

**IN THE COURT OF APPEALS
OF THE STATE OF ARIZONA**

DIVISION ONE

Case No. CA-CV 14-0567

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, a Missouri corporation, THOMAS AND KAREN MOORE, a California partnership, d/b/a TOM MOORE TRANSPORTATION, JASMINE, LLC, a Missouri corporation, and K&S TRUCKING LLC, a Wyoming limited liability corporation, on behalf of themselves and others similarly situated.

Plaintiffs and Appellants,

vs.

PACIFIC FINANCIAL ASSOCIATION, INC., a California corporation, and
FEDERAL SERVICE CORPORATION, an Arizona corporation

Defendants and Appellees.

On Appeal from the Superior Court of Maricopa County
(Case No. CV2013-000615, The Honorable Richard Gama, Judge)

APPELLANTS' OPENING BRIEF

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PRELIMINARY STATEMENT

This case presents a landmark question of first impression regarding whether the beneficiaries of a federally mandated trust instrument - a “Property Broker’s Trust Fund Agreement Under 49 U.S.C. 13906” (“BMC 85 Trust”) - can bring a tort action under Arizona law against the trustee for breach of fiduciary duty and negligence. The Superior Court dismissed Plaintiffs/Appellants’ complaint, ruling that the BMC 85 Trust is “not a ‘trust’ under Arizona law,” citing A.R.S. § 14-1201(58), and that Appellants’ claims could not be asserted under either the Arizona Trust Code or common law. The Superior Court also awarded Defendants/Appellees over \$85,000 in attorney fees against Appellants, concluding that their claims arose out of contract, not tort law.

As demonstrated herein, these rulings are unsustainable as a matter of law. Simply stated, and contrary to the Superior Court’s analysis, BMC 85 Trusts are statutory trusts, not “liquidation trusts and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions or employee benefits of any kind” under A.R.S. § 14-1201(58), and thus BMC 85 Trusts are not excluded from the definition of a “trust” under Arizona law. In particular, if this Court upholds the Superior Court’s ruling that Appellants’ claims are not actionable under common law because they are excluded under the Arizona Trust Code, then trustees of such “liquidation” and/or “employee benefits” trusts, and at

least twelve (12) other categories of trusts excluded under A.R.S. 14-1201(58) could breach their fiduciary duties with impunity. Finally, because the BMC 85 Trust allows for the application of Arizona law “to the extent not inconsistent with the rules and regulations of the FMCSA (Federal Motor Carrier Safety Administration),” the Superior Court’s rulings contravene the primary purpose of Congress in promulgating this statutory and regulatory regime -- “to protect carriers and the travelling and the shipping public against dishonest and financially unstable middlemen in the transportation industry.” The Superior Court’s judgment must be reversed in order to carry out these federally mandated remedial purposes.

STATEMENT OF THE CASE

Plaintiffs/Appellants (“Motor Carriers”) filed their Complaint in the Superior Court of Maricopa County on February 21, 2013, alleging, *inter alia*, that Defendants/Appellees (jointly “Pacific Financial”) breached their fiduciary duties under a BMC 85 Trust mandated by federal law pursuant to 49 U.S.C. § 13906(b) and 49 C.F.R. § 387.307. (IR #1). Pacific Financial initially attempted to remove the action to federal district court; however, on July 18, 2013, the district court granted the Motor Carriers’ motion to remand the case to the Superior Court. (IR ##9-10). *See OOIDA v. Pacific Financial Ass’n., Inc.*, 2013 WL 3772656 (D. Ariz. 2013). After the case was remanded, Pacific Financial filed an A.R.C.P.

12(b)(6) motion to dismiss the complaint. (IR ## 16-17). By Order filed on November 25, 2013, the Superior Court granted Pacific Financial's motion to Dismiss. (IR #34). On December 17, 2013, the Motor Carriers filed a Rule 59 Motion for New Trial (IR ##38, 44), and a Motion to Amend (IR ##35-37, 44). By Order filed on February 13, 2014, the Superior Court denied the Motor Carriers' motions. (IR #45). By Order filed on May 19, 2014, the Superior Court awarded Pacific Financial attorney fees against the Motor Carriers in the sum of \$85,017.00, and costs in the sum of \$773.00. (IR # 55). Judgment was filed on July 16, 2014. (IR #58). The Motor Carriers timely filed their Notice of Appeal on August 1, 2014. (IR #61).

STATEMENT OF FACTS

A. The Motor Carriers' Complaint

The named Motor Carriers in this case - Tom Moore Transportation, Jasmine, LLC, and K&S Trucking LLC - hauled freight pursuant to contractual agreements they had with a freight broker, non-party Alliance Transportation, Inc. ("Alliance Transportation"). *See* Complaint, IR #1, at ¶ 1.¹ The Motor Carriers'

¹ Appellant Owner-Operator Independent Drivers Association, Inc. ("OOIDA"), is a non-profit trade association with over 150,000 independent truckers, many of whom are FMCSA-licensed "motor carriers" who are beneficiaries of BMC-85 Trusts. OOIDA appears in its associational representative capacity, and does not seek damages. *See* Complaint, IR #1 at ¶ 11.

contracts with Alliance Transportation were secured and protected by a BMC-85 Trust under which Pacific Financial served as trustee. *Id.* The BMC 85 Trust explicitly required Pacific Financial to protect the security and assets of the Trust for the exclusive purpose of making direct payments to the Motor Carriers for the shipping services they provided to Alliance Transportation. *Id.* The Motor Carriers' Complaint alleged that Pacific Financial failed to carry out its duties in protecting the Trust assets and security. *Id.* Specifically, the Motor Carriers alleged that Pacific Financial breached its fiduciary duties, and was negligent, in failing to protect the security and assets of the Trust by, *inter alia*, failing to pay claims promptly; favoring certain trust beneficiaries to the detriment of others; engaging in conflicts of interest; and failing to terminate the trust upon the aggregation of claims sufficient to exhaust the trust corpus. *Id.* The Complaint alleged that Pacific Financial's negligence and breaches of fiduciary and trust duties caused actual damages to the Motor Carriers and putative class members. *Id.*

Counts I, II, and V of the Motor Carriers' Complaint alleged breach of fiduciary duty by Pacific Financial. Count III of the Complaint alleged that Pacific Financial breached its duty of good faith and fair dealing. Counts IV and VI of the Complaint alleged negligence by Pacific Financial and Federal Service Corporation. Count VII of the Complaint alleged that Federal Service Corporation

aided and abetted tortious conduct. Finally, Count VIII of the Complaint sought declaratory judgment that Pacific Financial is engaged in the “trust business.”

