2009, Z&S transferred assets to ZM or to third parties  
14    on behalf of ZM. TSUF ¶ 31. The assets that were transferred to  
15    ZM were all assets protected by a PACA statutory trust, meaning  
16    that the source of the funds transferred from Z&S to ZM was from  
17    the sales of perishable agricultural commodities that were  
18    subject to the PACA statutory trust. TSUF ¶ 32. The assets  
19    transferred directly to ZM or to third-party vendors on behalf of  
20    ZM amounted to \$4,319,241.23: \$3,040,000.00 in direct transfers  
21    to ZM and \$1,279,241.23 in transfers to third-party vendors on  
22    behalf of ZM. TSUF ¶ 33. These transfers from Z&S to ZM  
23    dissipated trust assets, which is unlawful under PACA. 7 C.F.R. §  
24    46.46(a)(2), (d)(1). Z&S became insolvent and unable to pay  
25    shippers and growers who had valid claims for debts covered by  
26    27  
28

1 PACA. TSUF ¶ 34. Z&S's failure to maintain its PACA trust and  
2 remit full and prompt payment to the trust beneficiaries violated  
3 PACA. 7 U.S.C. § 499b(4) .

4 An Order appointed Terence J. Long as Trustee of the assets  
5 of Z&S; required him to identify, take possession and control,  
6 and liquidate all assets of Z&S; and authorized him to "bring and  
7 prosecute all proper actions for the collection of contract  
8 proceeds due, or for the protection of the PACA trust assets, or  
9 to recover possession of the PACA trust assets from any person."  
10 TSUF ¶ 35. Pursuant to the Order, the Trustee calculated the  
11 total amount of the PACA claims after resolutions and settlements  
12 of objections and disputes regarding the PACA claims as  
13 \$7,176,731.94, although this was later reduced to \$6,978,264.59  
14 after the Court issued an order invalidating I.G. Fruit, Inc.'s  
15 claim for \$198,467.35. TSUF ¶ 36. Pursuant to the Order, the  
16 Trustee has distributed a total of \$3,436,344.84, leaving the net  
17 amount of \$3,541,919.75 still owing to PACA beneficiaries. TSUF ¶  
18 37. Z&S is liable under PACA for the unpaid \$3,541,919.75 due to  
19 PACA trust beneficiaries. See 7 U.S.C. § 499e(a) .

20 The Trustee's motion for summary judgment against Z&S as to  
21 Counts II and III is GRANTED in the amount of \$3,541,919.75.

### 22 3. Zaninovich

23 In *Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280, 283 (9<sup>th</sup>  
24 Cir. 1997), the Ninth Circuit explained that PACA liability  
25

1 attaches first to the licensed seller of produce. If the seller's  
2 assets are "insufficient to satisfy the liability, others may be  
3 found secondarily liable if they had some role in causing the  
4 corporate trustee to commit the breach of trust." *Id.* (quoting  
5 *Shepard v. K.B. Fruit & Vegetable*, 868 F.Supp. 703, 706 (E.D.  
6 Pa.)). "[I]ndividual shareholders, officers, or directors of a  
7 corporation who are in a position to control PACA trust assets,  
8 and who breach their fiduciary duty to preserve those assets, may  
9 be held personally liable under the Act." *Sunkist Growers*, 104  
10 F.3d at 283. "A court considering the liability of the individual  
11 may look at 'the closely-held nature of the corporation, the  
12 individual's active management role' and any evidence of the  
13 individual's acting for the corporation." *Id.*

14  
15  
16 The undisputed facts show that Zaninovich was in a position  
17 to, and did in fact, control PACA trust assets. Zaninovich was  
18 one of three directors of Z&S, its sole shareholder, and its  
19 president. TSUF ¶¶ 4, 5, 7. Zaninovich oversaw the operations of  
20 Z&S. TSUF ¶ 8. Zaninovich owned fifty percent (50%) of the shares  
21 in ZM and served as ZM's president. TSUF ¶¶ 6, 7. Zaninovich had  
22 no other significant independent sources of income other than  
23 from Z&S and considered all of his personal assets, at least to  
24 the extent PACA trust monies were distributed to him, to be PACA  
25 trust assets. TSUF ¶ 9. The records of the USDA AMS show that  
26 Zaninovich was identified as a "Reported Principal" on the PACA  
27  
28

1 license issued by the USDA AMS. TSUF ¶ 10. As Z&S's director,  
2 president, sole shareholder, and person who oversaw Z&S's day to  
3 day operations, Zaninovich was in the position to, and did  
4 control PACA trust assets.

