

MAR 11 2011

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. CC-10-1220-KiPaD  
 )  
 TANIMURA DISTRIBUTING, INC., ) Bk. No. CC-08-22644-TD  
 )  
 Debtor. )  
 \_\_\_\_\_ )  
 )  
 G.W. PALMER & CO., INC., ET )  
 AL., )  
 )  
 Appellants, )  
 )  
 v. ) **M E M O R A N D U M**<sup>1</sup>  
 )  
 CAROLYN A. DYE, Chapter 7 )  
 Trustee, )  
 )  
 Appellee. )  
 \_\_\_\_\_ )

Argued and Submitted on January 21, 2011  
at Pasadena, California

Filed - March 11, 2011

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding

Appearances: \_\_\_\_\_  
 Bradley Lewis Cornell argued for appellant, G.W.  
 Palmer Co., Inc., et al.  
 James A. Dumas Jr. argued for appellee, Carolyn A.  
 Dye  
 \_\_\_\_\_

Before: KIRSCHER, PAPPAS, and DUNN, Bankruptcy Judges.

\_\_\_\_\_

<sup>1</sup> This disposition is not appropriate for publication.  
 Although it may be cited for whatever persuasive value it may  
 have (see Fed. R. App. P. 32.1), it has no precedential value.  
See 9th Cir. BAP Rule 8013-1.

1 Chapter 7<sup>2</sup> debtor Tanimura Distributing, Inc. ("TDI"), is a  
2 wholesale dealer of produce subject to and licensed under the  
3 Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499  
4 et seq.<sup>3</sup> Appellants consist of a group of TDI's creditors who  
5 are also produce dealers subject to PACA (collectively the "PACA  
6 Creditors").<sup>4</sup> The PACA Creditors appeal an order from the  
7 bankruptcy court authorizing appellee-chapter 7 trustee, Carolyn  
8 A. Dye ("Trustee"), to distribute PACA trust funds. For the  
9 following reasons, we AFFIRM.

10  
11  
12  
13 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
14 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

15 <sup>3</sup> Congress enacted PACA in 1930 to promote fair trading  
16 practices in the produce industry. See 7 U.S.C. §§ 499a et seq.;  
17 Idahoan Fresh v. Advantage Produce, Inc., 157 F.3d 197, 199 (3d  
Cir. 1998). Specifically, "Congress intended PACA to protect  
small farmers and growers who were vulnerable to the practices of  
financially irresponsible buyers." Id. (footnote omitted).

18 Congress amended PACA in 1984 to provide the additional  
19 remedy of a statutory trust for "suppliers, sellers, or agents"  
20 against buyers who fail to make prompt payment. Under this  
21 provision, a buyer's produce, products derived from that produce,  
22 and the proceeds gained therefrom are held in a non-segregated,  
23 floating trust for the benefit of unpaid suppliers, sellers, and  
agents who meet the applicable statutory requirements to be  
granted the status of PACA trust fund beneficiaries. Id.  
See 7 U.S.C. § 499e(c)(2). The PACA trust commences by operation  
of law upon the seller's delivery of the produce and continues  
until the produce buyer makes full payment for the produce.  
7 U.S.C. § 499e(c)(2).

24 PACA trust proceeds are not property of the bankruptcy  
25 estate. See Bowlin & Son, Inc. v. San Joaquin Food Serv., Inc.  
(In re San Joaquin Food Serv., Inc.), 958 F.2d 938, 939 (9th Cir.  
1992).

26 <sup>4</sup> The PACA Creditors are made up of three groups which  
27 represent several parties: the G.W. Palmer Group; the S&H Packing  
28 Group; and the Pacific Tomato Growers Group. The total number of  
PACA claimants in this case is 71; the total number of PACA  
Creditors bringing this appeal is 47.

1   **I. FACTS AND PROCEDURAL BACKGROUND**

2           TDI filed a voluntary chapter 7 petition for relief on  
3 August 13, 2008. At that time, TDI owed roughly \$6 million to  
4 certain suppliers holding PACA trust rights.

