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APPENDIX A

[PUBLISH]
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 21-12133

In Re: NATHAN AARON FORREST, MARSHA WEIDMAN FORREST, Debtors.

SPRING VALLEY PRODUCE, INC., PRODUCE EXCHANGE CO., INC., FRESH DIRECT, INC., S. ROZA & COMPANY, INC.,
Plaintiffs-Appellants,

v.

NATHAN AARON FORREST, MARSHA WEIDMAN FORREST, Defendants-Appellees.

Filed: 08/31/2022

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:20-bk-03819-RCT

Before WILSON, BRANCH, and LAGOA, Circuit Judges.

WILSON, Circuit Judge:

In this case of first impression, we determine whether the Bankruptcy Code's exception to discharge in 11 U.S.C. § 523(a)(4) applies to debts incurred by a produce buyer who is acting as a trustee under the Perishable Agricultural Commodities Act (PACA). Appellant Spring Valley Produce, Inc. (SVP) is a creditor of Chapter 7 debtors Nathan and Marsha Forrest (the Forrests). The Forrests owe a pre-petition debt for produce which they are seeking to discharge. SVP initiated this adversary proceeding, seeking a declaration that the debt was nondischargeable under § 523(a)(4). The bankruptcy court granted the Forrests' motion to dismiss and held that § 523(a)(4) does not apply to PACA-related debts. After careful review of the briefs and the record and with the benefit of oral argument, we affirm the bankruptcy court's order dismissing SVP's claims because § 523(a)(4) does not except debts incurred by a PACA trustee from discharge.

In so holding, we adopt the following three-part test for determining whether a debtor is acting in a "fiduciary capacity" under § 523(a)(4) in relation to a creditor. First, the relationship must have (1) a trustee, who holds (2) an identifiable trust res, for the benefit of (3) an identifiable beneficiary or beneficiaries. Second, the relationship must define sufficient trust-like duties imposed on the trustee with respect to the trust res and beneficiaries to create a "technical" trust, with the strongest indicia of a technical trust being the duty to segregate trust assets and the duty to refrain from using trust assets for a non-trust

purpose. Third, the debtor must be acting in a fiduciary capacity before the act of fraud or defalcation creating the debt.

I. Factual Background and Procedural History

The undisputed facts are as follows. The Forrests are owners and officers of Central Market of FL, Inc. (Central Market), which buys and sells produce. SVP sold $261,504.15 worth of produce to Central Market for which Central Market never paid. During the transactions at issue, SVP and Central Market were licensed under PACA. SVP preserved its right as a PACA trust beneficiary by including the required statutory statement on its invoices to Central Market. Upon receiving and accepting SVP's produce shipments, Central Market became a PACA trustee of a trust res consisting of that produce.

On May 15, 2020, the Forrests filed a Chapter 7 bankruptcy petition hoping to discharge their business debts, including the debt owed to SVP. On August 14, 2020, SVP commenced this adversary proceeding, seeking a declaration that the debt is nondischargeable under § 523(a)(4). That statute excepts from discharge debts "for fraud or defalcation while acting in a fiduciary capacity[.]" 11 U.S.C. § 523(a)(4). SVP contended that Central Market incurred the debt "while acting in a fiduciary capacity" because it was serving as a PACA trustee when they failed to pay. And as principals of Central Market, SVP contended, the Forrests were personally liable for that PACA-related debt.

The Forrests moved to dismiss SVP's amended

complaint, arguing that a PACA trustee is not acting in a "fiduciary capacity" as that term is understood in the context of § 523(a)(4). Section 523(a)(4) does not apply to PACA-related debts, the Forrests argued, because PACA does not require segregation of trust assets nor prohibit use of trust assets for non-trust purposes. The bankruptcy court granted the Forrests' motion to dismiss. While determining that PACA imposes some trust-like duties, the bankruptcy court found that a PACA trust lacks the crucial element of a segregated trust res. Given the importance of this issue and the split of authority within this circuit, the bankruptcy court certified its order for direct appeal to this court pursuant to 28 U.S.C. § 158(d).

II. Standard of Review

On direct appeals from the bankruptcy court, we review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. *In re Dean*, 537 F.3d 1315, 1318 (11th Cir. 2008). A court's interpretation of the Bankruptcy Code is a question of law. *Pollitzer v. Gebhardt*, 860 F.3d 1334, 1338 (11th Cir. 2017).

III. Discussion

The parties dispute the correct test governing the scope and application of 11 U.S.C. § 523(a)(4). We also note that bankruptcy courts within this circuit have

generated varying results in applying § 523(a)(4).[1] Therefore, we begin by determining the appropriate standard governing § 523(a)(4)'s exception to discharge.

A. The § 523(a)(4) Exception to Discharge

The general rule is that an individual debtor's pre-bankruptcy debts are dischargeable in a Chapter 7 bankruptcy case. *In re Fernandez-Rocha*, 451 F.3d 813, 815–16 (11th Cir. 2006). Section 523 of the Bankruptcy Code lists various exceptions to this general rule of discharge. *See generally* 11 U.S.C. § 523. These exceptions are construed narrowly. *In re Fernandez-Rocha*, 451 F.3d at 816. The exception at issue provides that debts "for fraud or defalcation while acting in a fiduciary capacity" are discharged. 11 U.S.C. § 523(a)(4). For ease of reference, we will often refer to this statutory provision and all earlier versions of the provision as the "Fiduciary Capacity Exception." We also note that when we use the term "fiduciary capacity" in this opinion, we are referring only to that term as understood in the context of § 523(a)(4).

The Fiduciary Capacity Exception has existed through various bankruptcy statutes in effect since

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[1] One main point of dispute among bankruptcy courts in this circuit is whether trust assets must be segregated from non-trust assets for § 523(a)(4) to apply. Compare *In re Arthur*, 589 B.R. 761, 770 (Bankr. S.D. Fla. 2018) (concluding that § 523(a)(4) does not apply to PACA trusts because PACA trusts do not require segregation of trust assets), with *In re Tucker*, No. 06-5107, 2007 WL 1100482, at *4–5 (Bankr. M.D. Ga. Apr. 10, 2007) (concluding that the segregation of trust assets is not a requirement and thus § 523(a)(4) applies to PACA trusts).

1841. *Quaif v. Johnson*, 4 F.3d 950, 953 (11th Cir. 1993) (per curiam). But these statutes have all used similar language and all versions have referred to "defalcation" and to "fiduciary capacity" or "fiduciary character." *Id.* The focus of this case is not the meaning of the term " 'defalcation,' a word that only lawyers and judges could love."[22] *In re Jahrling*, 816 F.3d 921, 925 (7th Cir. 2016). Instead, this case focuses on the meaning of the term "fiduciary capacity."

The scope of the term fiduciary capacity in § 523(a)(4) is a question of federal law. *See In re Angelle*, 610 F.2d 1335, 1341 (5th Cir. 1980) (adopting that rule in the context of an earlier version of the Fiduciary Capacity exception).[33] Early Supreme Court cases interpreting the Fiduciary Capacity Exception have repeatedly stated that fiduciary capacity should not be construed expansively and is limited to the concept of "technical" trusts. *Quaif*, 4 F.3d at 953.

1. Principles from Early Supreme Court Cases on the Fiduciary Capacity Exception

The following Supreme Court cases provide us with a few key principles on the Fiduciary Capacity Exception. The first case interpreting the Fiduciary Capacity Exception was *Chapman v. Forsyth*, 43 U.S. (2 How.) 202, 11 L.Ed. 236 (1844). There, a principal

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[2] " 'Defalcation' refers to a failure to produce funds entrusted to a fiduciary." *Quaif*, 4 F.3d at 955.

[3] We have adopted as binding precedent all Fifth Circuit decisions issued before October 1, 1981, as well as all decisions issued after that date by a Unit B panel of the former Fifth Circuit. *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

was seeking to have debts incurred by his factor (or agent) excepted from discharge under the Fiduciary Capacity Exception. *Id.* 206–07. The principal gave cotton to his factor, who was to sell the cotton and remit the proceeds back to the principal. *Id.* at 206. The creditor in that case, the principal, argued that "[a] factor, with goods and money in his hands belonging to his principal, is in estimation of law, a trustee." *Id.* at 204. Thus, the crux of the creditor's argument was that the factor's failure to remit payment to the principal for the sale of the principal's cotton constituted a debt incurred for defalcation while acting in a fiduciary capacity.

The Court rejected this argument. *Id.* at 208. In doing so, the Court noted that if the Fiduciary Capacity Exception "embrace[d] such a debt, it [would] be difficult to limit its application." *Id.* And "[s]uch a construction would have left but few debts on which the law could operate." *Id.* The Court did agree that "[i]n almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust." *Id.* But the Court ultimately held that the Fiduciary Capacity Exception "speaks of *technical trusts*, and not those which the law implies from the contract" and held that a principal-factor relationship did not fall within the exception. *Id.* (emphasis added).

Put differently, fiduciary capacity refers to a trust "in its technical sense." *Upshur v. Briscoe*, 138 U.S. 365, 375, 11 S.Ct. 313, 34 L.Ed. 931 (1891). In *Upshur*, the Court focused on the prepositional phrase "while acting in" and concluded that the Fiduciary Capacity Exception "would seem to apply only to a debt created

by a person who was already a fiduciary when the debt was created." *Id.* at 378, 11 S.Ct. 313. Thus, the Court added a temporal limitation to the Fiduciary Capacity Exception in which the fiduciary obligations must predate the act of defalcation by the debtor.

The last Supreme Court case addressing the meaning of fiduciary capacity and technical trusts was *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 55 S.Ct. 151, 79 L.Ed. 393 (1934).[4] There, the creditor had a chattel mortgage in automobiles sold by the debtor. *Id.* at 330, 55 S.Ct. 151. The debtor sold one of the cars but failed to remit payment to the creditor. *Id.* When the debtor filed for bankruptcy, the creditor sought to have the debt on the mortgaged automobile excepted from discharge under the Fiduciary Capacity Exception and sued for conversion of the automobile. *Id.* at 330–31, 55 S.Ct. 151.

The Court asked whether the debtor, who held mortgaged property, was "a trustee in that strict and narrow sense" of the Fiduciary Capacity Exception. *Id.* at 333, 55 S.Ct. 151. The Court reaffirmed the principle that the debtor must be acting in a fiduciary capacity before the act of defalcation. *Id.* The Court found that "[i]t is not enough that, by the very act of wrongdoing out of which the contested debt arose, the bankrupt has become chargeable as a trustee ex maleficio." *Id.* While the documents executing the transaction characterized it as a trust relationship, the Court placed no emphasis on what the transaction

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[4]The Court did address § 523(a)(4) in *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 133 S.Ct. 1754, 185 L.Ed.2d 922 (2013), but that case focused on the meaning of defalcation and did not address technical trusts.

was called, but instead focused on the substance of the transaction. *Id.* at 334, 55 S.Ct. 151. And there, "[t]he substance of the transaction [was] this, and nothing more, that the mortgagor, a debtor, has bound himself by covenant not to sell the mortgaged chattel without the mortgagee's approval." *Id.* The Court then said that "[t]he resulting obligation is not turned into one arising from a trust because the parties to one of the documents have chosen to speak of it as a trust" and concluded that the Fiduciary Capacity Exception did not apply to this type of transaction. *Id.*

These early Supreme Court cases thus give us the following rules. First, the Fiduciary Capacity Exception does not apply to trusts implied by contract but applies to technical trusts or trusts in the technical sense. *Chapman*, 43 U.S. at 208. Second, the debtor must be acting in a fiduciary capacity before the act of defalcation creating the debt for the exception to apply. *Upshur*, 138 U.S. at 378, 11 S.Ct. 313. Third, the substance of the transaction, rather than its form, controls in determining whether a transaction fits the "strict and narrow" definition of a technical trust. *Davis*, 293 U.S. at 333–34, 55 S.Ct. 151.