5  
6 There is no issue that Zaninovich breached his fiduciary  
7 duty to preserve the PACA trust assets. While Zaninovich was in  
8 control of Z&S and its PACA trust assets, Z&S transferred  
9 \$4,319,241.23 out of Z&S's PACA trust to ZM. TSUF ¶ 33. Z&S  
10 became insolvent and unable to pay shippers and growers who had  
11 valid claims for debts covered by PACA. TSUF ¶ 34. Zaninovich  
12 breached his fiduciary duty to preserve Z&S's PACA trust assets,  
13 and is personally liable to PACA beneficiaries for \$3,541,919.75.  
14

15 The Trustee's motion for summary judgment against Zaninovich  
16 as to Counts II and III is GRANTED.

17 4. The Schoenburgs

18 a) Legal Standard for Secondary PACA Liability

19 The Trustee and the Schoenburgs disagree on the correct  
20 legal standard governing secondary PACA liability. Despite the  
21 Ninth Circuit's articulation of the applicable standard in  
22 *Sunkist Growers*, 104 F.3d at 283, the Trustee and the Schoenburgs  
23 ask the court to follow decisions from district and appellate  
24 courts outside the Ninth Circuit.  
25

26 The Trustee argues that PACA imposes individual liability  
27 not only where an individual actually controls PACA trust assets,  
28 but instead where an individual fails to exercise oversight of a



1 PACA broker/dealer. The Trustee cites three cases to support this  
2 position: (1) *Shepard, Inc. v. K.B. Fruit & Vegetable, Inc.*, 868  
3 F.Supp. 703 (E.D. Pa. 1994), a non-precedential district court  
4 case which the Ninth Circuit cited in *Sunkist Growers*; (2) a  
5 Fifth Circuit case, *Golman-Hayden Co. v. Fresh Source Produce,*  
6 *Inc.*, 217 F.3d 348 (5<sup>th</sup> Cir. 2000), which follows *Sunkist Growers*;  
7 and (3) this court's prior decision in *Grimmway Enters. v. PIC*  
8 *Fresh Global, Inc.*, 548 F.Supp.2d 840 (E.D. Cal. 2008), which  
9 cites *Golman-Hayden* and *Sunkist Growers*.  
10

11 In *Shepard*, 868 F.Supp. at 704, three defendants, officers,  
12 directors and shareholders of a PACA dealer claimed that they did  
13 not have control over the PACA dealer because one of the  
14 shareholder's nephews was the "true operator" of the business.  
15 Contrary to the Trustee's position, the *Shepard* court explained  
16 that individuals "are not secondarily liable merely because they  
17 served as corporate officers or shareholders." *Id.* at 706.  
18

19 Instead:

20 First, we must consider whether the [Defendants']  
21 involvement with [the company] was sufficient to establish  
22 legal responsibility. Second, we must determine whether the  
23 [Defendants], in allowing [the nephew] to use their  
24 corporation without any appreciable oversight, breached a  
25 fiduciary duty owed to the PACA creditors.

26 *Id.* *Shepard* found defendants' involvement with the company  
27 sufficient to impose PACA liability because defendants: (1) set  
28 up the corporation; (2) owned company stock; (3) exercised legal  
control as the company's officers and directors; (4) were

1 signatories to the company's commercial banking agreement; (5)  
2 applied for the company's business tax identification number; (6)  
3 paid rent after the nephew abandoned the company; and (7) stored  
4 some of its produce in the company's stalls. *Id.* Only after the  
5 *Shepard* court concluded that defendants could be legally  
6 responsible under PACA did it address whether defendant breached  
7 a fiduciary duty to PACA creditors. This inquiry is consistent  
8 with *Sunkist Growers*.

10 Similarly, in *Grimmway*, 548 F.Supp.2d at 849, a defendant  
11 could not be held secondarily liable under PACA merely because he  
12 served as a corporate officer or shareholder. The following  
13 factors were weighed to determine whether the defendant's  
14 involvement with the company was more than passive to justify  
15 exposure to legal responsibility under PACA: (1) the PACA license  
16 listed defendant as the company's reported principal; (2)  
17 defendant admitted he was the principal, president, director and  
18 shareholder of the company; (3) defendant admitted that he  
19 controlled the company's operations and financial dealings; (4)  
20 Pamela Terry, plaintiff's accounts receivable supervisor for  
21 credit and collections, stated in her declaration that she  
22 frequently spoke with defendant regarding the company's business  
23 operations and on several occasions to determine when the company  
24 would pay its outstanding invoices; and (5) Ms. Terry was  
25 informed that defendant was the person who decided if and when  
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1 plaintiff would receive payment. *Id.* at 849-850. *Grimmway* cited  
2 and followed *Sunkist Growers*. *See id.* at 848.

