



1 California, and then have Elite sell the crops on behalf of both  
2 parties. Id.

3 On November 1, 2010, Wyrick sent Angulo an email outlining  
4 Elite's proposal regarding the division of labor and  
5 responsibility for the crops. Id. at ¶ 3 & Ex. A. In the email,  
6 Wyrick stated what Elite would provide, what it would like AFCM to  
7 provide and asked Angulo for his thoughts on this. Id. In their  
8 complaint, Plaintiffs allege that AFCM and Elite did enter into an  
9 oral joint growing agreement, with the basic split of  
10 responsibilities as outlined in Wyrick's email. Compl. ¶ 23.

11 On January 11, 2011, Wyrick filed for Chapter 7 bankruptcy.  
12 Mot. at 1;<sup>1</sup> see also Docket No. 1, In re Stephen Frank Wyrick,  
13 Case No. 11-50240 (Bankr. N.D. Cal.) (hereinafter, In re Wyrick).<sup>2</sup>  
14 In his bankruptcy filing, he listed his address as 3376 Cienega  
15 Road in Hollister, California. Docket No. 1, In re Wyrick.

16 After the crops were harvested and sold, Elite sent AFCM an  
17 accounting statement dated May 17, 2011, showing that AFCM was  
18 owed \$167,188.43 for the crops. Angulo Decl. ¶ 4 & Ex. B; see  
19 also Compl., Ex. B.

20 Elite failed to pay AFCM its share of the proceeds for the  
21 crops. Id. at ¶ 5. On July 26, 2011, AFCM sent Elite a written  
22 notice of intent to preserve trust benefits under the Perishable  
23 Agricultural Commodities Act (PACA), alleging that Elite is  
24 obliged to hold these proceeds in trust for AFCM until full  
25 \_\_\_\_\_

26 <sup>1</sup> Wyrick has sworn to the truth of the contents of his motion  
27 under penalty of perjury. Mot. at 4.

28 <sup>2</sup> The Court takes judicial notice of the filings made in  
Wyrick's bankruptcy proceedings.

1 payment has been made. Id. at ¶ 5 & Ex. C. Wyrick was one of the  
2 named recipients of this letter, which was sent to him at the  
3 Cienaga Road address. Id.

4 On September 21, 2011, Plaintiffs initiated the instant suit,  
5 alleging that Wyrick was "a manager and/or direct or indirect  
6 owner" of Elite and that he and others were "responsible for the  
7 daily management and control" of Elite. Compl. ¶ 9, 16. In the  
8 complaint, AFCM asserts the following claims against Wyrick:  
9 (1) enforcement of PACA trust provisions and disgorgement (seventh  
10 cause of action); (2) violation of the PACA and the California  
11 Food and Agriculture Code (FAC) §§ 55631, et seq., for failure to  
12 account and pay promptly (eighth cause of action); (3) conversion  
13 (ninth cause of action); (4) unjust enrichment (tenth cause of  
14 action); (5) constructive trust and disgorgement (eleventh cause  
15 of action); (6) declaratory judgment (twelfth cause of action);  
16 and (7) injunctive relief (thirteenth cause of action).

17 On November 2, 2011, Wyrick was personally served with the  
18 summons at the Cienaga Road address. Docket No. 17.

19 On November 28, 2011, Plaintiffs filed a motion for entry of  
20 default against Wyrick. Docket No. 41. Plaintiffs served a copy  
21 of the motion upon Wyrick at the Cienaga Road address. Docket No.  
22 41-2.

23 On November 30, 2011, the Clerk entered default against  
24 Wyrick. Docket No. 43. Plaintiffs served a notice of entry of  
25 default on Wyrick at the Cienaga Road address. Docket No. 44.

26 On February 23, 2012, Angulo and his counsel had a conference  
27 call with Defendants Creighton and Curley and their attorney.  
28 Angulo Decl. ¶ 7. During the conference call, Creighton and

1 Curley stated that Elite was established by Wyrick, who provided  
2 the initial vegetable seed, land and equipment for the business,  
3 and that he, along with Richard Escamilla and other members of the  
4 Escamilla family, made the decisions on who Elite did business  
5 with and which creditors were paid. Id. at ¶¶ 7-8. Angulo had  
6 been given the same information during the course of AFCM's  
7 dealings with Elite. Id. at ¶ 9.

8 On May 25, 2012, Plaintiffs moved for default judgment  
9 against Elite, Wyrick and Defendants Richard Escamilla, Sr., Jose  
10 Escamilla and Richard Escamilla, Jr. Docket No. 68. They served  
11 Wyrick with a copy of this motion at the Cienaga Road address.  
12 Docket No. 68-5.

