

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHIQUITA BRANDS COMPANY	)	
NORTH AMERICA, INC., trading as	)	Civil Action
CHIQUITA FRESH, N.A.	)	No. 03-CV-05283
	)	
Plaintiff	)	
and	)	
	)	
DEL MONTE FRESH PRODUCE, N.A.;	)	
BANACOL MARKETING CORPORATION;	)	
M. LEVIN & COMPANY, INC.;	)	
STOREYS' FRUIT AND PRODUCE, INC.;	)	
and "R" BEST PRODUCE, INC.	)	
	)	
Intervenor Plaintiffs	)	
	)	
vs.	)	
	)	
J & J FOODS, INC.;	)	
JOSE M. DIAZ;	)	
JAVIER ALVARADO,	)	
	)	
Defendants	)	
	)	
vs.	)	
	)	
AMERICAN STREET FINANCIAL	)	
SERVICES CENTER; and	)	
PHILADELPHIA COMMERCIAL	)	
DEVELOPMENT CORPORATION	)	
	)	
Respondents	)	
	)	
and	)	
	)	
M & M FARM, INC.;	)	
M. LEVIN & COMPANY, INC.; and	)	
STOREYS' FRUIT & PRODUCE, INC.,	)	
	)	
Claimants	)	

\* \* \*

OPINION

JAMES KNOLL GARDNER,  
United States District Judge

This matter is before the court on intervenor plaintiff "R" Best Produce, Inc.'s Motion for Preliminary Injunction filed September 3, 2004. For the reasons expressed below, we deny the motion.

This preliminary injunction proceeding relates to the mortgages held by respondents Philadelphia Commercial Development Corp. ("PCDC") and American Street Financial Services Center ("ASFSC")<sup>1</sup> on real estate purchased by defendant J&J Foods, Inc. ("J&J"). J&J is a grocery retailer. "R" Best Produce, Inc. ("R" Best) sold various agricultural commodities to J&J, for which it has not been fully paid. "R" Best seeks this injunction in relation to a sheriff's sale of J&J's realty scheduled for November 9, 2004 in Philadelphia, Pennsylvania.

"R" Best relies on the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §§ 499a-499s, as amended, to argue that the realty is part of a PACA constructive trust. In its preliminary injunction motion, "R" Best seeks to either require PCDC to obtain the property as a constructive trustee of the PACA trust for the benefit of "R" Best as an agricultural commodities supplier, or to include the proceeds of the sale

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<sup>1</sup> Collectively, PCDC and ASFSC will be referred to as respondents.

within a PACA trust.

A hearing was held on "R" Best's motion for preliminary injunction on October 7, 2004. All evidence was received by stipulation. Closing arguments were conducted on October 21, 2004, after which the matter was taken under advisement.

#### Facts

Based upon the stipulated evidence at the hearing and the agreements of counsel at oral argument, the pertinent facts are as follows.

Intervenor plaintiff "R" Best Produce, Inc. is a New York corporation located in Bronx, New York. "R" Best is engaged in the business of selling wholesale quantities of perishable agricultural commodities ("produce").

Defendant J & J Foods, Inc., is a Pennsylvania corporation located in Allentown, Lehigh County, Pennsylvania. Defendants Jose M. Diaz and Javier Alvarado are the officers and directors of J & J Foods, Inc. who direct the day-to-day operations of J & J Foods. J & J is a licensed dealer of perishable commodities, engaged in the business of buying such commodities wholesale and selling them at retail.

During the period July 23 through September 20, 2003, "R" Best sold perishable commodities to J&J for \$69,347.50. To date, J&J has not paid "R" Best in full for these commodities.

PCDC is a corporation which maintains a Small Business

Revolving Loan Fund, through which it provides funding for the development of businesses in Philadelphia.<sup>2</sup> ASFSC is a Pennsylvania nonprofit corporation which provides loans to businesses within the American Street Empowerment Zone of Philadelphia.<sup>3</sup>

On June 11, 1998 both PCDC and ASFSC provided purchase money mortgages to J&J in the amounts of \$100,000 and \$110,000, respectively, for purposes of acquiring real property at 1301-1311 North Second Street, Philadelphia.<sup>4</sup> The purchase price of

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<sup>2</sup> Declaration of Franklin M. Cohen, Vice President and Counsel of the Philadelphia Commercial Development Corporation, filed September 29, 2004, attached to the Answer of Philadelphia Commercial Development Corporation to Motion of "R" Best Produce, Inc. For Preliminary Injunction, at paragraphs 2 and 3.

The Small Business Revolving Loan Fund is completely funded by annual grants from the United States Department of Housing and Urban Development. ("HUD"). The grants are issued pursuant to the Community Development Block Grant Program established in the Housing and Community Development Act of 1974, as amended, 42 U.S.C. § 5301 and regulations at 24 C.F.R. Part 570. PCDC is authorized to lend funds under this grant to assist businesses "to carry out economic development and job creation/retention activities." Cohen Declaration at paragraph 3.