B. The Superior Court’s Rulings

1. Dismissal of the Motor Carriers’ Complaint - In dismissing the Motor Carriers’ Complaint under A.R.C.P. 12(b)(6), the Superior Court concluded:

Defendants argue that the U.S. Department of Transportation Form BMC-85 Property Broker’s Trust Agreement ... is not a “trust” under the Arizona Trust Code. The Court agrees. Even if Form BMC-85 is an “express trust,” it is not a “trust” under A.R.S. § 14-1201(58). The Agreement creates a contractual obligation to pay certain debts, under certain terms and conditions. It is a “trust for the primary purpose of paying debts”—specifically, Alliance’s debts to shippers and motor carriers. The Court cannot read the first sentence of § 14-1201(58) in such a way as to render the “trust excludes” language superfluous. *E.g., Welch-Doden v. Roberts*, 202 Ariz. 201, 206 (App. 2002).

(IR #34).

2. Denial of the Motor Carriers’ Motion to Amend - Following the Superior Court’s dismissal order, the Motor Carriers filed: (1) a motion for new trial (IR ##38, 44); and (2) a motion to amend, emphasizing that their original complaint did not exclude the application of common law, and that notwithstanding the Court’s finding that the BMC 85 Trust was excluded under Arizona statute, the Motor Carriers should be permitted to proceed with their tort claims under common law. (IR ##35-37, 44). The Superior Court denied the Motor Carriers’ motions, without any separate analysis, stating that they were

being denied “[f]or the reasons stated in Defendants’ Joint Response” to the motions. (IR #45).

3. Attorneys Fee Award to Pacific Financial - In granting Pacific Financial’s motion for attorneys fees under A.R.S. §12-341 and A.R.S. §12-341.01, the Superior Court rejected the Motor Carriers’ demonstration that their claims arose out of Pacific Financial’s breach of fiduciary duty and negligence under the BMC 85 Trust, and accepted Pacific Financial’s theory that the court should look instead at the underlying contracts between the Motor Carriers and Alliance Transportation, concluding: “[T]he claims asserted by [the Motor Carriers] were based on agreements entered into by these parties and thus “arose out of contract.’ Under these circumstances, the causes of action alleged in torts could not exist ‘but for’ the alleged breach of the underlying contract.” (IR #55).

C. Statutory and Regulatory Setting

The BMC 85 Trust is promulgated pursuant to federal statute, 49 U.S.C. §13906, as a condition for brokers such as Alliance Transportation to engage in transportation agreements with the Motor Carriers. A copy of the “Property Broker’s Trust Fund Agreement Under 49 U.S.C. §13906” between Pacific Financial and Alliance Transportation was attached to Pacific Financial’s motion to dismiss. (IR #17). The BMC 85 Trust provides that “This agreement shall be governed by the laws of the State of Arizona, to the extent not inconsistent with the

rules and regulations of the FMCSA.” *Id.* The BMC 85 Trust permits the “Trustee”/financial institution (here, Pacific Financial), and the “Trustor”/broker (here, Alliance Transportation) to fill in the blank providing which state law they seek to have applied. *Id.* The Motor Carriers were not signatories to the BMC 85 Trust. *Id.* Pacific Financial executed the Trust as “TRUSTEE” by its President, J.P. Larson. *Id.*

49 U.S.C. § 13901 requires motor carriers and transportation brokers to be registered as such. 49 U.S.C. § 13904 sets forth additional requirements, including compliance with § 13906(b), for the registration of transportation brokers such as Alliance Transportation. Subsection (b) of 49 U.S.C. § 13906 provides:

(b) Broker requirements. The Secretary may register a person as a broker under section 13904 only if the person files with the Secretary a bond, insurance policy, or other type of security approved by the Secretary to ensure that the transportation for which a broker arranges is provided. The registration remains in effect only as long as the broker continues to satisfy the security requirements of this subsection.

“Congress’ primary purpose for regulating motor transportation brokers has been to protect carriers and the travelling and the shipping public against dishonest and financially unstable middlemen in the transportation industry.” *Property Broker Security for the Protection of the Public*, 4 I.C.C. 2d 358, 361, 1988 WL 225581 *3 (1988). In “adopting final rules that authorize property brokers to

establish trust funds as an alternate security to surety bonds,” the Interstate Commerce Commission stated:

We believe broker surety bonds and trust fund agreements will protect motor carriers and the shipping public against dishonest and financially unstable brokers with minimal government interference in the business dealings between brokers, on the one hand, and shippers and carriers, on the other. Additionally, we are convinced that the continuation of a \$10,000 bond amount or the initiation of a \$10,000 trust amount will not endanger the public interest in any way. Surety companies, for example, thoroughly investigate a bond applicant as to reputation, integrity, business ability, and financial stability. We expect financial institutions to similarly investigate a broker before entering a trust agreement with the Broker. The possibility of questionable brokers preying on shippers and carriers is thereby all but eliminated.

Id.

49 C.F.R § 387.307, which specifically requires the use of a BMC 85 Trust, provides:

(a) Security.

(1) A property broker must have a surety bond or trust fund in effect for \$10,000. The FMCSA will not issue a property broker license until a surety bond or trust fund for the full limits of liability prescribed herein is in effect. The broker license shall remain valid or effective only as long as a surety bond or trust fund remains in effect and shall ensure the financial responsibility of the broker.

