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**United States District Court
Central District of California**

SOUTH MILL MUSHROOM, LLC,
Plaintiff,
v.
V.I.P. MARKETING, INC., et al.,
Defendants.

Case No. 2:21-cv-07200-ODW (Ex)

**ORDER DENYING PLAINTIFF’S EX
PARTE APPLICATION FOR
TEMPORARY RESTRAINING
ORDER [12] AND MOTION FOR
PRELIMINARY INJUNCTION [14]**

I. INTRODUCTION & BACKGROUND

On September 8, 2021, Plaintiff South Mill Mushroom, LLC (“South Mill”) initiated this lawsuit against Defendants V.I.P. Marketing, Inc. (“V.I.P.”); Christopher Martin; Jesse Martin; and Martin Produce, Inc. South Mill sells mushrooms, and it asserts a breach of contract claim for Defendants’ failure to pay a total of \$494,079.65.

Because this is a suit for interstate sale of produce, the Perishable Agricultural Commodities Act of 1930 (“PACA”) applies, and South Mill’s remaining seven claims arise under PACA. Under PACA, when a seller sells qualifying produce to a buyer, a trust arises by operation of law, under which the buyer is the trustee of the produce (along with all proceeds derived therefrom) and the seller is the beneficiary. The trust lasts until the buyer renders payment. 7 U.S.C. § 499(e)(c)(2); 49 Fed. Reg.

1 at 45738. “PACA trusts are governed by traditional principles of trust law,” *In re*
2 *Country Harvest Buffet Rests., Inc.*, 245 B.R. 650, 653 (B.A.P. 9th Cir. 2000), and
3 they offer produce sellers “a self-help tool that will enable them to protect themselves
4 against the abnormal risk of losses resulting from slow-pay and no-pay practices by
5 buyers or receivers of fruits and vegetables,” 49 Fed. Reg. at 45737, 1984 WL
6 134994.

7 South Mill claims that V.I.P. has not paid for its orders and is therefore the
8 trustee of a PACA trust. On September 9, 2021, South Mill filed an ex parte
9 application for a Temporary Restraining Order (“TRO”) seeking an injunction barring
10 Defendants from “dissipating the trust assets,” that is, from selling the mushrooms or
11 from using or conveying any proceeds from sale of the mushrooms, until Defendants
12 pay South Mill the monies owed. 7 C.F.R. § 46.46(a)(2) (“‘Dissipation’ means any
13 act or failure to act which could result in the diversion of trust assets or which could
14 prejudice or impair the ability of unpaid suppliers, sellers, or agents to recover money
15 owed in connection with produce transactions.”); (Appl. TRO, ECF No. 12.) South
16 Mill also filed a related Motion for Preliminary Injunction. (Mot. Prelim. Inj., ECF
17 No. 14.) For the reasons explained below, the Court **DENIES** South Mill’s TRO
18 Application and Motion for Preliminary Injunction.

19 II. LEGAL STANDARD

20 A temporary restraining order is an “extraordinary remedy that may only be
21 awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v.*
22 *Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008); *see Earth Island Inst. v. Carlton*,
23 626 F.3d 462, 469 (9th Cir. 2010) (emphasizing plaintiffs “face a difficult task in
24 proving that they are entitled to this ‘extraordinary remedy’”). The standard for
25 issuing a temporary restraining order is “substantially identical” to that for issuing a
26 preliminary injunction. *Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d
27 832, 839 n.7 (9th Cir. 2001).

28

1 Pursuant to Federal Rule of Civil Procedure (“Rule”) 65, a court may grant
 2 preliminary injunctive relief to prevent “immediate and irreparable injury.” Fed. R.
 3 Civ. P. 65(b). To obtain this relief, a plaintiff must establish the “*Winter*” factors:
 4 (1) “he is likely to succeed on the merits”; (2) “he is likely to suffer irreparable harm
 5 in the absence of preliminary relief”; (3) “the balance of equities tips in his favor”;
 6 and (4) “an injunction is in the public interest.” *Am. Trucking Ass’ns, Inc. v. City of*
 7 *Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter*, 555 U.S. at 20). In
 8 the Ninth Circuit, the *Winter* factors may be evaluated on a sliding scale: “serious
 9 questions going to the merits, and a balance of hardships that tips sharply towards the
 10 plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also
 11 shows that there is a likelihood of irreparable injury and that the injunction is in the
 12 public interest.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir.
 13 2011) (internal quotation marks omitted).