<sup>3</sup> Declaration of Louis Mora, Executive Director of American Street Financial Services Center, filed September 29, 2004, at paragraph 2. This empowerment zone has been designated by the HUD as being in need of special economic and development programs. The funds used by ASFSC to make loans to businesses within the empowerment zone are provided by the United States Department of Health and Human Services ("HHS") under Title XX of the Social Security Act, 42 U.S.C. § 1397f.

<sup>4</sup> The property consisted of what is identified in the deed as seven premises: Premises "A" was 1301 North 2<sup>nd</sup> Street; premises "B" was 1303 North 2<sup>nd</sup> street and 1302 North Palethorp Street; Premises "C" was 1305 North 2<sup>nd</sup> Street; premises "D" was 1304 North Palethorp Street; premises "E" was 1307 North 2<sup>nd</sup> Street and 1306 North Palethorp Street; premises "F" was 1309 North 2<sup>nd</sup> Street; premises "G" was 1311 North 2<sup>nd</sup> Street. Mora Declaration at paragraphs 5-6; Cohen Declaration at paragraphs 5-8.

the property was \$175,000.<sup>5</sup> The remainder of the money loaned was used to refurbish the properties. Respondents entered an Intercreditor Agreement, dated June 11, 1998, in which they agreed to share first priority as to the property purchased by the two purchase mortgage moneys.<sup>6</sup>

In the ensuing years, respondents supplied additional loans to J&J, secured by the property. In a letter agreement dated October 20, 1999, but signed on October 25, 1999, PCDC provided J&J with a loan of \$100,000 for "Inventory purchases".<sup>7</sup> The loan agreement listed as collateral, a second mortgage on the 1301-1311 North Second Street properties and "a second lien perfected security interest in all of [J&J's] machinery, equipment, inventory, accounts receivable, general intangibles, contract rights, furniture, fixtures, and all proceeds thereof."<sup>8</sup> The parties executed a Loan and Security Agreement and a Promissory Note on November 22, 1999. Included with the Promissory Note was a Disclosure for Confession of Judgment in Promissory Note executed on November 22, 1999.

On November 18, 2002 ASFSC provided J&J with two

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<sup>5</sup> PCDC Exhibit A, Settlement Statement, PCDC 000011. Exhibits A and B from PCDC's answer to the preliminary injunction are numbered PCDC 000001 through PCDC 000040 for Exhibit A and PCDC 000041 through 000071 for Exhibit B. When referring to documents within PCDC's Exhibit A and B, reference will also be made to the applicable PCDC page number.

<sup>6</sup> PCDC Exhibit A, PCDC 000038 to 000040.

<sup>7</sup> PCDC Exhibit B, PCDC 000041.

<sup>8</sup> PCDC Exhibit B, PCDC 000042.

additional loans, both secured by the realty. The first was for \$100,000, of which \$79,387.96 was used to pay in full the outstanding balance on the loan issued by PCDC on October 25, 1999.<sup>9</sup> The second loan ASFSC made to J&J on November 18, 2002 in the amount of \$90,000 provided J&J with a line of credit for development and marketing.<sup>10</sup> J&J executed a Mortgage and Security Agreement as to Mortgage and Promissory Notes, on November 18, 2002.

J&J made monthly payment through June 2003 on the 1999 PCDC loan and the ASFSC loans.<sup>11</sup> Subsequently, J&J ceased making payments, defaulting on the loans.<sup>12</sup> As a result, on October 24, 2003, PCDC took judgment by confession against J&J in the amount of \$60,586.02, in addition to interest in the amount of \$2,908.32 and costs of \$3,276.50.<sup>13</sup> A sheriff's sale of the property to be conducted by the Sheriff of Philadelphia County is scheduled for November 9, 2004 at 10:00 a.m.<sup>14</sup>

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<sup>9</sup> Mora Declaration at paragraph 10, page 3; Mora Exhibit C, Mortgage Note; Cohen Declaration at paragraph 12, page 3.

<sup>10</sup> Mora Declaration at paragraph 10, page 3; Mora Exhibit C, Promissory Note.

<sup>11</sup> Mora Declaration at paragraph 11, page 4.

<sup>12</sup> Mora Declaration at paragraph 11, page 4; Cohen Declaration at paragraph 13, page 3.

<sup>13</sup> Cohen Declaration at paragraph 14, page 3; PCDC Exhibit D, Writ of Execution.

<sup>14</sup> See PCDC Exhibit D, Notice of Sheriff's Sale of Real Property.

### Underlying Litigation

Plaintiff, Chiquita Brands Company North America, Inc., trading as Chiquita Fresh, a corporation with its principal place of business in Cincinnati, Ohio, is engaged in the business of selling produce in interstate commerce. Chiquita initiated this action on September 19, 2003 by filing a Complaint against defendants.

Jurisdiction is based on Section 5(c)(5) of PACA and 28 U.S.C. §§ 1331 and 1332. Venue is proper under 28 U.S.C. § 1391 because the claim arose in this district and plaintiff asserted that defendant's principal place of business is in this district.

