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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

William Consalo & Sons Farms
Incorporated,

Plaintiff,

v.

Drobnick Distributing Incorporated;
Edward Drobnick; Deborah Drobnick;
Babaluci Fresh Fruit & Vegetables LLC;
Marco Antonio Siqueiros; Veronica
Siqueiros,

Defendants.

Drobnick Distributing Incorporated, a
California corporation

Cross-Complainant,

v.

Marco Antonio Siquerios, and Babaluci
Fresh Fruit & Vegetables, LLC aka Whole
Foods & Vegetables,

Cross-Defendants.

No. CV-10-00049-TUC-CKJ

ORDER

Pending before the Court is Cross-Complainant Drobnick Distributing Inc.’s (“Drobnick”) Supplemental Notice of Application and Application for Entry of Default Judgment as to Cross-Defendants Babaluci Fresh Fruit & Vegetables LLC aka Whole Foods & Vegetables and Marco Antonio Siquerios. (Doc. 159).

1 **I. Background**

2 Plaintiff William Consalo & Sons Farms, Inc. is a wholesale buyer and seller of
3 fresh fruits and vegetables located in Vineland, New Jersey. Plaintiff has held a PACA
4 license since 1962. In approximately June 2008, Defendant Marco Siqueiros started
5 Babaluci Fresh Fruit & Vegetables, LLC (“Babaluci”). Babaluci is a buyer and seller of
6 fresh fruits and vegetables. In January 2009, Plaintiff hired Marco Siqueiros to act as its
7 agent to buy and sell produce on behalf of Plaintiff in its Nogales, Arizona office.

8 Defendant Drobnick Distributing, Inc. is a brokerage firm in the business of
9 buying and selling fresh fruits and vegetables located in Salinas, California. Defendant
10 Edward Drobnick is its principal. Defendant Drobnick Distributing, Inc. has held a
11 PACA license since 2001.

12 On January 25, 2010, Plaintiff filed a Complaint against Babaluci and Marco
13 Siqueiros (collectively “Babaluci Defendants”), and Drobnick Distributing, Inc., Edward
14 and Deborah Drobnick (collectively “Drobnick Defendants”) alleging breach of PACA
15 trust. (Doc. 1). On March 5, 2010, the Drobnick Defendants filed their Answer. (Doc.
16 30). Drobnick also asserted a Cross-Complaint against the Babaluci Defendants.

17 The Cross-Complaint alleges that Drobnick entered into an agreement with
18 Babaluci to process invoices for the purchase of produce from Plaintiff to Babaluci, in an
19 effort to help Marco Siqueiros establish an industry credit rating. As compensation,
20 Drobnick would receive a transaction fee of \$.25 per carton. Invoices for the purchase of
21 produce from Plaintiff were delivered to Drobnick, which processed the invoices and
22 forwarded them to Babaluci. However, Babaluci received the purchased produce directly
23 from Plaintiff.

24 Between September 17, 2009 and November 20, 2009, Drobnick sent Babaluci
25 invoices for the produce purchased from Plaintiff as well as invoices for the agreed upon
26 transaction fees. However, Babaluci never made payments on those invoices. In
27 addition from November 3, 2009 through December 16, 2009, Drobnick agreed to sell
28 Babaluci produce and Babaluci agreed to pay Drobnick for that produce. However,

1 Babaluci failed to pay Drobnick for the produce.

2 The Babaluci Defendants have not filed an Answer in this cause of action or
3 responded to the Cross-Complaint. At an April 2010 hearing Defendant Siqueiros
4 admitted in open Court that he owes the outstanding balance to Plaintiff and that he owes
5 Drobnick money as well. On June 2, 2010, Plaintiff filed an Amended Complaint adding
6 Defendant Marco Siqueiros's wife, Veronica Siqueiros as a Defendant. (Doc. 85).

7 On June 3, 2010, Drobnick filed a Motion for Entry of Default as to the Cross-
8 Defendants. (Doc. 87). On June 9, 2010, the Clerk of the Court entered an Amended
9 Entry of Default pursuant to Rule 55(a), Federal Rules of Civil Procedure, against Cross-
10 Defendants. (Doc. 94). On June 23, 2010, Drobnick filed a Motion for Entry of Default
11 as to the Cross-Defendants. (Doc. 96).

12 On February 9, 2011, the Court denied Drobnick's Motion for Entry of Default
13 with leave to resubmit. (Doc. 112). The Court reasoned that Drobnick's claims in the
14 Cross-Complaint may affect Plaintiff's claims against Drobnick. As such, the Court
15 found that Drobnick could resubmit its Motion for default judgment upon the resolution
16 of the issues between Plaintiff and the Drobnick Defendants.

