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9

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11

12 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

13 **IN AND FOR THE COUNTY OF MARICOPA**

14

15	OWNER-OPERATOR INDEPENDENT	)	Case No.: CV2013-000615
	DRIVERS ASSOCIATION, et al.,	)	
16		)	<b>PLAINTIFF'S OPPOSITON TO</b>
	Plaintiffs,	)	<b>DEFENDANTS' MOTION TO DISMISS</b>
17		)	
	v.	)	(Assigned to the Honorable Sally Duncan)
18		)	
	PACIFIC FINANCIAL ASSOCIATION, INC, et.	)	
19	al.,	)	
	Defendants.	)	
20		)	
21		)	

22 Plaintiffs hereby oppose Defendants' Motion to Dismiss the Plaintiffs' claims under  
23 A.R.C.P. 12(b)(6), and state as follows.

24 **INTRODUCTION**

25 Plaintiffs filed their class action complaint against the Defendants in this Court on February  
26 21, 2013. Instead of answering, Defendants attempted to remove the action to federal district court,  
27 by claiming that Plaintiffs' claims were only cognizable under federal law. On July 18, 2013, the  
28 federal district court granted Plaintiffs' motion to remand the case to this Honorable Court,

1 concluding that “this dispute over a trustee’s fiduciary duties is squarely within the realm of state  
2 law and does not involve substantial federal questions.” *OOIDA v. Pacific Financial Association,  
3 Inc.*, 2013 WL 3772656 \*3 (D. Ariz., July 18, 2013)(copy attached as Exhibit A). Now – after  
4 delaying an answer to Plaintiffs’ complaint for five months – Defendants have filed a motion to  
5 dismiss the complaint in its entirety, with an assortment of puzzling arguments, including the  
6 assertion that they cannot be held accountable for, *inter alia*, their breaches of fiduciary duties,  
7 because the trust fund at the center of the case is “Not a ‘Trust’.” Def. Mot. at 4-7. As  
8 demonstrated herein, the Defendants’ motion is ill-conceived and unsupported either by reference to  
9 the allegations of the complaint or Arizona law. The Court should deny the motion, and Defendants  
10 should be required to answer and defend on the merits.

#### 11 **NATURE OF THE CASE**

12 The named Plaintiffs in this case - Tom Moore Transportation, Jasmine, LLC, and K&S  
13 Trucking LLC - are motor carriers who hauled freight pursuant to contractual agreements they had  
14 with a freight broker, non-party Alliance Transportation, Inc. (“Alliance Transportation”). *See*  
15 Complaint at ¶ 1. The Plaintiffs’ contracts with Alliance Transportation were secured and protected  
16 by a trust (“Trust”) created by a BMC-85 trust fund agreement under which Defendant Pacific  
17 Financial Association, Inc. (“Pacific Financial”), and its agent, Defendant Federal Service  
18 Corporation (“Federal Service”), served as trustees. *Id.* The trust fund agreement explicitly  
19 required the Defendants to protect the security and assets of the Trust for the exclusive purpose of  
20 making direct payments to Plaintiffs and putative class members for the shipping services they  
21 provided to Alliance Transportation. *Id.* The Defendants failed to carry out their duties in  
22 protecting the Trust assets and security. *Id.* Specifically, the Defendants breached their fiduciary  
23 duties, and were negligent, in failing to protect the security and assets of the Trust by, *inter alia*,  
24 failing to pay claims promptly; favoring certain trust beneficiaries to the detriment of others;  
25 engaging in conflicts of interest; and failing to terminate the trust upon the aggregation of claims  
26 sufficient to exhaust the trust corpus. *Id.* Defendants’ negligence and breaches of fiduciary and  
27 trust duties caused actual damages to the Plaintiffs and the putative class members. *Id.* Plaintiff,  
28 Owner-Operator Independent Drivers Association, Inc. (hereinafter “OOIDA”),

1 a Missouri corporation, is a non-profit trade association with over 150,000 independent truckers,  
2 many of whom are FMCSA-licensed “motor carriers” who are beneficiaries of BMC-85 Trusts.  
3 OOIDA appears in its associational representative capacity, and does not seek damages. *See*  
4 Complaint at ¶ 11.

5 Counts I, II, and V of Plaintiffs’ complaint allege breach of fiduciary duty by Pacific  
6 Financial. Count III of the complaint alleges that Pacific Financial breached its duty of good faith  
7 and fair dealing. Counts IV and VI of the complaint allege negligence by Pacific Financial and  
8 Federal Service Corporation. Count VII of the complaint alleges that Federal Service Corporation  
9 aided and abetted tortious conduct. Finally, Count VIII of the complaint alleges that Pacific  
10 Financial is engaged in the “trust business,” as defined by Arizona statutes. *See* A.R.S § 6-851 *et*  
11 *seq.*

12 Plaintiffs seek class certification, compensatory damages, declaratory judgment, injunctive  
13 relief, attorney’s fees and costs, punitive damages and interest. *See* Complaint at 24-25.

## 14 15 ARGUMENT

### 16 A. Standards Governing Motions to Dismiss

17 Dismissal is appropriate under Rule 12(b)(6) only if “as a matter of law [ ] plaintiffs would  
18 not be entitled to relief under any interpretation of the facts susceptible of proof.” *Coleman v. City*  
19 *of Mesa*, 230 Ariz. 352, 356, 284 P. 3d 863, 867 (2012)(citation omitted). “Arizona follows a  
20 notice pleading standard.” *Id.* “In determining if a complaint states a claim on which relief can be  
21 granted, courts must assume the truth of all well-pleaded factual allegations and indulge all  
22 reasonable inferences from those facts, but mere conclusory statements are insufficient.” *Id.*  
23 “[C]ourts look only to the pleading itself” when adjudicating a Rule 12(b)(6) motion. *Id.* If  
24 “matters outside the pleading” are considered, the motion must be treated as one for summary  
25 judgment. *Id.*, Ariz. R. Civ. P. 12(b)(6). Here, Defendants have annexed a copy of the trust fund  
26 agreement referenced in the Plaintiffs’ complaint, alleging that because it is “referenced in the  
27 Complaint, it is ‘not outside the pleading....’” *Id.* at n. 1. Plaintiffs do not necessarily agree with  
28 Defendants’ rationale in that regard; nonetheless, they have no objection to the Court’s

1 consideration of the actual BMC-85 trust fund agreement because it conclusively demonstrates that  
2 Defendants’ motion is baseless. A copy of the trust fund agreement is attached hereto as Exhibit B  
3 for the Court’s convenience.