2. A Technical Trust Requires A Trustee, an Identifiable Beneficiary, an Identifiable Trust Res, and Sufficient Trust-Like Duties

Although the Supreme Court has not provided a precise definition of technical trusts, we can look to definitions of trusts and general trust principles for clarity. As the Court in *Chapman* noted, there are two ways to look at the term "trust." 43 U.S. at 208. In a broad sense, the Court reasoned that there is some degree of "trust" imposed in almost all commercial

transactions. *Id.* The Court rightfully chose not to extend the Fiduciary Capacity Exception to this broad definition of trusts because doing so would except an inordinate number of debts from discharge. Instead, the Court limited the exception to technical trusts or trusts in the "technical sense." *Upshur*, 138 U.S. at 375, 11 S.Ct. 313.

Legal definitions on trusts provide the following insight on the distinction between trusts in a broad sense and trusts in a technical sense:

> In its technical sense, a trust is the right, enforceable solely in equity to the beneficial enjoyment of property, the legal title of which is vested in another and implies separate coexistence of the legal and the equitable titles vested in different persons at the same time; in its more comprehensive sense the term embraces every bailment, every transaction by agent or factor, every deposit, and every matter in which the slightest trust or confidence exists. The word *trust*, however, is frequently employed to indicate duties, relations, and responsibilities which are not strictly and technically trusts.

Trust, Black's Law Dictionary (11th ed. 2019) (citing William C. Dunn, *Trusts for Business Purposes* 2 (1922)).

This distinction between trusts in the technical sense and trusts in the more comprehensive or broad sense tracks with the Supreme Court's reasoning in *Chapman*. For example, the broad definition of trusts

would include the principal-factor relationship at issue in *Chapman*. But trusts in the technical sense are much narrower and include specific rights that do not exist in the broad or comprehensive definition of trust.

The Restatement (Third) of Trusts provides further insight on the characteristics of this narrower definition of trusts:

> In the strict, traditional sense, a trust involves three elements: (1) a trustee, who holds the trust property and is subject to duties to deal with it for the benefit of one or more others; (2) one or more beneficiaries, to whom and for whose benefit the trustee owes the duties with respect to the trust property; and (3) trust property, which is held by the trustee for the beneficiaries.

Restatement (Third) of Trusts § 2 cmt. f (2003).

As the Court noted in *Davis*, the Fiduciary Capacity Exception speaks of trusts in a "strict and narrow" sense. 293 U.S. at 333, 55 S.Ct. 151. Thus, for the Fiduciary Capacity Exception to apply, the relation between the creditor and the debtor must resemble this narrower definition of trusts, or trusts in the technical sense. Although we have not spelled out these three elements before, our decisions on the Fiduciary Capacity Exception have generally looked to whether the statute requires the debtor to hold trust property for the benefit of the creditor. *See Carey Lumber Co. v. Bell*, 615 F.2d 370, 374 (5th Cir. 1980) (finding that the debtor was acting in a fiduciary capacity where the statute "clearly define[d] the trust res"); *In re*

Fernandez-Rocha, 451 F.3d at 818 (finding that the debtor was not acting in a fiduciary capacity where statute did not "require a doctor to place funds 'in trust' for the benefit of third party patients").

As the Restatement notes, a trust in the "strict, traditional sense" involves duties imposed on the trustee with respect to the trust res and the beneficiary. And in analyzing whether a statutory trust can meet the narrow definition of a technical trust under the Fiduciary Capacity Exception, we have generally looked to the duties imposed by the statute. Thus, along with having an identifiable trustee, beneficiary, and trust res, a technical trust for purposes of § 523(a)(4) should also impose sufficient trust-like duties.[5]

3. Trust-Like Duties Sufficient to Create a Technical Trust

The core issue here is what type of trust-like duties are sufficient to create a technical trust under the Fiduciary Capacity Exception. While we have never expressly held what trust-like duties would be

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[5] This definition of technical trusts also follows how many bankruptcy courts in this circuit have defined technical trusts in applying the Fiduciary Capacity Exception. For example, one bankruptcy court adopted the rule that a technical trust requires "a segregated trust res, an identifiable beneficiary, and affirmative trust duties established by contract or by statute." *In re Triggiano*, 132 B.R. 486, 490 (Bankr. M.D. Fla. 1991). Another bankruptcy court adopted a different three-part test, reasoning that a technical trust requires "sufficient words to create a trust, a clearly defined trust res, and an intent to form a trust." *In re Davis*, 115 B.R. 346, 350 (Bankr. N.D. Fla. 1990).

sufficient, we are not writing on a clean slate. Our precedent has generally emphasized two duties: the duty to segregate trust assets and the duty to refrain from using trust-assets for non-trust purposes. The parties dispute whether either of these duties is a requirement for a technical trust. SVP contends that these duties are not required and that the PACA statutory trust imposes other duties that are sufficient. The Forrests respond that PACA fails to meet the narrow definition of a technical trust under § 523(a)(4) because it does not require segregation of trust assets, nor does it prohibit the use of trust assets for a non-trust purpose, and under our caselaw, the duty to segregate trust assets is a requirement for the Fiduciary Capacity Exception to apply. In its reply brief, SVP argues that a PACA trust imposes sufficient segregation and does not expressly permit the use of trust assets for a non-trust purpose.

Given this dispute among the parties, and bankruptcy courts within this Circuit, we review our caselaw, as well as the decisions of our sister circuits, to determine what trust-like duties are sufficient for a statute to create a technical trust. In doing so, we note that state law may provide different definitions or requirements of a trust generally, but the scope of fiduciary capacity under § 523(a)(4) is a question of federal law. *In re Angelle*, 610 F.2d at 1341.

There are only five published decisions in this Circuit and the former Fifth Circuit discussing the Fiduciary Capacity Exception. Of those five, four dealt with the concept of statutory trusts. Statutory trusts fall somewhere between the traditional categories of a trust created voluntarily between the parties by contract, known as an express trust, and a trust

created by operation of law, known as a constructive or resulting trust. *Quaif*, 4 F.3d at 953. While express trusts might fall under § 523(a)(4), resulting trusts do not because they fail the basic requirement that the debtor must be acting in a fiduciary capacity before the act of defalcation creating the debt. *Id.* In determining whether a statutory trust constitutes a technical trust under § 523(a)(4), we have looked to the trust-like duties imposed by a statute. In the two cases in which we found that a statutory trust did create a technical trust, the trust-like duties that were sufficient consisted of the duty to segregate trust assets or the duty to refrain from using trust assets for a non-trust purpose.

Starting with cases from the former Fifth Circuit, the first case addressing § 523(a)(4) was *Carey Lumber Co. v. Bell*. At issue there were Oklahoma lien trust statutes requiring that funds "received under any mortgage given for the purpose of construction or remodeling any structure shall upon receipt by the mortgagor be held as trust funds for the payment of all valid lienable claims due." *Carey Lumber*, 615 F.2d at 373 n.2. The Oklahoma statutes further provided that "[s]uch trust funds shall be applied to the payment of said valid lienable claims and no portion thereof shall be used for any other purpose until all lienable claims due and owing shall have been paid." *Id.* We rejected the debtor's argument that the Fiduciary Capacity Exception did not apply, finding that "the Oklahoma statutes clearly define the trust res and charge the trustee with affirmative duties in applying the trust funds." *Id.* at 374. Thus, we found that the statutes' duties to hold funds in trust and that trust funds could be used only for trust purposes

was sufficient for the debtor to be acting in a fiduciary capacity. *Id.*

Another case, *In re Cross*, addressed whether a debtor was acting in a fiduciary capacity based on a contract between the parties, not a statute. 666 F.2d 873, 876 (5th Cir. Unit B 1982). The debtor was in construction and entered into a contract with the creditor where the creditor would provide funds to the debtor to build a post office. *Id.* We found that this contract did not establish a fiduciary duty, noting the contract did not require the debtor "to maintain a segregated account" for the construction funds received from the creditor. *Id.* at 881. Similarly, in *In re Angelle*, we doubted "that a statute which merely makes misappropriation of funds a crime without, for example, *requiring segregation of accounts* would be enough to charge the parties with an intent to create a trust." 610 F.2d at 1340 (emphasis added).

The first case decided by the Eleventh Circuit on the Fiduciary Capacity Exception was *Quaif v. Johnson*. There, the statute at issue was a Georgia statute that required insurance agents to hold insurance premium payments from insured parties in a separate account and prohibited insurance agents from commingling the premiums with their personal funds. 4 F.3d at 953. In holding that the Georgia statute created a technical trust and that the Fiduciary Capacity Exception applied, we noted the following:

> It is true that some cases have indicated that a separation of the funds is necessary to establish the existence of a technical trust. *See Matter of McCraney*, 63 B.R. 64, 67 (Bankr. N.D. Ala. 1986); *In re*

> *Kelley*, 84 B.R. 225, 230 (Bankr. M.D. Fla. 1988). However, the court does not believe that a separation of premium funds *into distinct bank accounts* is an essential requirement of a trust. The Georgia statute requires that the premiums must be separate from other types of funds, but may be kept in a common premium account as long as there were adequate records of the sources of these funds. The court finds that this is sufficient "segregation" to satisfy the requirement that the fiduciary duties be created prior to the act of defalcation.

Id. at 954.

The parties, and bankruptcy courts in this Circuit, dispute whether this paragraph from *Quaif* expressly held that the duty to segregate trust assets is a requirement for a technical trust to exist, or whether it is only a factor in the analysis. We do not read *Quaif* to stand for the proposition that a segregation of funds requirement is always necessary for a technical trust to exist. In fact, we noted that bankruptcy courts have adopted this rule, but we chose not to adopt it. And while the phrase "sufficient 'segregation' " could be interpreted as a segregation requirement, when read in context it seems to be more of a reference to the requirement that the Georgia statute imposed sufficient duties pre-defalcation. Further, our holding in *Carey Lumber* shows that a statute can impose sufficient duties if it requires that the trustee cannot use trust funds for a non-trust purpose even though the statute did not impose a duty to segregate trust assets. However, when one reads *Quaif*, *In re Cross*, and *In re*

Angelle together, it is apparent that the duty to segregate trust assets is an important factor in the analysis.[6]

We also note that our sister circuits have emphasized the duties to segregate trust assets and to refrain from using trust assets for a non-trust purpose. For example, the Seventh Circuit has held that the hallmarks of an express trust for purposes of the Fiduciary Capacity Exception are "*segregation of funds*, management by financial intermediaries, and recognition that the entity in control of the assets has at most 'bare' legal title to them." *In re Berman*, 629 F.3d 761, 769 (7th Cir. 2011) (alteration adopted and emphasis added). Similarly, in discussing its caselaw on the Fiduciary Capacity Exception, the Fifth Circuit remarked that although it had "not expressly identified the particular 'trust-like' duty" sufficient for a technical trust, "one such duty has loomed large—the duty that a trustee refrain from spending trust funds for non-trust purposes." *In re Tran*, 151 F.3d 339, 343–44 (5th Cir. 1998).

Further support that the duty to segregate trust assets and the duty not to use trust assets for non-trust purposes are significant duties of a trustee comes from the Restatement (Third) of Trusts. The

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[6] Our most recent published decision addressing the Fiduciary Capacity Exception, *In re Fernandez-Rocha*, involved a Florida statute that required doctors to have sufficient means to pay malpractice claims. 451 F.3d at 815. However, that statute failed to meet the technical trust standard for the more fundamental reason that the statute did not establish a trust res, trustee, and beneficiary. See *id*. at 818 (explaining that the statute did not "require a doctor to place funds 'in trust' for the benefit of third party patients").