3 In *Golman-Hayden*, the Fifth Circuit followed *Sunkist*  
4 *Growers'* holding that "individual shareholders, officers, or  
5 directors of a corporation who are in a position to control trust  
6 assets, and who breach their fiduciary duty to preserve those  
7 assets, may be held liable under PACA." *Golman-Hayden Co.*, 217  
8 F.3d at 351. *Golman-Hayden* imposed liability on the sole  
9 shareholder of the company: "As the sole shareholder, he  
10 manifestly had absolute control of the corporation." *Id.*

11  
12 The Schoenburgs argue that personal liability attaches only  
13 where an individual is actually in a position of control, not  
14 simply by the corporate title the individual holds. The  
15 Schoenburgs cite a Third Circuit case, *Bear Mountain Orchards,*  
16 *Inc. v. Mich-Kim, Inc.*, 623 F.3d 163, 169 (3<sup>rd</sup> Cir. 2010):

17  
18 Whether Jacqueline Fleisher is individually liable under  
19 PACA turns not on whether she nominally held an officer (or,  
20 if argued, director) position, nor even the size of her  
21 shareholding, but whether she had the authority to  
22 direct the control of (i.e., manage) PACA assets held in  
23 trust for the producers. If so, she is secondarily liable  
24 for breaching the duty to preserve the PACA trust. If not,  
25 then only the corporation itself and Mr. Fleisher were  
26 responsible for the breach and therefore liable for the  
27 shortfall under PACA. The test for individual liability thus  
28 continues un-brightlined, as each case depends on facts  
found by the trier at trial (or the District Court at  
summary judgment when there is no genuine issue of material  
fact).

26 *Bear Mountain* concluded that a wife who was listed as a fifty  
27 percent (50%) shareholder and compensated officer on the  
28

1 company's tax returns, signed corporate checks at the direction  
2 of her husband, but was not involved in any major business  
3 decisions or involved in the day-to-day management, and did not  
4 have control of the trust assets. *Id.* at 174.

5       The Trustee and the Schoenburgs cite cases that all follow  
6 *Sunkist Growers*. A district court in the Ninth Circuit must  
7 follow that circuit's precedent. *Hart v. Massanari*, 266 F.3d  
8 1155, 1172 (9<sup>th</sup> Cir. 2001). The applicable *Sunkist Growers*  
9 standard for imposing secondary PACA liability is: "individual  
10 shareholders, officers, or directors of a corporation [1] who are  
11 in a position to control PACA trust assets, and [2] who breach  
12 their fiduciary duty to preserve those assets, may be held  
13 personally liable under the Act." *Sunkist Growers*, 104 F.3d at  
14 283. Contrary to the Trustee's argument, an individual's title,  
15 even officer, does not alone establish secondary liability.  
16 *Shepard*, 868 F.Supp. at 706; *Grimmway*, 548 F.Supp.2d at 849.  
17 Rather, "[a] court considering the liability of [an] individual  
18 may look at 'the closely-held nature of the corporation, the  
19 individual's active management role' and any evidence of the  
20 individual's acting for the corporation." *Sunkist Growers*, 104  
21 F.3d at 283.

22                   b)     Position to Control PACA Trust Assets

23       It is a disputed material issue of fact whether the  
24 Schoenburgs were in a position to control PACA trust assets.  
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1           The Trustee contends that from at least as early as 2006 and  
2 continuing through 2009, there were three directors of Z&S:  
3 Zaninovich, L. Schoenburg, and M. Schoenburg. TSUF ¶ 4. L.  
4 Schoenburg was one of the original applicants for Z&S' PACA  
5 license in 1985. TSUF ¶ 11. L. Schoenburg was listed as a  
6 Principal on Z&S' PACA license for the years 2008 and 2009. TSUF  
7 ¶ 12. From at least 2006, L. Schoenburg was the Vice-President of  
8 Z&S and was never removed from that office. TSUF ¶ 13. From at  
9 least 2000, L. Schoenburg was a director of Z&S and was never  
10 removed from that office. TSUF ¶ 14. Starting in 2007 and  
11 continuing into 2009, L. Schoenburg picked up Z&S checks in  
12 amounts between \$6,500.00 and \$9,000.00 at Z&S' office, cashed  
13 them at a bank, and returned the cash to Zaninovich. L.  
14 Schoenburg always only cashed one check at each financial  
15 institution to avoid the \$10,000.00 IRS currency transaction  
16 reporting requirement. TSUF ¶ 15. From 2000 to 2009, L.  
17 Schoenburg was on the payroll of Z&S. TSUF ¶ 16. L. Schoenburg  
18 received a credit card that he used for personal expenses that  
19 were billed to Z&S. TSUF ¶ 17. L. Schoenburg, as an officer of  
20 Z&S, signed loan documents in 2007 and 2008 on behalf of Z&S that  
21 purported to make Z&S a guarantor for loans made by the bank to  
22 ZM. TSUF ¶ 19.