## 4 5 ARGUMENT

### 6 A. The Trust Fund Agreement Creates an “Express Trust” Under Arizona Law

7  
8 Defendants’ motion to dismiss must be denied because they fundamentally misapprehend  
9 the statute upon which they predicate their motion. That statute - Ariz. Rev. Stat. Ann. § 14-  
10 1201(58) – explicitly *includes* “express trusts,” such as the Trust at issue in this case, as follows:

11 In this title, unless the context otherwise requires: . . . (58) ‘Trust’ *includes an*  
12 *express trust*, private or charitable, with any additions, wherever and however  
13 created....

14 *Id.* (emphasis added).

15 It is well settled that “[t]he essential elements of a trust are a competent settlor and a trustee,  
16 clear and unequivocal intent to create a trust, ascertainable trust res, and sufficiently identifiable  
17 beneficiaries.” *Golleher v. Horton*, 148 Ariz.537, 543, 715 P. 2d 1225, 1231 (App. 1986); *Lane*  
18 *Title and Trust Co. v. Brannan*, 103 Ariz. 272, 276–277, 440 P.2d 105, 109–110 (1968); *Jabczenski*  
19 *v. Southern Pac. Memorial Hosp. Inc.*, 119 Ariz. 15, 19, 579 P.2d 53, 57 (App.1978).

20 Plaintiffs’ complaint alleges the existence of each and all requirements of an express trust as  
21 follows:

- 22 • Pacific Financial is in the business of serving as “an FMCSA-authorized  
23 trustee for BMC-85 Trusts created by FMCSA-licensed freight brokers,”  
24 advertising itself as follows on its website: “Welcome to PFA - The largest  
25 Issuer of BMC-85’s in the nation.” *See* Complaint ¶ 15.
- 26 • “At all times relevant to this action, Pacific Financial was the Trustee for the  
27 BMC-85 Trust created by Alliance Transportation.” *Id.*
- 28 • Alliance Transportation entered the trust fund agreement with the  
Defendants for the purpose of providing “security for the plaintiffs and the  
putative class while doing business with Alliance.” *Id.*, ¶¶ 2-3.
- Alliance Transportation paid \$10,000 to Pacific Financial as the Trust  
corpus. *Id.*, ¶ 36.

- 1           • The trust fund agreement was “to provide security” to the beneficiaries of  
2           the Trust - motor carriers doing business with Alliance Transportation. *Id.*,  
3           ¶¶ 3 and 40).

3           The terms of the actual BMC-85 trust fund agreement at issue in this case (attached as  
4 Exhibit B) readily confirm that all of the fundamental elements of an express trust are present here.  
5 First, the trust fund agreement is prominently entitled: “Property Broker’s ***Trust Fund Agreement***  
6 Under 49 U.S.C. 13906 Or Notice of Cancellation of the Agreement.” *Id.* Second, the trust fund  
7 agreement expressly denominates Defendant Pacific Financial “***as Trustee***” “to assure compliance  
8 by ***the Trustor***,” Alliance Transportation, Inc., “with 49 U.S.C. 13906(b), and the rules and  
9 regulations of the Federal Motor Carrier Safety Administration, relating to insurance or other  
10 security for the protection of motor carriers or shippers, and shall inure to the benefit of any and all  
11 motor carriers or shippers to whom the Trustor may be legally liable for any of the damages herein  
12 described.” *Id.* Third, the trust fund agreement expressly identifies the ***trust res*** as follows: “trustee  
13 acknowledges the receipt of Ten Thousand Dollars (\$10,000), to be held ***in trust*** under the terms  
14 and conditions set forth herein.” *Id.*, ¶ 2. Finally, the trust fund agreement identifies the  
15 ***beneficiaries*** of the Trust as follows:

16  
17           Trustee shall pay up to the limit of Ten Thousand Dollars (\$10,000) directly ***to***  
18           ***a shipper or motor carrier*** any sum or sums which Trustee, in good faith,  
19           determines that the Trustor has failed to pay and would be held legally liable  
20           for reason of the Trustor’s failure to perform faithfully its contracts,  
21           agreements, or arrangements for transportation by authorized motor carriers,  
22           made by Trustor while this agreement is in effect, regardless of the financial  
23           responsibility or lack thereof, or the solvency or bankruptcy of Trustor.

24 *Id.*, ¶ 6.

25           In sum, the trust fund agreement readily satisfies the criteria of an express trust as follows:

- 26           • ***Trustee***- Defendant Pacific Financial Association, Inc.  
27           • ***Trustor***- Alliance Transportation, Inc.  
28           • ***Intent to Create Trust*** - “to assure compliance by the Trustor ....”  
              • ***Trust Res*** - \$10,000  
              • ***Beneficiaries***- “shipper or motor carrier” doing business with Alliance  
              Transportation

1 Given the foregoing, Defendants’ assertion that the trust fund agreement does not create a trust is  
2 patently erroneous.

