

United States District Court
For the Northern District of California

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
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FRESH & BEST PRODUCE, INC. dba FRESH)
AND BEST, a California corporation,)

Plaintiff,)

v.)

MICHAEL F. WALLAU ENTERPRISES, INC.,)
a California corporation, and MICHAEL F.)
WALLAU, an individual, and DOES 1 to 10,)

Defendants.)

Case No.: 10-CV-05109-LHK

ORDER DENYING EX PARTE
MOTION FOR TRO

On November 10, 2010, Plaintiff Fresh & Best Produce, Inc., filed an *ex parte* motion for a temporary restraining order (“TRO”) to enjoin Defendants from dissipating trust assets under the Perishable Agriculture Commodities Act, 7 U.S.C. § 499a et seq. Plaintiff also filed a motion for a preliminary injunction and moved to consolidate the trial on the merits with the hearing on the preliminary injunction. Having considered the arguments and declarations provided by Plaintiff, the Court finds that issuance of a TRO without notice to Defendant is not justified in this case. Accordingly, the Court DENIES Plaintiff’s *ex parte* motion for a TRO. The Court also DENIES Plaintiff’s request to consolidate the trial on the merits with the hearing on the preliminary injunction. The Court will hold a hearing on Plaintiff’s motion for preliminary injunction on Tuesday, November 30, 2010, at 2 p.m.

1 **I. Background**

2 The Perishable Agriculture Commodities Act (“PACA”), 7 U.S.C. § 499a et seq., protects
3 sellers of perishable agricultural goods by requiring a merchant, dealer, or retailer of perishable
4 produce to hold in trust proceeds from the sale of the perishable produce, and food derived from
5 that produce, for the benefit of all unpaid suppliers. 7 U.S.C. § 499e(c)(2); *Royal Foods Co., Inc.*
6 *v. RJR Holdings, Inc.*, 252 F.3d 1102, 1104-05 (9th Cir. 2001). District courts have jurisdiction
7 over actions brought by trust beneficiaries to enforce payment from a trust, 7 U.S.C. § 499e(c)(5),
8 including actions to enjoin dissipation of trust assets. *Frio Ice, S.A. v. Sunfruit, Inc.*, 918 F.2d 154,
9 157-58 (11th Cir. 1990).

10 Plaintiff Fresh & Best Produce, Inc., is a PACA licensee that has sold perishable
11 agricultural commodities to Defendant Wallau Enterprises for the past several years. Decl. Of
12 Chong Suk Cho in Supp. of Mot. for TRO (“Cho Decl.”) 2. Defendant Wallau Enterprises is a
13 corporation that owns three restaurants, all doing business as Mike’s Café, and Defendant Michael
14 Wallau is an officer of Wallau Enterprises. Compl. ¶¶ 3-4. Plaintiff claims that from July 2010 to
15 October 2010, Wallau Enterprises ordered and accepted produce from Plaintiff, but failed to pay
16 the invoices for many of those orders. Compl. ¶ 10. According to a declaration submitted by
17 Plaintiff’s Chief Financial Officer, Chong Suk Cho, Wallau Enterprises issued three checks totaling
18 \$15,079.33 to Plaintiff on or about August 10, 2010, to cover the produce purchased in July. Cho
19 Decl. ¶ 11. When Ms. Cho attempted to deposit the checks, however, the Bank informed her that
20 the checks would not clear, as the accounts from which they were drawn did not contain sufficient
21 funds. *Id.* Ms. Cho contacted the Defendants several times and initially was told that sufficient
22 funds would be available. *Id.* When the funds did not become available, Defendants began
23 avoiding Ms. Cho’s communications and did not return her calls. *Id.* Eventually, on October 25,
24 2010, two of the checks cleared. Cho Decl. ¶ 12. However, the third check, for \$4,163.93, still has
25 not cleared, *id.*, and Plaintiff claims that as of November 5, 2010, Defendants had not paid for
26 \$24,803.22 worth of produce. Compl. ¶ 11.

27 Based on the unpaid balance, the insufficient funds in Defendant’s accounts, and their
28 refusal to communicate with Plaintiff about the money owed, Plaintiff believes that Wallau

1 Enterprises has failed to preserve sufficient PACA trust assets to bring its account current. Cho
2 Decl. ¶ 3. Plaintiff alleges that Wallau Enterprises is in severe financial jeopardy and that the
3 PACA assets, required to be held in trust until all suppliers are paid, are threatened with
4 dissipation. Mem. of Pts. & Authorities in Supp. of Ex Parte TRO and Preliminary Injunction
5 (“Pl.s’ Mem.”) 5. Plaintiff therefore seeks a temporary restraining order to enjoin Defendants from
6 dissipating, paying, transferring, assigning or selling assets covered by the trust provisions of
7 PACA. Plaintiff requests that the Court issue such a TRO without notice to Defendants.