14 III. DISCUSSION

15 Between June 2021 and August 2021, South Mill and V.I.P. entered into
 16 contracts for the sale of Pennsylvania mushrooms. (Decl. of Anecia Wilson (“Wilson
 17 Decl.”) ¶¶ 7–8, ECF No. 12-2.) South Mill shipped the mushrooms, and V.I.P.
 18 received them and now owes a balance of \$494,079.65. (*Id.* ¶¶ 9, 16.) Although
 19 South Mill may have a contract claim, it is not entitled to an immediate injunction
 20 enforcing its rights in its PACA trust because it has failed to show irreparable harm
 21 under the heightened standard that applies when the defendant has no notice.

22 A. Ex Parte Requirements; No-Notice Requirements

23 A party seeking ex parte relief must establish: (1) why a motion cannot be
 24 calendared in a regular manner; (2) that the requesting party will be irreparably
 25 prejudiced if a motion is heard in accord with regular procedures; and (3) that the
 26 requesting party is without fault in creating the crisis that requires ex parte relief or
 27 that the crisis was due to excusable neglect. *Mission Power Eng’g Co. v. Continental*
 28 *Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995). “In other words, [an ex parte

1 application] must show why the moving party should be allowed to go to the head of
2 the line in front of all other litigants and receive special treatment.” *Id.*

3 “Where notice could have been given to the adverse party,” there exists only “a
4 very narrow band of cases in which ex parte orders are proper because notice to the
5 defendant would render fruitless the further prosecution of the action.” *Reno Air*
6 *Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006) (quoting *Am. Can*
7 *Co. v. Mansukhani*, 742 F.2d 314, 322 (7th Cir. 1984)). Thus, a party applying for ex
8 parte relief must make “reasonable, good faith efforts orally to advise counsel for all
9 other parties, if known, of the date and substance of the proposed ex parte application”
10 and must “advise the Court in writing and under oath of efforts to contact other
11 counsel and whether other counsel, after such advice, opposes the application.” C.D.
12 Cal. L.R. 7-19.1. This notice requirement may be waived only “[i]f the judge to
13 whom the application is made finds that the interest of justice requires that the ex
14 parte application be heard without notice (which in the instance of a TRO means that
15 the requisite showing under [Rule] 65(b) has been made).” C.D. Cal. L.R. 7-19.2.

16 Relatedly, Rule 65(b)(1) authorizes a court to issue a temporary restraining
17 order without notice to the adverse party only if:

18 (A) specific facts in an affidavit or a verified complaint clearly show that
19 immediate and irreparable injury, loss, or damage will result to the
20 movant before the adverse party can be heard in opposition; and

21 (B) the movant’s attorney certifies in writing any efforts made to give
22 notice and the reasons why it should not be required.

23 Fed. R. Civ. P. 65(b)(1). These restrictions are “stringent,” and the “circumstances
24 justifying the issuance of an ex parte order are extremely limited.” *Reno Air Racing*,
25 452 F.3d at 1131 (quoting *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423,
26 438–39 (1974)).

27 Here, the declaration of counsel submitted with the Application fails to address
28 why the Court should not require notice to Defendants. (*See generally* Wilson Decl.)

1 This is sufficient independent grounds for denying the application. Fed. R. Civ.
2 P. 65(b)(1)(B); C.D. Cal. L.R. 7-19.2.

3 Moreover, the relief South Mill seeks—trust enforcement without notice to
4 Defendants—is truly extraordinary. Under case law, federal rules, and local rules,
5 South Mill had to make a strong and clear showing that it would suffer irreparable
6 harm without immediate ex parte relief. As the following discussion of the *Winter*
7 factors makes clear, South Mill missed this mark by a wide margin.

8 **B. TRO Application**

9 South Mill seeks a temporary restraining order enjoining Defendants from
10 dissipating trust assets. But South Mill fails to satisfy the requirements for such relief.
11 As indicated in *Cottrell*, if a party altogether fails to show irreparable harm, its TRO
12 application must be denied, regardless of the other factors. 632 F.3d at 1135; *Winter*,
13 555 U.S. at 20. Here, South Mill has shown no irreparable harm at all, and
14 accordingly, the Court denies South Mill’s application without addressing the other
15 factors.

16 In support of its claim of irreparable harm, South Mill argues that the trust
17 assets are at risk of dissipation, and that it will suffer irreparable harm if the Court
18 does not issue an injunction enforcing the trust. (Appl. TRO 6–7.) This argument has
19 two principal flaws.