3 The only argument offered by Defendants in support of their motion is that the Trust is  
4 purportedly exempted from the terms of the Arizona trust code by Ariz. Rev. Stat. Ann. § 14-  
5 1201(58) which excludes “liquidation trusts and trusts for the primary purpose of paying debts ....”  
6 See Defendants’ Motion at 6. The simplest response to this argument is that the Trust is *not* a  
7 “liquidation trust[] and trust[] for the primary purpose of paying debts ....” First, and foremost, the  
8 expressly stated purpose of the trust fund agreement is for the “protection afforded to shippers and  
9 motor carriers,” *id.* at 2; and that “this Trust Fund Agreement is written to assure compliance by the  
10 Trustor ... with 49 U.S.C. 13906(b), and the rules and regulations of the Federal Motor Carrier  
11 Safety Administration [FMCSA], relating to insurance or other security for the protection of motor  
12 carriers or shippers ....” *Id.*

13 In order to place these provisions of the BMC-85 in their appropriate context, it is useful to  
14 examine the federal mandate requiring brokers such as Alliance Transportation to enter into trust  
15 fund agreements with trustees, such as Pacific Financial, as a condition to contracting with shippers  
16 or carriers, such as the named Plaintiffs. 49 U.S.C. § 13901 requires motor carriers and  
17 transportation brokers to be registered as such. 49 U.S.C. § 13904 sets forth additional  
18 requirements, including compliance with § 13906(b), for the registration of transportation brokers  
19 such as Alliance Transportation, the broker in this case. Subsection (b) of 49 U.S.C. § 13906  
20 provides:

21 **(b) Broker requirements.** The Secretary may register a person as a broker  
22 under section 13904 only if the person files with the Secretary a bond,  
23 insurance policy, or other type of security approved by the Secretary to ensure  
24 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.

25 This subsection has been implemented by regulations of the FMCSA. Thus, 49 C.F.R §  
26 387.307 provides (in pertinent part):

27 (a) Security.  
28

1 (1) A property broker must have a surety bond or trust fund in effect for  
2 \$10,000. The FMCSA will not issue a property broker license until a surety  
3 bond or trust fund for the full limits of liability prescribed herein is in effect.  
4 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.

\* \* \*

5 (b) Evidence of Security. .... Evidence of a trust fund with a financial  
6 institution must be filed using the FMCSA's prescribed Form BMC 85. The  
7 surety bond or the trust fund shall ensure the financial responsibility of the  
8 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.

9 *Id.*

10 Query: Why are all of these requirements imposed on brokers and trustees? The answer is  
11 readily found in historical precedent. For decades, brokers exploited the opportunities presented to  
12 them in their capacity as middlemen in shipping contracts. "[T]he primary purpose of Congress in  
13 regulating motor transportation brokers is to protect carriers and the traveling and the shipping  
14 public against dishonest and financially unstable middlemen in the transportation industry." *Gray*  
15 *Line Nat'l Tours Corp. v. United States*, 380 F.Supp. 263, 267 (S.D.N.Y.1974). The imposition of a  
16 requirement that brokers be secured and monitored by trustees such as Pacific Financial was  
17 designed to curb such abuses. Thus, in "adopting final rules that authorize property brokers to  
18 establish trust funds as an alternate security to surety bonds," the Interstate Commerce Commission  
19 stated:  
20

21 We believe broker surety bonds and trust fund agreements will protect motor  
22 carriers and the shipping public against dishonest and financially unstable  
23 brokers with minimal government interference in the business dealings  
24 between brokers, on the one hand, and shippers and carriers, on the other.  
25 Additionally, we are convinced that the continuation of a \$10,000 bond amount  
26 or the initiation of a \$10,000 trust amount will not endanger the public interest  
27 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.

28 *Property Broker Security for the Protection of the Public*, 4 I.C.C.2d 358, 1988 WL 225581 (1988).

1 In order to ensure these objectives, the BMC-85 trust fund agreement imposes a number of  
2 mandatory duties on Trustees such as Pacific Financial, including:

- 3 • Trustee agrees that payments made pursuant to the security provided herein to  
4 shippers and motor carriers pursuant to this Agreement will be made exclusively  
5 and directly to shippers or motor carriers that are parties to contracts, agreements or  
6 arrangements with Trustor.
- 7 • Trustee shall pay, up to a limit of Ten Thousand Dollars (\$10,000.00), directly to a  
8 shipper or motor carrier any sum or sums which Trustee, in good faith, determines  
9 that the Trustor has failed to pay and would be held legally liable by reason of  
10 Trustor's failure to perform faithfully its contracts, agreements, or arrangements for  
11 transportation by authorized motor carriers, made by Trustor while this agreement  
12 is in effect, regardless of the financial responsibility or lack thereof, or the solvency  
13 or bankruptcy, of Trustor.
- 14 • In the event that the trust fund is drawn upon and the corpus of the trust fund is a  
15 sum less than Ten Thousand Dollars (\$10,000.00), Trustor shall, within thirty (30)  
16 days, replenish the trust fund up to Ten Thousand Dollars (\$10,000.00) by paying  
17 to the Trustee a sum equal to the difference between the existing corpus of the trust  
18 fund and Ten Thousand Dollars (\$10,000.00).
- 19 • Trustee shall immediately give written notice to the FMCSA of all lawsuits filed,  
20 judgments rendered, and payments made under this trust agreement and of any  
21 failure by Trustor to replenish the trust fund as required herein.

22 See Exhibit B at ¶¶ 1, 6-8. Plaintiffs' Complaint carefully alleges that Defendants abdicated each  
23 and all of these mandates as follows:

24 Upon becoming a Trustee, Pacific Financial assumed a fiduciary duty with  
25 respect to the interests of those motor carriers contracting with Alliance  
26 Transportation. Because those motor carriers were well-defined and  
27 identifiable at any given point in time, Pacific Financial owed them a fiduciary  
28 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.

29 *Id.* ¶ 48.

30 In view of the foregoing historical and factual context, Defendants' assertion that

1 the express Trust created by the BMC-85 trust fund agreement is a “liquidating trust and trust for  
2 the primary purpose of paying debts,” is unsustainable. Def. Mot. at 4-7. Defendants cite no cases  
3 supporting their theory. There are none. To the contrary, liquidating trusts are indigenous to  
4 bankruptcy law; they are designed for the specific purpose of liquidating a bankruptcy estate. *See,*  
5 *e.g., In re Consolidated Pioneer Mortgage Entities*, 248 B.R. 368 (9th Cir. BAP 2000)(“If a  
6 liquidating trust is established, the trust is normally funded with property which will be reduced to  
7 cash by the liquidating trustee after confirmation of a plan of reorganization. The liquidating trustee  
8 will be given the authority to sell the assets within a reasonable time, to preserve the assets in the  
9 interim, and to distribute the proceeds to the debtor’s former creditors who are the beneficiaries of  
10 the liquidating trust.”). Finally, Defendants’ have disingenuously ignored the distinctions between a  
11 BMC-85 trust and a liquidating trust. Their effort to conflate the two is ill-conceived and should be  
12 rejected. Contrary to their suggestions, the provision of the trust fund agreement specifying that  
13 payments will be made “exclusively and directly to shippers or motor carriers that are parties to  
14 contracts, agreements or arrangements with Trustor,” serves the salutary objective of making sure  
15 that the funds are not diverted to any *other* parties, or for any *other* purposes, than those specified in  
16 the Trust. Such a provision does not diminish the status of the Trust as an *express trust*. Nor does it  
17 detract from the intended objective of “protect[ing] motor carriers and the shipping public against  
18 dishonest and financially unstable brokers with minimal government interference in the business  
19 dealings between brokers, on the one hand, and shippers and carriers, on the other.” *Property*  
20 *Broker Security for the Protection of the Public*, 1988 WL 225581. Accordingly, the Court should  
21 reject Defendants’ argument that “The BMC-85 is Not a ‘Trust’ Under Arizona Law.”