Restatement lists several duties imposed on trustees, including the duty of loyalty and the duty to segregate and identify trust property. The duty of loyalty provides that "a trustee has a duty to administer the trust solely in the interest of the beneficiaries." Restatement (Third) of Trusts § 78(1) (2007). In other words, the trustee has a duty not to use trust assets for a non-trust purpose. The Restatement also provides that the trustee has "a duty to keep the trust property separate from the trustee's own property and, so far as practical, separate from other property not subject to the trust." *Id.* § 84.

In short, our caselaw shows that we have not clearly defined a technical trust in any one decision. But synthesizing all of these cases, we hold that the following test applies in determining whether a debtor is acting in a "fiduciary capacity" under § 523(a)(4). First, the fiduciary relationship [7] must have (1) a trustee, who holds (2) an identifiable trust res, for the benefit of (3) an identifiable beneficiary or beneficiaries. This tracks the traditional and narrow definition of trusts in early Supreme Court cases as well as our own approach and the approach taken by bankruptcy courts in this Circuit. Second, the fiduciary relationship must define sufficient trust-like duties imposed on the trustee with respect to the trust res and beneficiaries to create a technical trust. Based on our caselaw, the two most important trust-like duties, and the ones that we have held create a technical trust, are the duty to segregate trust assets and the duty to refrain from using trust assets for a non-trust

[7] The term "fiduciary relationship" here refers to either a statutory trust or an express trust created by contract.

purpose. Third, the debtor must be acting in a fiduciary capacity before the act of fraud or defalcation creating the debt. *Quaif*, 4 F.3d at 953.

We also emphasize that our holding today is limited to the narrow meaning of "fiduciary capacity" in the context of § 523(a)(4)'s exception to discharge. Our decision does not address whether a fiduciary relationship creates a trust in other contexts. For instance, a statute or contract might define a relationship as that of a trust, but the scope of fiduciary capacity in the context of § 523(a)(4) is more limited and the exception does not apply simply because the parties or a statute label the relationship as a trust. *See Davis*, 293 U.S. at 334, 55 S.Ct. 151 ("The resulting obligation is not turned into one arising from a trust because the parties to one of the documents have chosen to speak of it as a trust."); *In re Tran*, 151 F.3d at 345–46 (noting that although the statute used the phrase "in trust," it did not create the required fiduciary relationship for § 523(a)(4) to apply). And on that note, although our discussion today focuses on a statutory trust, this analysis should equally apply to trusts created by contract, or express trusts. Courts should be wary of parties using labels like "trust" or "beneficiary" in contracts and, just like a statute, should ensure that the contract meets all the requirements of a technical trust. Further, our decision does not extend to analyzing whether a trustee has committed a breach of trust or to fiduciary relationships not involving trusts.

B. PACA-Related Debts Are Not Excepted from Discharge Under § 523(a)(4)

With a clear test in place, we now address whether a PACA trustee is acting in a fiduciary capacity in the context of § 523(a)(4).

The sale of perishable agricultural commodities, generally referred to as produce, can be a "real gamble." H.R. Rep. No. 98-543, at 406 (1983). To mitigate the risks facing small-business produce sellers and promote fair practices among dealers, Congress enacted PACA in 1930. 7 U.S.C. § 499a–499t. PACA mandates licensing of all commission merchants, dealers, and brokers who buy and sell produce in interstate commerce. *Id.* § 499c(a). Under PACA, it is unlawful for a produce buyer to fail to deliver prompt payment to a produce seller, and the seller can sue the buyer for damages for this unlawful act. *Id.* §§ 499b(4), 499e(a).

Congress further amended PACA in 1984 to establish a statutory trust between produce buyers and sellers. *Frio Ice, S.A. v. Sunfruit, Inc.*, 918 F.2d 154, 156 (11th Cir. 1990). The PACA trust was created in response to the unfavorable practice of produce buyers granting a security interest in their unpaid produce to lenders, leading to an increase in delinquent payments. *Id.* The PACA statute provides, in part, that:

> Perishable agricultural commodities received by a commission merchant, dealer, or 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.

7 U.S.C. § 499e(c)(2). A PACA trust "automatically arises in favor of a produce seller upon delivery of produce." *Frio Ice*, 918 F.2d at 156. To preserve the benefits of the trust, the produce seller must file written notice of intent to preserve its rights with the United States Department of Agriculture and the produce buyer. *Id.*

1. PACA Creates a Trustee, Identifiable Beneficiaries, and an Identifiable Trust Res

Our first step of the analysis under the Fiduciary Capacity Exception looks to whether the statute creates a trustee and identifiable beneficiaries and trust res. Here, the PACA statute, on its face, creates all three. The statute states that "a commission merchant, dealer, or broker" who receives perishable agricultural commodities must hold those items in trust for the benefit of "all unpaid suppliers or sellers of such commodities." 7 U.S.C. § 499e(2). Thus, the produce buyer is acting as a trustee. The beneficiaries are "all unpaid" produce sellers. The trust res consists of produce received "in all transactions," as well as "any receivables or proceeds" of that produce. A PACA

trust therefore satisfies the first requirement of a technical trust under § 523(a)(4).

2. PACA Does Not Impose Sufficient Trust-Like Duties to Create a Technical Trust

Turning to the second requirement, we must determine whether the PACA statute imposes sufficient trust-like duties to create a technical trust. Aside from the duty to hold produce in trust until produce sellers are paid, the statute itself does not provide any specific duties on the PACA trustee. But the PACA regulations provide further guidance.

The PACA regulations state that "[t]rust assets are to be preserved as a nonsegregated 'floating' trust." 7 C.F.R. § 46.46(b). They also indicate that "[c]ommingling of trust assets is contemplated." *Id.* Congress sought to structure the PACA trust as a nonsegregated trust "to minimize the burden of the PACA trust on produce dealers." *Frio Ice*, 918 F.2d at 159. While the regulations seem to lack the quintessential trust-like duty of segregating trust assets, SVP argues in its reply brief that PACA meets the segregation requirement set out in *Quaif*. According to SVP, the PACA trust is like the statutory trust at issue in *Quaif* because the PACA trust contains a common account for trust property from all the produce sellers. This segregation satisfies the standard in *Quaif*, the argument goes, because we held that further separation into distinct accounts is not a requirement so long as the trust property is held in a separate account from non-trust property. Further, the regulations only refer to the commingling of trust

assets, but do not refer to commingling of non-trust assets.

We reject SVP's argument for three reasons. First, SVP seems to equate a nonsegregated trust and segregated trust where the property for multiple beneficiaries is held in a common account. But these are two different concepts. The duty to segregate relates to the "duty to keep the trust property separate from the trustee's own property." Restatement (Third) of Trusts § 84 (2007). Thus, if a trust is "nonsegregated," then that implies that trust permits trust assets to be in the same account as non-trust assets.

Second, SVP conflates the terms "commingle" and "mingle." "Mingle" refers to the interaction of property from different trusts. *Id.* cmt. c. This is what we were addressing in *Quaif* where we held that it was sufficient to keep the insurance premiums in a common account. Mingling is permitted when it is "impractical or undesirable" to maintain separate account as long as accurate records are maintained and the funds are not put into the trustee's personal account. *Id.* On the other hand, "commingle" means "to mix personal funds with those of a beneficiary or client, [usually] in an improper or illegal way." *Commingle*, Black's Law Dictionary (11th ed. 2019). Thus, the phrase "[c]ommingling of trust assets is contemplated" refers to the commingling of trust assets with non-trust assets.

Third, the PACA statute is distinguishable from the statute in *Quaif* because, there, the statute expressly forbade the insurance agent from commingling insurance premiums with his personal funds. *Quaif*, 4 F.3d at 953. The PACA statute contains no

such provision. On the contrary, the PACA regulations suggest that commingling is permitted. We therefore conclude that PACA does not impose the important trust-like duty to segregate trust assets.

Also lacking from the PACA statute is the duty to refrain from using trust-assets for a non-trust purpose. The Forrests argue that PACA permits a PACA trustee to use trust assets for a non-trust purpose. They cite to the Federal Register discussing the PACA trust which states that:

> Trust assets are available for other uses by the buyer or receiver. For example, trust assets may be used to pay other creditors. It is the buyer's or receiver's responsibility as trustee to insure that it has sufficient assets to assure prompt payment for produce and that any beneficiary under the trust will receive full payment, including sufficient assets to cover the value of disputed shipments.

Regulations Under the Perishable Agricultural Commodities Act; Addition of Provisions to Effect a Statutory Trust. 49 Fed. Reg. 45735-01, 45738 (Nov. 20, 1984).

In its reply brief, SVP contends that the PACA trustee cannot use trust assets for non-trust purposes "if doing so results in the trustee having an insufficient amount to pay the outstanding PACA Trust claims." This is because, SVP argues, the PACA regulations require the PACA trustee "to maintain trust assets in a manner so that the trust assets are freely available to satisfy outstanding obligations to sellers of perishable agricultural commodities." 7 C.F.R. §

46.46(d)(1). According to SVP, the only situation when the PACA trustee can use trust assets for a non-trust purpose is when there is an excess amount in the trust and doing so would not dissipate the trust. And, the argument goes, this excess amount would not constitute PACA trust assets.

We find this argument lacks merit. The PACA statute provides that the trust consists of produce received as well as proceeds from the sale of that produce. 7 U.S.C. § 499e(c)(2). Consider the following scenario. A produce buyer buys $10,000 worth of fruits and vegetables from a produce seller. Those items go into the PACA trust. The produce buyer then sells that produce to its customers for $12,000, netting a profit of $2,000. As that $12,000 is proceeds of the produce received, it is a trust asset and goes back into the PACA trust. But since the produce buyer has an outstanding debt to the produce seller of only $10,000, the produce buyer could spend up to $2,000 of trust assets for a non-trust purpose while still upholding its duty to maintain enough assets to satisfy outstanding claims. Thus, the PACA statute and accompanying regulations do not prohibit the use of trust assets for non-trust purposes, and it could be permissible to do so in certain situations.

Despite the absence of a requirement to segregate trust assets and to refrain from using trust assets for a non-trust purpose, SVP maintains that PACA imposes other trust-like duties sufficient to create a technical trust. In particular, SVP points to the following duties: the trustee must hold all assets subject to the PACA trust for the benefit of unpaid produce sellers until they receive full payment; the trustee must maintain sufficient trust assets to satisfy

outstanding debts to unpaid produce sellers; and the trustee must keep accurate records of all transactions for a period of two years.

Starting with the trustee's obligation to hold trust assets for the benefit of unpaid produce sellers until they receive full payment, this is not so much a duty, but rather goes to the first part of our test in determining whether a statute creates a trustee, beneficiary, and trust res. Under the second part of our test, we focus on the duties of the trustee to manage the property being held in trust. And here, PACA does not impose the typical trust-like duty of segregation nor does it prohibit the trustee from using the trust assets for a non-trust purpose. Further, the statute does not expressly say that PACA beneficiaries must be paid from the PACA trust. Instead, the statute provides that the trust assets must be held in trust "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). But the statute does not specify whether the unpaid produce sellers are to be paid with funds from the PACA trust or funds from another source.

Next, we recognize that the PACA regulations do impose a duty on the trustee to maintain sufficient assets to satisfy outstanding debts, but we are not convinced that this duty is "trust-like" in nature. SVP cites no authority suggesting that this is a typical trust-like duty rather than a means to enforce the contractual obligations of the produce buyer to pay the produce seller. After all, "the central purpose of [the PACA trust] is to ensure payment to trust beneficiaries." *Frio Ice*, 918 F.2d at 159.

Lastly, SVP is correct that the duty to keep accurate records is a typical trust-like duty. *See* Restatement (Third) of Trusts § 83 (2007) ("A trustee has a duty to maintain clear, complete, and accurate books and records regarding the trust property and the administration of the trust."). However, we find that this trust-like duty alone cannot create a technical trust absent the important trust like duties of segregation and refraining from using trust assets for a non-trust purpose.