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26           The Trustee also provides evidence that from at least 2000  
27 and through 2009, M. Schoenburg was both a director and the  
28

1 Secretary/Treasurer of Z&S. TSUF ¶ 24. In 2008 and 2009, M.  
2 Schoenburg cashed at least thirteen Z&S checks at the request of  
3 her husband L. Schoenburg, who, in turn was cashing the checks  
4 for Zaninovich. TSUF ¶ 25. In 2008 and 2009, M. Schoenburg  
5 received a salary from Z&S. TSUF ¶ 26. M. Schoenburg received a  
6 credit card that was billed to Z&S. TSUF ¶ 27. M. Schoenburg  
7 received a Mercedes-Benz convertible that was leased by Z&S. TSUF  
8 ¶ 28. M. Schoenburg, as an officer of Z&S, signed loan documents  
9 in 2007 and 2008 on behalf of Z&S that made Z&S a guarantor for  
10 bank loans to ZM. TSUF ¶ 29.

12 The Schoenburgs contend that they were not shareholders in  
13 either Z&S or ZM at the time of the alleged wrongdoing. Rather,  
14 they were only "nominal" officers and directors, and Zaninovich,  
15 Z&S' sole shareholder, had complete and total control of Z&S and  
16 the PACA trust assets. The Schoenburgs submit evidence that after  
17 L. Schoenburg's retirement from Z&S (sometime between 1999 and  
18 2001): (1) L. Schoenburg relinquished all authority, power and  
19 control so that neither of the Schoenburgs had the ability to nor  
20 exercised any duties and/or responsibilities as director, officer  
21 and/or employee of Z&S, other than signing papers as directed,  
22 and L. Schoenburg's limited stint as a grape inspector in Nogales  
23 for a month each year in 2007 and 2008 (SSUMF ¶ 24); (3) The only  
24 documents the Schoenburgs signed, were signed at the direction of  
25 Zaninovich (SSUMF ¶ 25); (4) L. Schoenburg did not have nor did  
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1 he exercise any authority or control over purchases, sales or  
2 payment for perishable agricultural commodities or any other  
3 financial matters involving Z&S (SSUMF ¶ 27); (5) L. Schoenburg  
4 was not responsible for and did not make any decisions in the  
5 day-to-day operations of the company (SSUMF ¶ 28); (6) L.  
6 Schoenburg has neither received, bought nor sold perishable  
7 agricultural commodities for Z&S at any time since his retirement  
8 (SSUMF ¶ 29); (7) neither of the Schoenburgs approved or had  
9 access to the financial records of Z&S (SSUMF ¶ 30); (8) the  
10 Schoenburgs made no representations regarding the amounts  
11 contained in grower accounts at Z&S (SSUMF ¶ 31); (9) L.  
12 Schoenburg did not have any access to Z&S's banking dealings  
13 (SSUMF ¶ 32); (10) L. Schoenburg did not have any access to Z&S'  
14 books and records (SSUMF ¶ 33); (11) L. Schoenburg did not have  
15 or exercise any responsibility or duties as an officer of Z&S,  
16 but Z&S continued to identify him as an officer of Z&S because  
17 Zaninovich understood more than one officer was needed to be a  
18 corporation (SSUMF ¶ 34); (12) all management decisions at Z&S  
19 were made by Zaninovich (SSUMF ¶ 39); (13) neither of the  
20 Schoenburgs had any authority to, and did not, sign any checks  
21 that drew on any accounts belonging to Z&S (SSUMF ¶ 41); (14) L.  
22 Schoenburg never had or exercised any control over the perishable  
23 agricultural commodities at Z&S or the proceeds realized from  
24 their sale (SSUMF ¶ 49); and (15) the Schoenburgs had no  
25  
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1 knowledge of how the proceeds realized from the sale of  
2 perishable agricultural commodities at Z&S were being handled  
3 (SSUMF ¶ 51).

4 On a motion for summary judgment, "[t]he evidence of the  
5 non-movant is to be believed, and all justifiable inferences are  
6 to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477  
7 U.S. 242, 255 (1986). Based on the Schoenburgs' assertion of  
8 Zaninovich's dominance and control over Z&S operations and the  
9 Schoenburgs' minimal involvement, knowledge of the business'  
10 operations, and lack of day-to-day participation in the business  
11 of Z&S, the Schoenburgs have presented enough evidence to create  
12 a genuine issue of fact for trial. Drawing all inferences in  
13 favor of the Schoenburgs, a reasonable trier of fact could  
14 conclude that the Schoenburgs were not in a position to control  
15 PACA trust assets during the relevant time period.

