



IT IS ORDERED as set forth below:

Date: September 27, 2007

**W. H. Drake
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBERS
	:	
EDDIE RAY PERRINE	:	BANKRUPTCY CASE
SANDRA MICHELLE PERRINE,	:	05-10816-WHD
	:	
DEBTOR.	:	
_____	:	
	:	
COLLINS BROTHERS CORP. dba	:	ADVERSARY PROCEEDING
COLLINS BROTHERS PRODUCE,	:	NO. 05-1118
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
EDDIE RAY PERRINE,	:	
	:	
Defendant.	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
	:	BANKRUPTCY CODE

ORDER

Before the Court is a Complaint to Determine the Dischargeability of a Particular Debt, filed by Collins Brothers Corporation (hereinafter the “Plaintiff”) against Eddie Ray Perrine (hereinafter the “Debtor”). This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I); § 1334. Having a held a trial on the Complaint, the Court hereby renders its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Plaintiff is in the business of buying and selling wholesale quantities of perishable agricultural commodities. EMB Distributors, Inc. (hereinafter "EMB") is also in the business of buying and selling wholesale quantities of perishable agricultural commodities. EMB purchased produce, stored it in a warehouse, and, the day after receipt, delivered it to restaurants. At some time in 2003, EMB’s business slowed down due to increased competition. The Debtor, at all times relevant to this matter, was an officer of EMB and the sole shareholder of EMB, managed the operations of EMB, and had signature authority over the account from which EMB purchased goods from the Plaintiff. The Plaintiff sold goods to EMB on credit and delivered the goods to EMB. EMB failed to pay the Plaintiff for goods purchased in the amount of \$86,991.92.

On April 1, 2004, the Plaintiff sent a timely notice of its intention to preserve trust benefits provided by Section 5(c) of the Perishable Agricultural Commodities Act (hereinafter "PACA"). 7. The Plaintiff sued EMB and the Debtor in the District Court for the Northern District of Georgia under PACA. On October 13, 2004, the District Court entered judgment against EMB and the Debtor, jointly and severally, in the amount of \$98,369.57.

On March 4, 2005, the Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code. On June 20, 2005, the Plaintiff filed a complaint, pursuant to section 523(a)(4) of the Code, objecting to the dischargeability of the judgment debt owed by the Debtor.

CONCLUSIONS OF LAW

PACA provides for the creation of a nonsegregated, floating trust, under which a "dealer" who receives "perishable agricultural commodities" holds these commodities or the proceeds of their sale as a fiduciary until the seller has been paid in full. *See* 7 U.S.C. § 499e(c)(1). "The trust automatically arises in favor of a produce seller upon delivery of produce." *Frio Ice, S.A. v. Sunfruit, Inc.*, 918 F.2d 154, 156 (11th Cir. 1990) (citing 7 U.S.C. § 499e(c)(2)). To preserve the benefit of the trust, the seller must file with the buyer and the United States

Department of Agriculture written notice of its intent to preserve its rights. *See* 7 U.S.C. § 499e(c)(3).

“An individual who is in the position to control the trust assets and who does not preserve them for the beneficiaries has breached a fiduciary duty, and is personally liable for that tortuous act.” *Hereford Haven, Inc. v. Stevens*, 1999 WL 155707, * 2 (N.D. Tex. 1999); *see also Red’s Market v. Cape Canaveral Cruise Line, Inc.*, 181 F. Supp.2d 1339, 1344 (M.D. Fla. 2002), *affirmed*, *Red’s Market v. Cape Canaveral Cruise Line, Inc.*, 48 Fed. Appx., 328 (11th Cir. 2002); *Weis-Buy Services, Inc. v. Paglia*, 411 F.3d 415, 421 (3d Cir. 2005); *Golman-Hayden Co., Inc. v. Fresh Source Produce, Inc.*, 217 F.3d 348, 351 (5th Cir. 2000) (citing *Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280 (9th Cir. 1997)); *In re Steinberg*, 307 B.R. 310 (Bankr. S.D. Fla. 2003); *Morris Okun, Inc. v. Harry Zimmerman, Inc.*, 814 F. Supp. 346, 348 (S.D.N.Y. 1993); *In re Harper*, 150 B.R. 416, 419 (Bankr. E.D. Tenn. 1993); *In re Watford*, __ B.R. __, 2007 WL 2298241 (Bankr. M.D.N.C. Aug. 9, 2007).

Use of the trust assets for any purpose other than paying the produce seller, including the payment of legitimate business expenses, is a violation of the fiduciary duties imposed by PACA. *See Red’s Market v. Cape Canaveral Cruise Line, Inc.*, 181 F. Supp.2d 1339, 1344 (M.D. Fla. 2002), *affirmed*, *Red’s Market*

v. Cape Canaveral Cruise Line, Inc., 48 Fed. Appx., 328 (11th Cir. 2002). Dissipation of the trust assets, which occurs when the trustee relinquishes control of the goods without recovering payment, is also a breach of the PACA duties. *See Consumers Produce, Inc. v. M&T Chirico, Inc.*, 2005 WL 2420355 (W.D.N.Y. Sept. 30, 2005) (finding a breach of trust duties when controlling person permitted corporation to sell goods at a loss); *Bronia, Inc. v. Ho*, 873 F. Supp. 854 (S.D.N.Y. 1995) (seller's failure to collect and turn over accounts receivable upon sale of trust goods violated duty to make trust assets "freely available"); *Cooseman's Specialties, Inc. v. Gargiulo*, 485 F.3d 701 (2d Cir. 2007).