13 This Court referred the motion to a Magistrate Judge for a  
14 report and recommendation. Docket No. 69. The Magistrate Judge  
15 set a hearing on Plaintiffs' motion for July 10, 2012. Docket No.  
16 70. Plaintiffs served Wyrick with notice of the hearing at the  
17 Cienaga Road address. Docket No. 72.

18 On July 5, 2012, Wyrick called Plaintiffs' counsel.  
19 Anastassiou Decl. ¶ 7. He asked her about the hearing that was  
20 scheduled for July 10, 2012 and questioned her as to how he could  
21 be held liable for Elite's debt when he was Elite's employee and  
22 not its owner or officer. Id. He did not tell her that he had a  
23 new address or that he had problems receiving the documents in  
24 this case. Id. at ¶ 8.

25 On July 10, 2012, the Magistrate Judge held a hearing on the  
26 motion for default judgment. Docket No. 75. Neither Wyrick nor  
27 any of the other Defendants appeared at the hearing. Id. On that  
28 date, the Magistrate Judge filed a report, recommending that the

1 Court grant Plaintiffs' motion for default judgment. Docket No.  
2 76. Plaintiffs served a copy of the report and recommendation on  
3 Wyrick at the Cienaga Road address. Docket No. 77.

4 On July 19, 2012, Wyrick filed a declaration in opposition to  
5 the motion for default judgment. Docket No. 80. In his  
6 declaration, he asked to be dismissed from the lawsuit. He  
7 attested, "When I was originally served for this lawsuit I spoke  
8 to my former employer, Richard Escallia [sic] Sr. and he told me  
9 he would take care of having me removed from the action." Id. He  
10 stated, "My family and I lost our home to foreclosure in May 2012  
11 and moved to a new house," and that "it takes a long time for my  
12 mail to be forwarded and delivered so I was never served any  
13 paperwork at our new home until just days before a default  
14 judgment was scheduled to be entered." Id. He also stated, "I  
15 have been, and continue to be in active bankruptcy," and could  
16 therefore not afford to hire an attorney to represent him in this  
17 matter. Id. He further stated that he "was never an owner or  
18 even a board member of Elite Global" or a "decision maker, or  
19 responsible party for any contract elite [sic] engaged in" and  
20 that he "was only an employee" of Elite. Id.

21 Wyrick had emailed a copy of this document to Plaintiffs on  
22 July 16, 2012. Anastassiou Decl. ¶ 9 & Ex. A. He also mailed  
23 Plaintiffs a copy of this letter, which they received on July 18,  
24 2012, in an envelope bearing a return address of 113 Best Road in  
25 Hollister, California. Id. at ¶ 10. Wyrick had not previously  
26 informed Plaintiffs or indicated that he had a mailing address  
27 other than the Cienaga Road address. Id. Prior to receiving this  
28 letter, Plaintiffs regularly served Wyrick with copies of the

1 relevant documents filed in this case at the Cienaga Road address  
2 and these documents were never returned as undeliverable. Id. at  
3 ¶¶ 3-6. The Best Road address was not included in Wyrick's filing  
4 with the Court.

5 On August 7, 2012, the Court adopted the Magistrate Judge's  
6 report and recommendation and addressed Wyrick's filing. Docket  
7 No. 81. The Court stated,

8 He admits that he was served with the complaint, but  
9 states that he relied upon a co-Defendant to take care  
10 of it. He indicates that he did receive later documents  
11 from the Court, although he did not receive them timely  
12 at his new address. However, he did not, and still does  
13 not, provide a new address. He also implies that he has  
14 filed a bankruptcy petition. If he has, he may be  
15 entitled to a stay of these proceedings, but he provides  
16 no information about his purported bankruptcy filing.  
17 Otherwise, he provides no meritorious objection to the  
18 Report and Recommendation and the Court adopts it in  
19 every respect. If Defendant Wyrick has not filed for  
20 bankruptcy, he may file a motion for relief from  
21 judgment and a motion to set aside his default, if he  
22 has other grounds to do so.

23 Id. at 1-2.

24 On August 20, 2012, Wyrick filed the instant motion to vacate  
25 and set aside the default judgment, to dismiss the claims against  
26 him and for summary judgment. Docket No. 94.