16 The Trustee's motion for summary judgment against the  
17 Schoenburgs as to Counts II and III is DENIED.

18 B. Count VII: Breach of Fiduciary Duty

19 To establish a claim for breach of fiduciary duty,  
20 Plaintiffs must show: (1) the existence of a fiduciary  
21 relationship; (2) breach of that fiduciary relationship; and (3)  
22 damage proximately caused by that breach. *Roberts v. Lomanto*, 112  
23 Cal.App.4<sup>th</sup> 1553, 1562 (2003).  
24  
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1                   1.     Zaninovich

2                   There is no triable issue of fact that Zaninovich breached  
3 his fiduciary duty to PACA. Zaninovich had control over the PACA  
4 trust assets, and therefore had a fiduciary relationship to PACA  
5 trust beneficiaries. Zaninovich breached his fiduciary duty by  
6 transferring and dissipating \$4,319,241.23 of Z&S assets to ZM or  
7 to third parties on behalf of ZM. TSUF ¶ 33. As a result of the  
8 transfers, Z&S became insolvent and unable to pay shippers and  
9 growers who had valid claims for debts covered by PACA. TSUF ¶  
10 34. Z&S still owes the PACA trust beneficiaries \$3,541,919.75 by  
11 Z&S. TSUF ¶ 37. There is no issue of fact that Zaninovich's  
12 breach proximately caused this damage.  
13

14                   The Trustee's motion for summary judgment against Zaninovich  
15 as to Count VII is GRANTED.  
16

17                   2.     The Schoenburgs

18                   The threshold issue precluding summary judgment against the  
19 Schoenburgs is whether they owed claimants a fiduciary duty. A  
20 fiduciary relationship is:

21                   any relation existing between parties to a transaction  
22 wherein one of the parties is duty bound to act with the  
23 utmost good faith for the benefit of the other party. Such a  
24 relation[ship] ordinarily arises where a confidence is  
25 reposed by one person in the integrity of another, and in  
26 such a relation the party in whom the confidence is reposed,  
27 if he voluntarily accepts or assumes to accept the  
28 confidence, can take no advantage from his acts relating to  
the interest of the other party without the latter's  
knowledge or consent.

1 *Wolf v. Super. Ct.*, 107 Cal.App.4<sup>th</sup> 25, 29 (2003) (quoting *Herbert*  
2 *v. Lankershim*, 9 Cal.2d 409, 483 (1937)).

3  
4 The Trustee contends that the Schoenburgs owed claimants a  
5 fiduciary duty under PACA. "An individual who is in the position  
6 to control the trust assets and who does not preserve them for  
7 the beneficiaries has breached a fiduciary duty and is personally  
8 liable for that tortious act." *Sunkist Growers*, 104 F.3d at 283.  
9 There are material issues of fact whether the Schoenburgs were in  
10 the position to know of, access, and/or control the trust assets.  
11 It cannot be decided on summary judgment whether the Schoenburgs  
12 had a fiduciary duty to PACA trust beneficiaries.  
13

14 The Trustee's motion for summary judgment against the  
15 Schoenburgs as to Count VII is DENIED.

16 C. Count VIII: Conversion

17 In California, the tort of conversion has three elements:  
18 (1) ownership or right to possession of property; (2) wrongful  
19 disposition of the property right; and (3) damages. *G.S.*  
20 *Rasmussen & Assoc., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d  
21 896, 907 (9<sup>th</sup> Cir. 1992); *Kremen v. Cohen*, 337 F.3d 1024, 1029  
22 (9<sup>th</sup> Cir. 2003).  
23

24 1. Zaninovich

25 There is no triable issue of fact that Zaninovich converted  
26 PACA assets. Pursuant to the court's Order, the Trustee  
27 calculated the total amount of the PACA claims after resolutions  
28

1 and settlements of objections and disputes regarding the PACA  
2 claims: \$6,978,264.59. TSUF ¶ 36. Zaninovich transferred  
3 \$4,319,241.23 of Z&S assets to ZM or to third parties on behalf  
4 of ZM. TSUF ¶ 33. As a result of the transfers, Z&S became  
5 insolvent and unable to pay shippers and growers who had valid  
6 claims for debts covered by PACA. TSUF ¶ 34. The PACA  
7 beneficiaries are still owed \$3,541,919.75. TSUF ¶ 37.

9 The Trustee's motion for summary judgment against Zaninovich  
10 as to Count VIII is GRANTED.

11 2. The Schoenburgs

12 It is undisputed that PACA beneficiaries have an ownership  
13 or right to \$3,541,919.75, which remains unpaid. TSUF ¶ 37. There  
14 is insufficient evidence, however, that the Schoenburgs  
15 wrongfully disposed of the PACA trust assets. The Trustee  
16 contends that the Schoenburgs as individuals were in a position  
17 to control the PACA trust assets, and were responsible for the  
18 diversion of Z&S assets to ZM. The analysis is the same as to  
19 whether the Schoenburgs were in a position to control the PACA  
20 trust assets, which is a material issue of disputed fact.