22 **B. The Economic Loss Rule Does not Bar Plaintiffs’ Negligence Counts**

23 Defendants allege that “Plaintiffs claim to be third-party beneficiaries under a contract,  
24 namely the Form BMC-85 agreement between Pacific and Alliance.” Defendants’ Motion at 7.  
25 Not so. The Plaintiffs are the identified *beneficiaries* of a *trust* with respect to which Pacific  
26 Financial is the *Trustee*. Counts IV and VI of the Complaint alleging negligence are based on  
27 Arizona statutes and common law. *See* A.R.S. § 14-10804 (2009)(“Prudent administration: A  
28 trustee shall administer the trust as a prudent person would, by considering the purposes, terms,

1 distributional requirements and other circumstances of the trust. In satisfying this standard, the  
2 trustee shall exercise reasonable care, skill and caution.”); *Matter of Estes’ Estate*, 654 P. 2d 4, 8  
3 (Az. App. 1982)(“The trustee is under a duty to the beneficiary to exercise reasonable care and skill  
4 as a man of ordinary prudence would exercise in dealing with his own property ....”).

5 In short, the Defendants improperly conflate breach of contract claims (which have not been  
6 pled) with claims for malfeasance and negligence in the administration of a Trust (which have been  
7 pled).<sup>1</sup> The economic loss rule simply does not apply to the Plaintiffs’ claims here.

8 **C. Plaintiffs Do Not Assert Tortious Breach of Contract**

9 Perhaps Defendants’ most ill-conceived argument is that Plaintiffs have failed to allege a  
10 special relationship for purposes of establishing a tortious breach of contract claim. Def. Mot. at 8-  
11 10. The simplest rejoinder to this argument is that Plaintiffs have not asserted a tortious breach of  
12 contract claim against anyone. Plaintiffs have asserted a breach of good faith and fair dealing count  
13 (Count III) against Pacific Financial. But that count is predicated on a breach of good faith and fair  
14 dealing with respect to the *Trust* not with respect to a *contract*. Such a claim is cognizable under  
15 Arizona law. See e.g. *Dodge v. Fidelity and Deposit Co. of Maryland*, 778 P. 2d 1240, 1244  
16 (1989)(“We hold that a surety has a duty to act in good faith in responding to its obligee’s claims  
17 that the principal has defaulted.”); and A.R.S § 14-10801 ( “...the trustee shall administer the trust  
18 in good faith, in accordance with its terms and purposes and the interests of the beneficiaries...”).

19 Moreover, Defendants’ argument fails even by its own terms. According to Defendants,  
20 “The breach of a contract may provide the basis for a tort claim despite the economic loss rule, but  
21 only in relationships ‘characterized by elements of *public interest*, *adhesion*, or *fiduciary*  
22 *responsibility*.” Def. Mot. at 8-9 (emphasis added). As demonstrated throughout this memorandum,  
23  
24

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25 <sup>1</sup> The case relied upon by the Defendants is off point in any event. In *Flagstaff Affordable Housing*  
26 *Ltd. Partnership v. Design Alliance, Inc.*, 223 Ariz. 320, 223 P.3d 664 (2010) the plaintiff, Flagstaff  
27 Affordable Housing, contracted with an architect, Design Alliance, for the design of a building.  
28 The design was allegedly defective requiring expenditures for corrective measures. The Arizona  
Supreme Court ruled that the economic loss rule foreclosed recovery on non-contract theories of  
liability for purely economic losses. Here, Plaintiffs have no contract with Pacific Financial. Their  
claims and remedies arise out of their status as trust beneficiaries. The economic loss rule is  
therefore irrelevant here.

1 the elements of public interest and fiduciary duty form the very cornerstones of Plaintiffs’  
2 complaint. As such, defendants’ arguments fall at every turn.

3  
4 **D. OOIDA Has Standing**

5 It is inherently premature for Defendants to seek the dismissal of OOIDA on a motion to  
6 dismiss, as this particular question may call for the introduction of matters outside the complaint,  
7 such as declarations and exhibits. For now, it should suffice to say that the Plaintiffs’ pleading of  
8 the bases for OOIDA’s standing is present, and OOIDA’s associational standing has been upheld in  
9 numerous cases. *See, e.g., International Brotherhood of Teamsters v. United States Department of*  
10 *Transportation*, 714 F. 3d 580, 586 (D.C. Cir. 2013)( “[OOIDA] and the Teamsters both have  
11 organizational standing. An organization has standing to seek injunctive relief if at least one of its  
12 members would have standing and if the issue is germane to the organization’s purpose. [citation  
13 omitted]. Both groups satisfy these requirements: Their members are hurt by increased competition,  
14 and the groups exist to protect the economic interests of their members); *OOIDA v. Dunaski*, 763 F.  
15 Supp. 2d (D. Minn. 2011)( “Plaintiff OOIDA has associational standing pursuant to *Hunt v. Wash.*  
16 *State Apple Adver. Comm’n*, 432 U.S. 333, 343....”); *OOIDA v. C.R. England*, 2005 WL 2098919  
17 (D. Utah, Aug. 29, 2005)(“OOIDA has associational standing to seek declaratory and injunctive  
18 relief on behalf of its members ....”).