17 On March 30, 2011, the Court granted Plaintiff's Motion for Summary Judgment
18 against the Drobnick Defendants. (Doc. 118). In its Order, the Court found that the
19 Drobnick Distributing and Edward Drobnick were liable to Plaintiff for \$1,525,896.88 in
20 produce sold to the Drobnick Defendants. On July 29, 2013, the Court denied the
21 Drobnick Defendants Motion for Reconsideration. (Doc. 138). Judgment was entered on
22 July 29, 2013. (Doc. 139). On November 15, 2013, Drobnick filed a Supplemental
23 Motion for Default Judgment against Babaluci. (Doc. 159). No response has been filed.

24
25 **II. Discussion**

26 Rule 55, Federal Rules of Civil Procedure, provides for the entry of default
27 judgment by the Court. Fed. R. Civ. P. 55(b)(2). "The district court's decision whether to
28 enter a default judgment is a discretionary one." *Aldabe v. Aldabe*, 616 F.2d 1089, 1092

1 (9th Cir. 1980). After entry of default by the Clerk of the Court pursuant to Fed. R. Civ.
2 P. 55(a), the Court may grant default judgment pursuant to Fed. R. Civ. P. 55(b)(2). *See*
3 *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986) (discussing the two-step process
4 required by Rule 55). In exercising its discretion whether to grant default judgment, the
5 Court may consider the following factors:

6 (1) the possibility of prejudice to the plaintiff, (2) the merits
7 of plaintiff's substantive claim, (3) the sufficiency of the
8 complaint, (4) the sum of money at stake in the action; (5) the
9 possibility of a dispute concerning material facts; (6) whether
10 the default was due to excusable neglect, and (7) the strong
11 policy underlying the Federal Rules of Civil Procedure
12 favoring decisions on the merits.

13 *Id.* at 1471-72 (citations omitted). Upon entry of default by the Clerk, the general
14 rule is that "the factual allegations of the complaint, except those relating to the amount
15 of damages, will be taken as true." *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915,
16 917-18 (9th Cir. 1987) (internal citations omitted). Therefore, Plaintiff is "required to
17 provide proof of all damages sought in the complaint." *Pepsico, Inc. v. California*
18 *Security Cans*, 238 F.Supp.2d 1172, 1175 (C.D. Cal. 2002).

19 A. Procedural Requirements

20 As a preliminary matter, the Court addresses the adequacy of the service of
21 process on Cross-Defendants. *See e.g., SEC v. Internet Solutions for Business, Inc.*, 509
22 F.3d 1161, 1165 (9th Cir. 2007) (reviewing *de novo* whether "default judgment is void
23 because of lack of personal jurisdiction due to insufficient service of process."); *Mason v.*
24 *Genisco Technology Corp.*, 960 F.2d 849, 851 ("A person is not bound by a judgment in
25 a litigation to which he or she has not been made a party by service of process.").
26 Regarding service of process, Rule 4(e), Federal Rules of Civil Procedure, provides:

27 Unless federal law provides otherwise, an individual – other
28 than a minor, an incompetent person, or a person whose
waiver has been filed – may be served -in a judicial district of
the United States by: (1) following state law for serving a
summons in an action brought in courts of general jurisdiction
in the state where the district court is located or where service
is made[.]

1 Fed. R. Civ. P. 4(e). Further, “a domestic or foreign corporation, or a partnership
2 or other unincorporated association that is subject to suit under a common name, must be
3 served: (1) in a judicial district of the United States: (A) in the manner prescribed by Rule
4 4(e)(1) for serving an individual.” Fed. R. Civ. P. 4(h).

5 Defendant Babaluci Fresh Fruit & Vegetables LLC aka Whole Foods &
6 Vegetables is an Arizona corporation and Defendant Marco Siqueiros is above the age of
7 majority. As such, none of the Defendants are minors or incompetent. On March 5, 2010,
8 Plaintiff filed Returns of Service as to the Babaluci Defendants who were personally
9 served on March 3, 2010. (Docs. 28, 29). As such, Plaintiff properly served the Babaluci
10 Defendants with the Complaint.

11 Since the Complaint was properly served on the Babaluci Defendants in
12 accordance with Fed.R.Civ.P. 4, the Cross-Complaint constitutes a pleading filed after
13 the original complaint and therefore requires service under Federal Rule of Civil
14 Procedure 5. Fed.R.Civ.P. 5(a)(1)(B); *see e.g. Kruska v. Perverted Justice Foundation*
15 *Inc.*, 2010 WL 3156089, *3 (D. Ariz. 2010). One method of effecting proper service of a
16 Cross-Complaint is to mail “it to the person’s last known address – in which event
17 service is complete upon mailing.” Fed.R.Civ.P. 5(b)(2)(C). Drobnick mailed a copy of
18 the Cross-Complaint to the Cross-Defendants on March 5, 2010. (Doc. 31). Then, on
19 May 6, 2010, Drobnick had another copy of the Cross-Complaint served on the Cross-
20 Defendants including the registered agent for Babaluci Fresh Fruit & Vegetables, by
21 mailing a copy of the Cross-Complaint to their last known addresses. (Doc. 77).

