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6 **UNITED STATES DISTRICT COURT**
7 **EASTERN DISTRICT OF CALIFORNIA**
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9 JOHNSTON FARMS, a general partnership,

Case No. 1:17-cv-00016-LJO-SKO

10 Plaintiff,

**ORDER DIRECTING PLAINTIFF TO
SUPPLEMENT RECORD**

11 v.

(Doc. 17)

12 YUVAL YUSUFOV, an individual,

13 Defendant.

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18 Before the Court is Plaintiff's Motion for Entry of Default Judgment (the "Motion").
19 (Doc. 17.) The Court finds that it requires additional information from Plaintiff in order to rule on
20 the Motion.

21 Plaintiff provided insufficient evidence to establish the personal liability of Defendant
22 Yuval Yusufov, as an individual, under the Perishable Agricultural Commodities Act ("PACA"), 7
23 U.S.C. § 499a *et seq.* The Ninth Circuit has held that individuals associated with corporate
24 defendants may be liable under a PACA trust theory. *Sunkist Growers, Inc. v. Fisher*, 104 F.3d
25 280, 282–83 (9th Cir. 1997). In *Sunkist*, after surveying the decisions concerning individual
26 liability under a PACA trust claim, the Court stated:

27 The unanimous conclusion of the cases is that PACA liability attaches first to the
28 licensed seller of perishable agricultural commodities. If the seller's assets are
insufficient to satisfy the liability, others may be found secondarily liable if they had

1 some role in causing the corporate trustee to commit the breach of trust.

2 We agree that individual shareholders, officers, or directors of a corporation who are
3 in a position to control PACA trust assets, and who breach their fiduciary duty to
preserve those assets, may be held personally liable under the Act.

4 *Id.* at 283 (citation omitted). Consequently, to establish personal liability, Plaintiff must make a
5 showing that the assets of the licensed commission merchant, dealer, or broker are insufficient to
6 satisfy the liability. *See Superior Sales W., Inc. v. Revival Enterprises, Inc.*, No. SACV 13-352-
7 JST (JPRx), 2013 WL 12136966, at *3 (C.D. Cal. June 18, 2013) (citing *Coosemans Specialties,*
8 *Inc. v. Gargiulo*, 485 F.3d 701, 707 (2d Cir. 2007)). Plaintiff must then show that the individuals
9 controlled PACA trust assets and that the individuals breached their fiduciary duty to preserve
10 those assets. *See Sunkist*, 104 F.3d at 283.

11 Here, Plaintiff’s complaint falls short. First, Plaintiff did not allege any facts showing that
12 Fresh Growers Direct, Inc. (“Fresh Growers”), the licensed commission merchant, dealer and/or
13 retailer, has insufficient assets to satisfy the liability.¹ Plaintiff did not allege any facts as to the
14 manner in which Defendant Yusufov improperly controlled the PACA trust assets. Further, other
15 than alleging that Defendant Yusufov is an “officer, director, shareholder, and/or controlling
16 insider” of Fresh Growers (*see* Doc. 1 (“Compl.”) at ¶ 4), Plaintiff did not present any evidence of
17 Defendant Yusufov’s active management role, or evidence of Defendant Yusufov acting for the
18 corporation. Nor are there any facts showing how Defendant Yusufov breached his fiduciary duty.

19 Plaintiff instead apparently takes the position that Defendant Yusufov’s role as an “officer,
20 director, shareholder, and/or controlling insider” of Fresh Growers establishes that Defendant
21 Yusufov “controlled or was in a position to control” Fresh Growers’ assets. (*See* Memo. at 4;