5           On January 26, 2009, Trustee filed a Motion for an Order  
6 (1) Approving Stipulation Between Trustee and PACA Trust  
7 Creditors for Collection of Accounts Receivable, Establishing  
8 Trust Claims Procedures and Allowing Surcharge for Administrative  
9 Expenses; and (2) Modifying in Part Order Entered January 22,  
10 2009 (the "Stipulation"), following an agreement reached between  
11 Trustee and the PACA Creditors regarding the collection of PACA  
12 receivables and the evaluation of PACA claims. The Stipulation  
13 set forth a more detailed procedure for PACA claims and  
14 distributions than what the bankruptcy court had authorized in a  
15 January 22, 2009 order on Trustee's original motion.<sup>5</sup>

16           According to the Stipulation, any creditor who claimed PACA  
17 trust rights against TDI and wished to share in the distribution  
18 of any PACA trust assets had to timely file a PACA claim on a  
19 particular form and provide certain supporting documents, i.e., a  
20 declaration and a balance statement showing all invoices  
21 supporting the PACA claim and copies of the listed invoices. Any  
22 objections to a PACA claim had to "set forth in detail the legal  
23 and factual basis for the objection to each invoice or the  
24 payment thereof subject to the objection." PACA claims not  
25

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26           <sup>5</sup> Prior to the Stipulation, Trustee had filed a Motion for  
27 Order Authorizing Collection of Accounts Receivable, Establishing  
28 PACA Trust Claims Procedures, and Allowing Surcharge for  
Administrative Expenses. The bankruptcy court entered an order  
granting Trustee's motion on January 22, 2009.

1 timely objected to were deemed valid PACA claims for the amount  
2 stated in the proof of claim. Trustee was also to file a "PACA  
3 Trust Chart" listing each person/entity that filed a PACA claim,  
4 the amount of the claim, the amount of the claim deemed a valid  
5 PACA claim and/or the amount of the claim deemed invalid, the  
6 funds available for an interim distribution, and the pro rata  
7 distribution on the valid PACA claims. The Stipulation was to be  
8 "the last word in governing the rights and obligations of the  
9 parties, and the procedures to be followed . . . ."

10 Trustee's proposed Notice to be enclosed with the  
11 Stipulation and served on all potential PACA claimants stated: "A  
12 PREVIOUSLY FILED PROOF OF CLAIM IS NOT SUFFICIENT. EVERY  
13 POTENTIAL PACA CREDITOR MUST FILE A DECLARATION AND SUMMARY CHART  
14 AS SET OUT HEREIN," and further provided, "ANY CLAIMS NOT TIMELY  
15 FILED BY 15 APRIL 2009 SHALL BE BARRED."

16 On March 5, 2009, the bankruptcy court entered an order  
17 approving the Stipulation as written (the "March 5 Order"),  
18 modifying only the deadline dates as follows:

19 Notice to all creditors 20 to file claims	March 15, 2009
21 PACA claims bar date	May 15, 2009
22 Deadline to object to 23 PACA claim	June 15, 2009
24 Deadline to respond to 25 PACA claim objection	July 15, 2009
26 Deadline for Trustee to 27 file PACA Trust Chart	August 15, 2009
28 Deadline for objections to PACA Trust Chart	September 7, 2009

1	Deadline for motion to determine validity of a PACA claim	September 14, 2009
2		
3	Deadline for Trustee to file motion for approval of first interim distribution	October 7, 2009
4		
5		

6 The PACA Creditors timely filed their PACA proofs of claims  
7 pursuant to the Stipulation.<sup>6</sup> Trustee did not file any  
8 objections to any of the PACA Creditors' claims by the June 15,  
9 2009 deadline.

10 Because Trustee did not file the PACA Trust Chart as ordered  
11 by August 15, 2009, on September 22, 2009, the PACA Creditors  
12 filed a motion to compel Trustee to file it. They asserted that  
13 the PACA Trust Chart was necessary in order to define the class  
14 of PACA creditors, to determine the validity and amount of all  
15 such claims, and to provide the basis for any pro rata  
16 distribution of PACA trust assets recovered.

17 Trustee filed a response on October 27, 2009, asserting  
18 several reasons for why she had not yet prepared the PACA Trust  
19 Chart. First, Trustee contended that no distribution could be  
20 made unless and until the claims between Agricap and the PACA  
21

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22  
23 <sup>6</sup> Creditor Agricap, LLC ("Agricap") filed a PACA Claim for  
24 \$544,251.80. As part of its claim amount, Agricap asserted that  
25 it was entitled to payment of offsets from various PACA Creditors  
26 due from a financing agreement entered into with TDI which gave  
27 Agricap an interest in TDI's account receivables. The PACA  
28 Creditors admit that such offsets are owed, but dispute the  
amount of the offsets and whether they should be paid to Agricap  
or offset against the amount due to TDI's estate. This dispute  
between Agricap and the PACA Creditors is pending before the U.S.  
District Court for the Central District of California, S&H  
Packing & Sales Co., Inc. v. Tanimura Distrib., Inc., Case No.  
08-cv-05250.