19 OOIDA’s associational standing is further demonstrated on the face of the complaint which  
20 alleges that it is a non-profit trade association with over 150,000 independent truckers, many of  
21 whom are FMCSA-licensed “motor carriers” who are beneficiaries of BMC-85 Trusts. *See*  
22 *Complaint at ¶ 11*. Under applicable case-law, OOIDA has associational standing to seek  
23 declaratory and injunctive relief for its members in this action. In *Home Builders Ass'n of Cent.*  
24 *Arizona v. Kard*, 219 Ariz. 374, 377, 199 P.3d 629, 632 (Ct. App. 2008), the Court addressed the  
25 criteria for representational standing as follows:

26 [W]hen an entity asserts standing in a representative capacity, the court must  
27 determine “whether, given all the circumstances in the case, the association has  
28 a legitimate interest in an actual controversy involving its members and  
whether judicial economy and administration will be promoted by allowing  
representational appearance.” *Armory Park*, 148 Ariz. at 6, 712

1 P.2d at 919. A court also may consider relevant factors identified by the United  
2 States Supreme Court, which are whether: (a) the association's "members  
3 would have standing to sue in their own right; (b) the interests ... the  
4 association seeks to protect are relevant to the organization's purpose; and (c)  
neither the claim asserted nor the relief requested requires the participation of  
individual members." *Id.* (Citations omitted. Emphasis added.)

5 All of the requirements of associational standing are satisfied here. The three Named  
6 Plaintiffs are OOIDA members who have standing to sue in their own right. *See* Complaint ¶¶ 12,  
7 13 and 14. The interests OOIDA seeks to vindicate are germane to its purpose. *See* Complaint at ¶¶  
8 11 and 32. Moreover, neither the claims asserted nor the relief requested requires the participation  
9 of individual members. In sum, Defendants' motion to dismiss OOIDA should be denied either as  
10 premature, or on the merits.

11 **E. Plaintiffs Properly Seek Declaratory Judgment**

12 Contrary to Defendants' arguments, Plaintiffs can properly seek declaratory judgment  
13 regarding whether Pacific Financial it is engaged in a "trust business" under A.R.S. 6-851. The  
14 overriding predicate for a declaratory judgment is a justiciable controversy. "In order for there to be  
15 a justiciable controversy for the purposes of the declaratory judgment act there must be an assertion  
16 of a right, status or legal relation in which the plaintiff has a definite interest and a denial of it by the  
17 opposing party." *Samaritan Health Servs. v. City of Glendale*, 714 P.2d 887, 888 (App. 1986). The  
18 Arizona Uniform Declaratory Judgment Act, is "...declared to be remedial; its purpose is to settle  
19 and to afford relief from uncertainty and insecurity with respect to rights, status and other legal  
20 relations; and is to be liberally construed and administered." (A.R.S. § 12-1842.) Per A.R.S. § 12-  
21 1831, "Courts of record within their respective jurisdictions shall have power to declare rights,  
22 status, and other legal relations whether or not further relief is or could be claimed." (Emphasis  
23 added.)

24 The courts also have explicit authority to enter declaratory judgments in trust actions. A.R.S.  
25 § 12-1834 provides:

26 Any person interested... in the administration of a trust... may have a  
27 declaration of rights or legal relations in respect to any of the following:

- 28 1. To ascertain any class of creditors... or others; or



1 ORIGINAL e-filed this 21<sup>st</sup> day of August, 2013 with:  
2 Clerk of the Court Maricopa County Superior Court and

3 COPY send via Federal Express this 21<sup>st</sup> day of August 2013, to:

4  
5 Lonnie J. Williams, Jr.  
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8 /s/Daniel E. Cohen

# **EXHIBIT A**

2013 WL 3772656

Only the Westlaw citation is currently available.  
United States District Court,  
D. Arizona.

**OWNER-OPERATED** INDEPENDENT  
DRIVERS ASSOCIATION, et al., Plaintiffs,

v.

**PACIFIC FINANCIAL ASSOCIATION, Inc.**, et  
al., Defendants.

No. 2:13-cv-00373 JWS. | July 18, 2013.

## Opinion

### ORDER AND OPINION

JOHN W. SEDWICK, District Judge.

#### *I. MOTION PRESENTED*

\*1 At docket 8 plaintiffs **Owner-Operator** Independent Drivers Association (“OIDA”), Thomas and Karen Moore d/b/a Tom Moore Transportation, Jasmine, LLC, and K & S Trucking LLC (collectively “plaintiffs”) move to remand this case to the Arizona Superior Court, Maricopa County pursuant to 28 U.S.C. § 1447(c), arguing that there is no federal jurisdiction to support removal, and request attorneys’ fees associated with the removal. Defendants **Pacific Financial** Association, Inc. (“**Pacific**”) and its agent, Federal Service Corporation (“FSC”; collectively, “defendants”) respond at docket 18. Plaintiffs reply at docket 19. Oral argument was requested, but the motion has been thoroughly briefed, and oral argument would not be of further assistance to the court.

#### *II. BACKGROUND*

The plaintiffs are motor carriers or shippers who hauled freight pursuant to contractual agreements they had with a transportation broker, Alliance Transportation, Inc. (“Alliance”), which is not a party to this action. All such brokers must be registered with the Department of

Transportation pursuant to 49 U.S.C. § 13901. In order to be registered as a broker for transportation, under 49 U.S.C. § 13906, the person must file “a bond, insurance policy, or other type of security approved by the Secretary [of Transportation] to ensure that the transportation for which a broker arranges is provided.”<sup>1</sup> Alliance elected to provide the federally required security by way of a trust agreement with **Pacific**. In compliance with the regulations implementing the statute, the trust agreement provided for a \$10,000 fund (“Trust”) provided by Alliance to **Pacific** as the trustee and was filed on a prescribed form, Form BMC-85 (“Trust Agreement”).<sup>2</sup> The Trust is intended to “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.”<sup>3</sup>

The plaintiffs filed a class action complaint in Arizona Superior Court in Maricopa County against **Pacific** under state law for breach of fiduciary duty generally, for breach of fiduciary duty for failure to inform, for breach of the duty of good faith and fair dealing, for negligence, and for breach of fiduciary duty for the misallocation of trust assets. They raised state claims against **Pacific’s** agent, FSC, for breach of fiduciary duty related to the misallocation of trust assets, for negligence, and for aiding and abetting tortious conduct. They brought a declaratory judgment claim as well, asking the state court to determine that **Pacific** was engaged in the “trust business” as defined by state law.