22 As such, Drobnick Distributing has effected proper service of its Cross-Complaint
23 against the Cross-Defendants and the Cross-Defendants have failed to respond. Since the
24 Court has determined that service of the Cross-Complaint was proper, the Court shall
25 analyze the factors enunciated in *Eitel* to determine whether default judgment on the
26 Cross-Complaint is appropriate in this case.

27
28 *B. Eitel Factors*

1 *1. Possibility of Prejudice to the Plaintiff*

2 With respect to the first *Eitel* factor, Drobnick would suffer prejudice if the default
3 judgment is not entered because it would otherwise be without recourse for recovery.
4 Since the Cross-Defendants have failed to answer or otherwise respond to the allegations
5 in the Cross-Complaint, the Cross-Defendants are deemed to have admitted the truth of
6 those statements. *See Danning v. Lavine*, 572 F.2d 1386, 1389 (9th Cir. 1978). The
7 evidence before this Court indicates that Drobnick will be prejudiced by its inability to
8 recover damages for the Cross-Defendants' breach of contract and breach of trust. This
9 factor favors granting default judgment.

10
11 *2. Substantive Merits and Sufficiency of the Complaint*

12 The second and third *Eitel* factors are interrelated and shall be considered in
13 tandem. The Court will review Drobnick's claims in the Cross-Complaint and weigh
14 their substantive merits and sufficiency.

15 The Cross-Complaint alleges a breach of contract. The Cross-Complaint has
16 pleaded the existence of a contract. It alleges that Drobnick performed its contractual
17 duties and that the Cross-Defendants breached the agreement by not paying Drobnick the
18 amount owed on the invoices. As such, the Cross-Complaint has sufficiently pled breach
19 of contract. *See Raymat Materials, Inc. v. A&C Catalysts, Inc.*, 2013 WL 3662477, *2
20 (N.D. Cal. 2013).

21 The Cross-Complaint also alleges a breach of trust. To prevail on their breach of
22 trust claim, Plaintiff must prove "a violation by the trustee of any duty which as trustee
23 he owes to the beneficiary." *Boulder Fruit Exp. & Heger Organic Farm Sales v.*
24 *Transportation Factoring, Inc.*, 251 F.3d 1268, 1271 (9th Cir. 2001). (quoting
25 Restatement (Second) of Trusts § 201 (1959)). The federal regulations delineate a PACA
26 trustee's primary duty as follows:

27 Commission merchants, dealers and brokers are required to
28 maintain trust assets in a manner that such assets are freely
available to satisfy outstanding obligations to sellers of
perishable agricultural commodities. Any act or omission

1 which is inconsistent with this responsibility, including
2 dissipation of trust assets, is unlawful and in violation of
3 Section 2 of the Act, (7 U.S.C. 499b).

4 7 C.F.R. § 46.46(d)(1). “Dissipation” is defined as “any act or failure to act which
5 could result in the diversion of trust assets or which could prejudice or impair the ability
6 of unpaid suppliers, sellers, or agents to recover money owed in connection with produce
7 transactions.” 7 C.F.R. § 46.46(a)(2).

8 In the instant case, the Cross-Complaint properly alleges the elements for a breach
9 of the PACA trust. The Cross-Complaint identifies the PACA trust, and alleges a failure
10 by the Cross-Defendants to pay trust funds to Drobnick for goods sold. The Cross-
11 Complaint further alleges that the Cross-Defendants dissipated trust assets. Accordingly,
12 Drobnick has adequately pled its claims against the Cross-Defendants for breach of trust.
13 The substantive merits and sufficiency of the Cross-Complaint favors granting default
14 judgment.

15 *3. Amount of Money at Stake¹*

16 The fourth *Eitel* factor directs the Court to consider the amount of money at stake
17 in relation to the seriousness of the Cross-Defendants’ conduct. *Eitel*, 782 F.2d at 1471-
18 72. In this case, Drobnick seeks a total of \$17,603.79 in unpaid transaction fees and
19 interest. The unpaid transaction fees requested is \$10,320.00. Pursuant to the
20 outstanding transaction fee invoices, a penalty payment of 1.5% per month is owed on all
21 unpaid invoices. The amount of interest owed on the unpaid transaction fees is presently
22 \$7,283.79.