SVP also argues that general principles of trust law impose additional duties on PACA trustees, citing our decision in *Gargiulo v. G.M. Sales, Inc.*, 131 F.3d 995 (11th Cir. 1997). There, we reaffirmed the rule that "[g]eneral principles of trust law govern the PACA trust, and under such principles, even if property is transferred in breach of the trust, a 'bona fide purchaser' receives the property free of the trust." *Id.* at 999. But that case was in the context of a PACA creditor seeking disgorgement of loan payments to banks made with PACA trust funds. *Id.* at 998. The "[g]eneral principles of trust law" in *Gargiulo* thus refer to the circumstances under which a PACA creditor could disgorge those payments. *Id.* at 999. Further, a PACA trustee who misappropriates PACA trust funds might be in "breach of trust," *id.* at 999, but when analyzing the Fiduciary Capacity Exception, we are determining whether the fiduciary relationship between the debtor and creditor meets the narrower definition of a technical trust. Thus, our holding today that a PACA trustee is not acting in a fiduciary capacity in the context of § 523(a)(4) does not affect a determination on whether a PACA trustee's misuse of trust assets constitutes a breach of trust. In addition, our

holding does not impact the legal definition of PACA assets as trust assets, thus entitling PACA creditors to priority in bankruptcy proceedings. *C.H. Robinson Co. v. Tr. Co. Bank, N.A.*, 952 F.2d 1311, 1315 n.3 (11th Cir. 1992) ("Trust assets are actually exempt from the bankruptcy estate, and all trust beneficiaries must be paid in full before any remainder is distributed to secured creditors.").

In sum, the second step of our analysis under the Fiduciary Capacity Exception requires us to examine the trust-like duties imposed by the statute on the trustee. And here, we find that PACA does not impose sufficient trust-like duties to create a technical trust. Two of the hallmark duties of a technical trust are not imposed by the statute: the duty to segregate trust assets and the duty to refrain from using trust assets for a non-trust purpose. To the contrary, the PACA regulations suggest that commingling and the use of PACA trust assets for non-trust purposes is permitted. PACA does impose other duties on produce buyers, but one of these duties is not necessarily trust-like in nature and the remaining duties are simply not sufficient to meet the narrow definition of a technical trust.

3. A PACA Trust More Closely Resembles a Constructive or Resulting Trust

Based on our decision in *Frio Ice*, we find that a PACA trust bears closer resemblance to a constructive or resulting trust than a technical trust. As discussed, constructive or resulting trusts do not qualify as technical trusts under § 523(a)(4) because they do not meet the third requirement that the debtor must

be acting in a fiduciary capacity before the act of defalcation creating the debt. In *Frio Ice*, the issue was whether a district court could order an injunction to enforce payment from a PACA trust. *Frio Ice*, 918 F.2d at 155; *see also* 7 U.S.C. § 499e(c)(5) ("The several district courts of the United States are vested with jurisdiction specifically to entertain ... actions by trust beneficiaries to enforce payment from the trust."). We held that "[u]pon a showing that the trust is being dissipated or threatened with dissipation, a district court should require the PACA debtor to escrow its proceeds from produce sales, identify its receivables, and inventory its assets." *Frio Ice*, 918 F.2d at 159 (footnote omitted). In other words, a district court can order the PACA trustee to segregate trust assets upon a showing that the trust is being dissipated. In fact, we noted that "[s]egregation often may be the only means by which a federal court can prevent dissipation." *Id.* If segregation of trust assets is a strong indicator of a technical trust and that duty is only imposed after an act of defalcation—*i.e.*, dissipation of trust assets—then a PACA trust resembles a constructive or resulting trust to which § 523(a)(4) would not apply.

4. SVP's Policy Arguments Are Not Persuasive

We now turn to the policy arguments made by SVP. While we are convinced that a PACA trust does not meet the narrow exception to discharge in § 523(a)(4), we recognize that this case involves two statutes with competing interests. As many courts have made clear, whether § 523(a)(4) discharges a PACA trustee's obligations "represents a tug-of-war

between two competing federal statutes." *In re Villa*, 625 B.R. 111, 121 (Bankr. N.D. Fla. 2021). On the one hand, the Bankruptcy Code, "grant[s] a fresh start to the honest but unfortunate debtor." *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007) (internal quotation marks omitted). And on the other hand, PACA was enacted "to encourage fair trading practices in the marketing of perishable commodities." *Frio Ice*, 918 F.2d at 155. Our holding today balances these two interests.

SVP contends that our holding is contrary to Congress's intent, will negatively impact the produce industry, and will erode the protections afforded by PACA. First, SVP argues that because Congress amended PACA in 1984 and amended § 523(a)(4) in 2005, this timing difference shows that Congress could have chosen to exclude PACA trust obligations from § 523(a)(4) but chose not to. However, we find that this timing-difference argument cuts both ways. As the bankruptcy court below noted, "Congress has never been shy or reluctant about enacting express exceptions to the bankruptcy discharge." Congress has enumerated nineteen exceptions to discharge. *See* 11 U.S.C. § 523(a)(1)–(19). While Congress could have chosen to exclude PACA-related debts from § 523(a)(4), it is just as possible that Congress could have chosen to add an express exception to discharge for those debts.

SVP also suggests that Congress could have classified PACA debts as ordinary business debts and imposed other remedies for produce sellers such as liens. But instead, Congress chose to impose a trust relationship between produce buyers and sellers. SVP argues that the purpose of this was to except PACA

debts from discharge under § 523(a)(4). This argument too lacks merit. SVP cites no support in the PACA statute or regulations showing that this was Congress's purpose in creating the PACA trust. On the contrary, the statute provides that the purpose of the PACA trust was to address the "burden on commerce in perishable agricultural commodities" resulting from produce buyers granting security interests in their unpaid produce to lenders. 7 U.S.C. § 499e(c)(1). Because Congress labelled PACA debts as trust property, "secured lenders will be forced to return trust property they have received unless they can establish their status as bona fide purchasers." *C.H. Robinson Co.*, 952 F.2d at 1315. Thus, the PACA trust provides PACA creditors with a means to disgorge payments made from the PACA trust to third-party lenders. Further, the status of PACA debts as trust property entitles PACA creditors to the highest priority in bankruptcy proceedings. *See id.* ("[W]hen trust assets are distributed in bankruptcy, trust beneficiaries are to be paid first."). Therefore, without support to the contrary, we are not convinced that the purpose of the PACA trust was to except a produce buyer's debts from discharge when there remain other benefits of labelling those debts as assets of a trust.

Finally, SVP argues that not excepting PACA-related debts from discharge will leave PACA creditors without recourse. But as we have already noted, there are several avenues of recourse remaining to PACA creditors. They can seek disgorgement of payments made in breach of the PACA trust, and they are entitled to the highest priority in bankruptcy. In addition, PACA beneficiaries can obtain injunctive relief in district court to have trust assets segregated for the

benefit of all unpaid produce sellers. *Frio Ice*, 918 F.2d at 159.

Allowing PACA debtors to be freed from personal liability for their debts through bankruptcy discharge promotes the overarching goal of the Bankruptcy Code of providing debtors with a fresh start. At the same time, PACA still provides significant benefits to unpaid produce sellers as those creditors are entitled to the highest priority in a Chapter 7 liquidation. Our decision will not erode the protections of PACA and will strike a balance between these two statutes.

IV. Conclusion

We hold that debts incurred by a produce buyer acting as a PACA trustee are not excepted from discharge under § 523(a)(4). While a PACA trust does identify a trustee, beneficiary, and trust res, thus satisfying the first step of our analysis, it does not impose sufficient trust-like duties to fit the narrow definition of a technical trust under § 523(a)(4). PACA does not impose the duties to segregate trust assets and refrain from using trust assets for a non-trust purpose, which are strong indicia of a technical trust. Instead, a PACA trust more closely resembles a constructive or resulting trust, which do not fall within § 523(a)(4)'s exception to discharge. Therefore, we affirm the bankruptcy court's order dismissing SVP's complaint in this adversary proceeding.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-90014-H

SPRING VALLEY PRODUCE, INC., PRODUCE EXCHANGE CO., INC., FRESH DIRECT, INC., S. ROZA & COMPANY, INC.,

Petitioners,

vs.

NATHAN AARON FORREST,
MARSHA WEIDMAN FORREST,

Respondents.

Petition for Permission to Appeal from the United States Bankruptcy Court
for the Middle District of Florida

Before: WILSON, ROSENBAUM, and BRASHER, Circuit Judges.

BY THE COURT:

The Petition for Permission to Appeal pursuant to 28 U.S.C. Section 158(d)(2)(A) is GRANTED.

APPENDIX C

UNITED STATES BANKRUPTCY COURT
M.D. FLORIDA, TAMPA DIVISION

CASE NO. 8:20-BK-03819-RCT
ADV. NO. 8:20-AP-00447-RCT

In re: Nathan Aaron FORREST and Marsha Weidman Forrest, Debtors.

Spring Valley Produce, Inc., et al., Plaintiffs.

v.

Nathan Aaron Forrest and
Marsha Weidman Forrest, Defendants.

Signed May 4, 2021

ORDER GRANTING PLAINTIFFS' MOTION FOR CERTIFICATION FOR DIRECT APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND CERTIFICATION OF DIRECT APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Before the Court is Plaintiffs' Motion for Certification for Direct Appeal to the United States Court of Appeals for the Eleventh Circuit (the "Motion") (Doc.

23), in which Plaintiffs ask, pursuant to Fed. R. Bankr. P. 8006(f), the Court to certify a direct appeal of its Memorandum Decision and Order Granting Defendants' Amended Motion to Dismiss Amended Adversary Complaint (Doc. 20) (the "Order"). Defendants have not opposed the Motion. The Court finds the Motion complies with the service and content requirements of Fed. R. Bankr. P. 8006(f)(2). Upon due consideration of the Motion and as foreshadowed in the Order, the Court will grant the Motion and will certify the direct appeal.

Background

On April 2, 2021, the Court entered the Order, which dismissed this adversary proceeding with prejudice. Plaintiffs timely appealed the Order and have sought certification for direct appeal, arguing that the issues presented by the appeal satisfy the grounds stated in 28 U.S.C. § 158(d)(2)(A)(i) and (ii).

In this proceeding,[1] Plaintiffs, who are produce suppliers, sought a declaration that certain debts owed to them and arising under the trust provisions of the Perishable Agricultural Commodities Act ("PACA") [2] were not dischargeable pursuant to

[1] At the time it rendered its decision embodied in the Order, the Court also had before it a nearly identical motion by Defendants in a nearly identical adversary proceeding brought by G.W. Palmer & Co., Inc. (8:20-ap- 00448-RCT). The plaintiff in that adversary did not appeal the dismissal order, which was virtually identical to the Order appealed by Plaintiffs in this adversary proceeding.

[2] 7 U.S.C. §§ 499a – 499s.

§ 523(a)(4) of the Bankruptcy Code.[3] The issue, as framed by the Court, was whether the trust obligations set forth in PACA satisfy the "fiduciary capacity" requirement to render a PACA-related debt nondischargeable under 11 U.S.C. § 523(a)(4).

Plaintiffs advanced the position, adopted by a majority of courts, that PACA trusts satisfy the fiduciary requirements for purposes of § 523(a)(4).[4] Defendants advanced the minority view that PACA trusts do not satisfy the fiduciary requirements of § 523(a)(4).[5] Noting that bankruptcy courts in the Eleventh Circuit were divided on the issue,[6] the Court, after review of the application of § 523(a)(4) to statutory trust

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[3] 7 U.S.C. §§ 499a – 499s.