22 The Trustee's motion for summary judgment against the  
23 Schoenburgs as to Count VIII is DENIED.

24 V. THE SCHOENBURGS' MOTION FOR SUMMARY JUDGMENT

25 The Schoenburgs move for summary judgment on all claims  
26 asserted against them, including by the following pleadings:  
27

- 28 1. Complaint-in-Intervention by Joe W. Russell dba Joe Russell

- 1 Farms filed on July 9, 2009 (Doc. 57);
- 2 2. Complaint-in-Intervention by Peters Fresh Fruit, Inc. filed  
3 on July 9, 2009 (Doc. 61);
- 4 3. Complaint-in-Intervention by Visalia Produce Sales, Inc.  
5 dba Produce Source filed on July 10, 2009 (Doc. 64);
- 6 4. Complaint-in-Intervention by David Blayney filed on July 9,  
7 2009 (Doc. 66);
- 8 5. Complaint-in-Intervention by Del Monte filed on July 10,  
9 2009 (Doc. 68);
- 10 6. Complaint-in-Intervention by Rick Dreo filed on July 10,  
11 2009 (Doc. 69);
- 12 7. CII by Fourplay Farms filed on July 13, 2009 (Doc. No. 72);
- 13 8. Complaint-in-Intervention by Aron Margosian filed on July  
14 13, 2009 (Doc. 74);
- 15 9. Complaint-in-Intervention by George Margosian filed on July  
16 13, 2009 (Doc. 75);
- 17 10. Complaint-in-Intervention by Margosian Bros. filed on July  
18 13, 2009 (Doc. 76);
- 19 11. Complaint-in-Intervention filed by Three Play Farms filed  
20 on July 13, 2009 (Doc. 78);
- 21 12. Amended Complaint by Onions Etc., Inc., Duda Farm Fresh  
22 Foods, Inc., Cecelia Packing Corporation, John A. Clark and  
23 Addison W. Clark, Jr. dba Clark Farms, Rio Vista, Ltd. dba  
24 Guimarra of Nogales, Guimarra Farms, Inc., Guimarra  
25 International Marketing, APB, Inc. dba Tavilla Sales  
26 Company of Los Angeles, and Calavo Growers, Inc. filed on  
27 July 13, 2009 (Doc. 91);
- 28 13. Complaint-in-Intervention by Wildwood Produce Sales, Inc.  
filed on July 13, 2009 (Doc. 92);
14. Complaint-in-Intervention by Larry Gardner filed on July  
13, 2009 (Doc. 95);
15. Complaint-in-Intervention by I.G. Fruit, Inc. filed on July  
13, 2009 (Doc. 100);
16. Complaint-in-Intervention by Mark L. Pascoe filed on July  
13, 2009 (Doc. 109);
17. Complaint-in-Intervention by Jewel Marketing &  
Agribusiness, LLC dba Crown Jewels Marketing, LLC filed on  
July 13, 2009 (Doc. 111);

- 1 18. Complaint-in-Intervention by Jacob Hiebert filed on July  
2 13, 2009 (Doc. 124);
- 3 19. Complaint-in-Intervention by William Cotner filed on July  
4 13, 2009 (Doc. 130);
- 5 20. Complaint by Dandrea Produce filed on July 13, 2009 (Doc.  
6 148);
- 7 21. Complaint-in-Intervention by Golden Star Citrus, Inc.,  
8 Epicure Trading, Inc., Fresno Produce, Inc., Chamberlain  
9 Distributing, Inc. J-C Distributing, Inc., Sundale Sales,  
10 Inc., Seald Sweet, LLC, Seald Sweet West International,  
11 Inc., Richard Cotrell Marketing, Inc, Pandol Brothers, Inc.,  
12 Big Chuy Distributors and Sons, Inc., Booth Ranches, LLC,  
13 Kirschenman Enterprises Sales, Divine Flavor, LLC, CH  
14 Distributing, LLC, Wilson Produce, LLC, R&C Berndt, Inc.,  
15 Meyer, LLC, Pro Citrus Network, Inc., Gemco, Inc., King  
16 Fresh Produce, LLC, Premium Product Distributors, Inc.,  
17 Mikaelian and Sons, Inc., JP Produce, Inc., Fisher Capespan  
18 USA, LLC, Sunriver Trading Company Limited, Cal Fresco,  
19 LLC, Comercial Alfonso Eyzaguirre Y CIA, LTDA, Sunny Cove  
20 Citrus, LLC, Shipley Sales Service, Zimmerman Farms, Inc.,  
21 Salvadore Romero, The Fruit Branch, Inc., Raul Alvarez,  
22 Ramon Rios, Sunfed Produce, LLC, Ciruli Bros., LLC, William  
23 H. Kopke, Jr., Inc., Castro Produce, LLC, Kaweah Avenue  
24 Properties, LLC and Maria Alvarado filed on July 13, 2009  
25 (Doc. 157);
- 26 22. First Amended Complaint-in-Intervention by Frank Logoluso  
27 Farms filed on July 17, 2009 (Doc. 159);
- 28 23. First Amended Complaint-in-Intervention by Two Play  
Properties, LLC filed on July 31, 2009 (Doc. 186);
- 29 24. Cross-Complaint and Counterclaim by Fresno-Madera Land Bank  
30 filed on September 18, 2009 (Doc. 320);
- 31 25. Second Amended Cross-Complaint and First Amended  
32 Counterclaim by Fresno-Madera Land Bank filed on February  
33 17, 2009 (Doc. 432); and
- 34 26. Complaint-in-Intervention by Terence J. Long filed on  
35 February 17, 2009 (Doc. No. 433).