27 Plaintiffs oppose Wyrick's motion. Docket Nos. 84, 87, 89.<sup>3</sup>

28 Wyrick did not file a reply in support of his motion.

#### LEGAL STANDARD

Federal Rule of Civil Procedure 55(c) provides that a court  
"may set aside a default judgment under Rule 60(b)." Rule 60(b)

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<sup>3</sup> Plaintiffs' opposition papers were filed before the Court received Wyrick's motion papers.

1 enumerates the following grounds upon which a motion for relief  
2 from an order or judgment may be made:

- 3 1) mistake, inadvertence, surprise or excusable neglect;
- 4 2) newly discovered evidence which by due diligence  
5 could not have been discovered before the court's  
6 decision;
- 7 3) fraud by the adverse party;
- 8 4) the judgment is void;
- 9 5) the judgment has been satisfied; or
- 10 6) any other reason justifying relief.

11 The Ninth Circuit has stated that the three factors that  
12 govern lifting entry of default for good cause under Rule 55(c)  
13 also govern the vacating of a default judgment under Rule 60(b)(1)  
14 for excusable neglect or mistake. TCI Group Life Ins. Plan v.  
15 Knoebber, 244 F.3d 691, 696-97 (9th Cir. 2001); see also United  
16 States v. Signed Personal Check No. 730 of Yubran S. Mesle  
17 (Mesle), 615 F.3d 1085, 1091 n.1 (9th Cir. 2010) (noting that this  
18 test is applied more liberally in the Rule 55(c) context than in  
19 the Rule 60(b) context because in the former situation "there is  
20 no interest in the finality of the judgment with which to  
21 contend"). These three factors, to which courts refer as the  
22 "Falk factors," are (1) whether the defendant's culpable conduct  
23 led to the default; (2) whether the defendant has a meritorious  
24 defense; and (3) whether setting aside the default would prejudice  
25 the plaintiff. Brandt v. Am. Bankers, 653 F.3d 1108, 1111 (9th  
26 Cir. 2011) (citing Falk v. Allen, 739 F.2d 461, 463 (9th Cir.  
27 1984)). The standard is disjunctive and "the district court is  
28 free to deny relief if any of the three factors is true." Brandt,  
653 F.3d at 1111 (quoting Franchise Holding II, LLC v. Huntington

1 Restaurants Group, Inc., 375 F.3d 922, 926 (9th Cir. 2004))  
2 (internal quotation marks and formatting omitted). Thus, "a  
3 finding of culpability on the part of a defaulting defendant is  
4 sufficient to justify the district court's exercise of its  
5 discretion to deny relief." Id. The "inquiry into 'excusable  
6 neglect'" is "'at bottom an equitable one, taking account of all  
7 relevant circumstances surrounding the party's omission.'" Id. at  
8 1111.

9 The party seeking to vacate the entry of default bears the  
10 burden of demonstrating that these factors favor doing so. TCI  
11 Group Life Ins. Plan, 244 F.3d at 696.

#### 12 DISCUSSION

##### 13 I. Rule 60(b)(4)

14 Wyrick argues first that the default judgment should be set  
15 aside pursuant to Rule 60(b)(4) because it violated the automatic  
16 bankruptcy stay under 11 U.S.C. § 362 and thus was void as a  
17 matter of law. In relevant part, that statute serves to stay "any  
18 act to collect, assess, or recover a claim against the debtor that  
19 arose before the commencement of the" bankruptcy petition and "the  
20 commencement or continuation" of any "action or proceeding against  
21 the debtor that was or could have been commenced before the  
22 commencement of the" petition "or to recover a claim against the  
23 debtor that arose before the commencement of the" petition. 11  
24 U.S.C. § 362(a)(1),(6). However, it does not, and was not  
25 intended, "to bar proceedings for post-petition claims that could  
26 not have been commenced before the petition was filed." Taylor v.  
27 First Federal Sav. & Loan Ass'n, 843 F.2d 153, 154 (3d Cir. 1988).  
28 Here, both the conduct underlying the claim and the accrual of the

1 claim itself occurred after Wyrick filed his bankruptcy petition.  
2 Accordingly, this case was not subject to the automatic bankruptcy  
3 stay and the judgment was not void as a result, as Wyrick  
4 contends.

5 II. Rule 60(b)(1)

6 Wyrick also argues that good cause exists to set aside the  
7 default judgment pursuant to Rule 60(b)(1). The parties dispute  
8 whether any of the three Falk factors is met here.

