

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROHRER BROTHERS, INC.,

Plaintiff,

No. CIV S-10-3390 GEB CMK (TEMP)

v.

SUPER FRESH WHOLESALE FOODS
INC., et al.,

FINDINGS AND RECOMMENDATIONS

Defendants.

_____/

Plaintiff's motion for default judgment was submitted on the papers. Plaintiff's counsel has submitted a declaration wherein he avers that on or about February 8, 2011, defendant Howard Hartman, III, telephoned counsel and inquired as to why he was being sued. Defendant advised plaintiff's counsel that he intended to seek legal counsel in connection with defending this action. The court's docket reflects that defendants have not filed any motion for relief from the Clerk's Entries of Default despite being served with notices of the request for entries of default. Nor has any opposition to plaintiff's motion for entry of default judgment been filed.

For the reasons set forth below, the undersigned recommends that plaintiff's motion be granted and that default judgment be entered against defendants.

////

1 BACKGROUND

2 Plaintiff Rohrer Brothers, Inc. is a dealer in perishable agricultural commodities
3 with a principal place of business located in Sacramento, California. During the months of May
4 24, 2010 through September 7, 2010, plaintiff sold to defendants in interstate commerce various
5 wholesale lots of perishable agricultural commodities. After all credits, the principal sum
6 remaining due to plaintiff is \$10,323.01.

7 The record reflects that defendants were properly served with process on January
8 7, 2011 and defaults were entered on February 1 and 9, 2011. (Doc. Nos. 7, 14, 16.) On March
9 8, 2011, plaintiff filed a motion for default judgment. (Doc. No. 18.)

10 LEGAL STANDARDS

11 Federal Rule of Civil Procedure 55(b)(2) governs applications to the court for
12 entry of default judgment. Upon entry of default, the complaint's factual allegations regarding
13 liability are taken as true, while allegations regarding the amount of damages must be proven.
14 Dundee Cement Co. v. Howard Pipe & Concrete Prods., 722 F.2d 1319, 1323 (7th Cir. 1983)
15 (citing Pope v. United States, 323 U.S. 1 (1944); Geddes v. United Fin. Group, 559 F.2d 557 (9th
16 Cir. 1977)); see also DirectTV v. Huynh, 503 F.3d 847, 851 (9th Cir. 2007); TeleVideo Sys., Inc.
17 v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987).

18 Where damages are liquidated, i.e., capable of ascertainment from definite figures
19 contained in documentary evidence or in detailed affidavits, judgment by default may be entered
20 without a damages hearing. Dundee, 722 F.2d at 1323. Unliquidated and punitive damages,
21 however, require "proving up" at an evidentiary hearing or through other means. Dundee, 722
22 F.2d at 1323-24; see also James v. Frame, 6 F.3d 307, 310-11 (5th Cir. 1993).

23 Granting or denying default judgment is within the court's sound discretion.
24 Draper v. Coombs, 792 F.2d 915, 924-25 (9th Cir. 1986); Aldabe v. Aldabe, 616 F.2d. 1089,
25 1092 (9th Cir. 1980). The court is free to consider a variety of factors in exercising its discretion.
26 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Among the factors that may be