36 Doc. 680.

37 A. Business Entities Other than Z&S and Z & M

38 The Schoenburgs move for summary judgment to be absolved of  
39 liability for the activities of the following business entity  
40 Defendants: Fresno-Madera Federal Land Bank Association, FLCA,

1 Bank of the West, Belknap Pump Company, Inc., Jerry E. Robinson  
2 dba Sierra Fire Protection, Two Play Properties, LLC, Two Play  
3 Properties Arizona, LLC, Three Play Farms, Four Play Farms, and  
4 Four Play Ranch (together, "Business Entity Defendants"). The  
5 Schoenburgs contend that because they have no affiliation with  
6 any of Business Entity Defendants, they cannot be held  
7 responsible for the activities of any of these Defendants. The  
8 Schoenburgs' motion for summary judgment on this issue is not  
9 addressed in any opposition.  
10

11 It is undisputed that the Schoenburgs played no role in and  
12 are not and have never been owners, shareholders, members,  
13 partners, officers or directors in any of the Business Entity  
14 Defendants. SSUMF ¶ 5. As they have no affiliation with any  
15 Business Entity Defendant, the Schoenburgs' motion for summary  
16 judgment as to liability for the activities of the Business  
17 Entity Defendants is GRANTED.  
18

19 B. Individual Liability Under PACA

20 In the Ninth Circuit, "individual shareholders, officers, or  
21 directors of a corporation who are in a position to control PACA  
22 trust assets, and who breach their fiduciary duty to preserve  
23 those assets, may be held personally liable under the Act."  
24 *Sunkist Growers*, 104 F.3d at 283. "A court considering the  
25 liability of the individual may look at "the closely-held nature  
26 of the corporation, the individual's active management role" and  
27  
28

1 any evidence of the individual's acting for the corporation." *Id.*

2       There are material factual disputes regarding the extent of  
3 the Schoenburgs' knowledge, control and involvement with Z&S. The  
4 Trustee and Intervening Plaintiffs have provided evidence showing  
5 that L. Schoenburg: (1) never retired from his position as a  
6 director of Z & S; (2) never retired from his position as vice-  
7 president of Z & S; (3) continued to be a salaried employee on  
8 the payroll of Z & S; (4) was listed as a principal of Z & S on  
9 its PACA license during relevant time periods; (5) in his  
10 capacity as an officer of Z & S, authorized Z & S to guarantee  
11 loans provided to ZM; and (6) picked up Z & S checks, ranging  
12 between \$6,500.00 and \$9,000.00, at Z & S' office, cashed them at  
13 a bank, and returned the cash to Zaninovich. Trustee and  
14 Intervening Plaintiff also provide evidence that M. Schoenburg:  
15 (1) was both a director and secretary/treasurer of Z & S; (2)  
16 continued to be a salaried employee of Z & S; (3) in her capacity  
17 as a loan officer, authorized Z & S to guarantee loans provided  
18 to ZM; (4) in 2008 and 2009, cashed at least thirteen Z & S  
19 checks at the request of L. Schoenburg, who was himself asked by  
20 Zaninovich to cash checks; and (5) received a credit card that  
21 was billed to and paid by Z & S. Drawing all inferences in favor  
22 of the Trustee and Intervening Plaintiffs, there are material  
23 factual disputes that preclude summary judgment. A reasonable  
24 trier of fact could find, based on the Trustee's and Intervening  
25  
26  
27  
28

1 Plaintiffs' evidence, that the Schoenburgs were in a position to  
2 control the PACA assets, and breached their fiduciary duty to  
3 preserve the assets.

