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Avocado-Tomato Co., Inc.

FILED
OFFICE OF THE CLERK
01 MAY 11 PM 3:12
U.S. BANKRUPTCY COURT
ALBUQUERQUE, N.M.

**IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO**

IN RE:

FURR'S SUPERMARKETS, INC.
a Delaware Corporation
Tax ID No. 75-2364418 (Federal);
02-159595-0 (New Mexico)

Debtor.

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CASE NO. 01-10779-SA

CHAPTER 11

**MOTION TO COMPEL PAYMENT OF PACA CLAIM
OF SUPERIOR AVOCADO-TOMATO CO., INC.**

TO THE HONORABLE JAMES S. STARZYNSKI, UNITED STATES BANKRUPTCY
JUDGE:

NOW COMES Superior Avocado-Tomato Co., Inc. (hereinafter "Superior") and files
this its Motion to Compel Payment of PACA Claim and as cause therefore, would show the
Court as follows.

1 On February 8, 2001, the Debtor filed a petition for reorganization under
Chapter 11 of the Bankruptcy Code. Pursuant to the Code, the Debtor has retained
possession of its assets and has continued the operation and management of its business.

2 Superior is a vendor of produce having dealt with the Debtor both before and
after this Chapter 11 proceeding was initiated. Superior sold substantial quantities of
PACA-covered commodities to the Debtor. Superior sold this produce to the Debtor on a
credit basis, and on February 8, 2001, Superior was owed \$150,020.00 from prepetition
unpaid invoices.

441

3. Superior timely gave its notice to preserve trust benefits under the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499e et. seq., with the United States Department of Agriculture ("USDA"). Specifically, according to Section 499e(c)(4) of the PACA statute,

In addition to the method of preserving the benefits of the trust specified in paragraph (3), a [PACA] licensee may use ordinary and usual billing or invoice statements to provide notice of the licensee's intent to preserve the trust. The bill or invoice statement must include the information required by the last sentence of paragraph (3) and contain on the face of the statement the following: "The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. § 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received."

No other notices are required by Section 499e(c). See, e.g., Stowe Potato Sales, Inc. v. Terry's, Inc., 224 B.R. 329, 331-32 (W.D. Va. 1998). True and correct copies of Claimant's invoice statements for which payment is sought are attached hereto as Exhibit "A" and incorporated herein. As evidenced by each invoice, Claimant has fully complied with the requirements of Section 499e to preserve its PACA trust beneficiary status. Pursuant to Section 499e, Claimant has a valid, but unpaid PACA trust claim to property that is in Debtor's possession.

4. In February, 2001 this Court entered an Order allowing the Debtor to deal with PACA claimants outside of the Court. Subsequently, on April 20, 2001 and on May 2, 2001, Claimant wrote to counsel for the Debtor requesting payment of its valid PACA claim. Despite Claimant's request for payment, Debtor has refused and continues to refuse to pay Claimant's PACA claim.

5. Superior's PACA trust claims have priority status over both secured and unsecured creditors of the Debtor as well as over any administrative claims. Section 499e(c)(2), in pertinent part, states:

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

Thus, Debtor holds the commodities, or the proceeds derived therefrom, in trust for the benefit of Claimant.

6. As recognized by Debtor in its Motion for Order Authorizing Payment of Valid PACA and PASA Trust Claims, PACA trust assets do not become property of the bankruptcy estate under Section 541 of the Bankruptcy Code. See, e.g., In re Long John Silver's Restaurants, Inc., 230 B.R. 29, 32 (Bankr. D. Del. 1999). Further, a PACA trust beneficiary is entitled to claim trust property ahead of creditors holding security interests in the property. See Consumers Produce Co. v. Volante Wholesale Production, Inc., 16 F.3d 1374, 1379 (3rd Cir. 1994); Tom Lange Co. v. Kornblum & Co. (In re Kornblum), 81 F.3d 280, 284 (2nd Cir. 1996).

7. Pursuant to Chapter 38 of the Texas Civil Practice and Remedies Code, Claimant is entitled to recover its reasonable and necessary attorney's fees.

8. Claimant requests an order from the Court compelling Debtor to pay Claimant its PACA claim in the amount of \$150,020.00, plus reasonable and necessary attorney's fees incurred by Claimant in connection with the prosecution of this claim, within ten (10)

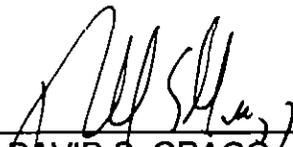
days of the date the Court's Order becomes final. Claimant would show that the amount of attorneys' fees and costs expended by it should in no event be less than \$20,000.00 to pursue its valid PACA claim.

WHEREFORE, PREMISES CONSIDERED, Superior prays for an Order of this Court compelling payment of Claimant's PACA claim and its reasonable and necessary attorney's fees and for such other and further relief, both at law and in equity, to which it may show itself to be entitled.

DATED this 10th day of May, 2001.