Section 523(a)(4) of the Bankruptcy Code provides that "a discharge . . . does not discharge an individual Debtor from any debt . . . for fraud or defalcation while acting in a fiduciary capacity." 11 U.S.C. § 523(a)(4). For a debt to fall within this exception to discharge, the debtor must have acted as a fiduciary within the meaning of section 523(a)(4). Not all fiduciary duties will satisfy this requirement. "The Supreme Court has consistently held that the term 'fiduciary' is not to be construed expansively, but instead is intended to refer to 'technical' trusts." *Quaif v. Johnson*, 4 F.3d 950, 953 (11th Cir.1993) (citing *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934)); *see also In re Fernandez-Rocha*, No. 06-10159, ___ F.3d ___ (11th Cir. June 12, 2006). Courts have recognized three

characteristics of a technical trust. *See Eavenson v. Ramey*, 243 B.R. 160 (N.D. Ga. 1999). First, a technical trust “must exist prior to the act creating the debt and without reference to that act.” *Id.* at 165; *see also Blashke v. Standard (In re Standard)*, 123 B.R. 444, 453 (Bankr. N.D. Ga. 1991) (Bihary, J.). Second, the fiduciary duties associated with the trust must be specifically set forth so that the trust relationship is expressly and clearly stated. *See id.* Third, the trust must have a “separately identifiable res.” *Id.*; *see also Matter of Snyder*, 184 B.R. 473 (D. Md. 1995) (citing *In re Baird*, 114 B.R. 198, 202 (9th Cir. BAP 1990)).

The majority of courts to have considered the issue have concluded that PACA creates a technical trust and imposes fiduciary duties upon the buyer that fall within section 523(a)(4)’s requirements. *See In re Tucker*, 2007 WL 1100482 (Bankr. M.D. Ga. Apr. 10, 2007); *In re Nix*, 1992 WL 119143 (M.D. Ga. 1992); *In re Watford*, __ B.R. __, 2007 WL 2298241 (Bankr. M.D.N.C. Aug. 9, 2007); *In re Masdea*, 307 B.R. 466, 474 (Bankr. W.D. Pa. 2004); *Matter of Snyder*, 184 B.R. 473, 474 (D. Md. 1995); *In re Harper*, 150 B.R. 416, 419 (Bankr. E.D. Tenn. 1993); *In re Nix*, 1992 WL 119143 (M.D. Ga. 1992); *In re Stout*, 123 B.R. 412 (Bankr. W.D. Okla. 1990). In *Matter of Snyder*, the district court reversed the bankruptcy court’s determination that a PACA trust was not an express trust, noting that a PACA trust satisfies all of the elements of an express trust, including

having an identifiable res, spelling out the duties of the trustee, and imposing “a trust prior to and without reference to the wrong which created the debt.” *Matter of Snyder*, 184 B.R. at 474. However, one court has held that a PACA trust is not an express trust because it is not a segregated trust and, therefore, there is no identifiable res. *See In re McCue*, 324 B.R. 389, 393 (Bankr. M.D. Fla. 2005). Having considered both views in light of the Eleventh Circuit Court of Appeals’ opinion in *Quaif v. Johnson*, this Court concurs with and adopts the majority view that a debt arising from a defalcation committed while acting as a fiduciary of a trust imposed by PACA is nondischargeable under section 523(a)(4). In the Eleventh Circuit, the term “defalcation refers to a failure to produce funds entrusted to a fiduciary.” *Quaif v. Johnson*, 4 F.3d 950, 955 (11th Cir. 1993). Although a defalcation may not result from a purely innocent mistake that results in a fiduciary’s inability to produce entrusted funds, “a ‘defalcation’ for purposes of [section 523(a)(4)] does not have to rise to the level of ‘fraud,’ ‘embezzlement,’ or even ‘misappropriation.’” *Id.* at 955; *see also In re Tucker*, 2007 WL 1100482 (Bankr. M.D. Ga. Apr. 10, 2007) (purely negligent act does not constitute a defalcation); *In re Watford*, ___ B.R. ___, 2007 WL 2298241 (Bankr. M.D.N.C. Aug. 9, 2007) (same).