9 Under the first factor, "a defendant's conduct is culpable if  
10 he has received actual or constructive notice of the filing of the  
11 action and intentionally failed to answer." TCI Group, 244 F.3d  
12 at 697. The Ninth Circuit has explained that "in this context the  
13 term 'intentionally' means that a movant cannot be treated as  
14 culpable simply for having made a conscious choice not to answer"  
15 or for having demonstrated "simple carelessness." Id. Instead,  
16 "to treat a failure to answer as culpable, the movant must have  
17 acted with bad faith, such as an 'intention to take advantage of  
18 the opposing party, interfere with judicial decisionmaking, or  
19 otherwise manipulate the legal process.'" Mesle, 615 F.3d at 1092  
20 (quoting TCI Group, 244 F.3d at 697); see also id. at 1094  
21 (concluding it was error to find a defendant's conduct culpable  
22 based on "his failure to act after being notified of the need to  
23 do so, in the absence of any indication that he acted in bad  
24 faith"). The Ninth Circuit has typically found culpability only  
25 if "'there is no explanation of the default inconsistent with a  
26 devious, deliberate, willful, or bad faith failure to respond.'" Id.  
27 at 1092 (quoting TCI Group, 244 F.3d at 698); see also TCI  
28 Group, 244 F.3d at 697 ("Neglectful failure to answer as to which

1 the defendant offers a credible, good faith explanation negating  
2 any intention to take advantage of the opposing party, interfere  
3 with judicial decisionmaking, or otherwise manipulate the legal  
4 process is not 'intentional.'").

5       Wyrick argues that his conduct was not culpable because he  
6 "was not given proper service and the time to which I could defend  
7 against this complaint." Mot. at 4. He also states that, after  
8 he was served with the complaint, he "assumed the matter was  
9 subject to the bankruptcy's automatic stay and bankruptcy process  
10 and no action was required," and that he had turned over the  
11 complaint to Elite and Richard Escamilla, Sr., who assured him  
12 that they would take care of the matter. He states that his home  
13 had been foreclosed upon and that his mail was not forwarded to  
14 his new address until mid-July 2012 and that it was only then that  
15 he learned that Plaintiffs were continuing to prosecute claims  
16 against him, that a default had been entered against him and that  
17 they were seeking a default judgment.

18       However, Wyrick has not provided a credible, good faith  
19 explanation negating bad faith. Many of the facts to which Wyrick  
20 has attested in the instant motion contradict his sworn statements  
21 elsewhere in the motion or in his earlier filing. For example,  
22 although he states that he was not properly served with the  
23 complaint and thus was not given time to defend against it, Wyrick  
24 also acknowledges that he was served with the complaint and that  
25 he turned over defense of the action to Elite.

26       Further, although Wyrick's misunderstanding about the  
27 bankruptcy stay and his belief that Elite and Escamilla were  
28 resolving this action for him may provide a good faith explanation

1 for his failure to respond initially to the complaint in a timely  
2 fashion, they do not explain his failure to address the default  
3 entered against him for more than seven months and he has not  
4 provided a credible explanation for this delay. The motion for  
5 entry of default and the default itself were filed and served upon  
6 Wyrick at the Cienaga Road address in November 2011. Through  
7 those filings, as he acknowledges in his motion, Wyrick reasonably  
8 should have known that the case was proceeding against him,  
9 despite his belief about the bankruptcy stay and the assurances of  
10 Elite and Escamilla. In his July 19, 2012 declaration, Wyrick  
11 attested that his home was foreclosed upon in May 2012 and that  
12 his family had to move to a new address at that time. Thus,  
13 Wyrick's statement in the present motion that he did not receive  
14 the motion for entry of default and the entry of default until  
15 mid-July due to the foreclosure is not credible.

16 In addition, Wyrick's representation that he did not receive  
17 the other filings until "mid-July" is also not credible. As  
18 previously noted, he called Plaintiffs' counsel on July 5, 2012  
19 regarding the motion for default judgment and hearing on that  
20 motion. Anastassiou Decl. ¶¶ 7-8; see also id. at ¶ 12 & Ex. C  
21 (letter from Wyrick's bankruptcy counsel to Plaintiffs' counsel  
22 acknowledged the telephone conversation took place on that date).<sup>4</sup>

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23  
24  
25 <sup>4</sup> The Court notes that there are other contradictions between  
26 Wyrick's various sworn representations. For example, he states in  
27 the instant motion that, had he known that this action was not  
28 subject to the bankruptcy stay or that Elite was not resolving the  
action, he would have immediately addressed the matter with his  
attorneys. Mot. at 1. However, in his prior filing, he asked  
that this action be dismissed, and represented that he could not  
afford a lawyer to represent him in this matter. Docket No. 80.

