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28United States District Court
For the Northern District of California

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

FRESH & BEST PRODUCE, INC.,

NO. 5:11-cv-03325 EJD (HRL)

Plaintiff(s),

**ORDER DENYING EX PARTE MOTION
FOR TEMPORARY RESTRAINING
ORDER**

v.

MICHAEL F. WALLAU ENTERPRISES,
INC., et. al.,

[Docket Item No. 4]

Defendant(s).
_____ /

On July 7, 2011, Plaintiff Fresh & Best Produce, Inc. (“Plaintiff”) commenced the instant case under the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. § 499e(c)(3), against Defendant Michael F. Wallau Enterprises, Inc. (Defendant”). Plaintiff also filed an ex parte motion for a temporary restraining order (“TRO”) to enjoin Defendant from dissipating trust assets, as well as a motion for preliminary injunction and a motion consolidate the trial on the merits with the hearing on the injunction. The court notes this is Plaintiff’s second ex parte request against Defendant on nearly identical facts, albeit in a new case. See Fresh & Best Produce, Inc. v. Michael F. Wallau Ent., Inc., No. 10-CV-05109-LHK, 2011 U.S. Dist. LEXIS 125201 (N.D. Cal. Nov. 12, 2010). Having reviewed this matter anew, the court agrees with its predecessor that an ex parte TRO is not justified. Accordingly, the request for a TRO will be denied, as will the request to consolidate the trial on the merits with the trial on the preliminary injunction. However, as Plaintiff

1 has presented facts which, on their face, may support injunctive relief, an expedited hearing on the
2 motion for preliminary injunction will be held on Friday, July 15, 2011, at 2:00 p.m.

3 **I. FACTUAL BACKGROUND**

4 Since this case presents facts nearly identical to that alleged in the prior lawsuit, many are
5 presented again here.

6 Plaintiff Fresh & Best Produce, Inc., is a PACA licensee that has sold perishable agricultural
7 commodities to Defendant for the past several years. Decl. Of Chong Suk Cho in Supp. of Mot. for
8 TRO (“Pl.’s Decl.”) at ¶¶ 4, 5. Defendant is a corporation that owns three restaurants, all doing
9 business as Mike’s Café. Complaint at ¶¶ 3, 4. Plaintiff claims that from March, 2011, to May,
10 2011, Defendant ordered and accepted produce from Plaintiff, but failed to pay the invoices for
11 many of those orders. Id. at ¶ 10. Defendant issued three checks totaling \$15,079.33 to Plaintiff on
12 or about August 10, 2010, to cover the produce purchased in July. Pl.’s Decl. at ¶ 11. When Plaintiff
13 attempted to deposit the checks, the Bank informed Plaintiff that the checks would not clear due to
14 insufficiency of funds. Id. Plaintiff contacted Defendant several times and initially was told that
15 sufficient funds would be available. Id. When the funds did not become available, Defendant began
16 avoiding Plaintiff’s communications and did not return her calls. Id. Eventually, on October 25,
17 2010, two of the checks cleared. Id. at ¶ 12. However, the third check, for \$4,163.93 did not clear.
18 Id.

19 On November 10, 2010, Plaintiff initiated a lawsuit against Defendant to recover the unpaid
20 invoices. Id. at ¶ 13. The lawsuit settled after Defendant appeared at a hearing on Plaintiff’s request
21 for a preliminary injunction. Id. Thereafter, Defendant began purchasing additional produce from
22 Plaintiff, although Defendant had not yet made all payments under the prior settlement agreement.
23 Id. Defendant then stopped paying for the additional produce and has not responded to Plaintiff’s
24 demands for payment. Id. As of June 29, 2011, Defendant owed Plaintiff \$12,420.20. Id. at ¶ 6.
25 Plaintiff now seeks an ex parte injunction to prevent Defendant from dissipating trust assets.

26 //

1 II. DISCUSSION

2 A. Legal Standard

3 PACA provides for the establishment of a statutory trust “in which a produce dealer holds
4 produce-related assets as a fiduciary until full payment is made to the produce seller or producer.”
5 Bowlin & Son, Inc. v. San Joaquin Food Serv. (In re San Joaquin Food Serv., Inc.), 958 F.2d 938,
6 939 (9th Cir. 1992). “The trust automatically arises in favor of a produce seller upon delivery of
7 produce and is for the benefit of all unpaid suppliers or sellers involved in the transaction until full
8 payment of the sums owing has been received.” C & E Enters., Inc. v. Milton Poulos, Inc. (In re
9 Milton Poulos, Inc.), 947 F.2d 1351, 1352 (9th Cir. 1991).