[4] See *Alliance Shippers, Inc. v. Guarracino* (*In re Guarracino*), 575 B.R. 298, 311 (Bankr. D.N.J. 2017) (listing cases); see also *N.P. Deoudes, Inc. v. Snyder* (*In re Snyder*), 184 B.R. 473 (D. Md. 1995); *E. Armata, Inc. et al. v. Parra* (*In re Parra*), 412 B.R. 99 (Bankr. E.D. N.Y. 2009); *A.J. Rinella & Co. v. Bartlett* (*In re Bartlett*), 397 B.R. 610 (Bankr. D. Mass 2008).

[5] See *CR Adventures LLC v. Hughes* (*In re Hughes*), 609 B.R. 789 (Bankr. N.D. Ill. 2019).

[6] Compare *Coosemans Miami, Inc. v. Arthur* (*In re Arthur*), 589 B.R. 761 (Bankr. S.D. Fla. 2018) (holding a PACA trust is not a "technical trust" for purposes of § 523(a)(4)), and *Cardile Bros. Mushroom Pkg., Inc. v. McCue* (*In re McCue*), 324 B.R. 389 (Bankr. M.D. Fla. 2005) (holding a PACA trust is not a technical trust because a PACA trust has no "segregated trust res"), with *In re Villa*, 625 B.R. 111 (holding a PACA trust is a "technical trust" for purposes of § 523(a)(4)), and *Gen. Produce, Inc. v. Tucker* (*In re Tucker*), No. 06-50092- JDW, Adv. No. 06-5107, 2007 WL 1100482 (Bankr. M.D. Ga. Apr. 10, 2007) (same), and *Collins Bros. Corp. v. Perrine* (*In re Perrine*), No. 05-10816-WHD, Adv. No. 05-1118, 2007 WL 7142580 (Bankr. N.D. Ga. Sept. 27, 2007) (same).

obligations including a review of certain key appellate decisions in the Eleventh Circuit, adopted the minority view.

The Court concluded that the minority view was more in line with the "strict and narrow" interpretation due the fiduciary exception to discharge provided in § 523(a)(4).[7] As the Court stated in the Order:

> Although the Eleventh Circuit has not addressed the issue squarely, it has steered lower courts towards narrowing the scope of § 523(a)(4) and pointed toward the need to have, at a minimum, "some" segregation of trust assets or a prohibition of using trust funds for non-trust purposes. These are the hallmarks of the type of trust relationship that should establish "fiduciary capacity" for purposes of § 523(a)(4) of the Bankruptcy Code.

The Court also observed that the issue of the statutory interpretation of the fiduciary requirements of § 523(a)(4) went beyond the instant application to PACA.

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[7] *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333, 55 S. Ct. 151, 154 (1934); see, e.g., *Guerra v. Fernandez-Rocha* (*In re Fernandez-Rocha*), 451 F.3d 813, 816 (11th Cir. 2006).

Discussion

A direct appeal from a final decision of a bankruptcy court to the applicable circuit court of appeals is authorized by 28 U.S.C. § 158(d)(2). The statute provides for expedited review of "appeals that raise controlling questions of law, concern matters of public importance, and arise under circumstances where a prompt, determinative ruling might avoid needless litigation."[8]

Federal Rule of Bankruptcy Procedure 8006(f)(1) allows a party to request certification of a direct appeal if "a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) applies . . . ." The specified circumstances that justify a direct appeal are:

> the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
>
> the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
>
> an immediate appeal from the judgment, order, or decree may materially advance

[8] *Weber v. United States Trustee*, 484 F.3d 154, 157–58 (2d Cir. 2007) (discussing the then-recent enactment of 28 U.S.C. § 158(d)(2)(A)).

> the progress of the case or proceeding in which the appeal is taken[.][9]

The statute refers to these circumstances in the alternative. Accordingly, certification may be warranted if any one of the three circumstances is present.[10]

Here, Plaintiffs argue that both the first and second specified circumstances apply. For the reasons stated in the Motion and echoed in the Order and above, the Court agrees.

For these reasons, it is **ORDERED**:

1. Plaintiffs' Motion (Doc. 23) is **GRANTED**.

2. The Court hereby **CERTIFIES** the Order for direct appeal to the United States Court of Appeals for the Eleventh Circuit.

The Clerk's Office is directed to serve a copy of this Order and Certification on interested parties that are non-CM/ECF users. Fed. R. Bankr. P. 8006(f)(5).

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[9] 28 U.S.C. § 158(d)(2)(A)(i)–(iii).

[10] E.g., *DaimlerChrysler Fin. Srvs. Am. LLC v. Barrett* (*In re Barrett*), 543 F.3d 1239, 1241 (11th Cir. 2008).

APPENDIX D

UNITED STATES BANKRUPTCY COURT
M.D. FLORIDA, TAMPA DIVISION

CASE NO. 8:20-BK-03819-RCT
ADV. NO. 8:20-AP-00447-RCT

In re: Nathan Aaron Forrest and Marsha Weidman Forrest, Debtors.

Spring Valley Produce, Inc., et al., Plaintiffs.
v.
Nathan Aaron Forrest and
Marsha Weidman Forrest, Defendants.

Signed April 02, 2021

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' AMENDED MOTION TO DISMISS AMENDED ADVERSARY COMPLAINT

Roberta A. Colton, United States Bankruptcy Judge

Before the Court is Defendants' Amended Motion to Dismiss Amended Adversary Complaint (the "Motion") (Doc. 13) and Plaintiffs' opposition to the Motion (Doc. 15). Considered with the Motion is a nearly identical motion filed by Defendants in a nearly identical adversary proceeding brought by G.W. Palmer &

Co., Inc. (the "Related Adversary").[1] The Court refers to the plaintiffs in these adversaries, collectively, as the "Produce Suppliers."

In both proceedings, the Produce Suppliers seek, among related relief, a declaration that certain debts owed to them and arising under the trust provisions of the Perishable Agricultural Commodities Act ("PACA") [2] are not dischargeable pursuant to § 523(a)(4) of the Bankruptcy Code.[3] The issue presented in both proceedings is whether the trust obligations set forth in PACA satisfy the "fiduciary capacity" requirement to render a PACA-related debt non-dischargeable under § 523(a)(4).

Background

Defendants Marsha and Nathan Forrest ("Debtors") are individuals who were officers of and together owned 50% of the shares of Central Market of FL, Inc. ("Central Market").[4] Central Market is licensed under PACA to buy and sell produce. Produce Suppliers are growers who sold produce to Central Market and have unpaid invoices. For purposes of these rulings, the Court assumes that Defendants are personally

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[1] *G.W. Palmer & Co., Inc. v. Forrest* (Adv. No. 8:20-ap-00448-RCT), Docs. 12 & 17.

[2] 7 U.S.C. §§ 499a – 499s.

[3] 11 U.S.C. §§ 101–1532 ("Code" or "Bankruptcy Code").

[4] The Complaint (Doc. 1) does not identify who holds the other 50% of the shares of Central Market.

liable for Central Market's obligations to the Produce Suppliers under PACA.[5]

Seeking to discharge their personal liability, Defendants filed a joint chapter 7 bankruptcy and have submitted their non-exempt assets to the chapter 7 trustee for liquidation. Produce Suppliers filed a timely complaint seeking a declaration that Debtors' liability for unpaid invoices cannot be discharged because Defendants held the produce sold to Central Market (and the proceeds thereof) in trust for the Produce Suppliers. Produce Suppliers argue that a breach of the statutory trust obligations in PACA satisfies the exception to discharge in § 523(a)(4) for debts for "fraud or defalcation" by a fiduciary. There is ample support for Produce Suppliers' position; indeed, it is a well-reasoned majority view.[6] Defendants disagree and have moved to dismiss the complaints with prejudice. Defendants rely on an equally well-reasoned minority approach.[7] Bankruptcy Courts in

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[5] *Cf. Melon Acres, Inc. v. Villa* (*In re Villa*), 625 B.R. 111, 123 (Bankr. N.D. Fla. 2021) (noting that debtors, who were principals of the PACA licensed corporation, might be individually liable for the debt owed to the plaintiff produce supplier, but holding the issue for trial).

[6] E.g., *N.P. Deoudes, Inc. v. Snyder* (*In re Snyder*), 184 B.R. 473 (D. Md. 1995); *E. Armata, Inc. et al. v. Parra* (*In re Parra*), 412 B.R. 99 (Bankr. E.D. N.Y. 2009); *A.J. Rinella & Co. v. Bartlett* (*In re Bartlett*), 397 B.R. 610 (Bankr. D. Mass 2008); see generally *Alliance Shippers, Inc. v. Guarracino* (*In re Guarracino*), 575 B.R. 298, 311 (Bankr. D.N.J. 2017) (listing cases and noting it would follow the majority view that PACA trusts satisfy the trust requirements for purposes of § 523(a)(4)).

[7] E.g., *CR Adventures LLC v. Hughes* (*In re Hughes*), 609 B.R. 789 (Bankr. N.D. Ill. 2019) (finding that a PACA trust does

the Eleventh Circuit are divided on whether PACA-related debt is dischargeable in bankruptcy.[8]

This and the Related Adversary raise an issue of great importance that is worthy of certification for direct appeal to the Eleventh Circuit. For that matter, it is an issue of statutory interpretation of § 523(a)(4) of the Bankruptcy Code that goes beyond the application here to PACA. The critical question is whether some segregation of trust funds or a prohibition on the use of such funds is required to render statutory trust obligations non-dischargeable in bankruptcy.

11 U.S.C. § 523(a)(4)

"An individual debtor's prepetition debts ... are generally dischargeable in a Chapter 7 case, and exceptions to the discharge are construed narrowly."[9]

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not satisfy the fiduciary requirements of § 523(a)(4) while acknowledging that "most decisions reach the opposite conclusion").

[8] *Compare Coosemans Miami, Inc. v. Arthur (In re Arthur)*, 589 B.R. 761 (Bankr. S.D. Fla. 2018) (holding a PACA trust is not a "technical trust" for purposes of § 523(a)(4)), and *Cardile Bros. Mushroom Pkg., Inc. v. McCue (In re McCue)*, 324 B.R. 389 (Bankr. M.D. Fla. 2005) (holding a PACA trust is not a technical trust because a PACA trust has no "segregated trust res"), with *In re Villa*, 625 B.R. 111 (holding a PACA trust is a "technical trust" for purposes of § 523(a)(4)), and *Gen. Produce, Inc. v. Tucker (In re Tucker)*, No. 06-50092- JDW, Adv. No. 06-5107, 2007 WL 1100482 (Bankr. M.D. Ga. Apr. 10, 2007) (same), and *Collins Bros. Corp. v. Perrine (In re Perrine)*, No. 05-10816-WHD, Adv. No. 05-1118, 2007 WL 7142580 (Bankr. N.D. Ga. Sept. 27, 2007) (same).

[9] *Guerra v. Fernandez-Rocha (In re Fernandez-Rocha)*, 451

This is in line with the Bankruptcy Code's goal of preserving a fresh start for the "honest but unfortunate" debtor.[10]

Section 523(a)(4) excepts from the discharge debts attributable to "fraud or defalcation while acting in a fiduciary capacity."[11] Whether a debtor is a "fiduciary" under § 523(a)(4) is a question of federal bankruptcy law, not underlying substantive state or federal law. [12] Consequently, not all fiduciary

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F.3d 813, 815–16 (11th Cir. 2006); *see, e.g.*, *United States v. Mitchell (In re Mitchell)*, 633 F.3d 1319, 1327 (11th Cir. 2011) ("[E]xceptions to the general rule of discharge ... are to be strictly construed in favor of the debtor."); *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301, 304 (11th Cir. 1994) ("[C]ourts generally construe the statutory exceptions to discharge in bankruptcy liberally in favor of the debtor and recognize that the reasons for denying a discharge must be real and substantial, not merely technical and conjectural." (internal quotations omitted)).