Plaintiff Chiquita Brands brought this action to enforce the trust provisions of P.L. 98-273, the 1984 amendment to Section 5(c) of PACA, 7 U.S.C. § 499e(c). Specifically, plaintiff contends that between March 7 and April 23, 2003, it sold and delivered to defendant J & J Foods in interstate commerce produce worth \$54,393.50, which it alleges remains unpaid. Plaintiff further contends that defendant accepted the produce.

Moreover, plaintiff asserts that when defendant received the produce, plaintiff became a beneficiary in a statutory trust designed to assure payment to produce suppliers. The alleged trust consists of all produce or produce-related assets, including all assets procured by such funds, in the

possession or control of defendants.

By Order of the undersigned, dated September 19, 2003, and filed September 22, 2003, an ex parte temporary restraining Order was issued upon defendants pursuant to Federal Rule of Civil Procedure 65(b). Thereafter, by Order dated September 24, 2003, and filed October 30, 2003, the undersigned, upon agreement of the parties, converted the temporary restraining Order into a preliminary injunction. By Order dated November 17, 2003, the undersigned approved the stipulation of the parties for entry of a preliminary injunction and establishment of the claims procedure under the trust provisions of PACA.<sup>15</sup>

The stipulation established a timetable for initial distribution of trust assets. Under this timeline, PACA Proof of Claims forms were due by December 14, 2003. The deadline for objections to claims was set at January 15, 2004, with responses to objections due by February 5, 2004. Chiquita's counsel was directed to file by February 15, 2004 a PACA Trust Chart listing the funds available for distribution as well as the amount of claims.

The court provided a ten-day period for filing objections to the PACA Trust Chart. Counsel for Chiquita was

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<sup>15</sup> On that same date, the undersigned filed a separate Order, entered under the agreement of Plaintiff Chiquita and defendants J&J Foods, Diaz and Alvarado. This Order directed Defendants to pay Chiquita a set monthly sum. The Order indicated that as long defendants made payments, Chiquita would not take measures to enforce the preliminary injunction. The Order also noted that in the event of default, Chiquita could take measures to enforce the Preliminary Injunction.

also directed to file a Motion for Approval of First Interim Distribution on February 25, 2004. The Order noted that the "This court shall exercise exclusive *in rem* jurisdiction over this action, the PACA Trust Assets and the PACA Trust Account established pursuant to this Order."<sup>16</sup> The Order also noted that "The Court also hereby retains jurisdiction to enter further Orders to enforce the terms of this PACA Claims Procedure."<sup>17</sup>

The stipulation and Order provided that counsel for the plaintiff would bear responsibility, "with the assistance and cooperation of J & J and its counsel" of "identify[ing] and collect[ing] the accounts receivable of J & J and preserv[ing] the funds collected for the benefit of all PACA trust creditors."<sup>18</sup> The stipulation and Order directed that PACA funds recovered would be placed within a separate interest-bearing account. The stipulation and Order also provided that:

J & J may also own other assets to which the PACA Trust creditors have claims. These assets shall be liquidated in due course after the approval of liquidation by Plaintiff's counsel. The parties agree to preserve the funds realized from liquidation of these assets by depositing them in a separate, segregated Trust Account, over which counsel for Plaintiff will have signatory authority and which account will also be opened under J & J's taxpayer identification number.

Stipulation, paragraph 7 at page 4.

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<sup>16</sup> Stipulation, paragraph 21 on page 8.

<sup>17</sup> Id.

<sup>18</sup> Stipulation paragraph 4, page 3.

Pursuant to the established claims procedure, several producers filed claims against the PACA trust. Several producers also moved to intervene, filing complaints in intervention. Pursuant to the established claims procedure, "R" Best Produce, Inc. submitted a timely claim on November 25, 2003 for \$86,684.38. Several other parties have also filed claims.

Although the stipulation did not address any issues relating to J&J's realty, these issues were addressed by this court. In a Rule 16 Status Conference Order, dated January 20, 2004, the court directed, "that in the event that a written agreement of sale is entered into for the building and property owned by defendants, which property may be the subject to the PACA trust in this matter" defense counsel was required to give notice of such an agreement to "all parties, PACA creditors, any lienholders on the property, any other interested person or entity, and the court."

The Status Conference Order also afforded the noticed parties an opportunity to file objections to the sale. The agreement further provided that "the net proceeds of any sale of the building and property owned by the defendants shall be placed in" the separate account which had been established as a result of the stipulation and Order of court from November 17, 2003. The Order also addressed the possibility of a sheriff's sale, requiring defense counsel to notify "all parties, PACA creditors,

any lienholders on the property, any other interested person or entity, and the court."<sup>19</sup>

The ensuing deadlines passed for filing of the chart and initial distribution motion, but no party filed either document. On June 29, 2004 the undersigned ordered an in-chamber Rule 16 Status Conference to determine why these deadlines had not been complied with and to determine the status of the claim process. The status conference was scheduled for October 7, 2004.