* * *

(b) Evidence of Security. Evidence of a trust fund with a financial institution must be filed using the FMCSA’s prescribed Form BMC 85. The surety bond or the trust fund shall ensure the financial responsibility of the broker by providing for payments to shippers or motor carriers if the broker fails to carry out its

contracts, agreements, or arrangements for the supplying of transportation by authorized motor carriers.

Id.

The BMC-85 Trust agreement sets forth the following recitations:

WHEREAS, the Trustor is or intends to become either a Broker or a Freight Forwarder pursuant to the provisions of the Title 49 U.S.C. 13904, and the rules and regulations of the Federal Motor Carrier Safety Administration (FMCSA) relating to insurance or other security for the protection of motor carriers and shippers, and has elected to file with the Federal Motor Carrier Safety Administration such a Trust Fund Agreement as will ensure financial responsibility and the supplying of transportation subject to the ICC Termination Act of 1995 in accordance with contracts, agreements, or arrangements therefor, and

WHEREAS, this Trust Fund Agreement is written to assure compliance by the Trustor as either a licensed Broker or a licensed Freight Forwarder of Transportation by motor vehicle with 49 U.S.C 13906(b), and the rules and regulations of the Federal Motor Carrier Safety Administration, relating to insurance or other security for the protection of motor carriers or shippers, and shall inure to the benefit of any and all motor carriers or shippers to whom the Trustor may be legally liable for any of the damages herein described.

(IR #17). The terms of the BMC 85 Trust include, *inter alia*, the following:

- Trustee agrees that payments made pursuant to the security provided herein to shippers and motor carriers pursuant to this Agreement will be made exclusively and directly to shippers or motor carriers that are parties to contracts, agreements or arrangements with Trustor. *Id.* ¶ 1.
- Trustee may, within its sole discretion, invest the funds comprising the corpus of this trust consistent with its fiduciary obligation under applicable law. *Id.* ¶ 5.
- Trustee shall pay, up to a limit of Ten Thousand Dollars (\$10,000.00), directly to a shipper or motor carrier any sum or sums which Trustee, in good faith, determines that the Trustor has failed to

pay and would be held legally liable by reason of Trustor's failure to perform faithfully its contracts, agreements, or arrangements for transportation by authorized motor carriers, made by Trustor while this agreement is in effect, regardless of the financial responsibility or lack thereof, or the solvency or bankruptcy, of Trustor. *Id.* ¶ 6.

- In the event that the trust fund is drawn upon and the corpus of the trust fund is a sum less than Ten Thousand Dollars (\$10,000.00), Trustor shall, within thirty (30) days, replenish the trust fund up to Ten Thousand Dollars (\$10,000.00) by paying to the Trustee a sum equal to the difference between the existing corpus of the trust fund and Ten Thousand Dollars (\$10,000.00). *Id.* ¶ 7.
- Trustee shall immediately give written notice to the FMCSA of all lawsuits filed, judgments rendered, and payments made under this trust agreement and of any failure by Trustor to replenish the trust fund as required herein. *Id.* ¶ 8.

(IR #17).

ISSUES PRESENTED FOR REVIEW

1. Whether the Trustee of a BMC 85 Trust, which is mandated by federal statute for the protection of motor carriers, is immune from tort liability under Arizona statutes and/or common law for breach of fiduciary duty and negligence under the Trust?

2. Whether an attorneys fee award against trust beneficiaries of a BMC 85 Trust is authorized under A.R.S. §12-341 and A.R.S. §12-341.01 where the beneficiaries' claims against the trustee arise from tort law?

ARGUMENT

I

THE SUPERIOR COURT ERRED IN DISMISSING THE MOTOR CARRIERS' CLAIMS ALLEGING PACIFIC FINANCIAL'S BREACH OF FIDUCIARY DUTY AND NEGLIGENCE UNDER A FEDERAL STATUTORY BMC 85 TRUST

A. The BMC 85 Trust is a Federal Statutory Trust That is Not Excluded From the Arizona Trust Code.

The Superior Court erred in dismissing the Motor Carriers' complaint on the ground that that a BMC 85 Trust is purportedly excluded from the Arizona Trust Code. The Superior Court's ruling involved the interpretation of a statute which is a matter of law that is reviewable by this Court de novo. *In re Naarden Trust*, 195 Ariz. 526, 528, 990 P. 2d 1085, 1087 (App. 1999).

As a threshold matter, the BMC 85 Trust is a statutory trust, mandated by federal law, which is not excluded from any definitions set forth in A.R.S. § 14-1201(58), the provision upon which the Superior Court relied in dismissing the Motor Carriers' Complaint. In this regard, the Superior Court concluded that the BMC 85 Trust is a "trust for the primary purpose of paying debts"—specifically, Alliance's debts to shippers and motor carriers, and therefore, "is not a 'trust' under the Arizona Trust Code." (IR #34). This ruling is erroneous because A.R.S. § 14-1201(58) does not exclude federal statutory trusts such as the BMC 85 Trust. A.R.S. § 14-1201(58) provides, in full:

58. “Trust” includes an express trust, private or charitable, with any additions, wherever and however created. Trust also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. Trust excludes other constructive trusts and excludes resulting trusts, conservatorship, personal representatives, trust accounts, custodial arrangements pursuant to chapter 7, article 7 of this title, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions or employee benefits of any kind, trusts created by a city or town for the payment of medical insurance, health care benefits or expenses, long-term or short-term disability, self insurance reserves and similar programs administered by a city or town, legal defense trusts and any arrangement under which a person is nominee or escrowee for another.

By no stretch of reasoning can any of these exclusions be interpreted to exclude a federally mandated statutory trust such as the BMC-85 Trust.

Additionally, the Arizona Trust Code, expressly includes statutory trusts. A.R.S. Title 14, Chapter 11, Article 1, A.R.S. § 14-10101, entitled “Short title” provides: “This chapter may be cited as the Arizona trust code.” *Id.* The Arizona legislature’s adoption of the Arizona Trust Code in 2009 was intended to make Arizona a “trust friendly” jurisdiction:

A legislative intent in enacting the ATC was specifically to make Arizona a “trust friendly” jurisdiction to increase the desirability of using trustees whose situs is in Arizona and not run trust money with hostile laws that frustrate the wishes of trust settlers.