The complaint alleges that starting in the fall of 2011, Alliance ceased paying motor carriers for their transportation services, and that these motor carriers began filing claims against the Trust. It alleges that by October 19, 2011, the aggregate of unpaid claims against the Trust premised upon deliveries before such date exceeded \$10,000, and that, therefore, the Trust ceased to be effective. It alleges that **Pacific** knew this to be the case, but failed to notify any Trust beneficiaries, failed to take steps to trigger Alliance’s duty under the Trust Agreement to replenish the Trust, or provide notice to the Federal Motor Carrier Safety Administration (“FMCSA”) about Alliance’s delinquency as was required under the Trust Agreement. It alleges that the plaintiffs thereafter hauled freight for Alliance pursuant to contracts without knowing that their contracts were not secured by the Trust. The complaint alleges that plaintiffs were not paid for their services and ultimately filed claims against the Trust for payment, which were also never paid. It further alleges that **Pacific** did not pay any claims until after the Trust was cancelled and that **Pacific** then chose to pay

claimants based on chronological order of delivery, meaning the Trust did not have any funds remaining to pay plaintiffs, who had claims for deliveries after October of 2011.

\*2 Defendants removed the case to federal court. In the removal notice defendants state that plaintiffs' claims depend upon 49 U.S.C. § 13906, 49 C.F.R. § 387.307, and the federally prescribed Form BMC-85. Thus, they assert that the court has original jurisdiction over the action pursuant to 28 U.S.C. § 1331 for federal question jurisdiction and pursuant to 28 U.S.C. § 1337(a) for jurisdiction over an act of Congress that regulates commerce. Plaintiffs now seek to remand.

### **III. STANDARD OF REVIEW**

Federal courts strictly construe the removal statute against removal jurisdiction.<sup>4</sup> There is a strong presumption against removal and “[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.”<sup>5</sup> The party seeking removal bears the burden of establishing federal jurisdiction.<sup>6</sup>

### **IV. DISCUSSION**

Defendants assert that this court has jurisdiction over the case pursuant to 28 U.S.C. § 1331, which confers jurisdiction over cases “arising under” the Constitution or law of the United States, and pursuant to 28 U.S.C. § 1337, which confers federal jurisdiction over cases “arising under” federal statutes regulating commerce. The “arising under” language of § 1337 is interpreted in the same manner as the “arising under” language of § 1331, and it is therefore proper to apply the principles of general federal-question jurisdiction to determine whether this court has jurisdiction over the case as defendants contend.<sup>7</sup> Under federal-question jurisdiction principles, the court has jurisdiction over cases where federal law creates the cause of action.<sup>8</sup> It also has jurisdiction over cases where state law creates the cause of action when state law nonetheless requires resolution of a disputed and substantial question of federal law and as long as entertaining the action in a federal forum will not disturb “any congressionally approved balance of federal and state judicial responsibilities.”<sup>9</sup>

#### **A. Federal cause of action**

The question of whether a claim arises under federal law must be determined by reference to the complaint.<sup>10</sup> All of plaintiffs' counts allege causes of action arising under Arizona statutory or common law based on defendants' conduct as trustee. Defendants argue that although plaintiffs' claims are directed at them as the trustee and framed in terms of Arizona state law, plaintiffs actually seek to recover the amounts owed to them by the broker, Alliance, pursuant to the Trust Agreement, which is a federal form and thus governed by the relevant federal statutes. Defendants argue that plaintiffs could have brought a federal claim against the broker, Alliance, under 49 U.S.C. § 14707(a) for failure to comply with 49 U.S.C. § 13906, and therefore this case is one rooted in federal law. However, even assuming defendants are right about § 14707(a), the fact that plaintiffs could have brought a federal claim does not mean federal law creates the cause of action. A plaintiff is the “master of his complaint” and “where he may pursue state and federal claims, he is free to pursue either or both, so long as fraud is not involved.”<sup>11</sup> Plaintiffs did not opt to bring a claim against the broker for failure to comply with federal law. Instead, they chose to bring a claim against the trustee based on a state law theory—that the trustee breached its fiduciary duties and was negligent in its execution of its duties under the Trust Agreement. “When a claim can be supported by alternative and independent theories—one of which is a state law theory and one of which is a federal law theory—federal question jurisdiction does not attach because federal law is not a necessary element of the claim.”<sup>12</sup> Therefore, federal law does not create the cause of action against Defendants.<sup>13</sup>

#### **B. Substantial question of federal law**

\*3 Defendants argue that federal jurisdiction exists because even if plaintiffs' cause of action arises from state law, their right to relief requires resolution of an essential, substantial question of federal law. They point out that the Trust Agreement is actually controlled by the provisions set forth in 49 U.S.C. § 13906<sup>14</sup> and 49 C.F.R. § 387.307.<sup>15</sup>

The case certainly involves issues of federal law. Federal law requires that a transportation broker such as Alliance be federally registered and, pursuant to 49 U.S.C. § 13906, registration requires that a broker file a bond or evidence of other security, such as a trust, to ensure that the transportation for which a broker arranges is provided. The Trust Agreement is thus a means to comply with federal law, and moreover, the Trust Agreement itself is actually a federal form, Form BMC-85. Form BMC-85 is the form a broker must use pursuant to

387.307 as evidence of the required trust. However, despite the interplay of federal law in relation to the Trust Agreement, the court concludes that federal issues are not substantial to the resolution of the case.

First, the terms of the Trust Agreement (Form BMC–85) indicate that the agreement is governed by state law to the extent that state law is not inconsistent with the applicable federal rules and regulations.<sup>16</sup> The only federal regulation applicable to the Trust Agreement is 49 C.F.R. § 387.307. It requires that the trust be in the amount of \$10,000 and states that the broker’s license is only valid as long as the trust fund remains in effect and ensures the broker’s **financial** responsibility.<sup>17</sup> It also requires that the trust agreement “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.”<sup>18</sup> It does not set forth the duties of the trustee or discuss the requirements of parties seeking to recover from the trust. Thus, federal law is not inconsistent, and by its own terms the Trust Agreement is governed by state law.