"R" Best's Motion for Preliminary Injunction

On September 3, 2004, "R" Best Produce, Inc.'s Motion for Preliminary Injunction was filed. In its motion, "R" Best is not seeking an injunction to prevent the sheriff's sale. Rather it is seeking to have PCDC announce at the sale that it will be bidding on the property as the constructive trustee of a PACA account. Additionally, "R" Best is seeking to have the proceeds of the sheriff's sale placed into a bank account that has been established for holding PACA trust assets.<sup>20</sup>

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<sup>19</sup> Rule 16 Status Conference Order, January 20, 2004.

<sup>20</sup> Intervenor plaintiff "R" Best seeks the following relief in its proposed order:

**ORDERED**, that PCDC shall announce at Sheriff's sale ... relating to J&J's real property ... that it will bid on the J&J Real Estate as the constructive trustee for PACA Trust Account or a separate segregated interest bearing Trust Account over which counsel for Plaintiff will have signatory authority, and which account will be opened under J&J taxpayer identification number and that it is required to inform the Sheriff that it will take title to the J&J Real Estate as the constructive trustee for the PACA Trust Account and be so named on the Sheriff's deed.

(Footnote 20, continued)

The motion contained a draft Order to Show Cause for Preliminary Injunction. This proposed Order sought to have the secured creditors on the realty, Philadelphia Commercial Development Corporation and American Street Financial Services Center, show cause why a preliminary injunction should not issue as to the pending sheriff's sale. On September 16, 2004, this court issued upon PCDC, ASFSC and J&J an Order to Show Cause for Preliminary Injunction requiring written responses by September 29, 2004. The court scheduled a hearing on the preliminary injunction for October 7, 2004, in place of the previously scheduled Rule 16 status conference.

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(Footnote 20 continued:)

**ORDERED** that PCDC, ASFSC and J&J and their assignees, in the event any one of them takes title to the J&J Real Estate at the Sheriff's Sale, shall hold said property as the constructive trustee for the PACA Trust Account or Trust Account, and shall refrain from encumbering, selling or conveying the property, without further order of this Court, after notice to all parties in interest; and it is further

**ORDERED** that PCDC, ASFSC and J&J shall pay any money distributed to or received by them in connection with or as a result of the Sheriff's Sale into the PACA Trust Account or Trust Account pending a ruling by this Court as to the equitable owner of said proceeds; and it is further

**ORDERED** that PCDC, ASFSC and J&J must give notice to all parties in this action and obtain the approval of this Court before rescheduling or canceling the Sheriff's Sale; and it is further

**ORDERED** that J&J and its officers agents and attorneys must file an accounting with this Court as to compliance with the November 17, 2003 Order of this Court including (i) a detailed report of J&J's accounts receivable and its efforts to collect same and the exact location of all funds collected, and (ii) an inventory of J&J's other assets and their location and details regarding any claims or liens relating thereto, any efforts made to liquidate said assets, any proposed or consummated transfers thereof, and the exact location of all proceeds of any such transfer by the        day of        , 2004 and have served a copy of said accounting by the same date upon all the parties to this action.

Proposed Order for Preliminary Injunction.

In conformance with the rule to show cause, PCDC and ASFSC submitted replies on September 29, 2004. Defendant J&J Foods did not file a reply.

The Answer of Philadelphia Commercial Development Corporation to Motion of "R" Best Produce, Inc. For Preliminary Injunction filed that date, also included a memorandum in support, and the Declaration of Franklin M. Cohen in Opposition to Motion for Preliminary Injunction. Mr. Cohen is the Vice President and Counsel to the Philadelphia Development Corporation.

PCDC also attached four exhibits to its answer: Exhibit A consists of various loan papers for a \$100,000 loan PCDC made to J&J in April 2, 1998; Exhibit B consists of various loan papers relating to a \$100,000 loan PCDC made to J&J on October 20, 1999; Exhibit C consists of letter dated September 23, 2004 from PCDC Counsel M. Melvin Shralow, Esquire to "R" Best Counsel Ralph Wood, Esquire; Exhibit D consists of various papers relating to a writ of execution and sheriff's sale on J&J's realty. Exhibits A and B are referenced in Mr. Cohen's Declaration.

The Answer of American Street Financial Services Center in Opposition to Motion for Preliminary Injunction by "R" Best Produce, Inc. In Opposition to Motion for Preliminary Injunction by "R" Best Produce, Inc. filed September 29, 2004, included a

memorandum in support. ASFSC also filed a Declaration of Luis Mora, Executive Director of American Street Financial Services Center. Attached to the Declaration are three exhibits: Exhibit A is a Mortgage Note and a Mortgage and Security Agreement, both dated June 11, 1998; Exhibit B is a Settlement Statement dated June 11, 1998; Exhibit C is a Mortgage Note dated November 18, 2002, a payment schedule dated January 20, 2003, a Promissory Note dated November 18, 2002 and a Mortgage and Security Agreement dated November 18, 2002.