See Les Raatz, *The Arizona Trust Code*, Arizona Attorney Magazine, Jan. 2009, at 20, 21. Quoted in *In re Estate of King*, 228 Ariz. 565, 570, 269 P. 2d 1189, 1194 (App. 2012).

The Arizona Trust Code, Title 14, Chapter 11, Article 1, A.R.S. § 14-10102, entitled “Scope” provides:

This chapter applies to express trusts, charitable or noncharitable trusts *and trusts created pursuant to a statute*, judgment or decree that requires the trust to be administered in the manner of an express trust.

Id. (Emphasis added). The Arizona Trust Code addresses duties owed by trustees to beneficiaries including certain duties alleged in the Motor Carriers’ Complaint.²

The Code is supplemented by “the common law of trusts and principles of equity . . . except to the extent modified by this chapter or another statute of this state.”

Title 14, Chapter 11, Article 1, A.R.S. § 14-10106.

² “[T]he trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries...” (A.R.S § 14-10801); “A trustee shall administer the trust solely in the interests of the beneficiaries.” (A.R.S § 14-10802); “If a trust has two or more beneficiaries, the trustee shall act impartially in... distributing the trust property, giving due regard to the beneficiaries' respective interests.” (A.R.S § 14-10803); “A trustee shall take reasonable steps to enforce claims of the trust...” (A.R.S § 14-10811); “...(A) trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.” (A.R.S § 14-10813); and “On termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution.” (A.R.S § 14-10817). (IR #1, ¶ 17).

Fundamental rules of statutory construction defeat the notion that a statutory trust such as the BMC Trust “is not a ‘trust’ under the Arizona Trust Code. In *Pima County by City of Tucson v. Maya Const. Co.*, 158 Ariz. 151, 155, 761 P. 2d 1055, 1059 (1988), the Supreme Court ruled:

[I]f it is reasonably practical, a statute should be explained in conjunction with other statutes to the end that they may be harmonious and consistent; and, if statutes relate to the same subject and are thus *in pari materia*, they should be construed together with other related statutes as though they constituted one law. Unless a statute, from its language or effect, clearly requires the conclusion that the legislature must have intended it to supersede or impliedly repeal an earlier statute, courts will not presume such an intent. [citation omitted]. Also, when reconciling two or more statutes, courts should construe and interpret them, whenever possible, in such a way so as to give effect to all the statutes involved.

Id. Given these considerations, because the Arizona Trust Code, A.R.S. § 14-10102, includes “trusts created pursuant to a statute,” and because A.R.S. § 14-1201(58) does not exclude such trusts, they can consistently be read together to permit the application of the Arizona Trust Code to the BMC 85 Trust without reaching the question of whether the Trust Code supersedes A.R.S. § 14-1201(58).

In addition, A.R.S. § 14-1201, “Definitions,” clarifies that the definitions set forth therein are dependent on the context. (“In this title, *unless the context otherwise requires*: . . .”). Here, the context of a statutory trust – which is mandated by federal law, and explicitly included in the Arizona Trust Code,

A.R.S. § 14-10102 – dictates that such trusts be recognized under the Code, thus obviating any conflict with A.R.S. § 14-1201(58).

Furthermore, BMC 85 Trusts are not “liquidation trusts and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions or employee benefits of any kind” under A.R.S. § 14-1201(58), and thus BMC 85 Trusts are not excluded from the definition of a “trust” under Arizona law. The Superior Court erred in accepting the interpretation advanced by Pacific Financial, to the exclusion of the remaining words and context of this particular exclusion, i.e., “liquidation trusts” and/or “employee benefits” trusts.

Even assuming that the Superior Court correctly ruled that a statutory trust must comport with Pacific Financial’s interpretation of A.R.S. § 14-1201(58), the court nonetheless erred in concluding that the BMC Trust is a “trust for the primary purpose of paying debts.” (IR #34). “Congress’ *primary purpose* for regulating motor transportation brokers has been to protect carriers and the travelling and the shipping public against dishonest and financially unstable middlemen in the transportation industry.” *Property Broker Security for the Protection of the Public*, 4 I.C.C.2d 358, 361, 1988 WL 225581 *3. (emphasis added). The BMC 85 Trust expressly incorporates these purposes, providing that: “[T]his Trust Fund Agreement is written to assure compliance by the Trustor as either a licensed Broker or a licensed Freight Forwarder of Transportation by

motor vehicle with 49 U.S.C 13906(b), and the rules and regulations of the Federal Motor Carrier Safety Administration, relating to insurance or other security for the protection of motor carriers or shippers, and shall inure to the benefit of any and all motor carriers or shippers to whom the Trustor may be legally liable for any of the damages herein described.” (IR #17).

These purposes are further effectuated by the establishment of a comprehensive structure under which trustees such as Pacific Financial are expected to investigate and monitor brokers to deter them from “preying” on motor carriers. As stated by the I.C.C.:

Surety companies, for example, thoroughly investigate a bond applicant as to reputation, integrity, business ability, and financial stability. We expect financial institutions to similarly investigate a broker before entering a trust agreement with the Broker. The possibility of questionable brokers preying on shippers and carriers is thereby all but eliminated.

Property Broker Security for the Protection of the Public, 4 I.C.C.2d 358, 363 1988 WL 225581 *4. In light of the foregoing, it is simply incorrect – and overly simplistic – to conclude that the intricate statutory and regulatory regime pursuant to which the BMC 85 Trust was promulgated has “the primary purpose of paying debts,” when its primary purposes are demonstrably far more expansive, prophylactic and remedial in scope, to wit: “to protect carriers and the travelling

and the shipping public against dishonest and financially unstable middlemen in the transportation industry.” *Id.*, 4 I.C.C.2d 358, 361, 1988 WL 225581 *3.