23 Drobnick also seeks a total of \$361,626.93 in damages and interest for the produce
24 sold to Cross-Defendants pursuant to the terms set forth in the invoices. The amount of
25 unpaid invoices for produce totals \$212,519.80. Pursuant the invoices, a penalty payment
26

27
28 ¹ Drobnick has attached copies of all the invoices for unpaid produce and unpaid
transaction fees that had been submitted to Babaluci as well as a spreadsheet itemizing
the attorneys’ fees and costs incurred by Drobnick.

1 of 1.5% per month on any unpaid balance is charged. The total interest owed on the
2 unpaid produce invoices is \$149,107.13.

3 Additionally, Drobnick asserts that it never received any of the produce or any
4 proceeds from the sale of the produce referenced in the invoices for \$1,555,396.62, which
5 are the subject of the Plaintiff's First Amended Complaint. Further, Cross-Defendants
6 were responsible for selling that produce and received all the proceeds from the sale of
7 that produce. As such, Drobnick asserts that Cross-Defendants should be required to
8 indemnify and hold harmless Drobnick against damages of \$1,525,896.88 plus interest at
9 the federal judgment rate, which was awarded to Plaintiff against Drobnick and Edward
10 Drobnick pursuant to the Judgment entered in this case. (Doc. 139).

11 Finally Drobnick seeks \$63,866.46 in attorneys' fees and costs. In light of Cross-
12 Defendants failure to defend against this cause of action and the liquidated amount of
13 damages sought, this Court finds that this factor favors granting default judgment.

14
15 *4. The Possibility of a Dispute Concerning Material Facts*

16 The fifth *Eitel* factor contemplates the possibility of a dispute concerning material
17 facts. Upon entry of default "the factual allegations of the complaint, except those
18 relating to the amount of damages, will be taken as true." *Televideo Systems, Inc. v.*
19 *Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987) (internal citations omitted). The Cross-
20 Defendants have had more than an ample amount of time to defend against Drobnick's
21 claims, yet they have not done so. As such, there are no material facts in dispute. Thus,
22 this factor favors the entry of default judgment.

23
24 *5. Whether Default Was Due to Excusable Neglect*

25 The sixth *Eitel* factor considers whether the default was due to excusable neglect.
26 The Cross-Defendants were served via first class mail on March 5, 2010 and again on
27 May 6, 2010. (Docs. 31, 77). There is no evidence before this Court to indicate that the
28 Cross-Defendants failure to answer or otherwise respond to the Cross-Complaint is due to

1 excusable neglect. Indeed, in light of the amount of time that has passed since service of
2 the Cross-Complaint and Cross-Defendants Marco Siqueiros's appearance at the April
3 2010 evidentiary hearing, it seems unlikely that Cross-Defendants' failure to respond
4 could be attributable to excusable neglect. As such, this factor favors entry of default
5 judgment.

6
7 *6. Public Policy Favoring Decisions on the Merits*

8 The seventh *Eitel* factor involves "the strong public policy underlying the Federal
9 Rules of Civil Procedure favoring decisions on the merits." *Eitel*, 782 F.2d at 1472. This
10 concept, however, is not an absolute. Rule 55(a), Federal Rules of Civil Procedure,
11 specifically contemplates "termination of a case before hearing the merits . . . whenever a
12 defendant fails to defend an action." *Pepsico, Inc. v. California Security Cans*, 238
13 F.Supp.2d 1172, 1177 (C.D. Cal. 2002). Thus, despite the strong public policy in favor of
14 decisions on the merits, cases such as this make "a decision on the merits impractical, if
15 not impossible." *Id.* As such, this Court is not precluded from entering default judgment
16 against the Cross-Defendants, and finds that default judgment is appropriate.

17 Accordingly, IT IS HEREBY ORDERED that:

18 1. Drobnick's Supplemental Notice of Application and Application for Entry
19 of Default Judgment is GRANTED. (Doc. 159).

20 2. Cross-Defendants Babaluci Fresh Fruit & Vegetables LLC aka Whole
21 Foods & Vegetables and Marco Siqueiros, jointly and severally, shall pay Drobnick
22 Distributing Inc. damages in the amount of \$379,230.72.

23 3. Cross-Defendants Babaluci Fresh Fruit & Vegetables LLC aka Whole
24 Foods & Vegetables and Marco Siqueiros, jointly and severally, shall pay Drobnick
25 Distributing Inc.'s attorneys' fees and costs in the amount of \$63,866.46.

26 4. Interest on the total principal amount of this Judgment of \$443,097.18 at
27 the federal judgment rate as specified in 28 U.S.C. §1961 shall accrue from the date of
28 this Judgment until paid.