1 Creditors were resolved in a pending district court matter (see  
2 footnote 6), so any chart she would provide would be  
3 informational only. Second, many of the PACA claims submitted  
4 did not take into account the setoffs that TDI's estate and  
5 Agricap could assert against them if the claimant bought produce  
6 from TDI and had unpaid invoices. Third, some creditors filed  
7 proofs of claim that looked like PACA claims prior to the general  
8 claims bar date, but they did not file a subsequent PACA claim  
9 pursuant to the March 5 Order, and some of those that did re-file  
10 claimed a different amount than they claimed previously.  
11 Finally, many PACA claimants filed claims for amounts that  
12 differed significantly from TDI's scheduled amounts owed, and  
13 those overstated claims required further analysis. To prove  
14 these asserted facts, Trustee submitted "Exhibit A" - a chart  
15 identifying the claimant, the amount claimed by the claimant, the  
16 amount the claimant owed TDI to be offset, and the difference  
17 between the two amounts.

18 The PACA Creditors replied, contending that Trustee's  
19 response served as an untimely and unsupported objection to the  
20 PACA Creditors' claims; her objections were months late and  
21 lacked evidentiary support. They further argued that the claims  
22 of those parties who chose not to file a PACA proof of claim  
23 should be barred per the March 5 Order. Although the bankruptcy  
24 court heard the motion to compel on December 16, 2009, we have no  
25 transcript from that hearing, and no order was ever entered on  
26 the motion to compel.

27 On January 20, 2010, Trustee filed a Motion for Order  
28 Authorizing Distribution of PACA Trust Funds (the "Distribution

1 Motion"). Trustee wished to distribute approximately \$119,000  
2 collected from TDI's accounts receivable to the PACA claimants on  
3 a pro rata basis, which equated to a payment of approximately two  
4 cents on the dollar. Trustee proposed to distribute funds based  
5 on the principal amount of the PACA claimant's filed claim, minus  
6 any amount owed to TDI, including amounts owed on TDI's invoices  
7 that were assigned to Agricap.

8 In short, Trustee's proposed distribution worked as follows.  
9 If a PACA claimant's pro rata distribution was \$500 based on its  
10 gross claim of \$10,000, and the claimant owed TDI \$2,000, the  
11 claimant would receive \$0 because the \$2,000 debt cancelled out  
12 the \$500 distribution. Trustee contended that her distribution  
13 method was the most equitable since some creditors had already  
14 paid the estate while other creditors paid nothing, and any other  
15 method would result in the paying creditors subsidizing the  
16 distribution to those creditors who did not pay.

17 Due to the modest amount of funds available, Trustee was  
18 willing to disregard the discrepancies between the filed claim  
19 amounts and the amounts reflected as owed in TDI's records, and  
20 accept as true the amount claimed by the PACA claimants, even  
21 though several claimants failed to provide any evidentiary  
22 support for their claims. Trustee further proposed to distribute  
23 funds to any PACA claimant, whether or not they filed an actual  
24 "PACA" proof of claim as required by the March 5 Order. Finally,  
25 to make the distribution more equitable, Trustee proposed  
26 removing any component of attorneys fees or interest requested in  
27 some of the claims.

28

1 The PACA Creditors filed objections.<sup>7</sup> Although they agreed  
2 to a setoff, they contended that it should work as follows. If a  
3 PACA claimant's pro rata distribution is \$500 based on its gross  
4 claim for \$10,000, and it owes TDI \$2,000, the \$2,000 should be  
5 setoff from the \$10,000, leaving the claimant with a "net" claim  
6 of \$8,000, which provides the basis for its pro rata distribution  
7 of \$400. In other words, the setoff amount should be deducted  
8 from the gross amount of the claim, not the pro rata  
9 distribution. The PACA Creditors also contended that the claims  
10 of 12 creditors who failed to file a proper PACA proof of claim  
11 pursuant to the March 5 Order should be barred. Further, they  
12 asserted, three of these 12 claimants were not valid PACA trust  
13 creditors because they failed to either: (1) include statutorily  
14 prescribed language on their billing statements as required under  
15 7 U.S.C. § 499e(c)(4); or (2) provide evidence of separate timely  
16 written notice of intent to preserve their PACA trust rights as  
17 required under 7 U.S.C. § 499e(c)(3). Finally, the PACA  
18 Creditors contended that TDI was obligated to pay interest and  
19 attorneys fees on each PACA claim.

20 A hearing was held on the Distribution Motion on  
21 February 10, 2010. During oral argument, the bankruptcy court  
22 expressed its dismay about the extent of the legal expense and  
23 delay occasioned by arguing about what was really pennies to any  
24 particular creditor. The court further noted that Trustee was

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26  
27 <sup>7</sup> The GW Palmer Group and the Pacific Tomato Group each  
28 filed an objection to the Distribution Motion. S&H Packing Group  
did not file an objection, but did appear at the hearing and  
opposed Trustee's proposals.