The proposition that a BMC 85 Trust exists primarily for the payment of debts also fundamentally misapprehends the function of the Trust which is to require the trustee to ensure the timely processing of claims so that they never exceed the \$10,000 value of the Trust. *See* IR # 17, ¶ 6. In this case, by the time Pacific Financial cancelled the Trust in February 2012, Alliance Transportation was on the verge of bankruptcy, and when it filed its bankruptcy petition in April 2012, it had listed 300 unsecured debts totaling about \$1,245,000, *i.e.*, far more than the \$10,000 sum in the Trust. *See* Complaint (IR #1, ¶¶ 80-84). This meltdown could have been prevented had Pacific Financial exercised reasonable care and diligence as trustee, as explained in the Motor Carriers’ Complaint:

Upon becoming a Trustee, Pacific Financial assumed a fiduciary duty with respect to the interests of those motor carriers contracting with Alliance Transportation. Because those motor carriers were well-defined and identifiable at any given point in time, Pacific Financial owed them a fiduciary duty to promptly pay their claims; to give notice to Alliance Transportation and the FMCSA of such payments (thereby triggering Alliance Transportation’s duty to replenish the Trust); and, upon becoming aware of unresolved claims sufficient in the aggregate to exhaust the trust corpus, to terminate the Trust. Only by paying claims promptly could Pacific Financial responsibly protect the security provided by the Trust to motor carriers doing business with Alliance Transportation. And, only by promptly terminating the Trust, could Pacific Financial protect motor carriers conducting business with Alliance Transportation while it was effectively undersecured or unsecured.

(IR #1, ¶ 48). Based on the foregoing, it cannot reasonably be concluded that the intricate operational structure of a BMC 85 Trust exists solely for the payment of debts. Quite the contrary, its purpose is *to prevent* the accumulation of debts in excess of the \$10,000 sum in the trust, as exemplified by the facts in this case. Here, had Pacific Financial acted with reasonable care and diligence, it would have taken steps to ensure that the exhaustion of the Trust was never threatened, and that once such a threat existed, it should have cancelled the Trust and/or informed motor carrier beneficiaries that Alliance was unsecured or under-secured so that they could mitigate their losses. Such duties far surpass the mere payment of debts.

Pacific Financial has never cited a single case demonstrating that a statutory trust such as the BMC 85 Trust is not a trust under A.R.S. § 14-1201(58), even if it has a requirement that the trust assets are to be used solely for the benefit of motor carriers. There are myriad trusts which have the function of paying debts. To be sure, it is doubtful that there are many trusts where the assets are not to be used for such a purpose. For example, a trust might require the trustee to apply the trust assets for the health and well-being needs of the beneficiary by paying the beneficiary's food, clothing, rent, and medical "debts." Are all such trusts excluded from the Arizona Trust Code because they require the payment of "debts"?

Finally, the Superior Court failed to consider the detrimental impact its ruling will have on the federally mandated Trust system in Arizona and elsewhere. First, carriers and the shipping public will no longer be protected “against dishonest and financially unstable middlemen in the transportation industry,” if trustees are allowed to breach their fiduciary duties under BMC 85 Trusts without fear of liability. Second, because the federally mandated BMC 85 Trust provides the exclusive authorization for Pacific Financial to conduct the business of selling such trusts, the Superior Court’s ruling that the BMC 85 Trust is not a trust under Arizona law, strips it of its authority to sell such trusts under the auspices of Arizona law. Indeed, the Superior Court’s ruling would inevitably compel the federal government to disallow all financial institutions from conducting business relating to BMC 85 Trusts in Arizona. Third, if the Superior Court’s ruling is upheld, it would invite unscrupulous brokers and trustees from around the country to establish Arizona as a haven where they can commit torts with impunity because BMC 85 Trusts are “not trusts” under Arizona law. Such a scenario defies the axiom that “Courts will not place an absurd or unreasonable construction on statutes.” *State v. McFall*, 103 Ariz. 234, 238, 439 P. 2d 805, 809 (1968). It also frustrates the legislature’s intention of making Arizona a “trust friendly” jurisdiction to increase the desirability of using trustees whose situs is in Arizona and not run trust money with hostile laws that frustrate the wishes of trust settlers,”

or as pertinent here, the statutory mandate of the United States government. *See Raatz, The Arizona Trust Code*, Arizona Attorney Magazine, Jan. 2009, at 20, 21. *Quoted in In re Estate of King*, 228 Ariz. 565, 570, 269 P. 2d 1189, 1194.

Based on the foregoing points and authorities, this Court should reverse the Superior Court's judgment.

II

THE SUPERIOR COURT ERRED IN REFUSING TO ALLOW THE MOTOR CARRIERS' CLAIMS TO PROCEED UNDER COMMON LAW

If the Motor Carriers' tort claims are excluded under the Arizona Trust Code, then under clearly established principles, they are nonetheless actionable at common law. The Superior Court erred by failing to acknowledge that the Motor Carriers' original complaint did not exclude common law claims and/or by refusing to permit them to amend their complaint to explicitly allege such claims.

It is well settled that "if the common law is to be changed or abrogated by statute, the legislature must do so expressly or by necessary implication," and that "[a]bsent a clear manifestation of legislative intent to abrogate the common law, we interpret statutes with every intendment in favor of consistency with the common law." *Pleak v. Entrada Property Owners' Ass'n*, 207 Ariz. 418, 422, 87 P.3d 831, 835 (2004).

In addition, it would violate the Arizona Constitution to disallow the Motor Carriers' common law claims. Article 18, § 6 of the Arizona Constitution provides:

The right of action to recover
damages for injuries shall never be abrogated

Id. The Arizona Supreme Court has ruled:

article 18, § 6 is an “open court’ guarantee intended to constitutionalize the right to obtain access to the courts....” *** The language of the provision is to be construed broadly and unrestrictively. *** As such, article 18, § 6 prevents abrogation of all common law actions for negligence, intentional torts, strict liability, defamation, and other actions in tort which trace origins to the common law.

Cronin v. Sheldon, 195 Ariz. 531, 538, 991 P. 2d 231, 238 (1999) (citations omitted).