"R" Best filed on October 6, 2004, a Reply Memorandum of Law in Support of Motion for Preliminary Injunction. In addition, on that same date, Counsel for "R" Best filed a Supplemental Declaration of Ralph Wood in Support of Motion for Preliminary Injunction. In response, PCDC filed on October 6, 2004 the Motion of the Philadelphia Commercial Development Corporation to Strike the Reply Brief and Supplemental Affidavit of "R" Best Produce and to Exclude Evidence Relating to Documents Produced by J&J Foods.

A hearing was conducted before the undersigned on October 7, 2004. The parties agreed to the inclusion of the Declarations of Cohen and Mora into evidence. The parties also agreed to the admission of Exhibits A, B, and D which were attached to PCDC's response, as well as the Exhibits attached to the Mora Declaration. Respondents PCDC and ASFSC objected to

admission of the declaration of Attorney Woods that had been filed the preceding day. The undersigned sustained the objection.

"R" Best argued that its case could be sustained by the evidence contained in the Declarations and exhibits entered into evidence that had been submitted by respondents. Accordingly, the court closed the record, noting that any additional evidence would only be considered if offered by stipulation of all parties prior to the court hearing argument on the preliminary injunction. No additional stipulations were submitted.

At the hearing, the undersigned raised sua sponte the issue of the court's jurisdiction to entertain this motion for preliminary injunction. The court noted that although "R" Best was a claimant to the PACA trust, it was not a party to the underlying action because it had not filed an intervening complaint in the underlying action. The court also noted that respondents PCDC and ASFSC were not parties to the underlying action.

The undersigned noted that for this court to have jurisdiction to grant a preliminary injunction to "R" Best, "R" Best would need to file a motion seeking to file *nunc pro tunc* a complaint asserting permanent injunctive relief, because courts do not have authority to issue temporary or preliminary injunctive relief in the absence of a complaint seeking permanent

relief. The court noted that respondents could raise objections at closing argument if "R" Best filed a complaint seeking permanent injunctive relief unrelated to the preliminary injunctive relief already sought. In addition, the court directed "R" Best, PCDC and ASFSC to submit summaries of their positions prior to argument.

At the hearing, the respondents objected to "R" Best's filing of a reply brief on October 6, 2004, noting that the Order to Show cause specifically precluded submission of a reply brief without prior court approval. The court withheld ruling on this issue, but ultimately considered the reply brief.

On October 13, 2004, "R" Best submitted a stipulation granting leave to "R" Best to intervene as a plaintiff. The court approved the stipulation on October 21, 2004.<sup>21</sup>

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<sup>21</sup> "R" Best's intervening complaint contains five counts brought against either J&J Foods or Jose M. Diaz and Javier Alvarado. The First three counts identify J&J as a defendant.

In Count I intervenor plaintiff relies on 7 U.S.C. § 499e(c)(5) seeking to enjoin J&J Foods and "persons or entities who seek to act in concert with or participate with J&J in the dissipation of the PACA Trust Fund by defeating the orderly liquidation of J&J...." Complaint in Intervention of "R" Best Produce, Inc. Paragraph 25 on page 8. Plaintiff also asks the court to declare J&J as the trustee of the PACA trust fund for the benefit of intervenor plaintiff and other PACA trust creditors. Plaintiff also seeks recovery from J&J of \$69,347.50.

In Count II, plaintiff seeks recovery from J&J under 7 U.S.C. §499e(b)(2) for monetary damages of \$69,347.50. In Count III, intervenor plaintiff brings a breach of contract claim again seeking monetary damages of \$69,347.50. Intervenor plaintiff alleges that J&J Foods acquired this amount of produce from Intervenor plaintiff without paying for it.

In Count IV, intervenor plaintiff seeks to hold J&J owners Diaz and Alvarado personally liable under 7 U.S.C. § 499(e) for Breach of Fiduciary Responsibility in their role as trustees of the PACA trust. Similarly, in Count V, intervenor plaintiff again seeks to recover trust benefits from defendants Diaz and Alvarado. In all five counts intervenor plaintiff also seeks attorneys fees and costs.

"R" Best raises no counts against PCDC or ASFSC, and neither of these respondents is identified or mentioned in the complaint.

Pursuant to the court's order at the October 7, 2004 hearing, "R" Best, PCDC and ASFSC submitted summaries of the issues prior to closing arguments. The undersigned heard closing arguments on October 21, 2004 from counsel for "R" Best Products, PCDC and ASFSC. The court took the matter under advisement.

#### DISCUSSION

The parties raise several issues: first, whether "R" Best may seek injunctive relief against respondents; second, whether petitioner supplier or respondent purchaser bears the burden of proof; and third, whether the real estate in question is PACA trust asset. We address these issues in turn.

#### Background

Congress enacted PACA in 1930 to protect agricultural commodity producers from buyers and merchants of such commodities. It did so by licensing all buyers of perishable agricultural commodities and by allowing unpaid sellers to petition the Department of Agriculture for an order requiring the buyer to pay damages to the seller. Tanimura & Antel, Inc., v. Packed Fresh Produce, Inc., 222 F.3d 132, 135 (3d Cir. 2000).