Respectfully submitted,

LANGLEY & BANACK, INCORPORATED
Trinity Plaza II, Ninth Floor
745 East Mulberry
San Antonio, Texas 78212-3166
(210) 736-6600/(210) 735-6889 (Telecopier)

By: 
DAVID S. GRAGG
Texas State Bar No. 08253300

ATTORNEYS FOR SUPERIOR
TOMATO-AVOCADO CO., INC.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was sent on this 10th day of May 2001, by *U. S. First Class Mail*, postage prepaid, (unless otherwise indicated) to those persons and entities on the attached service list.


David S. Gragg

Superior Tomato-Avocado Co., Inc.

750 MIERIDA
SAN ANTONIO, TEXAS 78207
(210) 434-4121 FAX (210) 434-1949

Invoice: 864208 DATE 9/23/00 PAGE 1
NUMBER 1851
CARR'S SUPERMARKET'S, INC.
3820 RAILROAD DR.
EL PASO, TX 79924

RECEIVED BY _____ DATE _____

To comply with P.A.C.A. Trust Fund Provisions. All bills due and payable in 10 days in Bexar County, San Antonio, Texas. No claims allowed unless made immediately upon receipt of goods.

SA. ANAME RICHARD MEDINA NUMBER 0
Rt. 00 St 0
W# SHIPPED BY: *Richard Medina* DATE *9/23/00*

TRUCK NO. _____ DRIVER: _____ TIME IN: _____ A.M. P.M.

The perishable agricultural commodities listed on this invoice were not subject to the statutory trust administered by Section 52 of the Finance and Administration Code, Act 1987, U.S.C. 489, et seq. The sale of these commodities under a contract of purchase or sale of these commodities is not subject to the provisions of the U.S.C. 489, et seq. or any amendments or proceeds from the sale of these commodities will fall directly to the seller.

Superior Tomato-Avocado Co., Inc.

750 MIERIDA
SAN ANTONIO, TEXAS 78207
(210) 434-4121 FAX (210) 434-1949

Invoice: 864952 DATE 9/25/00 PAGE 1
NUMBER 1851
CARR'S SUPERMARKET'S, INC.
3820 RAILROAD DR.
EL PASO, TX 79924

RECEIVED BY _____ DATE _____

To comply with P.A.C.A. Trust Fund Provisions. All bills due and payable in 10 days in Bexar County, San Antonio, Texas. No claims allowed unless made immediately upon receipt of goods.

SA. ANAME RICHARD MEDINA NUMBER 0
Rt. 100 St 0
W# SHIPPED BY: *Richard Medina* DATE *9/25/00*

TRUCK NO. _____ DRIVER: _____ TIME IN: _____ A.M. P.M.

The perishable agricultural commodities listed on this invoice were not subject to the statutory trust administered by Section 52 of the Finance and Administration Code, Act 1987, U.S.C. 489, et seq. The sale of these commodities under a contract of purchase or sale of these commodities is not subject to the provisions of the U.S.C. 489, et seq. or any amendments or proceeds from the sale of these commodities will fall directly to the seller.

CODE	DESCRIPTION	UNIT	QUANTITY	UNIT PRICE	AMOUNT
65850	TOMATOES BLK 6X6 #5#	CS	430.00	11.00	5290.00
65400	TOMATOES 4 COUNT PACKAGE	CS	1000	10.00	10000.00
99999	RE:	EA	1	0.00	0.00
99999	RE:	EA	1	0.00	0.00
99999	P.O. # 155412	EA	1	0.00	0.00
99999	RE:	EA	1	0.00	0.00
99999	DELIVER BY 6:30	EA	1	0.00	0.00

Charge

Invoice Net

15280.00

CODE	DESCRIPTION	UNIT	QUANTITY	UNIT PRICE	AMOUNT
66400	TOMATOES FLAT 4X5	CS	100.00	11.50	1150.00
65400	TOMATOES 4 COUNT PACKAGE	CS	1500	10.00	15000.00
66850	TOMATOES ROMA 25#	CS	200.00	14.00	2800.00
99999	RE:	EA	1	0.00	0.00
99999	P.O. # 155413	EA	1	0.00	0.00
99999	RE:	EA	1	0.00	0.00
99999	DELIVER APPT : 6:30 A.M.	EA	1	0.00	0.00

Charge

Invoice Net

19900.00

Superior Toma

SAN ANTONIO
(210) 434-4112

Invoice: 867415

URR'S SUPERMARKET
1820 RAILROAD DR.
L PASO, TX

RECEIVED BY _____

To comply with P.A.C.A. Trust Fund Provisions:
Do not cash or deposit this check in San Antonio, Texas. No claims will be paid for cash or deposits made in San Antonio, Texas.

SALESMAN NAME RICHARD M

Rt 100 S

WE SHIPPED BY: _____

TRUCK NO. _____ DRIVER: _____

TIME OUT: _____ A.M. P.M.

OFFICE COPY

Superior Toma

SAN ANTONIO
(210) 434-4112

Invoice: 867415

URR'S SUPERMARKET
1820 RAILROAD DR.
L PASO, TX

RECEIVED BY _____

To comply with P.A.C.A. Trust Fund Provisions:
Do not cash or deposit this check in San Antonio, Texas. No claims will be paid for cash or deposits made in San Antonio, Texas.