The Motor Carriers' rights in these respects are also protected under the Fourteenth Amendment to the United States Constitution, as observed by the Supreme Court in *Baker v. University Physicians Healthcare*, 231 Ariz. 379, 388, 296 P. 3d 42, 51 (2013):

Both the anti-abrogation clause of the Arizona Constitution and the Fourteenth Amendment of the Federal Constitution protect a plaintiff's right of access to the courts. *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *Cronin*, 195 Ariz. at 538–39 ¶ 35, 991 P.2d at 238–39. A court may not, consistent with the Arizona Constitution, prohibit a plaintiff from bringing a common law tort action. *Cronin*, 195 Ariz. at 538–39 ¶ 35, 991 P.2d at 238–39. Nor may a court, under the Due Process Clause, deprive a plaintiff of a meaningful opportunity to be heard. *Boddie*, 401 U.S. at 377, 91 S.Ct. 780.

The Superior Court denied the Motor Carriers’ motions for a new trial and to amend the complaint, stating that they were being denied “[f]or the reasons stated in Appellees’ Joint Response” to Appellants’ motions. (IR #14). In opposing the Motor Carriers’ motion to amend, Pacific Financial raised two principal arguments. First, it argued that: “A.R.S. § 14-1201(58), as informed by A.R.S. 14-1102 and 14-1012-601(sic), as well as the legislative histories of those acts, whether expressly or by necessary implication *modifies* the common law such that certain instruments that might be called “trusts” are not treated as actually being trusts under Arizona law.” (IR #41 at 5-6)(emphasis in original). Second, it argued the BMC 85 “is not a trust at all,” even under common law. *Id.* Neither proposition can withstand scrutiny.

A. A.R.S. § 14-1201(58) Does Not Modify the Common Law

Pacific Financial’s assertion that A.R.S. § 14-1201(58) modifies the common law is logically at odds with its proposition that the BMC 85 Trust is excluded from the Arizona Trust Code. If, as Pacific Financial contends, a BMC 85 Trust is excluded from the Arizona Trust Code, then the Code does not modify such an excluded trust. It is either included in the Code, and subject to any modifications that are set forth in the Code, or it is excluded, and not subject to any such modifications. Pacific Financial’s conclusory assertion fails to prove that there has been a “clear manifestation of legislative intent to abrogate the common

law,” or that there should be any departure from the rule that statutes must be interpreted “with every intendment in favor of consistency with the common law.” *Pleak*, 207 Ariz. 418, 422, 87 P.3d 831, 835.

Pacific Financial’s argument would also lead to absurd results. A.R.S. § 14-1201(58) excludes at least twelve (12) different categories of trusts.³ Following Pacific Financial’s logic, A.R.S. § 14-1201(58) would nullify all common law causes of action with respect to any of these trusts, leaving them in a no man’s land, along with the BMC Trust. This is an inherently untenable proposition. *See McFall*, 103 Ariz. 234, 238, 439 P. 2d 805, 809 (“Courts will not place an absurd or unreasonable construction on statutes.”). In sum, Pacific Financial’s assertion that the Arizona Trust Code abrogates the common law must be rejected, and the Superior Court’s refusal to permit the Motor Carriers’ common law claims to proceed on the merits should be reversed.

³ Trust excludes other constructive trusts and excludes resulting trusts, conservatorship, personal representatives, trust accounts, custodial arrangements pursuant to chapter 7, article 7 of this title, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions or employee benefits of any kind, trusts created by a city or town for the payment of medical insurance, health care benefits or expenses, long-term or short-term disability, self insurance reserves and similar programs administered by a city or town, legal defense trusts and any arrangement under which a person is nominee or escrowee for another.

B. The BMC Trust is a Trust

Pacific Financial's argument that a BMC Trust Agreement "is not a trust at all," is also demonstrably unfounded. Here, Pacific Financial argued that "the modification of common law that was brought about by A.R.S. § 14-1201(58) would only apply to 'trusts' set up for the payment of debt. It would not apply to contracts for the payment of debt." (IR #41 at 5-6). As demonstrated above, however, Pacific Financial's conclusion that A.R.S. § 14-1201(58) modifies the common law is simply incorrect. At most, A.R.S. § 14-1201(58) may modify the provisions of Arizona statutes, but it may not abrogate the common law. Again, there must be a "clear manifestation of legislative intent to abrogate the common law," and statutes must be interpreted "with every intendment in favor of consistency with the common law." *Pleak*, 207 Ariz. 418, 422, 87 P.3d 831, 835.

Moreover, Arizona law may not modify or override the explicit federal mandate that a BMC 85 Trust has the legal status as a Trust. In this regard, the BMC 85 Trust provides that "This agreement shall be governed by the laws of the State of Arizona, to the extent not inconsistent with the rules and regulations of the FMCSA." (IR #17). Accordingly, in the event there is no Arizona trust law applicable to the BMC Trust, the Arizona courts should apply federal common law in order to effectuate the statutory mandate of the federal government in promulgating the Trust. *See, e.g., In re Arctic Express, Inc.*, 636 F. 3d 781, 792

(6th Cir. 2011)(“These common law principles apply to the formation of statutory trusts: A trust is created when a settler conveys property to a trustee with a manifest intent to impose a fiduciary duty on that person requiring that the property be used for the specific benefit of others.”).

As for Pacific Financial’s assertion that the BMC Trust is a contract, and not a trust, it suffices to say that the federal executive branch, by mandate of the United States Congress, has explicitly promulgated the BMC 85 Trust as a trust, specifically a “Property Broker’s Trust Fund Agreement Under 49 U.S.C. 13906. (IR #17). This confirms the BMC Trust’s status as a trust, and defeats Pacific Financial’s assertion that it is a contract. As the Sixth Circuit reasoned in *In re Arctic Express*: “There are numerous examples of statutory trusts, many of which leave no doubt as to Congress’s intent to create a trust through the explicit use of that term in the language of the regulation.” *Id.*, 636 F. 3d 781 at 793. Here, the federal mandate requiring use of the BMC 85 Trust defeats Pacific Financial’s assertion that the BMC Trust Agreement “is not a trust at all.”