1 not finished with her efforts to collect further money, and that  
2 no matter how it ruled on the \$119,000 distribution, a de minimis  
3 amount in light of the \$6 million in PACA claims, its ruling was  
4 not a final disposition to any issue other than who would get to  
5 share in the \$119,000, but even that decision was subject to  
6 reconsideration. Regarding the issue of attorneys fees and  
7 interest, Trustee agreed that if the PACA claimant's invoice to  
8 TDI provided for interest and attorneys fees, the claimant would  
9 receive them, even though it was pennies.

10 After hearing the parties' arguments, the bankruptcy court  
11 announced orally its ruling in favor of Trustee, adopting her  
12 proposed method of distribution:

13 COURT: It seems to me that where we are with respect to  
14 an order is that A, it's without prejudice to . . .  
15 further collections, B it's without prejudice with  
16 respect to what's going on in the district court and C,  
17 it's subject to reconsideration at any time down the  
18 road if causes [sic] establish [sic] for  
19 reconsideration.

20 TRUSTEE'S COUNSEL: Yes sir.

21 COURT: Well, if that's the case, then it would be my  
22 inclination to accept the trustee's point of view with  
23 respect to off sets [sic], that we're talking about a  
24 nominal amount of money in virtually every case, a tiny  
25 fraction of the individual PACA claim or aggregate PACA  
26 claim . . . .

27 Here we have extremely limited assets and we have what  
28 is necessarily an interim order to take care of a small  
29 pot of money and to get it in the hands of people who  
30 deserve to share in the recoveries. I think on that  
31 basis the trustee's proposal is acceptable and I would  
32 sign an order to that effect.

33 Hr'g Tr. 29:4-25, Feb. 10, 2010.

34 On May 27, 2010, the bankruptcy court entered an order on  
35 the Distribution Motion in accordance with its February 10 oral  
36 ruling (the "May 27 Order"). Only those objecting creditors who

1 attached invoices to their PACA claims that provided for their  
2 contractual entitlement to interest and/or attorneys fees would  
3 receive them. The court declined to award any discretionary  
4 interest to those creditors whose invoices, if any, did not  
5 provide for interest and/or attorneys fees. The PACA Creditors  
6 timely appealed.

## 7 **II. JURISDICTION**

8 The bankruptcy court had jurisdiction under 28 U.S.C.  
9 §§ 1334 and 157(b)(2)(A). On June 25, 2010, we received a copy  
10 of the PACA Creditors' motion for leave to appeal. On September  
11 2, 2010, the motions Panel issued an order determining that the  
12 order on appeal was final and immediately appealable without the  
13 need for leave of the Panel. However, the Panel granted leave to  
14 the extent that leave to appeal was necessary. Therefore, we  
15 have jurisdiction under 28 U.S.C. § 158.<sup>8</sup>

## 16 **III. ISSUES**

- 17 1. Did the bankruptcy court abuse its discretion when it  
18 adopted Trustee's method of distribution?
- 19 2. Did the bankruptcy court err in permitting certain claimants  
20 to receive a pro rata disbursement from the PACA trust funds?
- 21 3. Did the bankruptcy court abuse its discretion by not  
22 granting discretionary prejudgment interest to certain PACA  
23 Creditors?

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24  
25  
26 <sup>8</sup> The parties informed the Panel at oral argument that at  
27 least \$25,000 of the PACA trust funds remain to be distributed.  
28 As a result, this appeal is not moot. See United States v. Tanoue, 94 F.3d 1342, 1344 (9th Cir. 1996)(appeal is moot when events occur that make it impossible for the appellate court to grant "any effective relief whatever.").

1 IV. STANDARD OF REVIEW

2 The bankruptcy court's decisions with respect to matters of  
3 setoff are reviewed for an abuse of discretion. Arkinson v.  
4 Frontier Asset Mgmt., LLC (In re Skagit Pac. Corp.), 316 B.R.  
5 330, 335 (9th Cir. BAP 2004). The bankruptcy court's decision to  
6 deny discretionary prejudgment interest is also reviewed for an  
7 abuse of discretion. Endico Potatoes, Inc. v. CIT  
8 Group/Factoring, Inc., 67 F.3d 1063, 1071-72 (2d Cir. 1995).  
9 This involves a two-step inquiry. United States v. Redlightning,  
10 624 F.3d 1090, 1110 (9th Cir. 2010)(citing United States v.  
11 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009)). First, we  
12 determine de novo whether the bankruptcy court identified the  
13 correct legal rule to apply to the relief requested. Id. If the  
14 court did not identify the correct legal rule, it is an abuse of  
15 discretion. Second, we determine if the bankruptcy court's  
16 application of the correct legal standard was illogical,  
17 implausible, or without support in inferences that may be drawn  
18 from the facts in the record. Id. (internal citations omitted).  
19 If the court's application of the correct legal standard to the  
20 facts was illogical, implausible, or without support in  
21 inferences that may be drawn from the facts in the record, then  
22 the bankruptcy court abused its discretion. Id.