4 The Schoenburg's motion for summary judgment as to PACA  
5 liability is DENIED.  
6

7 C. Fiduciary Duty

8 The Schoenburgs move for summary judgment on the issue that  
9 they did not owe a fiduciary duty to any claimant. As discussed  
10 above, there are material issues of fact as to whether the  
11 Schoenburgs owed a fiduciary duty to PACA trust beneficiaries.

12 For all the reasons stated, the Schoenburgs' motion for  
13 summary judgment as to the issue of whether they owe a fiduciary  
14 duty to the remaining claimants is DENIED.  
15

16 D. Unjust Enrichment

17 The Schoenburgs move for summary judgment on the issue of  
18 unjust enrichment. The Schoenburgs contend that the only benefits  
19 they received were pursuant to: (1) L. Schoenburg's retirement  
20 agreement, which was executed well before the period at issue;  
21 and (2) automobile transactions in which the Schoenburgs  
22 exchanged cars they owned outright for cars leased by Z&S. There  
23 is an absence of evidence to support a claim for unjust  
24 enrichment against the Schoenburgs. The Trustee and Intervening  
25 Plaintiffs withdrew their opposition to this motion at the July  
26 25, 2011 hearing. No other party has opposed the Schoenburgs'  
27  
28



1 motion.

2 The Schoenburgs' motion for summary judgment as to the issue  
3 of unjust enrichment is GRANTED.

4 E. California Statutes

5 The Schoenburgs move for summary judgment on the causes of  
6 action asserted based on breaches of California Food &  
7 Agriculture Code §§ 56611, 56615, 56623, and 56620. The  
8 Schoenburgs contend that no private right of action exists under  
9 these sections of the California Food & Agriculture Code.  
10

11 Article 20 of the California Food & Agriculture Code sets  
12 forth the California Food & Agriculture Code's civil remedies and  
13 penalties. Section 56652(a) provides:

14 Any person that violates any provision of this chapter is  
15 liable civilly in the sum of not less than five hundred  
16 dollars (\$500) or more than one thousand dollars (\$1,000)  
17 for each and every violation. This sum shall be recovered in  
18 an action by the secretary in any court of competent  
19 jurisdiction. All sums which are recovered pursuant to this  
20 section shall be deposited in the State Treasury to the  
21 credit of the Department of Food and Agriculture Fund.

22 Cal. Food & Agr. Code § 56652(a). As to injunctive relief,

23 Section 56651 provides:

24 The director may bring an action to enjoin the violation or  
25 the threatened violation of any provision of this chapter or  
26 of any order which is made pursuant to this chapter in the  
27 superior court in the county in which such violation occurs  
28 or is about to occur.

Cal. Food & Agr. Code § 56651. These Sections do not provide a  
private right of action. No opposing party has provided any  
statutory basis for a private right of action under the cited

1 sections of the California Food & Agriculture Code.

2 The Schoenburgs' motion for summary judgment as to the  
3 causes of action based on California Food & Agriculture Code §§  
4 56611, 56615, 56623, and 56620 is GRANTED.

5 F. 39303 Road 56 in Dinuba, California 93618

6 The Schoenburgs contend that the Trustee seeks to quiet  
7 title to the property located at 39303 Road 56 in Dinuba,  
8 California 93618 ("Property"), and that it is undisputed that the  
9 Schoenburgs claim no interest in the Property. The Trustee does  
10 not address this argument in his opposition.  
11

12 The Schoenburgs' motion for summary adjudication that the  
13 Schoenburgs do not claim an interest in the Property is GRANTED.  
14

## 15 VI. CONCLUSION

16 For the reasons stated:

17 1. The Trustee's motion for summary judgment is GRANTED in part  
18 and DENIED in part, as follows:

19 a. GRANTED against Z&S as to Counts II and III;

20 b. GRANTED against Zaninovich as to Counts II, III, VII,  
21 and VIII; and

22 c. DENIED against the Schoenburgs as to Counts II, III,  
23 VII, and VIII.

24 2. The Schoenburgs' motion for summary judgment is GRANTED in  
25 part and DENIED in part, as follows:

26 a. GRANTED as to:  
27  
28

i. claims based on the activities of business entity  
Defendants other than Z&S and ZM;

ii. unjust enrichment;

iii. causes of action based on breaches of California Food & Agriculture Code §§ 56611, 56615, 56623, and 56620; and

iv. the Schoenburgs do not claim an interest in the Property located at 39303 Road 56 in Dinuba, California.

b. DENIED as to:

i. PACA liability; and

ii. fiduciary duty.

3. The Trustee and the Schoenburgs shall submit proposed forms of judgments consistent with this memorandum decision within five (5) days following electronic service of this memorandum decision.

SO ORDERED.

DATED: August 2, 2011

/s/ Oliver W. Wanger  
Oliver W. Wanger  
United States District Judge