The BMC Trust satisfies all criteria as a trust under Arizona common law. “The essential elements of a trust are a competent settlor and a trustee, clear and unequivocal intent to create a trust, ascertainable trust res, and sufficiently identifiable beneficiaries.” *Golleher v. Horton*, 148 Ariz. 537, 543, 715 P. 2d 1225, 1231 (App. 1986); *Lane Title and Trust Co. v. Brannan*, 103 Ariz. 272, 276–

277, 440 P.2d 105, 109–110 (1968); *Jabczenski v. Southern Pac. Memorial Hosp. Inc.*, 119 Ariz. 15, 19, 579 P.2d 53, 57 (App.1978). The Motor Carriers' Complaint alleges the existence of each and all requirements of an express trust as follows: *Trustee*- Pacific Financial Association, Inc.; *Trustor*- Alliance Transportation, Inc.; *Intent to Create Trust* - "to assure compliance by the Trustor", and regulatory mandate under 49 C.F.R § 387.307; *Trust Res* - \$10,000; *Beneficiaries*- "shipper or motor carrier" doing business with Alliance Transportation.

Pacific Financial's assertion that the Trust has no hallmarks of a trust is repudiated by the provisions of the Trust. The Trust explicitly identifies Pacific Financial as the "TRUSTEE," a duty unconditionally undertaken and memorialized by the signature of its President, J.P. Larson. (IR # 17 at 2). In addition, the Trust expressly imposed fiduciary duties on Pacific Financial's handling of the trust corpus, *e.g.*, "Trustee may, within its sole discretion, invest the funds comprising the corpus of this trust *consistent with its fiduciary obligation* under applicable law." *Id.* ¶ 5. (emphasis added).

Finally, Arizona common law provides redress with respect to the Motor Carriers' tort claims. *See Bulla v. Valley Nat. Bank of Phoenix*, 82 Ariz. 84, 89, 308 P.2d 932, 935 (1957) ("Generally, the powers and duties of a trustee are measured by the terms of the instrument creating the trust and in the performance

of these duties, he must in good faith protect the interests of all the beneficiaries and exercise the care and diligence which an ordinary prudent person under the circumstances would exercise in the management of his own affairs.”); *Lane Title & Trust Co*, 103 Ariz. 272, 278, 440 P.2d 105, 111 (“...the trustee owes the beneficiary a duty of undivided loyalty. Restatement (Second), Trusts ss 170, 206; Bogert, Trusts and Trustees, s 543 (2d ed. 1964).”).

In conclusion, by dismissing the Motor Carriers’ Complaint on the grounds that the Form BMC-85 is “not a ‘trust’ under Arizona law,” the Superior Court defeated the federal statutory mandate requiring redress under state law because it is “inconsistent with the rules and regulations of the FMCSA.” Based on the Superior Court’s ruling, trustees under BMC Trusts can commit any act of negligence or breach of fiduciary duty, and the courthouse doors will be closed to their beneficiaries. This is a patently unconscionable result.

The Motor Carriers’ Complaint should not have been dismissed. The Superior Court’s judgment should be reversed, and the Motor Carriers’ Amended Complaint should be permitted to proceed to adjudication on the merits.

III

**THE SUPERIOR COURT’S AWARD OF
ATTORNEYS FEES TO PACIFIC FINANCIAL WAS NOT
AUTHORIZED UNDER A.R.S. §12-341 OR A.R.S. §12-341.01**

In awarding attorneys fees to Pacific Financial, the Superior Court rejected the Motor Carriers' demonstration that their claims arose out of Pacific Financial's breach of fiduciary duty and negligence under the BMC 85 Trust, and accepted its theory that the court should look instead to the underlying contracts between the non-party broker, Alliance and the Motor Carriers, concluding: "[T]he claims asserted by [the Motor Carriers] were based on agreements entered into by these parties and thus 'arose out of contract.' Under these circumstances, the causes of action alleged in torts could not exist 'but for' the alleged breach of the underlying contract." (IR #55). The Superior Court's reasoning is erroneous as a matter of law.

The Motor Carriers' Complaint in this case is grounded exclusively in tort law, specifically alleging Pacific Financial's breach of fiduciary duty and negligence:

This action arises as a result of the Defendants' breach of their fiduciary duties, and negligence, in failing to protect the security and assets of the Trust by, *inter alia*, failing to pay claims promptly; favoring certain trust beneficiaries to the detriment of others; engaging in conflicts of interest; and failing to terminate the trust upon the aggregation of claims sufficient to exhaust the trust corpus. Defendants' negligence and breaches of fiduciary and trust duties caused actual damages to the Plaintiffs and the putative class members.

See Complaint (IR #1 at ¶ 1). There is no contract cause of action alleged in the Complaint. The Motor Carriers' claims do not arise out of a contract, but out of

Pacific Financial’s alleged negligence and breach of fiduciary duty under the BMC 85 Trust. The Motor Carriers are not signatories to the BMC 85 Trust. They are trust beneficiaries of the Trust. Their action against Pacific Financial arises under tort law – not contract law. Finally, the BMC-85 Trust Fund Agreement giving rise to this action is a statutory trust, promulgated pursuant to federal statute – 49 U.S.C. § 13906. It is on the basis of that federally mandated statutory trust that the Motor Carriers are entitled to pursue their tort claims.

The Superior Court committed error by disregarding all of these factors, and choosing instead to accept Pacific Financial’s theory that the beneficiaries of the BMC 85 Trust should pay attorneys fees because “the causes of action alleged in torts could not exist ‘but for’ the alleged breach of the underlying contract” between the beneficiaries and the non-party broker, Alliance Transportation, Inc. (IR #55). A well settled body of case law confirms this error.