23 Whether certain PACA Creditors are entitled to share in the  
24 PACA trust assets is a question of law reviewed de novo. C&E  
25 Enters., Inc. v. Milton Poulos, Inc. (In re Milton Poulos, Inc.),  
26 107 B.R. 715, 717 (9th Cir. BAP 1989), aff'd in part, rev'd in  
27 part, 947 F.2d 1351 (9th Cir. 1991). De novo review requires  
28 that we consider a matter anew, as if it had not been heard

1 before, and as if no decision had been previously rendered.  
2 United States v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988).

3  
4 **V. DISCUSSION**

5 **A. The Bankruptcy Court Did Not Abuse Its Discretion When It**  
6 **Adopted Trustee's Method Of Distribution.**

7 **1. Setoff in Bankruptcy.**

8 The rule of setoff allows parties that owe mutual debts to  
9 state the accounts between them, subtract one from the other and  
10 pay only the balance. Cohen v. Sav. Bldg. & Loan Co. (In re  
11 Bevill, Bresler & Schulman Asset Mgmt. Corp.), 896 F.2d 54, 57  
12 (3d Cir. 1990). The purpose of setoff is to avoid "the absurdity  
13 of making A pay B when B owes A." Studley v. Boylston Nat'l  
14 Bank, 229 U.S. 523, 528 (1913).

15 The Bankruptcy Code does not grant a right to setoff; state  
16 law governs these rights. Citizens Bank of Md. v. Strumpf,  
17 516 U.S. 16, 18-19 (1995). Section 553 acknowledges the common  
18 law and state law rights of setoff and merely preserves such  
19 rights.<sup>9</sup> Id. The parties do not dispute that California law  
20 recognizes the equitable right to setoff. Fed. Nat'l Mortg.  
21 Ass'n v. County of Orange (In re County of Orange), 183 B.R. 609,  
22 622 (Bankr. C.D. Cal. 1995).

23 "In determining whether the right to setoff should be

24  
25 <sup>9</sup> Section 553(a) provides in relevant part:

26 Except as otherwise provided . . . this title does not  
27 affect any right of a creditor to offset a mutual debt owing  
28 by such creditor to the debtor that arose before the  
commencement of the case under this title against a claim of  
such creditor against the debtor that arose before the  
commencement of the case . . . .

1 preserved in bankruptcy under § 553, the party asserting setoff  
2 must demonstrate the following: (1) the debtor owes the creditor  
3 a prepetition debt; (2) the creditor owes the debtor a  
4 prepetition debt; and (3) the debts are mutual." Biggs v. Stovin  
5 (In re Luz Int'l, Ltd.), 219 B.R. 837, 843-44 (9th Cir. BAP  
6 1998). The parties agree that setoff is applicable in this case.

## 7 **2. Analysis.**

8 Where the parties disagree is at what point the setoff  
9 should be applied in the distribution calculation. The PACA  
10 Creditors contend that the bankruptcy court erred in implementing  
11 Trustee's inequitable method of subtracting the distribution  
12 amount from the debt owed to TDI because the claims of TDI (or  
13 Agricap) will be fully satisfied, while the PACA Creditors'  
14 claims will be only partially satisfied, if they receive any  
15 distributions at all. The PACA Creditors assert that the  
16 equitable approach is to reduce the principal claims by the  
17 amounts the PACA Creditors owe to TDI.

18 Section 553 does not prescribe the means by which a setoff  
19 may or must be executed in order to be effective. PACA also  
20 sheds no light on this subject. While offsetting the total  
21 amount party A owes party B against the total amount that party B  
22 owes party A may be the predominant method to calculate a setoff,  
23 it is not the exclusive method. In re Fruehauf Trailer Corp.,  
24 414 B.R. 36, 42 (Bankr. D. Del. 2009) ("Based on the equitable  
25 nature of setoff, a court may calculate the setoff in the way it  
26 deems most equitable.").

27 While we recognize the special protections Congress afforded  
28 to PACA creditors with respect to payment, and that Trustee did

1 not timely object to any of the PACA claims, we cannot conclude  
2 on this record that the bankruptcy court abused its discretion  
3 when it adopted Trustee's proposed method of setoff for this  
4 initial distribution. In the absence of any controlling  
5 authority, the court was free to apply Trustee's method, which it  
6 determined, in its discretion, was the most equitable. We will  
7 not alter the trial court's discretionary decision.