Despite these protections, there were continued concerns with sellers not being paid by buyers:

Congress focused on the increase in the number of buyers who failed to pay, or were dilatory in paying,

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their suppliers, and the impact of such payment practices on small suppliers who could not withstand a significant loss or delay in receipt of monies owed.... Also, Congress was troubled by the common practice of produce buyers granting liens on their inventories to their lenders, which covered all proceeds and receivables from sales of perishable agricultural commodities, while the produce suppliers remained unpaid.... This practice elevated the lenders to a secured creditor position in the case of the buyers' insolvency, while the sellers of perishable agricultural commodities remained unsecured creditors with little legal protection or means of recovery in a suit for damages.

Tanimura, 222 F.3d at 135 (internal citations omitted); see also 7 U.S.C. § 499e(c)(1).<sup>22</sup>

To address these concerns, Congress amended PACA in 1984. The amendment sought to assure that suppliers of produce are paid by imposing a floating, non-segregated statutory trust on all produce-related assets. 7 U.S.C. § 499e(c)(2); In re Magic Restaurants, Inc., 205 F.3d 108, 111 (3d Cir. 2000).<sup>23</sup> The

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<sup>22</sup> These concerns are set forth in the language of the 1984 Amendment to PACA:

(1) It is hereby found that a burden on commerce in perishable agricultural commodities is caused by financing arrangements under which commission merchants, dealers, or brokers, who have not made payment for perishable agricultural commodities purchased, contracted to be purchased, or otherwise handled by them on behalf of another person, encumber or give lenders a security interest in, such commodities, or on inventories of food or other products derived from such commodities, and any receivables or proceeds from the sale of such commodities or products, and that such arrangements are contrary to the public interest. This subsection is intended to remedy such burden on commerce in perishable agricultural commodities and to protect the public interest.

7 U.S.C. § 499e(c)(1).

<sup>23</sup> The specific statutory language establishing the trust provides that:

Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all

(Footnote 23 continued)

trust must be maintained for the benefit of unpaid suppliers, sellers or agents who provided the commodities until full payment has been made. Tanimura & Antel, Inc., v. Packed Fresh Produce, Inc., 222 F.3d 132 (3d Cir. 2000). With this background, we turn to the issues before the court.

### Injunctive Relief

Respondents PCDC and ASFSC argue that Rule 65(d) of the Federal Rules of Civil Procedure provides that an Order granting an injunction binds only the parties to the action. Respondents note in the Complaint in Intervention of "R" Best Produce, Inc., "R" Best does not bring any claim against either of them. Respondents argue that because "R" Best has not joined or otherwise plead either of them into the action, it may not use this action to pursue injunctive relief against them. They also argue that because "R" Best is not seeking permanent injunctive relief in the Intervening Complaint, it may not seek preliminary injunctive relief here.

In response, intervenor plaintiff "R" Best argues that

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(Footnote 23 continued:)

inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents.

7 U.S.C. § 499e(c)(2).

Rule 65(d) allows an injunction against "those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."<sup>24</sup>

We disagree with respondents that "R" Best has failed to properly seek injunctive relief in its complaint. In paragraph 25 of the Complaint in Intervention, "R" Best seeks

further injunctive relief including but not limited to an injunction to restrain persons or entities who seek to act in concert with or participate with J&J in the dissipation of the PACA Trust Fund by defeating the orderly liquidation of J&J and deposit of the proceeds thereof into Trust Accounts in accordance with this Court's prior Consent Order, pending a determination by this Court as to a division of said proceeds in accordance with PACA.

Moreover, in the prayer for relief immediately following paragraph 25, "R" Best prays as follows.

(d) That J&J's assets be liquidated under the supervision of this court and the proceeds thereof be deposited into the Trust Accounts pending a determination of their division in accordance with PACA, and that persons or entities who seek to act in concert with or participate with J&J in the dissipation of the PACA Trust Fund by defeating the orderly liquidation of J&J and the deposit of the proceeds thereof into Trust Accounts in accordance with this Court's prior Consent Order *be enjoined from interfering in said liquidation and that J&J be required to account for its handling of said liquidation in accordance with the requirements of the Consent Order.* (Emphasis added.)

Additionally, in our November 17, 2003 Order approving the stipulation of the parties for entry of a preliminary injunction,

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<sup>24</sup> Respondents PCDC and ASFSC each received notice of "R" Best's motion for preliminary injunction and intervening complaint and had the opportunity to present their opposition to the grant of injunctive relief.

we indicated that we would entertain exclusive *in rem* jurisdiction over the PACA trust assets. “[F]ederal courts retain their authority to issue injunctive relief in actions over which they have jurisdiction.” Tanimura, 222 F.3d at 139. (Citations omitted.)

Accordingly, we conclude that intervenor plaintiff “R” Best has standing to seek, and we have jurisdiction to grant, a preliminary injunction.