1 Further, to the extent that Wyrick appears to blame  
2 Plaintiffs for sending him notices at the Cienaga Road address,  
3 and states that Plaintiffs continue to send him service copies at  
4 his former address, the Court notes that Wyrick never updated his  
5 address in his bankruptcy case and that he continues to be served  
6 with documents in that case at that address. See, e.g., Docket  
7 Nos. 58-59, In re Wyrick (September 12, 2012 Order Discharging  
8 Debtor and certificate of service upon Wyrick at the Cienaga Road  
9 address). Since they were provided notice of his new address,  
10 Plaintiffs have served Wyrick at that address. See, e.g., Docket  
11 No. 83-1.

12 Thus, Wyrick has not offered a credible and good faith  
13 explanation for his failure to answer. Considering the facts of  
14 this case, including that Wyrick's various sworn representations  
15 materially contradict each other and suggest bad faith conduct,  
16 the Court finds that Wyrick has not shown good cause to set aside  
17 the default judgment and DENIES his motion. Accordingly, the  
18 Court need not reach the other Falk factors.

19 The Court notes, however, that to the extent that Wyrick  
20 asserts that he cannot be held personally liable under PACA for  
21 the actions of Elite, Plaintiffs have offered substantial evidence  
22 that Wyrick did exercise sufficient control over Elite to incur  
23 such liability. See Sunkist Growers v. Fisher, 104 F.3d 280, 283  
24 (9th Cir. 1997) ("An individual who is in the position to control  
25 the trust assets and who does not preserve them for the  
26 beneficiaries has breached a fiduciary duty, and is personally  
27 liable for that tortious act . . . [A] PACA trust in effect  
28 imposes liability on a trustee, whether a corporation or a

1 controlling person of that corporation, who uses the trust assets  
2 for any purpose other than repayment of the supplier.") (internal  
3 citation omitted). This includes testimony from a number of  
4 witnesses with knowledge of Wyrick's role in Elite and Wyrick's  
5 own emails, in which he directly participated in negotiating the  
6 contract at issue here.

7 Further, although, in general, setting aside a default is  
8 considered prejudicial only if the opposing party's "ability to  
9 pursue his claim will be hindered," such as through "loss of  
10 evidence, increased difficulties of discovery, or greater  
11 opportunity for fraud or collusion," TCI Group, 244 F.3d at 701  
12 (citations omitted), under the circumstances of the instant case,  
13 the delay alone constitutes prejudice. Plaintiffs assert claims  
14 under PACA, which was created in 1930 "primarily for the  
15 protection of the producers of perishable agricultural products--  
16 most of whom must entrust their products to a buyer or commission  
17 merchant who may be thousands of miles away, and depend for their  
18 payment upon his business acumen and fair dealing." In re  
19 Kornblum & Co., 81 F.3d 280, 283 (2d Cir. 1996) (quoting H.R. Rep.  
20 No. 1196, 84th Cong., 1st Sess. 2 (1955)). "Congress amended the  
21 statute in 1984 to add an additional remedy: the perishable  
22 commodities or proceeds from the sale of those commodities are  
23 held in trust by the dealer for the benefit of the unpaid seller  
24 until full payment is made." Sunkist Growers, 104 F.3d at 282  
25 (citation omitted). At that time, the relevant House report noted  
26 that prompt payment to producers of crops, such as AFCM, is an  
27 important concern:  
28

1 Producers and shippers of perishable commodities are,  
2 for the most part, small size businesses. The process  
3 of growing, harvesting, packing and shipping perishables  
4 is a real gamble; costs are high, capital is tied up in  
5 farm land and machinery, and returns are delayed until  
6 the crop is sold. If the grower-shipper cannot realize  
7 any returns on the sale of the crop when due, he may not  
8 be able to survive.

9 H. Rep. No. 98-543, 98th Cong., 1st Sess. 5 (1983). Delays are  
10 also problematic because, once funds in a trust "are dissipated,  
11 it is all but impossible to effect recovery." Id. Thus, here, it  
12 would be unduly prejudicial to AFCM to delay its ability to  
13 recover based on Wyrick's culpable failure to participate in these  
14 proceedings in a timely fashion.

15 CONCLUSION

16 For the reasons set forth above, the Court DENIES Wyrick's  
17 motion to vacate and set aside the default judgment and DENIES AS  
18 MOOT his motion to dismiss and for summary judgment (Docket No.  
19 94).

20 IT IS SO ORDERED.

21 Dated: 3/29/2013

22   
23 \_\_\_\_\_  
24 CLAUDIA WILKEN  
25 United States District Judge  
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