8 We further note that the bankruptcy court clearly stated  
9 that its ruling here was not an across-the-board determination of  
10 how future distributions would be made, and that it would have no  
11 effect on any matters pending in the district court. Accordingly,  
12 we AFFIRM this portion of the May 27 Order.

13 **B. The Bankruptcy Court Did Not Err When It Allowed Certain**  
14 **PACA Claimants To Share In The Distribution Of The PACA**  
**Trust Funds.**

15 In the March 5 Order, the bankruptcy court approved the  
16 Stipulation as drafted, modifying only certain deadline dates.  
17 Despite the March 5 Order, Trustee's Distribution Motion proposed  
18 that all PACA claimants, whether or not they filed a PACA proof  
19 of claim and supporting evidence, be allowed to receive a pro  
20 rata distribution. The PACA Creditors opposed. They asserted  
21 that allowing 12 procedurally defective claims circumvented the  
22 Stipulation's purpose of determining valid PACA trust  
23 beneficiaries. Trustee contended that the 12 claims should be  
24 allowed because perhaps PACA claimants were confused as to what  
25 was effectively a requirement that they file two claims. Over  
26 the PACA Creditors' objection, the bankruptcy court approved  
27 Trustee's proposal to allow them.

28 Although not titled as such, Trustee's request to allow the

1 12 procedurally defective claims essentially functioned as a  
2 motion for relief from the March 5 Order under Fed. R. Civ. P.  
3 60(b), incorporated by Rule 9024. The PACA Creditors contend  
4 that the bankruptcy court erred when it allowed these 12  
5 claimants to share in the distribution of PACA trust funds in  
6 light of the March 5 Order. This argument is better suited for  
7 the bankruptcy court.

8 In the May 27 Order, the bankruptcy court modified the  
9 procedural rules for PACA claims set forth in the March 5 Order.  
10 As courts of equity, bankruptcy courts have broad discretion  
11 under Rule 9024 to reconsider, vacate, or modify past orders.  
12 Meyer v. Lenox (In re Lenox), 902 F.2d 737, 739-40 (9th Cir.  
13 1990). And although Rule 9024 refers to relief from final  
14 orders, it does not restrict the bankruptcy court's power to  
15 reconsider any of its previous orders when equity so requires.  
16 Id. at 740. What the PACA Creditors should be arguing on appeal  
17 is how the bankruptcy court abused its discretion when it entered  
18 the May 27 Order granting Trustee's request for relief from the  
19 March 5 Order. They have not provided any such argument. Issues  
20 not raised on appeal are waived. McCrary v. Barrack (In re  
21 Barrack), 217 B.R. 598, 602 n.2 (9th Cir. BAP 1998). We may,  
22 however, review an issue not properly presented if our failure to  
23 do so would result in manifest injustice. Leer v. Murphy, 844  
24 F.2d 628, 634 (9th Cir. 1988). Because the effect of including  
25 these 12 claimants in a distribution that equates to less than  
26 two cents on the dollar is de minimis, no manifest injustice  
27 exists, and therefore we decline to review this matter.

28 The PACA Creditors further argue that three of these 12 PACA

1 claimants failed to establish their rights as PACA trust  
2 beneficiaries, and the bankruptcy court erred when it included  
3 them in the distribution.<sup>10</sup> Whether these three PACA claimants  
4 are entitled to share in the PACA trust assets is a question of  
5 law we review de novo. Milton Poulos, 107 B.R. at 717.

6 Under PACA, the trust automatically arises in favor of a  
7 produce seller upon delivery of produce and is for the benefit of  
8 all unpaid suppliers or sellers until the buyer has paid the sums  
9 owing in connection with the subject transactions in full.

10 Milton Poulos, 947 F.2d at 1352 (citing 7 U.S.C. § 499e(c)(2)).

11 Nonetheless, unpaid produce sellers must take certain steps to  
12 preserve their rights to benefit from the trust. Id. at 1352-53.

13 Licensed PACA produce sellers can accomplish this by including  
14 language required by the PACA statute on the face of their  
15 invoices to notify the buyer that the produce is sold subject to  
16 the trust. See 7 U.S.C. § 499e(c)(4).<sup>11</sup> Alternatively, produce  
17 sellers can preserve their trust rights by sending a document  
18 entitled "Notice of Intent to Preserve Trust Benefits" to the  
19 buyer within 30 days after expiration of the parties' payment

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21 <sup>10</sup> The alleged three claimants are Martinez Farms (Claim No.  
22 30), Plug Connection (Claim No. 1), and Tom Fruden Tomato (Claim  
23 No. 3).

24 <sup>11</sup> The language required under 7 U.S.C. § 499e(c)(4) is:

25 The perishable agricultural commodities listed on this  
26 invoice are sold subject to the statutory trust authorized  
27 by section 5(c) of the Perishable Agricultural Commodities  
28 Act, 1930 (7 U.S.C. 499e(c)). The seller of these  
commodities retains a trust claim over these commodities,  
all inventories of food or other products derived from these  
commodities, and any receivables or proceeds from the sale  
of these commodities until full payment is received.