1 considered by the court are

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

8 Eitel, 782 F.2d at 1471-72 (citing 6 Moore's Federal Practice ¶ 55-05[2], at 55-24 to 55-26).

9 ANALYSIS

10 I. Whether Default Judgment Should Be Entered

11 The factual allegations of plaintiff's complaint, taken as true pursuant to the entry
12 of default against defendants, and the affidavits submitted in support of the motion for summary
13 judgment establish the following circumstances: Plaintiff Rohrer Brothers, Inc. is a dealer in
14 perishable agricultural commodities with a principal place of business located in Sacramento,
15 California. During the months of May 24, 2010 through September 7, 2010, plaintiff sold to
16 defendants in interstate commerce various wholesale lots of perishable agricultural commodities.
17 After all credits, the principal sum remaining due to plaintiff is \$10,323.01. Under the Perishable
18 Agricultural Commodities Act ("PACA"), a statutory trust has been created in which defendants
19 herein, the produce buyers, as trustees, hold their produce-related assets in trust as a fiduciary
20 until full payment is made to the produce seller, trust beneficiary. 7 U.S.C. § 499e(c). The trust
21 claim has been preserved because the statutory trust notice language was included on the face of
22 each invoice. 7 U.S.C. § 499e(c)(4); Granja Decl., Exh. C. Attorneys fees and interest are also
23 appropriately awarded under the PACA. Middle Mountain Land and Produce, Inc. v. Sound
24 Communities, Inc., 307 F.3d 1220, 1222-25 (9th Cir. 2002); Granja Decl., Exh. A (contractual
25 provision for interest and attorneys fees).
26

After weighing the Eitel factors, the undersigned finds that the material
allegations of the complaint support plaintiff's claims. Plaintiff will be prejudiced if default
judgment is denied because plaintiff has no other recourse for recovery of the damages suffered

1 due to the defendants' failure to pay for agricultural commodities received by them.

2 In light of the entry of default against the defendants, there is no apparent
3 possibility of a dispute concerning the material facts underlying the action. Nor is there any
4 indication that the defendants' default resulted from excusable neglect, as defendants have been
5 properly notified of the pendency of the lawsuit and have acknowledged they are aware of the
6 pending action.

7 Although public policy generally favors the resolution of a case on its merits, the
8 defendants' failure to make a proper appearance and defend against plaintiff's claims has made a
9 decision on the merits impossible in this case. Because most of the Eitel factors weigh in
10 plaintiff's favor, the undersigned, while recognizing the public policy favoring decisions on the
11 merits, will recommend that default judgment be entered against the defaulted defendants.

12 II. Terms of Judgment to Be Entered

13 After determining that entry of default judgment is warranted, the court must next
14 determine the terms of the judgment. Upon consideration of all of plaintiff's briefing, the
15 undersigned will recommend that damages be awarded in the amount requested.

16 By its motion for default judgment, plaintiff seeks a judgment in the principal sum
17 of \$10,323.01, interest from September 8, 2010, to the date of judgment at the rate of \$5.09 per
18 day, reasonable attorneys fees in the sum of \$1,137.50, together with post-judgment interest on
19 the judgment at the rate of eighteen percent per annum, and costs in the sum of \$510.00. The
20 affidavits of Jeff Granja and exhibits attached thereto and the affidavit of plaintiff's counsel
21 support the entry of judgment in the amounts requested.

22 CONCLUSION

23 For the reasons set forth above, IT IS RECOMMENDED that:

- 24 1. Plaintiff's motion for default judgment (Doc. No. 18) against defendants Super
25 Fresh Wholesale Foods, Inc., Howard Hartman, Jr., and Howard Hartman, III, be granted;
26 2. Judgment be entered against the defendants in the principal sum of \$10,323.01,

1 interest from September 8, 2010, to the date of judgment at the rate of \$5.09 per day, reasonable
2 attorneys fees in the sum of \$1,137.50, together with post-judgment interest on the judgment at
3 the rate of eighteen percent per annum, and costs in the sum of \$510.00.

4 These findings and recommendations will be submitted to the United States
5 District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
6 fourteen days after these findings and recommendations are filed, any party may file written
7 objections with the court. A document containing objections should be titled “Objections to
8 Magistrate Judge’s Findings and Recommendations.” The parties are advised that failure to
9 file objections within the specified time may, under certain circumstances, waive the right to
10 appeal the District Court’s order. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

11
12 DATED: March 30, 2011

13 
14 **CRAIG M. KELLISON**
15 UNITED STATES MAGISTRATE JUDGE

16
17 JMM
18 rohrerbros-superfresh.def