#### Burden of Proof

In Tanimura, supra, the United States Court of Appeals for the Third Circuit addressed whether, and under what circumstances, a district court can grant equitable injunctive relief to a trust beneficiary produce supplier to prevent dissipation of trust fund assets under PACA.

In that case, a produce supplier sought injunctive relief against a retailer to whom it sold wholesale produce for which the retailer did not fully pay. The injunction was requested to prevent further dissipation of PACA trust assets. The supplier also sought an injunction against a third party who allegedly was converting, or had converted to his own use and benefit, PACA trust assets rightfully belonging to the supplier.

The Third Circuit in Tanimura held that the district court clearly had jurisdiction over actions by private parties seeking to enforce payment from the trust. The Third Circuit

concluded that dissipation of PACA trust assets can render money damages inadequate, thereby necessitating equitable relief. The Court recognized that once the PECA trust is dissipated, it is almost impossible for the beneficiary to obtain recovery, thus the prevention of trust dissipation becomes essential to any meaningful remedy.

In order to be entitled to a preliminary injunction, plaintiff must satisfy four factors.

(1) whether the movant has shown a reasonable probability of success on the merits; (2) whether movant will be irreparably injured by denial of the relief; (3) whether granting the preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

Tanimura, 222 F.3d at 140. (Citations omitted.)

Applying these factors to the facts in Tanimura, the Third Circuit concluded that a supplier had a high probability of success on the merits in its suit to enforce payment because the supplier sufficiently demonstrated its entitlement to payment, and its status as a trust beneficiary with a perfected interest. The Third Circuit also concluded that the supplier suffered irreparable injury when the trust was depleted and funds were not available for immediate repayment. The Court concluded that granting the injunction would not result in greater harm because the sellers were already insolvent.

The Court also concluded that issuance of a preliminary

injunction was in the public interest, because the PACA statutory purpose encapsulates this, specifically that section 499e(c) "is intended to remedy such burden on commerce in perishable agricultural commodities and to protect the public interest." Tanimura, 222 F.3d at 140, footnote 7 (quoting 7 U.S.C. § 499e(c)(1)).

We conclude that the facts of Consumer Produce Company, Inc. v. Volante Wholesale Produce, Inc., 16 F.3d 1374 (3d Cir. 1994) are similar to the case before this court. In both cases, suppliers of produce seek to recover loan repayments made to defendant or respondent banks by defendant produce retailers. In each case, the plaintiff's suppliers allege that the loan repayments were made in breach of a statutory trust created for their benefit under PACA. 7 U.S.C. §499e(c). In each case plaintiff alleges that the money used by the retailer to repay its bank loans was derived from sale of produce which the retailer bought from the supplier without fully paying the supplier for those goods.

The Third Circuit in Consumer Produce concluded that "Third-party transferor" (the bank) may retain PACA trust assets without liability to trust beneficiaries (produce suppliers) if the transferors are bona fide purchasers for value and without notice of the breach of trust. The Third Circuit concluded that the bank received the loan payments for the pre-existing debt

"for value" because the trust property transferred was money.

The Third Circuit in Conumer Produce also concluded that if the trustee retailer transfers trust property in breach of trust to the bank for value, the transferee bank takes free of the trust, although it had notice of the existence of the trust, unless the bank also had notice that the trustee is committing a breach of trust in making the transfer. Finally, the Third Circuit concluded that the bank had the burden of proving it was a bona fide purchaser with respect to the loan payments made by the retailer.

Ordinarily the party seeking injunctive relief has the burden of establishing the four preliminary injunction factors enumerated above, Tanimura, supra. In Consumer Produce the court placed upon the bank the burden of establishing that it was a bona fide purchaser with respect to the loan payment. We reconcile these separate burdens as follows.

The party seeking injunctive relief bears the initial burden of establishing the four factors necessary for granting an injunction. The burden then shifts to the respondent bank to prove that it is a bona fide purchaser with respect to the loan payments received from the retailer.

Even if a party might establish a prima facie entitlement to injunctive relief, respondent will be exempt from the injunction if respondent can establish that it is a bona fide

purchaser.<sup>25</sup> With these principles in mind, we apply the foregoing principles of law to the facts of this case.

#### PACA Trust Asset

Respondents argue that "R" Best will not be able to establish the first element for obtaining a preliminary objection (the likelihood of success on the merits) because J&J's realty is not a PACA trust asset. We agree.

The PACA statute defines the PACA trust as including "all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products." 7 U.S.C. § 499e(c)(2). Put another way, the corpus of a PACA trust "is comprised of (1) the perishable agricultural commodities purchased from [the] suppliers, (2) all inventories of food or other products derived from the perishable agricultural commodities, and (3) receivables or proceeds from the sale of such commodities or products." In re Magic Restaurants, Inc., 205 F.3d at 111-112.