SALESMAN NAME RICHARD M

Rt 100 S

WE SHIPPED BY: _____

TRUCK NO. _____ DRIVER: _____

TIME OUT: _____ A.M. P.M.

The general use agricultural commodities listed on this invoice are covered by the Agricultural Commodities Act of 1971. For more information, please contact the Department of Agriculture, Office of Agricultural Commodity Services, Washington, D.C. 20250. This invoice is not valid unless it is accompanied by the invoice of the producer of the commodity.

Superior Toma

SAN ANTONIO
(210) 434-412

Invoice: 8700466 0

TURR'S SUPERMARKET
3820 RAILROAD DR.
PASO, TEXAS

RECEIVED BY _____

To comply with P.A.C.A. Trust Fund Provisions
County, San Antonio, Texas. No claims will

SA NAME RICHARD M

Rt 100 S

mea

We SHIPPED BY: _____

TRUCK NO. _____ DRIVER: _____

TIME OUT: _____ A.M. P.M.

To comply with P.A.C.A. Trust Fund Provisions
County, San Antonio, Texas. No claims will
OFFICE COPY 1

Superior Toma

SAN ANTONIO
(210) 434-412

Invoice: 871270 0

UK S SUPERMARKET
3820 RAILROAD DR.
PASO, TEXAS

RECEIVED BY _____

To comply with P.A.C.A. Trust Fund Provisions
County, San Antonio, Texas. No claims will

SA NAME RICHARD M

Rt 100

mea

We SHIPPED BY: _____

TRUCK NO. _____ DRIVER: _____

TIME OUT: _____ A.M. P.M.

To comply with P.A.C.A. Trust Fund Provisions
County, San Antonio, Texas. No claims will
OFFICE COPY 1

Superior Tomato-Avocado Co., Inc.

750 MERIDA
SAN ANTONIO, TEXAS 78207
(210) 434-4121 FAX (210) 434-1949

Invoice: 876267 DATE 10/21/00 PAGE 1
NUMBER 1851
FURRI'S SUPERMARKET'S, INC.
3820 RAILROAD DR.
EL PASO, TX 79924

RECEIVED BY _____ DATE _____

To comply with P.A.C.A. Trust Fund Provisions. All bills due and payable in 10 days in Bexar County, San Antonio, Texas. No claims allowed unless made immediately upon receipt of goods.

SALESWOMAN NAME **RICHARD MEDINA** NUMBER **1851**

RT 100 St 0

W# SHIPPED BY: JRM DRIVER: Antonio Alvarez DATE: 10/21/00

TRUCK NO. _____ DRIVER: _____ DATE: _____
TIME OUT: _____ A.M. P.M. TIME IN: _____ A.M. P.M.

OFFICE COPY

Superior Tomato-Avocado Co., Inc.

750 MERIDA
SAN ANTONIO, TEXAS 78207
(210) 434-4121 FAX (210) 434-1949

Invoice: 876720 DATE 10/23/00 PAGE 1
NUMBER 1851
FURRI'S SUPERMARKET'S, INC.
3820 RAILROAD DR.
EL PASO, TX 79924

RECEIVED BY _____ DATE _____

To comply with P.A.C.A. Trust Fund Provisions. All bills due and payable in 10 days in Bexar County, San Antonio, Texas. No claims allowed unless made immediately upon receipt of goods.

SALESWOMAN NAME **RICHARD MEDINA** NUMBER **1851**

RT 100 St

W# SHIPPED BY: JRM DRIVER: Antonio Alvarez DATE: 10/23/00

TRUCK NO. _____ DRIVER: _____ DATE: _____
TIME OUT: _____ A.M. P.M. TIME IN: _____ A.M. P.M.

OFFICE COPY

CODE	DESCRIPTION	UNIT	QUANTITY	UNIT PRICE	AMOUNT
66400	TOMATOES FLAT 4X5	CS	100.00	20.00	2000.00
65850	TOMATOES BLK 5X6 25#	CS	480.00	18.00	8640.00
65400	TOMATOES 4 COUNT PACKAGE	CS	1000	13.00	13000.00
99999	RE:	EA	1	0.00	0.00
99999	RE:	EA	1	0.00	0.00
99999	DELIVER BY 6:30 AM	EA	1	0.00	0.00
99999	SUNDAY 10/22/00	EA	1	0.00	0.00
99999		EA	1	0.00	0.00

Charge Invoice Net 23640.00

CODE	DESCRIPTION	UNIT	QUANTITY	UNIT PRICE	AMOUNT
66400	TOMATOES FLAT 4X5	CS	100.00	20.00	2000.00
65850	TOMATOES BLK 5X6 25#	CS	480.00	18.00	8640.00
65400	TOMATOES 4 COUNT PACKAGE	CS	1000	13.00	13000.00
99999	RE:	EA	1	0.00	0.00
99999	RE:	EA	1	0.00	0.00
99999	P.O. 157705	EA	1	0.00	0.00
99999	DEL. BY 6:30 A.M.	EA	1	0.00	0.00

Charge Invoice Net 20760.00

**IN RE: FURR'S SUPERMARKETS,
INC.; CAUSE NO. 01-10779
CHAPTER 11**

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