8 II. Legal Standard

9 Because Plaintiff seeks issuance of a TRO without notice to the adverse parties, Plaintiff
10 must satisfy both the general standard for temporary restraining orders and the requirements for *ex*
11 *parte* orders set forth in Federal Rule of Civil Procedure 65(b). The standard for issuing a TRO is
12 identical to the standard for issuing a preliminary injunction. *Brown Jordan Int’l, Inc. v. Mind’s*
13 *Eye Interiors, Inc.*, 236 F. Supp. 2d 1152, 1154 (D. Haw. 2002); *Lockheed Missile & Space Co.,*
14 *Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). A plaintiff seeking a
15 preliminary injunction must make a four-fold showing: (1) that he is likely to succeed on the
16 merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that
17 the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Winter v.*
18 *Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 374 (2008); *Amer. Trucking Assocs., Inc.*
19 *v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

20 In addition, a plaintiff seeking issuance of a TRO without notice to the defendant must
21 satisfy two further requirements: (1) “specific facts in an affidavit or a verified complaint [must]
22 clearly show that immediate and irreparable injury, loss, or damage will result to the movant before
23 the adverse party can be heard in opposition,” and (2) the applicant’s attorney must certify in
24 writing the reasons why notice should not be required. Fed. R. Civ. Pro. 65(b)(1). The Ninth
25 Circuit has cautioned that there are very few circumstances justifying the issuance of an *ex parte*
26 TRO. *Reno Air Racing Assoc., Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006). Such
27 circumstances include “a very narrow band of cases in which *ex parte* orders are proper because
28

1 notice to the defendant would render fruitless the further prosecution of the action.” *Id.* (quoting
2 *Amer. Can Co. v. Mansukhani*, 742 F.2d 314, 322 (7th Cir.1984)).

3 **III. Analysis**

4 Plaintiff argues that an *ex parte* TRO should issue because giving notice to Defendant
5 Wallau Enterprises “will only provide it advance warning that an order may be entered, thereby
6 giving it time to further dissipate its trust assets by paying personal liabilities or non-trust
7 creditors.” Pl.’s Mem. 5. The Court agrees that dissipation of PACA trust assets constitutes a form
8 of irreparable harm that may justify issuance of an *ex parte* TRO. In enacting the trust provisions
9 of PACA, Congress sought to prevent the harm that occurs when dealers pay secured creditors
10 from the proceeds of perishable agricultural commodities, leaving agricultural suppliers with no
11 means of recovering payment. *See* 7 U.S.C. § 499e(c)(1); *Middle Mountain Land and Produce Inc.*
12 *v. Sound Commodities Inc.*, 307 F.3d 1220, 1223-24 (9th Cir. 2002). The legislative history of
13 PACA recognizes that once trust funds are dissipated, it is all but impossible to effect recovery.
14 H.R. Rep. No. 98-543 (1983), *reprinted in* 1984 U.S.C.C.A.N. 405, 411. Accordingly, courts in
15 this district have granted *ex parte* TROs upon a clear showing that notice will result in further
16 dissipation of trust assets. *Chong's Produce, Inc. v. Meshaal*, No. C 09-4787, 2009 WL 3298175
17 (N.D. Cal. Oct. 9, 2009); *Inn Foods Inc. v. Turner Mead LLC*, No. C 07-00649, 2007 WL 484781
18 (N.D. Cal. Feb. 9, 2007). *But see ASA Farms, Inc. v. Fresh ‘N Healthy, Inc.*, No. C08-00122, 2008
19 WL 115009 (N.D. Cal. Jan. 10, 2008) (denying request for *ex parte* TRO).