Second, contrary to defendants’ assertion, there is no federal private right of action for plaintiffs’ claims against them as trustees under 49 U.S.C. § 14707(a). The existence of a federal private right of action for a plaintiff’s claims is a sufficient indication that there are substantial federal issues at stake and that Congress intended those issues to be within the scope of federal jurisdiction.<sup>19</sup> Here, there is no such congressional intent. Section 14707(a) provides for private right of action to enforce a broker’s compliance with the registration requirements of § 13906, but that does not suggest that Congress intended to provide carriers with a federal cause of action against trustees to recover delinquent shipping charges from a broker’s trust. While the lack of a federal cause of action does not foreclose jurisdiction, it is relevant to the jurisdictional analysis and suggests that Congress did not intend such actions to fall within the realm of federal jurisdiction.<sup>20</sup> This, coupled with the fact that the Trust Agreement is to be construed pursuant to the laws of Arizona by its very terms, causes the court to conclude that this dispute over a trustee’s fiduciary duties is squarely within the realm of state law and does not involve substantial federal questions.

\*4 Defendants argue that even if there is not a federal private right of action, the Sixth Circuit’s decision in *Milan Express Co., Inc. v. Western Surety Co.*<sup>21</sup> is persuasive and demonstrates how disputes related to a security instrument required by § 13906 invoke federal jurisdiction. *Milan* involved a dispute between a motor

carrier and the sureties of brokers regarding the proceeds of surety bonds created on a federal form (Form BMC–84), administered under federal regulations, and required by federal statute. The Sixth Circuit stated, “The historical federal interest in the regulation of interstate commerce persuades us that plaintiffs’ claims for recovery under the bonds, which are clearly creatures of federal law, should ... be heard in a federal forum that possesses substantial expertise in matters of interstate commerce.”<sup>22</sup> *Milan*, however, is distinguishable. First, *Milan* involved surety bonds, not trust agreements, and therefore Form BMC–84, not BMC–85, was at issue. Form BMC–85 explicitly states that the agreement shall be governed by state law: Form BMC–84 does not. Moreover, *Milan* involved the failure of a surety to make payment on a bond, and this case involves the more complex issue of a trustee’s fiduciary duties related to the management and supervision of a trust, duties not outlined in the applicable federal statutes and regulations, but instead addressed in Arizona statutory and common law.

### C. Judicial estoppel

Defendants argue that plaintiff OOIDA should be judicially estopped from arguing that the court does not have jurisdiction.<sup>23</sup> They cite and provide a copy of a case filed by OOIDA in the United States District Court for the Middle District of Florida wherein OOIDA recognized that federal jurisdiction exists over claims involving “activities of transportation brokers engaged in the interstate transportation of property by motor carriers.”<sup>24</sup> In the Florida case, OOIDA brought an action against a broker for violation of 49 C.F.R. § 317.9(a). Here, in contrast, OOIDA is suing a trustee under state law, not a broker under a federal regulation. Thus, OOIDA is not taking an inconsistent position which might warrant judicial estoppel.

### D. Attorneys’ fees

Plaintiffs request attorneys’ fees pursuant to 28 U.S.C. § 1447(c), which states that “[a]n order remanding the case may require payment of just costs and any actual expenses, including attorneys’ fees, incurred as a result of the removal.” This court concludes that, while ultimately not successful, defendants’ removal was objectively reasonable.<sup>25</sup> It was not clearly foreclosed based upon the Sixth Circuit’s holding in *Milan*, and nothing in the record suggests that removal was for an improper purpose, such as imposing costs on plaintiffs or prolonging litigation.<sup>26</sup> Thus, attorneys’ fees are not warranted.

to the Superior Court of the State of Arizona, Maricopa County.

### V. CONCLUSION

Based on the preceding discussion, plaintiffs' motion to remand at docket 8 is GRANTED. The case is remanded

#### Footnotes

- 1 49 U.S.C. § 13906(b).
- 2 49 C.F.R. § 387.307(b), (d) (requiring that the evidence of a trust fund be filed using Form BMC-85).
- 3 49 C.F.R. § 387.307(b).
- 4 *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.1992).
- 5 *Id.*
- 6 *Prize Frize, Inc. v. Matrix, Inc.*, 167 F.3d 1261, 1265 (9th Cir.1999), *superceding by statute on other grounds as explained in Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 681 (9th Cir.2006).
- 7 *See Garrett v. Time-D.C., Inc.*, 502 F.2d 627, 629 (9th Cir.1974) (“[T]he ‘arising under’ language in 1337 is interpreted in essentially the same way as the ‘arising under’ phrase in 1331.”).
- 8 *Grable & Sons Metal Products, Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312.
- 9 *Id.* at 314.
- 10 *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9–10 (1983).
- 11 *Ultramar America, Ltd. v. Dwelle*, 900 F.2d 1412, 1414 (9th Cir.1990).
- 12 *Rains v. Criterion Systems, Inc.*, 80 F.3d 339, 346 (9th Cir.1996).
- 13 *Ultramar America*, 900 F.2d at 1414 (“Whether the complaint states a claim ‘arising under’ federal law must be ascertained by the legal construction of [the plaintiff’s] allegations, and not by the effect attributed to those allegations by the adverse party.” (internal quotations omitted)).
- 14 49 U.S.C. § 13906(b) 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.”
- 15 49 C.F.R. § 387.307 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.”
- 16 Doc. 18–1 at p. 3, ¶ 12.

- 17 49 C.F.R. § 387.307(a)(1).
- 18 49 C.F.R. § 387.307(b).
- 19 *Grable*, 545 U.S. at 317.
- 20 *Id.* at 317–18 (clarifying that while a federal cause of action is a sufficient condition for federal question jurisdiction, it is not a necessary one).
- 21 886 F.2d 783 (6th Cir.1989).
- 22 *Milan*, 886 F.2d at 787.
- 23 Doc. 18 at p. 2, n. 1.
- 24 Doc. 18–2 at p. 3, ¶ 4.
- 25 *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005);
- 26 *Id.* at 140–41.