1 terms. See 7 U.S.C. § 499e(c)(3).<sup>12</sup> Literal compliance is  
2 required. San Joaquin, 958 F.2d at 940.

3 The PACA Creditors contend that the three PACA claimants did  
4 not preserve their PACA trust rights because their proofs of  
5 claim failed to either (1) include the statutorily prescribed  
6 language on their ordinary and usual billing statements or  
7 invoices, or (2) provide evidence of a separate timely written  
8 notice of intent. While these alleged deficiencies may be true,  
9 the PACA Creditors failed to provide any evidence in the record  
10 to support their contentions. Although they recited the claim  
11 numbers related to the three PACA claimants' proofs of claim, the  
12 PACA Creditors did not include copies of these claims (or any  
13 documents filed therewith) in the record. We also have no  
14 transcripts from any of the several PACA-related hearings (other  
15 than the one from Trustee's Distribution Motion), so we have no  
16 knowledge of whether any of the three PACA claimants appeared  
17 and/or submitted any evidence to the bankruptcy court proving

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19 <sup>12</sup> Title 7 U.S.C. § 499e(c)(3) provides:

20 The unpaid supplier, seller, or agent shall lose the  
21 benefits of such trust unless such person has given written  
22 notice of intent to preserve the benefits of the trust to  
23 the commission merchant, dealer, or broker and has filed  
24 such notice with the Secretary [of Agriculture] within  
25 thirty calendar days (i) after expiration of the time  
26 prescribed by which payment must be made, as set forth in  
27 regulations issued by the Secretary, [or] (ii) after  
28 expiration of such other time by which payment must be made,  
as the parties have expressly agreed to in writing before  
entering into the transaction . . . . When the parties  
expressly agree to a payment time period different from that  
established by the Secretary, a copy of any such agreement  
shall be filed in the records of each party to the  
transaction and the terms of payment shall be disclosed on  
invoices, accountings, and other documents relating to the  
transaction.

1 their standing as valid PACA creditors.

2 An appellant who attacks the trial court's findings or  
3 conclusions on appeal must include in the record all the evidence  
4 on which the court may have made its findings or conclusions.  
5 See Fed. R. App. P. 10(b); Bourke v. City of San Diego, 1997 WL  
6 75571, at \*1 (9th Cir. Feb. 17, 1997)(citing Thomas v. Computax  
7 Corp., 631 F.2d 139, 141 (9th Cir. 1980)). We, as a court of  
8 appeal, are under no obligation to scour the bankruptcy court  
9 docket or claims register to unearth what the PACA Creditors  
10 should have provided in the record. Kritt v. Kritt (In re  
11 Kritt), 190 B.R. 382, 386-87 (9th Cir. BAP 1995); Carter v. Am.  
12 Oil Co., 139 F.3d 1158, 1163 (7th Cir. 1998). Failing to present  
13 a sufficient record can itself serve as a basis for summary  
14 affirmance or for dismissal of the appeal. Cnty. Commerce Bank  
15 v. O'Brien (In Re O'Brien), 312 F.3d 1135, 1137 (9th Cir. 2002).

16 Without any evidence in the record, we are unable to conduct  
17 a meaningful review of this issue. Accordingly, we must AFFIRM  
18 this portion of the May 27 Order.

19 **C. The Bankruptcy Court Did Not Abuse Its Discretion When It**  
20 **Declined To Award Certain PACA Creditors Discretionary**  
**Prejudgment Interest.**

21 In its May 27 Order, the bankruptcy court authorized the  
22 payment of prejudgment interest (and attorneys fees) to those  
23 PACA claimants who attached invoices to their claims that  
24 provided a contractual entitlement to interest and/or attorneys  
25 fees. It declined to award discretionary interest to those 18  
26 claimants who did not provide such invoices. The PACA Creditors  
27 contend that the bankruptcy court erred in denying discretionary  
28 interest to these 18 PACA Creditors who were not otherwise

1 entitled to such interest under a contractual right. We  
2 disagree.