In this case, the facts established at trial demonstrate that EMB was a

“dealer” within the meaning of PACA and that EMB received “perishable agricultural commodities” from the Plaintiff. The facts also establish that the Plaintiff perfected its right to have the goods and their proceeds held in trust by EMB, and the evidence presented at trial has established that EMB failed to pay the Plaintiff for \$86,991.92 worth of perishable goods. During the period in which the Plaintiff sold perishable commodities to EMB, the Debtor was an officer and the sole shareholder of EMB, managed the operations of EMB, and had signature authority over the account from which EMB purchased goods. The Debtor personally handled the transactions between EMB and the Plaintiff, including the placing of orders, picking up orders, and communicating with the Plaintiff’s representative about payment. Accordingly, the Court concludes that the Debtor was a controlling person and breached a fiduciary duty owed to the Plaintiff by failing to maintain the PACA trust assets. The failure to produce either the perishable goods or sufficient assets to pay for the goods is a breach of the fiduciary duty and constitutes a defalcation, regardless of whether the debtor misappropriated the funds for his own use or otherwise personally benefitted from the funds. *See In re Harper*, 150 B.R. 416 (Bankr. E.D. Tenn. 1993) (holding that “defalcation . . . encompasses embezzlement, the misappropriation of trust funds held in any fiduciary capacity, and the failure to properly account for such funds”;

because the debtor failed to pay for produce, the debtor had committed a defalcation).

Nonetheless, the Debtor has asserted that his failure to produce the trust assets resulted from the fact that a portion of the produce purchased by EMB from the Plaintiff was either sold at a loss or discarded after it had rotted. In short, the Debtor asserts that he did not cause EMB to use PACA trust proceeds for any purpose whatsoever, because these proceeds never existed. In support of this, the Debtor testified that EMB's business was no longer profitable due to lower sales resulting from increased competition; that EMB was either unable to sell goods received from the Plaintiff or was required to sell them at a loss; that EMB remitted to the Plaintiff all proceeds from the sale of the Plaintiff's goods; and that EMB used funds borrowed by the Debtor, rather than trust funds, to continue business operations.

Having considered the testimony presented, the Court finds that the Debtor caused EMB to breach its fiduciary duty to preserve the Plaintiff's goods and the proceeds resulting from the sale of those goods. Although the ultimate burden of proof as to whether a debt is nondischargeable lies with the creditor, the Plaintiff has produced sufficient evidence to satisfy that burden and to shift the burden to the Debtor to demonstrate that he did not cause EMB to breach the PACA duties

owed to the Plaintiff. The Plaintiff has satisfied its burden by demonstrating that the produce it sold to EMB was subject to PACA, that EMB received the produce, that the Plaintiff perfected its right to have the produce held in trust, that EMB failed to pay for the produce, and that the Debtor was in a position of control. Upon delivery of the goods to EMB, PACA created a floating trust over all of the assets of EMB, and that trust never terminated because the Plaintiff was never paid in full for the goods. *See In re Stout*, 123 B.R. 412 (Bankr. D. Okla. 1990). The Debtor, as the person in control of EMB, had a fiduciary duty to “make freely available” the assets of EMB for “prompt payment” to the Plaintiff for the goods received. *See Cooseman’s Specialties, Inc. v. Gargiulo*, 485 F.3d 701 (2d Cir. 2007). The Debtor caused EMB to breach that duty by failing to pay the Plaintiff. This conduct constitutes a defalcation.

The Debtor has argued that he did not commit a defalcation because he did not cause EMB to use trust funds for any purpose. He submits that the proceeds from the sale of the trust assets were simply insufficient to pay for the cost of the goods. In support of this, the Debtor points to his testimony that he personally borrowed \$30,000 on his home to permit EMB to pay operating expenses, such as payroll and transportation costs.

The Court first notes that the fact that EMB did not use the trust funds to

pay business expenses does not necessitate a finding that the Debtor did not commit a defalcation. Certainly, evidence that the Debtor caused EMB to use trust funds to pay business expenses would be one means of demonstrating a defalcation, but it is not the only means. In the Court's view, any use of EMB's assets for any purpose other than payment of the beneficiary constitutes a breach of the trust.

It is undisputed that EMB did not use its assets to pay the Plaintiff for approximately \$86,000 worth of goods received. The Court does not find credible the Debtor's testimony that this large amount of goods was not marketable and was discarded as waste. This conclusion is contradicted by the Debtor's testimony that he was able to sell "most" of the goods he purchased. The Debtor introduced only his testimony that he remitted to the Plaintiff or other vendors all of the proceeds received from the sale of goods received from the Plaintiff. This testimony was vague and did not attempt to quantify, even in an approximate amount, the goods that may have been discarded due to waste.

Second, even in light of the Debtor's testimony that \$30,000 of EMB's operating expenses were paid from funds borrowed by the Debtor, the Debtor's testimony supports the finding that EMB used trust funds to pay operating expenses, including funds distributed to the Debtor personally. The Debtor

testified that, at the end of the period in which he operated EMB, he obtained a second mortgage to “help” pay the business expenses of EMB, but that EMB used incoming revenues to fund the business for as long as it could be kept “afloat.” This testimony supports a finding that, in addition to the \$30,000 of borrowed funds, EMB also used its revenues to pay EMB’s business expenses. Because the PACA trust was a floating trust, all of EMB’s assets were subject to the trust, regardless of whether the assets were derived from the sale of the Plaintiff’s goods.

CONCLUSION

Having considered the evidence presented at trial, the Court concludes that the debt owed to the Plaintiff by the Debtor is **NONDISCHARGEABLE** under section 523(a)(4).

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