20 In this case, however, Plaintiff has not clearly shown that immediate dissipation of trust
21 assets will occur before Defendants can be heard in opposition, as required by Rule 65(b). The
22 Court is certainly concerned that Defendant has a substantial outstanding balance, lacks sufficient
23 funds in one of its bank accounts, and appears to be avoiding Plaintiff’s attempts to collect the
24 money it is owed. Nonetheless, Plaintiff’s moving papers fail to acknowledge that since mid-
25 September, Defendant has made regular payments and appears to be keeping up with the invoices
26 for Plaintiff’s produce. *See* Cho Decl. Ex. A. In addition to payments in the amount of \$4,555.81
27 and \$6,355.19, which presumably represent the cleared checks previously issued for the July
28 produce, Defendant has paid over \$10,000 in regular payments for September and October

1 invoices. *Id.* Indeed, Defendant appears to have paid nearly all invoices issued since September
2 15, 2010.¹ *Id.* This recent payment history does not support Plaintiff’s contention that, upon
3 learning of Plaintiff’s motion, Defendant will immediately dissipate trust assets, in violation of
4 federal law, in order to satisfy non-trust creditors prior to entry of a temporary restraining order.²
5 Nor is it clear, based on these recent payments, that Defendant Wallau Enterprises is in such
6 “severe financial jeopardy,” Pl.’s Mem. 5, that dissipation, or further dissipation, of trust assets
7 will occur before this Court can hold a hearing. Rather, Defendant’s recent payment history
8 creates the impression of a struggling business that is nevertheless attempting, with some success,
9 to honor its obligations to Plaintiff.

10 Preliminary injunctive relief is “an extraordinary remedy that may only be awarded upon a
11 clear showing that the plaintiff is entitled to such relief.” *Winter*, 129 S.Ct. at 376. Where a
12 plaintiff seeks such relief without notice to the adverse party, he should be able to show that notice
13 would result in immediate, irreparable harm such that notice would “render fruitless the further
14 prosecution of the action.” *Reno Air Racing Assoc., Inc.*, 452 F.3d at 1131. In this case, Plaintiff
15 has not clearly shown that it will face immediate, irreparable injury if Defendant is advised of its
16 application for a TRO. Accordingly, the Court DENIES Plaintiff’s *ex parte* motion for a
17 temporary restraining order.

18 Although Plaintiff has not persuaded the Court that notice to Defendant would result in
19 immediate dissipation of trust funds, the Court finds that Plaintiff has nonetheless made a strong
20 enough showing to warrant an expedited hearing on the motion for a preliminary injunction. The
21 Court will hold a hearing on Plaintiff’s motion for preliminary injunction on Tuesday, November
22

23 ¹ The account for Mike’s Cafe Menlo Park appears to be current for all invoices issued since
24 September 15, 2010. The account for Mike’s Portola Valley appears to be current for invoices
25 issued since September 15, 2010, with the exception of one invoice for \$109.96 issued on October
26 20, 2010, and not yet paid by October 30, 2010. The statement for Mike’s Cafe-Palo Alto provided
27 by Plaintiff appears to be incomplete and does not contain invoices or payments beyond September
28 17, 2010. However, the statement lists only \$102.02 as the amount 1-30 days past due. It therefore
seems that Mike’s Cafe-Palo Alto is current on invoices issued since September 15, 2010, with the
exception of the \$102.02 balance.

² Counsel’s claim that Defendants may liquidate trust assets to avoid personal liability, including
potential criminal liability for failure to pay taxes, is particularly speculative. Certification of
Counsel as to Why Notice Is Not Required Pursuant to Rule 65(b), at 2.

1 30, 2010, at 2 p.m. Plaintiff also moved to consolidate the trial on the merits with hearing on
2 preliminary injunction. Because Defendants have not been served with the complaint or any other
3 papers filed by Plaintiff, Defendants could be unfairly prejudiced if trial on the merits were held on
4 such short notice. Accordingly, Plaintiff's motion to consolidate the trial on the merits with the
5 hearing on preliminary injunction is DENIED.

6 **IV. Conclusion**

7 For the foregoing reasons, the Court HEREBY ORDERS as follows:

- 8 (1) Plaintiff's *ex parte* motion for a temporary restraining order is DENIED.
9 (2) Plaintiff's motion to consolidate the trial on the merits with the hearing on preliminary
10 injunction is DENIED.
11 (3) Plaintiff shall immediately serve Defendants with the summons, complaint, and all other
12 documents filed in this case, including this Order. Plaintiff shall effect service no later than
13 close of business on Monday, November 15, 2010.
14 (4) Defendant shall file an opposition to Plaintiff's motion for preliminary injunction no later
15 than Friday, November 19, 2010. Plaintiff may file a reply by Wednesday, November 23,
16 2010, at 4 p.m.
17 (5) The hearing on Plaintiff's motion for preliminary injunction shall be held on Tuesday,
18 November 30, 2010, at 2 p.m. in Courtroom 4, 5th floor, in the San Jose Courthouse.

19 **IT IS SO ORDERED.**

20
21 Dated: November 12, 2010

22 
23 _____
24 LUCY H. KOH
25 United States District Judge
26
27
28