In this case, the real property itself does not fall within the statutory definition of PACA trust assets. The real

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<sup>25</sup> An alternative approach, which would yield the same result, would be to conclude that petitioner can not sustain its burden of establishing the first factor (that petitioner has a reasonable probability of success on the merits) because respondent is a bona fide purchaser and therefore exempt from an injunction.

estate is neither inventory of food, nor a product derived from a perishable agricultural commodity, nor a receivable or proceeds from the sale of a commodity or product. Accordingly, the real estate is not part of the corpus of the PACA trust.

We find persuasive the reasoning in In re United Fruit & Produce Company Inc., 242 B.R. 295 (Bankr. W.D. Pa. 1999) in which the United States Bankruptcy Court for the Western District of Pennsylvania concluded that vehicles and equipment were not PACA assets. The court reasoned that:

Although the PACA language imposing a trust is powerful and invasive, it imposes the trust only upon a limited and defined collateral. "The corpus of the trust consists of the produce, inventories of food or other products derived from the produce and any receivables or proceeds from their sale." It does not include vehicles and equipment.

The intent of PACA is not violated by recognition of the liens of Lenders who provide purchase money financing to enable the Debtor to purchase equipment for business use and take a security interest in solely the vehicles or equipment for which they provide financing. The PACA trust creditors would have us make a much broader interpretation and trace the payments made on the vehicles and equipment so that we might find that the vehicles and equipment are PACA trust assets. (citation omitted).

In re United Fruit & Produce Company Inc., 242 B.R. at 301-302.

We find that, just as vehicles and equipment do not fall within the trust corpus, real property similarly lies outside the corpus of the trust.

We note that one of the purposes of the act was to

ensure payment to suppliers, by eliminating the practice of merchants giving lenders a security interest in the commodities buyers acquired from suppliers. Respondents' loaning of money to J&J by taking a security interest in J&J's realty does not run afoul of the policy goals of PACA. It preserves the suppliers interest in the commodities yet gives creditors security to provide the funding which merchants can then use to acquire the commodities.

Under normal circumstances, the buyer of produce, after re-selling it and paying the supplier, would have earned profits. Although the produce retailer retains a responsibility to maintain sufficient funds to pay commodity suppliers, the produce retailer is free to use these profits in any way it chooses, whether for acquiring realty, renovating currently-owned realty, or acquiring inventory.

In this case "R" Best argues that between the years 1998 and 2002 J&J made principal payments from commingled PACA trust fund proceeds to acquire equity in real estate. However, "R" Best presents no evidence to establish that J&J was indebted to any suppliers at that time. The evidence presented demonstrates that J&J ceased making payments to respondents in June 2003, one month before "R" Best began selling commodities to J&J. As such, "R" Best has not established that trust proceeds

were used for payments during those years.<sup>26</sup> As "R" Best has not established a likelihood of success on the merits, its request for preliminary injunction is denied.

#### Conclusion

For the foregoing reasons, we deny "R" Best Produce, Inc's Motion for Preliminary Injunction.

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<sup>26</sup> The pleadings in the underlying suit aver that Chiquita delivered commodities to J&J in March and April of 2003 for which it was not paid. If so, the PACA trust would have gone into effect in March, when the commodities were delivered without payment. To the extent that mortgage payments were made from trust proceeds, we conclude that respondents PCDC and ASFSC were unaware of the existence of the trust and unaware that J&J was improperly transferring trust funds. Accordingly, we conclude that respondents were bona fide purchasers such that trust proceeds paid to them are not subject to disgorgement.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHIQUITA BRANDS COMPANY	)	
NORTH AMERICA, INC., trading as	)	Civil Action
CHIQUITA FRESH, N.A.	)	No. 03-CV-05283
	)	
Plaintiff	)	
and	)	
	)	
DEL MONTE FRESH PRODUCE, N.A.;	)	
BANACOL MARKETING CORPORATION;	)	
M. LEVIN & COMPANY, INC.;	)	
STOREYS' FRUIT AND PRODUCE, INC.;	)	
and "R" BEST PRODUCE, INC.	)	
	)	
Intervenor Plaintiffs	)	
	)	
vs.	)	
	)	
J & J FOODS, INC.;	)	
JOSE M. DIAZ;	)	
JAVIER ALVARADO,	)	
	)	

Defendants )  
)  
vs. )  
)  
AMERICAN STREET FINANCIAL )  
SERVICES CENTER; and )  
PHILADELPHIA COMMERCIAL )  
DEVELOPMENT CORPORATION )  
)  
Respondents )  
)  
and )  
)  
M & M FARM, INC.; )  
M. LEVIN & COMPANY, INC.; and )  
STOREYS' FRUIT & PRODUCE, INC., )  
)  
Claimants )

\* \* \*

O R D E R

NOW this 8<sup>th</sup> day of November 2004, upon consideration of intervenor plaintiff "R" Best Produce, Inc's Motion for Preliminary Injunction filed September 3, 2004; after hearing held October 7, 2004; after closing arguments held October 21, 2004; and for the reasons contained in the accompanying Opinion,

IT IS ORDERED that the motion is denied.

BY THE COURT:

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James Knoll Gardner  
United States District Judge