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E-Filed 2/23/2010

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

CHONG'S PRODUCE, INC.,

Plaintiff,

v.

H&T, LLC, et al.,

Defendants.

Case Number C 10-691 JF (HRL)

ORDER¹ GRANTING *EX PARTE*
APPLICATION FOR TRO AND
SETTING CASE MANAGEMENT
CONFERENCE TO DISCUSS
SCHEDULING OF HEARING ON
PRELIMINARY INJUNCTION AND
TRIAL

[re: doc. no. 2]

On February 18, 2010, Plaintiff Chong's Produce, Inc. ("Plaintiff") filed the complaint in this action, alleging that: Defendant H&T, LLC ("Defendant") purchased fruits and vegetables from Plaintiff for a total amount exceeding \$39,412.50; Plaintiff delivered the produce to Defendant; Defendant accepted the produce; and Defendant has failed to pay invoices due and owing in the amount of \$9,957.00. The complaint alleges several claims under the Perishable Agricultural Commodities Act ("PACA"), and a claim for breach of contract. Plaintiff seeks a

¹ This disposition is not designated for publication in the official reports.

1 temporary restraining order (“TRO”) and a preliminary injunction enjoining Defendant from
2 dissipating the assets of a PACA statutory trust.

3 PACA imposes a statutory trust on all produce-related assets held by agricultural
4 merchants, dealers, and brokers. 7 U.S.C. § 499e(c). Plaintiff alleges that Defendant is a dealer
5 under PACA. Compl. ¶ 7. A district court may issue an order for injunctive relief to preserve
6 the assets of the statutory trust. *See Frio Ice, S.A. v. Sunfruit, Inc.*, 918 F.2d 154, 158-59 (11th
7 Cir. 1990).

8 The standard for issuing a TRO is the same as that for issuing a preliminary injunction.
9 *Brown Jordan Int’l, Inc. v. Mind’s Eye Interiors, Inc.*, 236 F. Supp. 2d 1152, 1154 (D. Hawaii
10 2002); *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323
11 (N.D. Cal. 1995). In the Ninth Circuit, a party seeking a preliminary injunction must show either
12 (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the
13 existence of serious questions going to the merits and the balance of hardships tipping in the
14 movant’s favor. *Roe v. Anderson*, 134 F.3d 1400, 1401-02 (9th Cir. 1998); *Apple Computer, Inc.*
15 *v. Formula Int’l, Inc.*, 725 F.2d 521, 523 (9th Cir. 1984). These formulations represent two
16 points on a sliding scale in which the required degree of irreparable harm increases as the
17 probability of success decreases. *Roe*, 134 F.3d at 1402.

18 A TRO may be issued without notice to the adverse party *only if*“(A) specific facts in an
19 affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or
20 damage will result to the movant before the adverse party can be heard in opposition; and (B) the
21 movant’s attorney certifies in writing any efforts made to give notice and the reasons why it
22 should not be required.” Fed. R. Civ. P. 65(b)(1). Moreover, in this district an applicant for a
23 TRO must give notice to the adverse party “[u]nless relieved by order of a Judge for good cause
24 shown.” Civ. L.R. 65-1(b).

25 Plaintiff submits the declaration of its president, Andy Chong, who states that Defendant
26 initially paid Defendant’s bills but stopped doing so in March 2009; Defendant has failed to
27 respond to weekly demands for payment; and Defendant continues to do business and to receive
28 produce from other vendors. Plaintiff’s counsel submits a written certification stating that

1 because Defendant appears to be avoiding Plaintiff and to be experiencing financial problems,
2 Plaintiff fears that the trust assets will be dissipated if Defendant is given notice of the motion.

3 Plaintiff requests that the Court enjoin and restrain Defendant H&T, LLC, its agents,
4 officers, subsidiaries, banking and financial institutions, and all persons in active concert or
5 participation with said Defendant from the following conduct: dissipating, paying, transferring,
6 assigning or selling any and all assets covered by or subject to the trust provisions of PACA
7 without agreement of Plaintiff, or until further order of this Court.

8 For good cause shown, the Court will issue the requested TRO restraining Defendant
9 from the above conduct pending disposition of Plaintiff's motion for preliminary injunction. The
10 assets subject to this order include all of Defendant's assets unless Defendant can prove to the
11 Court that a particular asset is not derived from perishable agricultural commodities, other
12 products derived from perishable agricultural commodities, or receivables or proceeds from the
13 sale of such commodities or products. However, Defendant may sell perishable commodities for
14 fair compensation on the condition that Defendant maintains the proceeds of such sales subject to
15 this Order.

16 Plaintiff requests that the Court consolidate the hearing on the motion for preliminary
17 injunction with the trial. The Court will set a case management conference for the purpose of
18 discussing this request with counsel.

19 **ORDER**

- 20 (1) Plaintiff's *ex parte* application for TRO is GRANTED. Defendant is HEREBY
21 RESTRAINED from the conduct described above;
22 (2) a case management conference is HEREBY SET for March 5, 2010, at 10:30
23 a.m.;
24 (3) the TRO shall remain in place until midnight on March 5, 2010 or until other
25 order of the Court.

26 Dated: February 23, 2010

27 JEREMY FOGEL
28 United States District Court