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# **EXHIBIT B**

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B. M. C. 85

FILER FMCSA  
ACCOUNT NO. 22512

Approved by OMB  
2126-0017  
License No.  
MC- 643224

PROPERTY BROKER'S TRUST FUND AGREEMENT UNDER 49 U.S.C. 13906  
OR NOTICE OF CANCELLATION OF THE AGREEMENT

KNOW ALL MEN BY THESE PRESENTS, That we Alliance Transportation, Inc.

(Broker)  
of 5990 Stoneridge Dr #118 Pleasanton, CA 94588  
(Street) (City) (State) (Zip code)

as TRUSTOR (hereinafter called Trustor), and PACIFIC FINANCIAL ASSOCIATION, INC.,  
(Name of Trustee)

a financial institution created and existing under the laws of the State of California  
(State or District of Columbia)

as TRUSTEE (hereinafter called Trustee) hold and firmly bind ourselves and our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Trustor is or intends to become a Broker pursuant to the provisions of the Title 49 U.S.C. 13904, and the rules and regulations of the Federal Motor Carrier Safety Administration 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 a licensed Property Broker 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.

NOW, THEREFORE, the trustor and trustee, to accomplish the above, agree as follows:

1. 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.
2. Trustee agrees that the protection afforded to shippers and motor carriers hereby will continue until any and all claims made by shippers or motor carriers for which Trustor may be legally liable have been settled or until the funds deposited by Trustor pursuant to this Agreement have been exhausted, whichever comes first.
3. The parties hereto acknowledge and certify that said Trustee shall exclusively manage the security and trust fund, as herein set forth, and shall have legal title to the security and trust fund, pursuant to the terms and conditions as set forth in this agreement. Further, the parties hereto, and the said Trustee, as evidenced by their signatures to this agreement, acknowledge and certify that (a) said Trustee, neither has nor expects to have any interest, financial, proprietary, or otherwise, whatsoever, in Trustor; and (b) said Trustor, neither has nor expects to have any interest, financial, proprietary, or otherwise, whatsoever, in Trustee.
4. Trustee acknowledges the receipt of the sum of Ten Thousand Dollars (\$10,000.00), to be held in trust under the terms and conditions set forth herein.
5. Trustee may, within its sole discretion, invest the funds comprising the corpus of this trust fund consistent with its fiduciary obligation under applicable law.
6. 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.
7. 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).
8. 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.
9. This agreement may be canceled at any time upon thirty (30) days written notice by the Trustee or Trustor to the FMCSA on the form printed at the bottom of this agreement. The thirty (30) day notice period shall commence upon actual receipt of a copy of the trust fund agreement with the completed notice of cancellation at the FMCSA's Washington, DC office. The Trustee and/or Trustor specifically agrees to file such written notice of cancellation.
10. All sums due the Trustee as a result, directly or indirectly, of the administration of the trust fund under this agreement shall be billed directly to Trustor and in no event shall said sums be paid from the corpus of the trust fund herein established.

Exhibit B

1 of 2

11. Trustee shall maintain a record of all financial transactions concerning the Fund, which will be available to Trustor upon request and reasonable notice and to the FMCSA upon request.

12. This agreement shall be governed by the laws in the State of Arizona, to the extent not inconsistent with the rules and regulations of the FMCSA.

This trust fund agreement is effective the 22 day of April, 2008, 12:01 a.m., standard time at the address of the Trustor as stated herein and shall continue in force until terminated as herein provided.

Trustee shall not be liable for payments of any of the damages hereinbefore described which arise as the result of any contracts, agreements, undertakings, or arrangements made by the Trustor for the supplying of transportation after the cancellation of this Agreement, as herein provided, but such cancellation shall not affect the liability of the Trustee for the payment of any such damages arising as the result of contracts, agreements, or arrangements made by the Trustor for the supplying of transportation prior to the date such cancellation becomes effective.

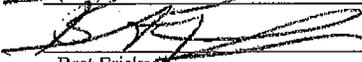
IN WITNESS WHEREOF, the said Trustor and Trustee have executed this instrument on the 22 day of April, 2008.

TRUSTOR

Name Alliance Transportation, Inc.

Address 5990 Stoneridge Dr #118  
Pleasanton, CA 94588

Telephone No. (408)291-0375

By   
Bret Erickson  
President

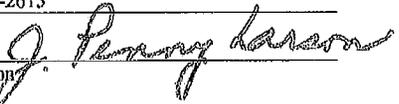
Witness   
(Signature and Title)

TRUSTEE

Name PACIFIC FINANCIAL ASSOCIATION, INC.

Address 12707 High Bluff #200  
San Diego, CA. 92130

Telephone No. (800)595-2615

By   
J.P. Larson  
President

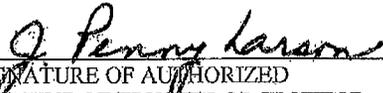
Witness   
(Signature and Title)

Only financial institutions may qualify to act as Trustee. Trustee, by the above signature, certifies that it is a financial institution and has legal authority to assume the obligations of Trustee and the financial ability to discharge them

NOTICE OF CANCELLATION

THIS IS TO ADVISE THAT THE ABOVE BROKER TRUST FUND AGREEMENT EXECUTED ON THE 22 DAY OF April 2008 IS HEREBY CANCELED AS SECURITY IN COMPLIANCE WITH THE FMCSA SECURITY REQUIREMENTS UNDER 49 U.S.C. 13906(b) and 49 CFR 387.307, EFFECTIVE AS OF THE 22 DAY OF February 2012, 12:01 A.M. STANDARD TIME AT THE ADDRESS OF THE TRUSTOR, PROVIDED SUCH DATE IS NOT LESS THAN THIRTY (30) DAYS AFTER THE ACTUAL RECEIPT OF THIS NOTICE BY THE FMCSA.

23 January 2012 DATE SIGNED

  
SIGNATURE OF AUTHORIZED  
REPRESENTATIVE OF TRUSTEE OR TRUSTOR