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23 ¹ Plaintiff, relying on *Coosemans*, asserts that it need not “show that there are insufficient assets from the corporate
24 defendant before seeking recovery from [Defendant Yusufov].” (Doc. 17-3, Memo. of P&As in Support of Pl.’s Mot.
25 for Entry of Default J. (“Memo.”) at 6.) *Coosemans*, however, does not so hold. In that case, there was evidence
26 before the Court that the licensed dealer’s assets were subject to collateral litigation with a third party and in
27 uncollected accounts receivable. 485 F.3d at 707. The *Coosemans* court observed that “[w]hen PACA trust assets are
28 tied up in litigation, or in the form of uncollected accounts receivable, they are insufficient to satisfy the PACA
liability because they are not ‘freely available’ for ‘prompt payment’ to trust beneficiaries as the PACA regulations
require,” and held that “plaintiffs need not wait for the conclusion of [the dealer’s] litigation or collection efforts
before seeking recovery directly from [the individual defendant].” *Id.* (citing 7 C.F.R. § 46.46(d)(1), (e)). Here,
unlike *Coosemans*, Plaintiff has made no showing at this stage of the proceedings that the assets of Fresh Growers
Direct, Inc. are not “freely available” for “prompt payment” such that they are insufficient to satisfy the PACA
liability.

1 Compl. ¶¶ 29–30.) In so doing, Plaintiff effectively asks the Court to impose a bright-line rule: if
2 an individual is alleged to be an “officer, director, shareholder, and/or . . . insider,” then, taking
3 that allegation as true, *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987), he
4 is by that fact in a position to control the PACA trust assets. This position expressly contradicts
5 the Ninth Circuit’s decision in *Sunkist*. In *Sunkist*, the Ninth Circuit concluded that the defendants
6 may be individually liable under PACA, but not because of their formal titles. Instead, *Sunkist*
7 explained that “[a] court considering the liability of [an] individual [under PACA] may look at
8 ‘the closely-held nature of the corporation, the individual’s active management role[,]’ and any
9 evidence of the individual’s acting for the corporation.” *Id.* at 283 (quoting *Frio Ice v. SunFruit,*
10 *Inc.*, 724 F. Supp. 1373, 1382 (S.D. Fla. 1989)). It then remanded to the district court to apply the
11 appropriate test in the first instance. *See Bear Mt. Orchards, Inc. v. Mich–Kim, Inc.*, 623 F.3d
12 163, 171–72 (3d. Cir. 2010) (interpreting the Ninth Circuit’s decision in *Sunkist* as focusing
13 primarily on context when determining individual liability).

14 The allegations in Plaintiff’s complaint are not well-pleaded beyond conclusory statements
15 of breach of fiduciary duties. “[N]ecessary facts not contained in the pleadings, and claims which
16 are legally insufficient, are not established by default.” *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d
17 1261, 1267 (9th Cir. 1992) (citation omitted). Plaintiff has failed to submit sufficient evidence as
18 set out in *Sunkist* and, as a result, Plaintiff has failed at this stage to establish the individual
19 liability of Defendant Yuval Yusufov. *See Abbate Family Farms Ltd. P’ship v. G D Fresh*
20 *Distribution, Inc.*, No. 1:12-cv-0303 LJO-BAM, 2012 WL 2160959, at *3–4 (E.D. Cal. June 13,
21 2012); *Wahluke Produce, Inc. v. Guerra Mktg. Int’l Inc.*, No. 1:11-CV-1981 LJO-BAM, 2012 WL
22 1601876, at *2–3 (E.D. Cal. May 7, 2012).

23 For these reasons, the Court ORDERS that Plaintiff shall file the following by no later than
24 **Tuesday, December 12, 2017**, evidence showing that, during the relevant time period:

25 (1) Fresh Growers Direct, Inc. had insufficient assets to satisfy the liability;
26 (2) Fresh Growers Direct, Inc. was a closely-held corporation, Defendant Yusufov had an
27 active management role in Fresh Growers Direct, Inc., and/or that Defendant Yusufov acted for
28 Fresh Growers Direct, Inc.; and

1 (3) Defendant Yusufov breached his fiduciary duty to maintain PACA trust assets.

2 To permit Plaintiff adequate time to submit its supplemental evidence, the hearing on the
3 Motion currently set for November 29, 2017, is hereby **CONTINUED to December 20, 2017, at**
4 **9:30 AM in Courtroom 7 (SKO) before Magistrate Judge Sheila K. Oberto.**

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6 IT IS SO ORDERED.

7 Dated: November 21, 2017

/s/ *Sheila K. Oberto*
8 UNITED STATES MAGISTRATE JUDGE

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