[10] *See, e.g.*, *In re Mitchell*, 633 F.3d at 1326; *In re Miller*, 39 F.3d at 304.

[11] The United States Supreme Court interprets the term "defalcation" to mean "knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior." *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 269, 133 S. Ct. 1754, 1757 (2013).

[12] *See Hearn v. Goodwin (In re Goodwin)*, 355 B.R. 337, 343–44 (Bankr. M.D. Fla. 2006) ("Fiduciary relationships are determined by federal bankruptcy law and are narrowly defined." (citation omitted)); *Artis v. West (In re West)*, 339 B.R. 557, 566 (Bankr. E.D. N.Y. 2006) ("The state or federal law at issue may bestow a broader meaning to the term fiduciary than it might have under § 523(a)(4)." (*citing In re Marchiando*, 13 F.3d 1111, 1116 (7th Cir. 1994))); *see also Follett Higher Educ. Grp. v. Berman (In re Berman)*, 629 F.3d 761, 767 (7th Cir. 2011); *Arvest Mortg. Co. v. Nail (In re Nail)*, 680 F.3d 1036, 1039 (8th Cir. 2012); *Texas Lottery Comm'n v. Tran (In re Tran)*, 151 F.3d 339,

relationships will qualify for the exception to discharge under the Bankruptcy Code, and the Supreme Court has long held that the fiduciary exception to discharge is "strict and narrow."[13]

As explained by the Eleventh Circuit in *Guerra*:

> Although § 523(a)(4) establishes an exception to dischargeability for debts for "defalcation while acting in a fiduciary capacity," this exception is a narrow one. "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, 55 S. Ct. 151, 79 L. Ed. 393 (1934), and other Supreme Court cases interpreting previous versions of the § 523(a)(4) exception, but noting that all versions have referred to "defalcation" and to "fiduciary capacity" or "fiduciary character"); *see Commonwealth Land Title Co. v. Blaszak (In re Blaszak)*, 397 F.3d 386, 391 (6th Cir. 2005) (noting that the term "fiduciary capacity" is construed more narrowly in the context of § 523(a)(4) than in other circumstances)[.][14]

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343 (5th Cir. 1998).

[13] *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333, 55 S. Ct. 151, 154 (1934).

[14] *Guerra*, 451 F.3d at 816.

While a breach of an express or technical trust is potentially non-dischargeable under § 523(a)(4), breaches of constructive or resulting trusts do not fall within this particular discharge exception. Again, as explained in *Guerra*:

> In *Quaif*, this Court further noted that the 1934 *Davis* decision is the last Supreme Court case to speak to the issue and that the Supreme Court has left "the lower courts to struggle with the concept of 'technical' trusts." *Quaif*, 4 F.3d at 953. *Quaif* also discussed the trends in judicial interpretation of the § 523(a)(4) exception and noted that courts seemed to include the voluntary, express trust created by contract within the scope of "fiduciary capacity" as used in § 523(a)(4). *Id.* In contrast, courts have excluded the involuntary resulting or constructive trust, created by operation of law, from the scope of the exception. *Id.* Additionally, *Quaif* noted that cases have "also articulated a requirement that the trust relationship have existed prior to the act which created the debt in order to fall within the statutory [fiduciary capacity] exception." *Id.* (citing *Matter of Angelle*, 610 F.2d 1335 (5th Cir. 1980)). Accordingly, "constructive" or "resulting" trusts, which generally serve as a remedy for some dereliction of duty in a confidential relationship, do not fall within the § 523(a)(4) exception "because the act which created the debt

> *simultaneously* created the trust relationship." *Id.* (emphasis added).[15]

Statutory trusts like a PACA trust fall somewhere between an express trust and a constructive trust. Again, the Eleventh Circuit explains: "[S]tatutorily created trusts 'fit into neither of the traditional categories' of express trust or resulting or constructive trust and [ ] courts ha[ve] struggled with reconciling this new type of trust."[16]

The key appellate decisions in this Circuit[17] on the dischargeability of a statutory trust obligation are *Quaif v. Johnson*,[18] *Guerra v. Fernandez-Rocha (In re Fernandez-Rocha)*,[19] *Angelle v. Reed (In re Angelle)*,[20]

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[15] *Id*.

[16] *Id*. at 817 (quoting *Quaif v. Johnson*, 4 F.3d 950, 953–54 (11th Cir. 1993)).

[17] Decisions of the Fifth Circuit rendered prior to October 1, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

[18] 4 F.3d 950 (11th Cir. 1993) (determining that a Georgia statute requiring an insurance agent, with regard to premiums paid or refunded to him, to segregate those funds from other funds and to separately account for those funds due each principal met the requirements of a "technical trust").

[19] 451 F.3d 813 (11th Cir. 2006) (determining that a Florida statute requiring a doctor simply to maintain a certain level of malpractice insurance or sufficient assets to pay a malpractice claim was not technical trust).

[20] 610 F.2d 1335 (5th Cir. 1980) (determining that a Louisiana statute making it criminal for a contractor to misappropriate funds advanced by a contracting party for any purpose other than construction of the project subject to the contract did not make the contractor a fiduciary of the contracting party and

and *Murphy & Robinson Inv. Co. v. Cross (In re Cross)*.[21] Of these, only *Quaif* found a statutory trust to be a technical trust sufficient to render a debt non-dischargeable for "fraud or defalcation" under § 523(a)(4).

In *Quaif*, the Eleventh Circuit highlighted the segregation of trust assets. The statutory trust in question was a Georgia statute creating a trust on the receipts of insurance agents for the benefit of insurers.[22] The Eleventh Circuit concluded that the insurance agent in *Quaif* was acting in a fiduciary capacity because the Georgia statute (i) required the agent "to promptly account for and remit payments of funds to the insurer" and (ii) forbid the agent "from commingling the funds with his operating or personal accounts."[23]

The *Quaif* court rejected the debtor's argument that an insurance agent is not acting in a fiduciary capacity because under the statute, the agent does not have to maintain separate, segregated accounts for each insurer to whom the agent owes premiums. In finding that the agent was acting in a fiduciary capacity pre-defalcation, the court focused on the duty of the agent to segregate trust assets, namely the

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noting that even if the statute had, the fiduciary relationship would not have arisen until and because of the misappropriation and thus would not be considered a technical trust).

[21] 666 F.2d 873 (5th Cir. Unit B 1982) (on facts similar to Angelle, the Court held that Georgia law did not impose preexisting fiduciary obligations upon contractors with regard to misappropriation of advanced funds).

[22] *Quaif*, 4 F.3d at 953–54.

[23] *Id.* at 954.

insurance premiums, from non-trust assets. The court explained as follows:

> The Georgia statute requires that the *premiums must be separate from other types of funds*, but may be kept in a common premium account as long as there were adequate records of the sources of these funds. *The court finds that this is sufficient "segregation" to satisfy the requirement that the fiduciary duties be created prior to the act of defalcation.*[24]

The statute at issue in *Quaif* clearly required an insurance agent to segregate trust funds into a separate account and not to commingle trust funds with the agent's personal funds. This is structure familiar to an attorney's handling of client trust funds.[25] All "trust funds" are segregated in a single trust account. A separate fund for each beneficiary is not required. But it is indisputably clear to the "fiduciary" what funds are available for general business operations and what funds are not.

Both *Cross*[26] and *Angelle*[27] involved alleged defalcations by general contractors who misappropriated funds advanced by contracting parties. In *Cross*, the

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[24] *Id*. (emphasis added).

[25] See, e.g., R. Regulating Fla. Bar 5-1.1(a) ("A lawyer must hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation."); see generally 7 Am. Jur. 2d Attorneys at Law §§ 63–64 (describing a lawyer's responsibilities regarding the handling of trust account funds).

[26] 666 F.2d 873.

[27] 610 F.2d 1335.

contractor's debts were dischargeable because the debtor was "under no obligation to maintain a segregated account" and owed no fiduciary duty "prior to and independent of ... alleged misconduct."[28] In *Angelle*, a builder owed no fiduciary duty because the relevant statute did not create a trust relationship prior to the alleged misappropriation.[29] Though the *Angelle* court did not hold expressly that segregation was required, the court expressed "doubts ... that a statute which merely makes misappropriation of funds a crime without, for example, requiring segregation of accounts would be enough to charge the parties with an intent to create a trust."[30]

Writing for the *Angelle* court, Judge Brown explained that statutory trusts should be interpreted consistent with the purpose behind the Bankruptcy Code, *i.e.*, to give the debtor a fresh start and "a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."[31] It is, after all, for this reason that it is often said that exceptions to discharge should be limited to those clearly expressed in the statute.[32]

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[28] 666 F.2d at 881.

[29] 610 F.2d at 1340.

[30] *Id.*

[31] *Id.* at 1339 (quoting *Lines v. Frederick*, 400 U.S. 18, 20, 91 S. Ct. 113, 114 (1970)).

[32] *Id.*; see, e.g., *Bullock*, 569 U.S. at 275, 133 S. Ct. at 1760 (noting that it is a "long-standing principal that 'exceptions to discharge should be confined to those plainly expressed.' " (quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 62, 118 S. Ct. 974, 977 (1998))); In re Miller, 39 F.3d at 304 (stating that narrow

In *Donald Hanft, M.D., P.A. v. Church (In re Donald Hanft, M.D., P.A.)*,[33] the District Court for the Southern District of Florida, in a non-PACA trust case, articulated three criteria for a technical trust to exist for purposes of § 523(a)(4):

> "(1) a segregated trust *res*;
>
> (2) an identifiable beneficiary; and
>
> (3) affirmative trust duties established by contract or statute."[34]

The District Court for the Middle District of Florida in *Hemenway v. Bartoletta*[35] articulated the same criteria in rejecting a § 523(a)(4) claim based on the fiduciary obligations imposed by Florida law on general partners in a limited partnership.[36] Applying this three-part test,[37] Judge Funk of this Court

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interpretation of the statutory exceptions to discharge "ensures that the 'honest but unfortunate debtor' is afforded a fresh start").

[33] 315 B.R. 617 (S.D. Fla. 2002), aff'd sub nom. *Hanft v. Church*, 73 F. App'x 387 (11th Cir. 2003).

[34] *Id*. at 623.

[35] No. 8:12-cv-2114-T-JSM, 2012 WL 4513073 (M.D. Fla. Oct. 2, 2012).

[36] *Id*. at *4; see also *Aamodt v. Narcisi* (*In re Narcisi*), 559 B.R. 233, 240 (M.D. Fla. 2016) (articulating the same three-part test and affirming the bankruptcy court's conclusion that no fiduciary relationship arose under Pennsylvania statutes governing the licensing and regulation of auctioneers).

[37] The bankruptcy cases most often cited for this three-part test are *Cladakis v. Triggiano* (*In re Triggiano*), 132 B.R. 486, 490 (Bankr. M.D. Fla. 1991) ("This Court has consistently ruled

rejected a PACA trust claim under § 523(a)(4) in *Cardile Bros. Mushroom Pkg., Inc. v. McCue (In re McCue)*.[38] Recognizing the three-part test, and with further analysis of PACA in light of the developing case law, Judge Mark of the Bankruptcy Court for the Southern District of Florida reached the same conclusion in *Coosemans Miami, Inc. v. Arthur (In re Arthur)*.[39] But very recently, Chief Judge Specie of the Bankruptcy Court for the Northern District of Florida reached the opposite conclusion. Judge Specie noted that she had previously rejected a segregate *res* requirement and thus she adopted the majority view.[40]

Outside of the statutory trust context, courts have been reluctant to find non-dischargeable fiduciary liability in commercial transactions.[41] So as to narrow

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that in order to meet the requirements of a fiduciary relationship under § 523(a)(4) of the Bankruptcy Code, the Debtor must have acted under an express or technical trust, wherein there is a segregated trust res, an identifiable beneficiary, and affirmative trust duties established by contract or by statute.") and *Am. Sur. & Cas. Co. v. Hutchinson* (*In re Hutchinson*), 193 B.R. 61, 65 (Bankr. M.D. Fla. 1996) (noting the same and quoting In re Triggiano). See also In re Goodwin, 355 B.R. at 344 ("In the bankruptcy context, the 'fiduciary relationship necessary for an exception to discharge requires the existence of an express or technical trust ... which exists when there is a segregated trust res, an identifiable beneficiary, and trust duties established by contract or statute[.]' " (quoting *Sides v. Futch (In re Futch*), 265 B.R. 283, 287 (Bankr. M.D. Fla. 2001))).