In *Barmat v. John and Jane Doe Partners A–D*, 155 Ariz. 519, 520, 747 P.2d 1218, 1219 (1987), the Arizona Supreme Court considered whether a successful party could recover attorneys’ fees in a malpractice action in which a contractual relationship also had existed. The Court concluded: “The legislature clearly did not intend that every tort case would be eligible for an award of fees whenever the parties had some sort of contractual relationship or ingenious counsel could find authority for an implied-in-law contractual claim.” *Id.* The Court

acknowledged that some “professionals owe special duties to their clients” that are implied by law rather than by contractual terms. “[B]reaches of those duties are generally recognized as torts” and thus actions to recover for such breaches are not actions “arising out of contract.” *Id.* Accordingly, A.R.S. § 12–341.01(A) did not authorize an award of attorneys' fees. *Id.*

In *In re Naarden Trust*, 195 Ariz. 526, 990 P.2d 1085, the Court of Appeals affirmed the trial court’s denial of the trustee’s request for attorney’s fees after defeating the plaintiff’s claims seeking an accounting and other relief for the allegedly improper actions of the Trustee. The trustee argued that the plaintiff’s claims against him arose out of the trust instrument and a property settlement agreement between the plaintiff and her ex-husband. The Court of Appeals concluded: “Because a trust is not a contract, we conclude that A.R.S. §§ 12–341.01 (A) does not entitle [the Trustee] to attorney’s fees as the successful party.” *Id.*, 195 Ariz. at 527, 990 P. 2d at 1086. The Court explored the distinction between trusts and contracts as follows:

Although the trustee's duties may derive from the trust instrument (as well as relevant statutes or common law), they initially stem from the special nature of the relation between trustee and beneficiary. Therefore, although the trustee may be liable for a breach of fiduciary duties, its undertakings or promises in a trust instrument are not normally “contractual.”

Id., 195 Ariz. at 530, 990 P. 2d at 1089. The Court held:

We hold that the duties of a trustee stem from duties implied by law because of the relationships created by the trust, and that such relationships are not contractual. Therefore, suits that arise out of a trust relationship are not suits arising out of a contract for purposes of A.R.S. section 12-341.01(A).

Id. Likewise here, the Motor Carriers' claims arose out of a trust relationship, and are not claims arising out of a contract for purposes of A.R.S. section 12-341.01(A).

The Superior Court's reliance on *Sparks v. Republic National Life Ins. Co.*, 132 Ariz. 529, 647 P. 2d 1127 (1982), *cert. denied* 459 U.S. 1070, 103 S.Ct. 490, 74 L.Ed.2d 632 (1982) is misplaced here. (IR #55 n.1). In *Sparks*, suit was brought against an insurance company by its insured for *both* breach of contract *and* tort alleging bad faith and misrepresentation. The court found that while the tort claim of bad faith in dealing with an insured cannot be committed absent the existence of an insurance contract and a breach thereof, an action for misrepresentation "sounds mainly in tort and its existence does not depend upon the breach of contract of insurance." 132 Ariz. 529, 544, 647 P. 2d 1127, 1142. The facts presented in this case, however, are completely inapposite. The Motor Carriers were not signatories to the BMC 85 Trust between Pacific Financial and Alliance Transportation, and they did not assert combined tort and contract claims against Pacific Financial as the plaintiffs did in suing the insurance company in *Sparks*. Here, the Motor Carriers do not allege a breach of a contractual duty.

Indeed, the Superior Court stated: “Plaintiffs deny that they have alleged any contract-based claims or tortious breach of contract claims based on a ‘special relationship’ . . . Rather, they contend that their claims are all predicated on ‘the Trust.’” (IR #34 at 2). The Motor Carriers allege the breach of duties implied at law owed to them by Pacific Financial as trust beneficiaries under the BMC 85 Trust. Because such claims arise from duties imposed by law, rather than a contract between Pacific Financial and the Motor Carriers, fees are not available under the statute.

Finally, the Motor Carriers submit that the Superior Court abused its discretion in awarding attorneys fees given the novel questions presented in this case, and the inevitable chilling effect the court’s ruling will have in other cases. *See Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 569, 694 P. 2d 1181, 1183 (1985). It is also patently inequitable for Pacific Financial to obtain dismissal of the Motor Carriers’ claims based on tort law, but to then obtain attorneys fees based on contract law. Pacific Financial cannot have it both ways.

CONCLUSION

For the foregoing reasons the judgment of the Superior Court should be reversed, and the order awarding attorneys fees to Pacific Financial should be vacated. The case should be remanded with instructions to the Superior Court to permit the case to proceed on the merits.

DATED this 28th day of October, 2014.

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CERTIFICATE OF FILING

Pursuant to Arizona Rule of Civil Appellate Procedure 15(d), I hereby certify that the foregoing APPELLANTS' OPENING BRIEF was electronically filed with the Clerk of the Arizona Supreme Court, Division One this 28th day of October, 2014.

/s/ Brian J. Campbell

BRIAN J. CAMPBELL

CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rule of Civil Appellate Procedure 14, I hereby certify that the foregoing APPELLANTS' OPENING BRIEF uses proportionately spaced type of 14 points or more, is double-spaced using a Times-Roman font, and contains **8,109** words.

DATED: October 28, 2014

/s/ Brian J. Campbell

BRIAN J. CAMPBELL

DECLARATION OF SERVICE

I, Brian J. Campbell, declare as follows:

I am a resident of the State of Arizona, residing or employed in Phoenix, Arizona. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 3101 North Central Avenue, Suite 840, Phoenix, Arizona 85012. On October 28, 2014, two (2) copies of APPELLANTS' OPENING BRIEF were placed in a Federal Express envelope addressed to:

Lonnie J. Williams, Jr.
STINSON MORRISON HECKER LLP
1850 North Central Avenue, Suite 2100
Phoenix Arizona, 45004-4584
Counsel for Defendant and Appellee

which envelope, was then sealed and picked up at our offices by regularly scheduled Federal Express personnel on October 28, 2014, and was scheduled for delivery to opposing counsel on October 29, 2014.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 28th day of October, 2014, at Phoenix, Arizona.

/s/ Brian J. Campbell
BRIAN J. CAMPBELL