20 First, South Mill has failed to make a substantial showing that the trust assets
21 are at risk of dissipation. As evidence of dissipation, South Mill submits a single
22 email from Defendant Christopher Martin, V.I.P.’s principal:

23 As you may now know Gabe is going to move on to a different
24 company. . . I have said that I will be paying the debt to everyone,
25 especially South Mill[. . . I am currently restructuring our company & I
26 am in the middle of selling a personal property so that I will make a lump
27 sum payment. . . I tried to come up with different ideas & formulas so
28 that I could make this work for everyone, including keeping the
mushroom department, but now that isn’t going to happen. I will ask for
a few weeks to get my finances in order & will be paying off the VIP

1 debt with some personal funds. . . . I will make good on this, but I just
2 ask for a little time to do so

3 I'll be in touch to let you guys about the payments as soon as we get
4 close to the escrow date. . . .

5 Thank you.

6 (Wilson Decl. ¶ 26.) Based on this single email, South Mill asserts that V.I.P. has
7 failed to maintain sufficient PACA Trust assets.

8 South Mill's showing is wholly insufficient to demonstrate that trust assets are
9 or risk being dissipated. The email says nothing about the whereabouts of the
10 mushrooms or the proceeds therefrom. The email also says nothing about V.I.P.'s or
11 the other Defendants' ability to pay. Indeed, South Mill's ex parte papers are
12 generally devoid of any indication of exactly what type of dissipation South Mill
13 fears. The Court cannot say that South Mill has made the required strong showing of
14 dissipation when South Mill failed to take the foundational step of specifying exactly
15 what kind of dissipation it fears. *See Frio Ice, S.A. v. Sunfruit, Inc.*, 918 F.2d 154,
16 159, n.8 (11th Cir. 1990) (instructing district courts to enforce PACA trusts only
17 "[u]pon a showing that the trust is being dissipated or threatened with dissipation");
18 *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009) ("A party seeking an asset
19 freeze must show a likelihood of dissipation of the claimed assets, or other inability to
20 recover monetary damages, if relief is not granted.")

21 Moreover, even if South Mill could demonstrate dissipation, the question here
22 is whether South Mill's harm is *irreparable*, that is, whether South Mill has an
23 adequate remedy at law. Where the harm arises from nonpayment, as here, South Mill
24 can be made completely whole with money damages. *Moss v. Infinity Ins. Co.*, 197 F.
25 Supp. 3d 1191, 1203 (N.D. Cal. 2016) ("Where . . . a plaintiff can seek money
26 damages if she prevails on claims for breach of contract . . . she has an adequate
27 remedy at law.") Thus, the dissipation of trust assets threatens irreparable harm only
28 if there is an additional showing that Defendants are insolvent.

1 South Mill does not make this showing. South Mill relies on only two pieces of
2 evidence: the above email, along with an additional assertion that Defendant Jesse
3 Martin and “another business partner” are soon to retire. (Wilson Decl. ¶ 25.) But the
4 mere fact a person is retiring from a company says nothing about that company’s
5 financial state. Thus, South Mill fails to show that any defendant is insolvent or that
6 an award of money damages will otherwise be inadequate to make South Mill whole.
7 Indeed, Christopher Martin’s email indicates exactly the opposite: that Defendants are
8 solvent and intend to pay the debt.

9 Because South Mill makes no showing of irreparable harm, immediate
10 injunctive relief is inappropriate, and the Court need not consider the remaining
11 *Winter* factors. Accordingly, the Court **DENIES** South Mill’s TRO Application.
12 South Mill’s Motion for Preliminary Injunction is also ex parte and is judged by the
13 same legal standard, and the court **DENIES** that motion as well.

14 **IV. CONCLUSION**

15 For the foregoing reasons, the Court finds that South Mill has not met the high
16 burden of establishing that it is entitled to injunctive relief without notice to
17 Defendants. Accordingly, the Court **DENIES** South Mill’s ex parte Application for a
18 Temporary Restraining Order (ECF No. 12). The Court also **DENIES** South Mill’s
19 ex parte Motion for Preliminary Injunction (ECF No. 14), without prejudice to
20 renewing the Motion with proper notice.

21
22 **IT IS SO ORDERED.**

23
24 September 10, 2021

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27 **OTIS D. WRIGHT, II**
28 **UNITED STATES DISTRICT JUDGE**