[38] 324 B.R. 389.

[39] 589 B.R. 761.

[40] *In re Villa*, 625 B.R. 111.

[41] See *Gen. Elec. Capital Corp. v. Morrison* (*In re Morrison*), 110 B.R. 578, 580–81 (Bankr. M.D. Fla. 1990) (reviewing key

the scope of this type of liability in the commercial setting, courts have focused on the required separation of trust assets from general operating funds.[42] Courts have generally rejected attempts by commercial lenders to create a technical trust—and thus a non-dischargeable obligation—by inserting "trust language" in loan agreements.[43] This is only likely to be successful if there is a clear comingling prohibition.[44]

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decisions of the United States Supreme Court and concluding that language contained in a commercial contract, notwithstanding its use of the relevant term, did not "create a trust in the strict and narrow sense as required to bar discharge under § 523(a)(4)"); see also *GMAC Inc. v. Coley* (*In re Coley*), 433 B.R. 476, 496 (Bankr. E.D. Pa. 2010) ("[T]he § 523(a)(4) discharge exception is not designed to apply to debts arising from ordinary commercial or contractual relationships." (citing cases)); *Congress Fin. Corp. v. Levitan* (*In re Levitan*), 46 B.R. 380, 384–86 (Bankr. E.D. N.Y. 1985) ("If security agreements like the one signed by [the parties] were found to impose a fiduciary obligation upon the debtor, creditors could easily make fiduciaries out of ordinary commercial debtors and the exception might indeed swallow the rule.").

[42] *See In re Morrison*, 110 B.R. at 581 (distinguishing *Chrysler Credit Corp. v. Rebhan (In re Rebhan)*, 45 B.R. 609 (Bankr. S.D. Fla. 1985) and finding that debtor was not under a "duty to separate or segregate" sale proceeds nor prohibited from commingling those proceeds with its general operating funds).

[43] *In re Morrison*, 110 B.R. at 581; see also *In re Coley*, 433 B.R. 476; *In re Levitan*, 46 B.R. 380.

[44] E.g., *Kubota Tractor Corp. v. Strack* (*In re Strack*), 524 F.3d 493, 495–96, 499–500 (4th Cir. 2008) (finding an express trust as to sale proceeds of financed farm equipment where the parties' agreement required the debtor to "segregate the proceeds and hold the same in trust" for the manufacturer); *Chrysler Credit Corp. v. Rebhan* (*In re Rebhan*), 45 B.R. 609, 613–14 (Bankr. S.D. Fla. 1985) (finding an express trust as to the sale

PACA

Congress enacted PACA during the Great Depression to promote fair trading practices in the shipping, handling, and marketing of perishable agricultural commodities in interstate commerce.[45] Congress sought to protect "small farmers and growers who were vulnerable to the practices of financially irresponsible buyers."[46] Thus, PACA requires produce buyers to make full and prompt payments upon receiving goods from sellers.[47] Failure to make prompt payments "triggers civil liability and the possible revocation of the buyer's PACA license [that is] required by 7 U.S.C. § 499c."[48]

About thirty years ago, Congress amended PACA to include more protection for produce sellers against defaulting buyers by adding a floating trust

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proceeds of financed vehicles where the parties' agreement required the debtor to keep proceeds "separate from all other funds"). But see *First Nat'l Bank of Wichita Falls v. Parr* (*In re Parr*), 347 B.R. 561, 565 (Bankr. N.D. Tex. 2006) (finding that a covenant in a floor-plan financing agreement requiring the debtor to segregate funds was not enough to rise to the level of a technical trust).

[45] See *Am. Banana Co. v. Republic Nat'l Bank of N.Y., N.A.*, 362 F.3d 33, 36 (2d Cir. 2004); *Consumers Produce Co. v. Volante Wholesale Produce, Inc.*, 16 F.3d 1374, 1377–78 (3d Cir. 1994).

[46] *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 199 (3d Cir. 1998).

[47] 7 U.S.C. § 499b(4); see, e.g., *Idahoan Fresh*, 157 F.3d at 199.

[48] *Idahoan Fresh*, 157 F.3d at 199; see 7 U.S.C. §§ 499e(a); 499h(a).

provision.[49] Under this provision, found at 7 U.S.C. § 499e(c), "a buyer's produce, products derived from that produce, and the proceeds gained therefrom are held in a non-segregated, floating trust for the benefit of unpaid suppliers who have met the applicable statutory requirements."[50] Section 499e(c) requires licensed buyers to hold all perishable commodities purchased, as well as sale proceeds, in trust for the benefit of unpaid sellers, until the sellers receive full payment. And, under PACA, the produce seller's claim for payment has a higher priority than the buyer's perfected, secured creditors.[51]

Congress added the floating trust provision to protect produce sellers from buyers "who encumber or give lenders a security interest in" produce, products,

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[49] 7 U.S.C. § 499e(c); see generally *In re Fresh Approach, Inc.*, 48 B.R. 926, 927–28 (Bankr. N.D. Tex. 1985) (discussing the then-recent amendments to PACA which were "intended to provide for sellers of produce the sort of protection against other creditors of a delinquent purchaser/dealer contemplated for livestock dealers in the Packers and Stockyards Act of 1921").

[50] *Idahoan Fresh*, 157 F.3d at 199 (citing 7 U.S.C. § 499e(c); 7 C.F.R. § 46.46(b)).

[51] *Id.*; *Greg Orchards & Produce, Inc. v. Roncone*, 180 F.3d 888, 891 (7th Cir. 1999) ("Properly preserved, trust rights are superior to the interests of secured creditors."). To be eligible for PACA trust benefits, the seller must satisfy a notice requirement by either (1) notifying the buyer within thirty days of default or any time after the seller realizes payment has been dishonored, or (2) including a statutory statement referencing the trust on its invoices, which illustrate the seller's intent to preserve trust benefits. 7 U.S.C. §§ 499e(c)(3), (4); 7 C.F.R. § 46.46(c), (f). A seller loses its PACA trust benefits if it fails to give the required written notice in invoice statements or if the seller agreed to payment terms beyond thirty days. See Idahoan Fresh, 157 F.3d at 203–05.

and proceeds.[52] PACA supplies that protection by placing produce sellers "first in line among creditors for all produce-related assets."[53] This includes the buyer's secured creditors.[54] In essence, the PACA trust elevates produce sellers to "a level of superpriority."[55]

PACA also authorizes an unpaid produce seller to bring an action in the district court to "enforce payment from the trust."[56] If necessary, an unpaid seller can obtain an injunction to stop dissipation of trust assets[57] as well as an order requiring the buyer to segregate trust funds.[58] If segregation is ordered, the

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[52] *Roncone*, 180 F.3d at 891 (quoting 7 U.S.C. § 499e(c)(1)).

[53] *Frio Ice, S.A. v. Sunfruit, Inc.*, 918 F.2d 154, 156 (11th Cir. 1990).

[54] See, e.g., *Patterson Frozen Foods, Inc. v. Crown Foods Int'l, Inc.*, 307 F.3d 666, 669 (7th Cir. 2002) ("PACA trust rights take priority over the interests of all other creditors, including secured creditors.").

[55] *Agri-Sales, Inc. v. United Potato Co.*, 436 F. Supp. 2d 967, 972 (N.D. Ill. 2006); see also *Patterson Frozen Foods*, 307 F.3d at 669 (stating that PACA gives produce sellers "a superior secured interest").

[56] 7 U.S.C. § 499e(c)(5).

[57] See, e.g., *Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.*, 222 F.3d 132, 138–39 (3d Cir. 2000); *Cont'l Fruit Co. v. Thomas J. Gatziolis & Co.*, 774 F. Supp. 449, 453–54 (N.D. Ill. 1991).

[58] See *Frio Ice*, 918 F.2d at 159 ("Upon a showing that the trust is being dissipated or threatened with dissipation, a district court should require the PACA debtor to escrow its proceeds from produce sales, identify its receivables, and inventory its assets. It should then require the PACA debtor to separate and

buyer must escrow the funds in favor of all unpaid produce sellers, not just the complaining supplier.[59]

Significantly, individual officers and shareholders of PACA buyers may be personally liable for PACA related debts.[60] Personal liability is imposed on individuals who "had the authority to direct the control of (*i.e.,* manage) PACA assets held in trust for the producers."[61] Such personal liability for someone in control of a PACA licensed buyer is akin to guaranteeing sufficient funds to pay produce sellers, without regard to whether the failure to pay was intentional.[62]

Discussion

The meaning of the term "fiduciary capacity" in 11 U.S.C. § 523(a)(4) is a question of federal bankruptcy law, especially, as here, where two federal statutes

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maintain these produce-related assets as the PACA trust for the benefit of all unpaid sellers having a bona fide claim.").

[59] See *id.* ("Segregation of only part of the trust solely to accommodate a beneficiary's singular interest is inappropriate because the statutory trust exists for the benefit of all unpaid produce suppliers.").

[60] See, e.g., *Weis–Buy Servs., Inc. v. Paglia*, 411 F.3d 415, 420–21 (3d Cir. 2005); *Patterson Frozen Foods*, 307 F.3d at 669; *Golman–Hayden Co. v. Fresh Source Produce Inc.*, 217 F.3d 348, 350–51 (5th Cir. 2000).

[61] *Bear Mountain Orchards, Inc. v. Mich–Kim, Inc.*, 623 F.3d 163, 167–69 (3d Cir. 2010); see also *Weis–Buy Servs., Inc. v. Paglia*, 411 F.3d at 421.

[62] See *Red's Market v. Cape Canaveral Cruise Line, Inc.*, 181 F. Supp. 2d 1339, 1343–44 (M.D. Fla. 2002), aff'd, 48 F. App'x 328 (2002); see also *Evergreen Farms & Produce, LLC v. G & S Melons, LLC*, No. 8:15-cv-1921-T-33TGW, 2016 WL 81385, at *2 (M.D. Fla. Jan. 7, 2016).

are implicated. And a statutory trust will only meet the definition if it effectively creates a technical trust. Beyond these two basic tenants, not much is clear in this area of the law. But a reasonable approach to begin the analysis of whether a particular statutory trust is more like a technical trust or more like a resulting or constructive trust is to examine the relationship between the parties and the specific obligations imposed by the statute.

For example, in *In re Marchiando*,[63] the court held that a lottery ticket agent was not the state's fiduciary under § 523(a)(4) despite an Illinois statute that (i) declared proceeds from ticket sales "a trust fund" until paid, (ii) prohibited the ticket agent from commingling the proceeds, and (iii) granted the state a lien on all the ticket agent's property for any unpaid proceeds.[64] Although the ticket agent was "[t]echnically" a trustee, "[r]ealistically" she had "no duties of a fiduciary character" until she failed to remit sale proceeds.[65] "Until then, she was just a ticket agent."[66] The segregation requirement, criminal penalties, and so on were simply devices "to establish and enforce a lien in the proceeds, the better to collect them securely."[67] Such an arrangement, the court concluded, was "remote from the conventional trust or fiduciary

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[63] 13 F.3d 1111 (7th Cir. 1994).