3 The PACA statute is silent on the issue of attorneys fees  
4 and prejudgment interest. 7 U.S.C. § 499a et seq. In Middle  
5 Mountain Land & Produce, Inc. v. Sound Commodities, Inc., the  
6 Ninth Circuit interpreted PACA's statutory language "in  
7 connection with" to include attorneys fees and interest as part  
8 of a claimant's PACA claim against the assets of the trust if the  
9 PACA claimant had a contractual right to such fees and  
10 interest.<sup>13</sup> 307 F.3d 1220, 1222-23 (9th Cir. 2002). As for  
11 prejudgment interest absent a contractual right, Middle Mountain  
12 held that the trial court has broad discretion to fashion  
13 prejudgment interest awards to PACA claimants, and it can award  
14 reasonable prejudgment interest if it is necessary to protect the  
15 interests of the PACA claimants.<sup>14</sup> Id. at 1226 (citing Endico  
16 Potatoes, 67 F.3d at 1071-72).

17 The decision whether to grant prejudgment interest and the  
18 rate used if such interest is granted "are matters confided to  
19 the district court's broad discretion, and will not be overturned  
20 on appeal absent an abuse of that discretion." Endico Potatoes,  
21 67 F.3d at 1071; Blau v. Lehman, 368 U.S. 403, 414 (1962)(on  
22 appeal denial of prejudgment interest will only be reversed if it  
23

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24 <sup>13</sup> See 7 U.S.C. § 499e(c)(2), supra n.3

25 <sup>14</sup> As for attorneys fees, Middle Mountain held that such  
26 awards in PACA claims are proper in two situations: (1) when an  
27 enforceable contract exists giving the plaintiff a right to  
28 attorney's fees; and (2) when a PACA claimant's litigation  
efforts result in a common fund for the benefit of a group of  
claimants. Id. at 1224-25. Attorneys fees are not at issue in  
this appeal.

1 "was either so unfair or so inequitable as to require us to upset  
2 it." ).

3 Despite PACA's strong policy to increase legal protection  
4 for unpaid sellers of agricultural commodities and encourage  
5 prompt payment by buyers, Middle Mountain did not hold that  
6 merely being a PACA claimant entitles one to prejudgment  
7 interest. If that were the case, the court would not have held  
8 that trial judges have broad discretion to award prejudgment  
9 interest under PACA, and all PACA claimants would automatically  
10 receive it. Therefore, Middle Mountain suggests that the PACA  
11 claimant must show something more.

12 The 18 PACA Creditors subject to the bankruptcy court's  
13 denial of prejudgment interest provided no facts before the  
14 bankruptcy court to show why such an award was warranted as a  
15 matter of discretion. For example, did these 18 PACA Creditors  
16 attempt to collect their outstanding invoices prior to TDI filing  
17 bankruptcy? If so, how did TDI respond? How long ago did their  
18 transaction(s) with TDI occur? The 18 PACA Creditors also failed  
19 to offer the interest rate or the relevant dates that might be  
20 used in calculating the amount of interest. In fact, only four  
21 of them provided in their oppositions to the Distribution Motion  
22 how much interest should be awarded.<sup>15</sup>

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24 <sup>15</sup> Two objections to the Distribution Motion were filed by  
25 the PACA Creditors, one by the G.W. Palmer Group and one by the  
26 Pacific Tomato Group. Only the Pacific Tomato Group's objection  
27 set forth any alleged interest amounts owing in its prayer for  
28 relief. Out of the 13 creditors in that list, only four of them  
(Pacific Tomato Growers, MJ International Marketing, Natural  
Selection Foods, and Interfresh, Inc.) are part of the 18 PACA  
Creditors denied interest. The remaining 14 parties failed to  
assert what amount of interest was allegedly owed.

1 If these 18 PACA Creditors could not explain in their  
2 oppositions why they should be awarded prejudgment interest or,  
3 for most of them, even state how much they wanted, then the  
4 bankruptcy court could not have abused its discretion in denying  
5 it. In addition, as the bankruptcy court observed, since the  
6 cost of recalculating interest clearly outweighed what little the  
7 18 PACA Creditors stood to recover in interest with this first  
8 distribution, awarding them discretionary prejudgment interest  
9 was not necessary to protect their interests pursuant to PACA.  
10 We see no abuse here and AFFIRM this portion of the May 27  
11 Order.<sup>16</sup>

#### 12 VI. CONCLUSION

13 For the foregoing reasons, we AFFIRM.  
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23 <sup>16</sup> The 18 PACA Creditors also argue that they are entitled  
24 to discretionary prejudgment interest under California law,  
25 citing Cal. Civ. Code § 3287(a). Their argument is misplaced.  
26 Since their claim arises under a federal statute, the award of  
27 interest is governed by federal law, not the law of the forum  
28 state. Poleto v. Consol. Rail Corp., 826 F.2d 1270, 1274 (3d  
Cir. 1987), overruled on other grounds, Kaiser Aluminum & Chem.  
Corp. v. Bonjorno, 494 U.S. 827 (1990); Sunclipse, Inc. v.  
Butcher (In re Butcher), 200 B.R. 675, 680 (Bankr. C.D. Cal.  
1996)(same).