10 Plaintiff seeks a TRO to preserve PACA trust assets. The standard for issuing a TRO is the
11 same as that for the issuance of preliminary injunction. See New Motor Vehicle Bd. of Cal. v. Orrin
12 W. Fox Co., 434 U.S. 1345, 1347 n.2, 98 S. Ct. 359, 54 L. Ed. 2d 439 (1977). A preliminary
13 injunction is “an extraordinary remedy that may only be awarded upon a clear showing that the
14 plaintiff is entitled to such relief.” Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 129 S. Ct.
15 365, 376, 172 L. Ed. 2d 249 (2008). “The proper legal standard for preliminary injunctive relief
16 requires a party to demonstrate (1) ‘that he is likely to succeed on the merits, (2) that he is likely to
17 suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his
18 favor, and (4) that an injunction is in the public interest.” Stormans, Inc. v. Selecky, 586 F.3d 1109,
19 1127 (9th Cir. 2009) (citing Winter, 129 S. Ct. at 374). As a corollary to this test, the Ninth Circuit
20 has also found a preliminary injunction appropriate if “serious questions going to the merits were
21 raised and the balance of the hardships tips sharply in the plaintiff’s favor,” thereby allowing
22 preservation of the status quo where complex legal questions require further inspection or
23 deliberation. Alliance for the Wild Rockies v. Cottrell, 622 F.3d 1045, 1049 (9th Cir. 2010).

24 Since Plaintiff’s request appears ex parte, two further requirements must be satisfied
25 pursuant to Federal Rule of Civil Procedure 65. The moving party must put forth “specific facts in
26 an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or

1 damage will result to the movant before the adverse party can be heard in opposition,” and counsel
2 for the moving party must certify in writing “any efforts made to give notice and the reasons why it
3 should not be required.” Fed. R. Civ. P 65(b)(1). There are “a very narrow band of cases in which
4 ex parte orders are proper.” Reno Air Racing Assoc., Inc. v. McCord, 452 F.3d 1126, 1131 (9th Cir.
5 2006).

6 **B. Analysis**

7 Plaintiff argues that Defendant will “dissipate its trust assets by paying personal liabilities or
8 non-trust creditors” unless an ex parte TRO is issued. There is precedent for such an order in this
9 district. See, e.g., Chong's Produce, Inc. v. Meshaal, No. C 09-4787, 2009 U.S. Dist. LEXIS 98452
10 (N.D. Cal. Oct. 9, 2009); Inn Foods Inc. v. Turner Mead LLC, No. C 07-00649, 2007 U.S. Dist.
11 LEXIS 97548 (N.D. Cal. Feb. 9, 2007). In this case, however, Plaintiff has not demonstrated that
12 immediate dissipation of trust assets will occur if Defendant is first notified and heard in opposition.
13 While Defendant’s apparent pattern of non-payment and avoidance of obligations - even after a prior
14 lawsuit on this same issue - is of concern to the court, most of Plaintiff’s allegations have been
15 previously rejected as insufficient for an ex parte TRO. Fresh & Best Produce, Inc., 2011 U.S. Dist.
16 LEXIS at *7-10. Moreover, Plaintiff’s more recent allegations are obviated by the same reasons
17 previously recognized. Indeed, while Plaintiff states that Defendant “very soon stopped paying”
18 after purchasing additional produce in March, 2011, the invoices attached to Plaintiff’s declaration
19 demonstrate that Defendant has made three payments totaling \$9,487.19 in April and May, the most
20 recent payment having posted on May 31, 2011. Pl.’s Decl. at ¶14, Ex. A. In fact, the invoices
21 indicate that Defendant paid the entirety of the outstanding balance for March. Id. at Ex. A. Now,
22 as previously, this recent payment history does not support Plaintiff’s contention that Defendant will
23 immediately dissipate trust assets. In addition, it cannot be found on this limited showing that
24 Defendant’s financial condition is such that dissipation will occur before a hearing, especially when
25 the hearing is set on shortened time.

26 In light of the discussion above, the court finds Plaintiff has not met its burden to show

1 “immediate and irreparable” loss absent an ex parte order. Accordingly, the court declines
2 Plaintiff’s request.

3 **III. ORDER**

4 Based on the foregoing:

5 1. Plaintiff’s ex parte motion for a TRO is DENIED;

6 2. Plaintiff’s motion to consolidate the trial on the merits with the hearing on the
7 preliminary injunction is DENIED as doing so would be highly prejudicial to Defendant, who has no
8 notice of this proceeding;

9 3. Plaintiff is ordered to immediately serve Defendant with the summons, complaint,
10 and all other documents filed in this case. Such service shall be effected no later than close of
11 business on Monday, July, 11, 2011;

12 4. Defendant shall file an opposition to Plaintiff’s motion for preliminary injunction no
13 later than 4:00 p.m. on Wednesday, July 13, 2011, at 4:00 p.m. Plaintiff may file a reply no later
14 than 4:00 p.m. on Thursday, July 14, 2011, at 4:00 p.m.; and

15 5. The hearing on Plaintiff’s motion for preliminary injunction shall be held on Friday,
16 July 15, 2011, at 2:00 p.m. in Courtroom 1, 5th Floor, at the United States District Court located at
17 280 S. 1st Street in San Jose.

18 IT IS SO ORDERED.

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21 Dated: July 7, 2011


EDWARD J. DAVILA
United States District Judge

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THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

Susan E. Bishop sbishop@prattattorneys.com

Dated: July 7, 2011

Richard W. Wieking, Clerk

By: /s/ EJD Chambers
Elizabeth Garcia
Courtroom Deputy