

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3

4 CHONG'S PRODUCE, INC.,

No. C 14-00497 CW

5 Plaintiff,

ORDER DENYING

WITHOUT PREJUDICE

6 v.

PLAINTIFF'S

APPLICATION FOR A

7 POLANI FINANCIALS & INVESTMENT

TEMPORARY

8 CORPORATION, a California

RESTRAINING ORDER

corporation, and PRABHAKAR

(Docket No. 5)

9 POLANI,

10 Defendants.

11 _____/

12 On February 5, 2014, Plaintiff Chong's Produce, Inc. filed ex
13 parte for a temporary restraining order against Defendants Polani
14 Financials & Investment Corporation dba Shalimar Restaurant and
15 Prabhakar Polani. Plaintiff seeks a TRO to preserve its
16 beneficial interest in the statutory trust created under the
17 Perishable Agricultural Commodities Act of 1930 (PACA), 7 U.S.C.
18 §§ 499a-499t, as amended. For the reasons stated below, the Court
19 DENIES WITHOUT PREJUDICE Plaintiff's application for TRO.

20 To qualify for a temporary restraining order, the moving
21 party must demonstrate "(1) a likelihood of success on the merits;
22 (2) a significant threat of irreparable injury; (3) that the
23 balance of hardships favors the applicant; and (4) whether any
24 public interest favors granting an injunction." Raich v.
25 Ashcroft, 352 F.3d 1222, 1227 (9th Cir. 2003); see also Winter v.
26 Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374 (2008).
27 Alternatively, a temporary restraining order could issue where
28 "the likelihood of success is such that serious questions going to

1 the merits were raised and the balance of hardships tips sharply
2 in plaintiff's favor," so long as the plaintiff demonstrates
3 irreparable harm and shows that the injunction is in the public
4 interest. Alliance for the Wild Rockies v. Cottrell, 632 F.3d
5 1127, 1131 (9th Cir. 2011) (citation and internal quotation and
6 editing marks omitted). Further, a TRO may not be issued without
7 notice to the adverse party unless "(1) it clearly appears from
8 specific facts shown by affidavit or by the verified complaint
9 that immediate and irreparable injury, loss, or damage will result
10 to the applicant before the adverse party or that party's attorney
11 can be heard in opposition, and (2) the applicant's attorney
12 certifies to the court in writing any efforts made to give notice
13 and the reasons why it should not be required." Fed. R. Civ. P.
14 65(b).

15 PACA was enacted to "suppress unfair and fraudulent practices
16 in the marketing of fruits and vegetables in interstate and
17 foreign commerce" and to provide "a code of fair play" to "aid
18 traders in enforcing their contracts." 49 C.F.R. § 45735-01. In
19 1984, PACA was amended to include a provision creating a statutory
20 trust on all produce-related assets, including the produce itself,
21 or any proceeds from the sale thereof, to be held by the purchaser
22 in favor of the seller. Middle Mountain Land & Produce Inc. v.
23 Sound Commodities Inc., 307 F.3d 1220, 1224 (9th Cir. 2002). The
24 trust must be maintained for the benefit of the seller until full
25 payment has been made. Id.

26 Plaintiff asserts that it sold perishable agricultural
27 commodities to Defendants from 2008 to 2013. Chong Decl. ¶ 4.
28 However, in 2013, Defendants stopped paying for produce they

1 ordered and received. Id.; Chong Decl., Ex. B. The outstanding
2 unpaid balance is \$6,021.00. Chong Decl. ¶ 4. Plaintiff
3 contacted Defendants on several occasions to attempt to collect
4 the unpaid balance, to no avail. Id. ¶ 10. Plaintiff
5 acknowledges that Defendants are still operating the restaurant at
6 their known address and receiving produce from other vendors. Id.
7 ¶ 11. Nevertheless, Plaintiff argues that Defendants' nonpayment
8 of their debt to Plaintiff alone suggests that Defendants are
9 unable to satisfy their debt and operating expenses out of their
10 profit margins, and instead are likely turning to PACA trust
11 funds. Id. Plaintiff's president, Mr. Chong, asserts that in his
12 experience, this situation inevitably leads to liquidation of the
13 entity maintaining the PACA trust, rendering recovery impossible.
14 Id. ¶ 12.

15 Plaintiff has not demonstrated that a TRO is warranted.
16 While Plaintiff has demonstrated a likelihood that Defendants are
17 delinquent in payments subject to a PACA trust, Plaintiff has not
18 shown that an immediate dissipation of trust assets will occur,
19 and as a result has not demonstrated there is a significant threat
20 of irreparable injury. Fresh & Best Produce, Inc. v. Michael F.
21 Wallau Enterprises, Inc., 2010 WL 4704040, at *3 (N.D. Cal.).
22 That Defendants are in arrears alone does not necessarily indicate
23 that trust assets are being depleted, especially without any
24 additional evidence of Defendants' financial situation or risk of
25 liquidation. Id. Further, there is no justification for granting
26 Plaintiff's ex parte application without notice to Defendants.
27 Plaintiff argues that giving Defendants advance warning would give
28 Defendants time to dissipate trust assets. But Plaintiff provides

1 no facts to support this conclusory statement. See ASA Farms,
2 Inc. v. Fresh 'N Healthy, Inc., 2008 WL 115009, at *1 (N.D. Cal.).
3 Imposing a TRO that will potentially affect all Defendants'
4 assets,¹ without giving Defendants notice or opportunity to be
5 heard, poses an unreasonable risk of harm to Defendants.

6 Accordingly, the Court DENIES Plaintiff's ex parte
7 application for a TRO without prejudice to a renewed application
8 with either a sufficient showing of the danger of immediate
9 dissipation of the trust or notice to Defendants. Otherwise, the
10 Court shall hear the preliminary injunction motion on February 27,
11 2013, at 2:00 PM. Plaintiff shall serve notice on Defendants no
12 later than February 10, 2014. Defendants may file a response no
13 later than February 21, 2014. No replies will be permitted.
14 Plaintiff's request to consolidate trial on the merits with the
15 preliminary injunction hearing is DENIED.

16 IT IS SO ORDERED.

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18 Dated: 2/7/2014


CLAUDIA WILKEN
United States District Judge

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26 ¹ See Docket No. 5-3 (proposed order requesting a TRO that
27 would enjoin "all of the assets of Defendant" unless they "can
28 prove to this Court that a particular asset is not derived from
perishable agricultural commodities").