[64] See *id.* at 1113; *Ill. Dep't of Lottery v. Marchiando* (*In re Marchiando*), 138 B.R. 548, 552 (Bankr. N.D. Ill. 1992) (setting forth the text of Section 10.3 of the Ill. Lottery Law (20 Ill. Comp. Stat. Ann. 1605/10.3)).

[65] *In re Marchiando*, 13 F.3d at 1116.

[66] *Id.*

[67] *Id.*

setting."[68]

Writing for the court, Judge Posner focused on the relationship between the parties in the trust arrangement under the Illinois statute and the relative balance of power.[69] The court examined a "conventional" trust relationship in the context of a lawyer and his client, a director and a corporate shareholder, and a managing and limited partner. In these cases, Judge Posner observed that it is almost a paternalistic relationship between the fiduciary and the beneficiary.[70] The Illinois lottery trust statute, in contrast, was found not analogous to a conventional trust as the relationship established between the ticket agent and the state lacked this paternalistic quality. In fact, Judge Posner warned against attempts by states to create all types of non-dischargeable debts by labeling debtors as fiduciaries.[71] But Judge Posner also cautioned debtors that wrongful or criminal activity may render a debt non-dischargeable under some other exception to discharge.[72]

As described above, PACA was enacted, and amended, to address a perceived imbalance of power and to assist produce sellers in collecting their unpaid invoices. But as the Eleventh Circuit observed in *Frio Ice*, PACA also balances the burden of PACA obligations on produce dealers by permitting funds to be

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[68] *Id.*

[69] *In re Marchiando*, 13 F.3d at 1115–17.

[70] *Id.* at 1116.

[71] *Id.*

[72] *Id.* at 1117.

comingled.[73] Comingling eases the pressure on the PACA dealer's inability to finance or securitize the inventory or receivables. As Judge Mark observed in *In re Arthur*, a true trust relationship does not generally involve such a balancing.[74]

To the extent *In re Marchiando* suggests it is relevant, the relationship between a produce seller and a PACA dealer is—bottom line—an arm's length business transaction. And, like the Illinois lottery trust statute, even with its bells and whistles, PACA fails to create the same type of a relationship characteristic of the conventional fiduciaries described by Judge Posner. PACA's trust provisions are a means to enforce a business debt and to provide a mechanism to incorporate the statutory protections into the contractual agreement between the parties. Only if the PACA dealer does not maintain sufficient funds to pay the debt can a produce seller obtain a segregation order from a federal district court.

The Fifth Circuit reached the same conclusion as the *Marchiando* court in another state lottery case, but on different grounds.[75] Texas had enacted a statutory trust where lottery sellers acted as fiduciaries and a trust was imposed on the proceeds of lottery sales. The Texas statute had many of the same bells and whistles as the Illinois statute. However, the "fiduciaries" were not required to segregate the lottery

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[73] *Frio Ice*, 918 F.2d at 159.

[74] *In re Arthur*, 589 B.R. at 770 ("Deference to the countervailing interest of a trustee is beyond the stricter confines of fiduciary capacity. To qualify as a technical trust, protection of the trust beneficiary should be paramount.").

[75] *In re Tran*, 151 F.3d at 343–44.

proceeds, *i.e.,* the trust assets, and were permitted to use the funds to pay other obligations.[76] In holding that the statutory trust did not meet the "fiduciary" requirements of § 523(a)(4), the court stated:

> In our previous cases, we have not expressly identified the particular "trust-like" duty—or combination of duties—that a state statute must impose to create the specie of fiduciary that meets muster under § 523(a)(4). Nonetheless, one such duty has loomed large—the duty that a trustee refrain from spending trust funds for non-trust purposes.[77]

So, in the Fifth Circuit, it appears that the ability to comingle and use trust assets for non-trust purposes may be fatal to a non-dischargeability claim under § 523(a)(4).[78]

PACA's trust provisions have many of the same attributes as the Texas lottery statute. It is a "floating" trust,[79] meaning that a PACA dealer may use proceeds from the sale of one seller's produce to pay a different seller, or for any other purpose, if the dealer maintains sufficient assets to pay his PACA

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[76] *Id*. at 341, 343 & nn.18 & 20.

[77] *Id*. at 343–44.

[78] Produce Suppliers correctly note that *In re Tran* is non-binding authority on this Court. Nevertheless, the Court finds it persuasive because like Eleventh Circuit jurisprudence, its roots lie in the former Fifth Circuit.

[79] 7 C.F.R. § 46.46(b).

liabilities.[80] The PACA dealer need not segregate produce or sale proceeds. In fact, the governing regulation expressly states that "[c]ommingling of trust assets is contemplated."[81] "Unpaid produce sellers have no claim to specific assets of the [PACA dealer], and they share pro rata if their claims exceed ... available trust assets."[82]

Because the trust "floats," it applies to all the dealer's PACA-related assets regardless of source. But without some segregation, or prohibition on the use of the funds, the arrangement does not operate as a typical trust where the produce seller would continue to own, beneficially, the produce and the sale proceeds and the PACA dealer would merely hold

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[80] See 7 C.F.R. § 46.46(d)(1) (stating that PACA licensees must "maintain trust assets" so that they are "freely available to satisfy outstanding obligations to sellers"); see also *In re Hughes*, 609 B.R. at 799.

[81] 7 C.F.R. § 46.46(b). Arguably, the regulation is unclear as to whether PACA trust assets may be commingled with each other in a segregated trust account or whether the trust "floats" over all funds of the PACA licensee. If the former interpretation is correct, it would be inconsistent with the remedy established by the Eleventh Circuit in Frio Ice. Frio Ice establishes that the proper remedy for a PACA defalcation is an order directing the segregation of trust assets. Obviously, the failure of a PACA licensee to segregate trust assets in the face of such a court order, under current law, could form the basis of a non-dischargeable obligation under more than one provision of 11 U.S.C. § 523(a).

[82] *In re Hughes*, 609 B.R. at 799; see 7 U.S.C. § 499e(c)(2) (providing that produce, products, and proceeds shall be held in trust "for the benefit of all unpaid suppliers or sellers" (emphasis added)); *Country Best v. Christopher Ranch, LLC*, 361 F.3d 629, 632 (11th Cir. 2004) ("Because PACA trusts are intended for the benefit of all unpaid suppliers, all beneficiaries to a trust share the same priority." (citing *Frio Ice*, 918 F.2d at 159)).

bare legal title. To the contrary, PACA dealers freely may use the produce and any proceeds, so long as they are able to pay all unpaid sellers.[83] PACA simply has no formal separation and ownership rules generally associated with a technical trust.[84]

In *Frio Ice*, the Eleventh Circuit explained that "[s]egregation often may be the *only* means by which a federal court can prevent dissipation."[85] However, the court concluded that district courts cannot require a PACA dealer "to separate and maintain ... the PACA trust for the benefit of all unpaid sellers" prior to a showing of dissipation or threat thereof.[86] If the ability to comingle and freely use trust assets is fatal to a technical trust, *Frio Ice* suggests that a PACA trust may be more analogous to a resulting trust as it does not fully mature as a technical trust until there is dissipation and a segregation order.

Without a doubt, a PACA trust has many attributes of a technical trust. A trust *res* is identified, if not identifiable at any point in time,[87] as are the beneficiaries of that trust, *i.e.,* produce sellers.[88] A PACA

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[83] See 7 C.F.R. § 46.46(d)(1); *In re Hughes*, 609 B.R. at 799.

[84] Cf. *In re McGee*, 353 F.3d 537, 541 (7th Cir. 2003) (concluding that "[b]y virtue of the formal separation and ownership rules" certain provisions of the Chicago Municipal Code created a technical trust as between a landlord and her tenants such that her "act of defalcation" served to disqualify the landlord from receipt of her bankruptcy discharge under 11 U.S.C. § 523(a)(4)).

[85] *Frio Ice*, 918 F.2d at 159 (emphasis added).

[86] *Id.* at 159 & n.8.

[87] See 7 U.S.C. § 499e(c)(2); 7 C.F.R. § 46.46(b).

[88] See 7 U.S.C. § 499e(c)(2); 7 C.F.R. § 46.46(c)(1).

dealer owes certain duties to a produce seller before any defalcation. For example, a PACA dealer must keep organized books and records,[89] and must be licensed.[90] And most importantly, a PACA dealer must maintain sufficient assets to satisfy the claims of unpaid produce sellers.[91]

The majority view is that these PACA-imposed duties are "enough" to imbue a PACA dealer with "fiduciary capacity" without any requirement of segregation or any prohibition on using PACA trust assets for non-trust purposes. However, these same duties probably would not be "enough" under the Fifth Circuit's reasoning in *In re Tran*.[92] Although the Eleventh Circuit has not addressed the issue squarely, it has steered lower courts towards narrowing the scope of § 523(a)(4) and pointed toward the need to have, at a minimum, "some" segregation of trust assets or a prohibition of using trust funds for non-trust purposes. These are the hallmarks of the type of trust relationship that should establish "fiduciary capacity" for purposes of § 523(a)(4) of the Bankruptcy Code.

A "segregated *res*" has been long-recognized as a requirement for non-PACA commercial cases or for other statutory trusts.[93] And in a fast-paced business environment, it makes sense that if an entrepreneur is to be saddled with a business debt forever and denied a fresh start, there should be some clear lines of

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[89] 7 U.S.C. § 499i; 7 C.F.R. §§ 46.14–46.15.

[90] 7 U.S.C. § 499c(a); 7 C.F.R. § 46.3(a).

[91] 7 U.S.C. § 499e(c)(2); 7 C.F.R. § 46.46(d)(1).

[92] 151 F.3d 339.

[93] *See supra* pp. 8–9 and notes 33–36, 41–44.

demarcation. So why is PACA different?

The Produce Suppliers argue that PACA is different from the state statutes previously analyzed by the courts because PACA is a federal statute on equal footing with the Bankruptcy Code. Indeed, Judge Posner's warning about all sorts of state statutory trusts usurping a bankruptcy discharge does not apply to Congress. But the argument goes both ways. Whereas a state lacks the ability to amend the Bankruptcy Code to specifically exempt a debt from discharge, Congress has never been shy or reluctant about enacting express exceptions to the bankruptcy discharge.[94] No such express exception yet exists for individual PACA-related liability.[95]

This is an issue on which reasonable minds can and do differ, and this Court does not presume, or even wish, to have the last word. But forced to decide, this Court errs on the side of the "strict and narrow" interpretation of § 523(a)(4) and concludes that some clear lines of demarcation should exist before an individual is saddled with a business debt for eternity. Ultimately, this is an issue for the Eleventh Circuit to resolve.

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[94] 11 U.S.C. § 523(a) (enumerating 19 distinct exceptions to the discharge).

[95] Judge Specie, in adopting the majority position, makes a good argument that Congress could have excepted PACA liability from the exception to discharge in § 523(a)(4), but has chosen not to do so. *In re Villa*, 625 B.R. at 121–22. A fair point, but § 523(a)(4) also does not expressly limit itself to the fiduciary obligations of "technical trusts" and yet there is little disagreement that non-technical trusts do not fall within this section.

For these reasons, it is **ORDERED**:

1. Defendants' Motion (Doc. 13) is **GRANTED**, and Plaintiffs' adversary complaint is **DISMISSED**, with prejudice.[96]

2. In view of the importance of this issue and the split of authority within this circuit, upon request, this Court will certify this Order for direct appeal pursuant to 28 U.S.C. § 158(d) and Fed. R. Bankr. P. 8006(d).

Service of this Order other than by CM/ECF is not required. Local Rule 9013-3(b).

[96] A similar order will be entered in the Related Adversary.