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

CHURCH BROTHERS, LLC,

NO. 5:11-cv-04114 EJD (HRL)

Plaintiff(s),

ORDER:

v.

GARDEN OF EDEN PRODUCE, LLC, et.
al.,

**GRANTING PLAINTIFF'S
APPLICATION FOR TEMPORARY
RESTRAINING ORDER;**

Defendant(s).

**ISSUING ORDER TO SHOW CAUSE RE:
PRELIMINARY INJUNCTION**

[Docket Item No. 3]

_____ /

Plaintiff Church Brothers, LLC ("Plaintiff") commenced the instant case under the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. § 499e(c)(3), against Defendants Garden of Eden Produce, LLC ("Garden") and its principal, Javier Gonzalez ("Gonzalez"). Presently before the court is Plaintiff's ex parte application for a temporary restraining order ("TRO") to enjoin Defendants from dissipating PACA trust assets, as well as a motion for preliminary injunction. See Docket Item No. 3. Plaintiff provided notice of this application to Defendants through overnight mail and e-mail on August 19, 2011. See Decl. of Daniel E. Griffee ("Griffee Decl."), at ¶ 6. To date, Defendants have not responded.

Having reviewed this matter, the court finds Plaintiffs have provided a sufficient basis for the issuance of ex parte injunctive relief. Accordingly, the request for a TRO will be granted and a hearing on the motion for preliminary injunction will be held on Thursday, September 8, 2011, at

1 10:00 a.m. as stated in the order which follows.¹

2 **I. FACTUAL AND PROCEDURAL BACKGROUND**

3 Plaintiff is a PACA licensee in this business of growing, harvesting, and selling perishable
4 agricultural commodities with headquarters in Salinas, California. See Decl. of Jay Brown (“Brown
5 Decl.”), at ¶ 5. In or about June or July, 2011, Gonzalez contacted Plaintiff and requested that
6 Plaintiff sell produce to Garden, a Nevada dealer. See id. at ¶ 7; see also Decl. of Frank Cruz (“Cruz
7 Decl.”), at ¶ 4. As a result, Plaintiff sold to Garden 13 shipments of green onions and tomatillos.
8 See Brown Decl., at ¶¶ 6, 8. Plaintiff provided to Defendant invoices for each shipments on the date
9 of the transaction, all of which contain the following statement:

10 The perishable commodities listed on this invoice are sold subject to
11 the statutory trust authorized by section 5c fo the Perishable
12 Agricultural Commodities Act....The seller of these commodities
13 retains a trust claim over these commodities, all inventories of food or
other products derived from these commodities, and any receivables or
proceeds from the sale of these commodities until full payment is
received.

14 See id., at Ex. 1. The invoices further provide for finance charges on delinquent accounts at the rate
15 of 1.5% per month, or 18% annually. See id.

16 Plaintiff also required Garden to complete a credit application. See Decl. of Linda Schroeder
17 (“Schroeder Decl.”), at ¶ 8. On the application, Gonzalez represented he had registered as a PACA
18 licensee by providing a purported registration number. See id. at Ex. 2. Plaintiff’s counsel later
19 determined this registration number identified by Gonzalez was issued to another produce dealer
20 operating from Oxnard, California. See Griffee Decl., at ¶ 3.

21 The total price of the produce accepted by Garden is \$177,442.50. See Schroeder Decl., at ¶
22 5. Garden paid \$3,500.00 toward this balance. See id. at ¶ 7. Thus, \$173,942.50 remained to be
23 paid. Id.

24 Plaintiff made several inquiries about the balance owed by Garden throughout July, 2011,
25 and Gonzalez responded on several occasions that he would pay the balance. See id. at ¶ 9; see also
26 Brown Decl., at ¶ 12. On July 27, 2011, Gonzalez e-mailed Plaintiff’s credit manager stating that

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

1 Garden would made three wire transfer deposits to pay the outstanding balance. See Schroeder
2 Decl., at ¶ 9. Garden did not initiate the transfers as promised. See id. Gonzalez also told
3 Plaintiff’s Chief Financial Officer that Garden was encountering problems collecting on its own
4 invoices and was having financial difficulties which prevented full payment to Plaintiff. See Brown
5 Decl., at ¶ 12.

6 As of August 18, 2011, Garden still owed Plaintiff \$173,442.50. See Schroeder Decl., at ¶ 7.
7 Plaintiff also calculated interest on the unpaid balance of \$750.00, for a total of \$183,818.50.
8 Plaintiff commenced this case on August 22, 2011, and now seeks an ex parte injunction to prevent
9 Garden from dissipating trust assets in order to preserve its claim to the amount owed.

10 II. DISCUSSION

11 A. Legal Standard

12 PACA provides for the establishment of a statutory trust “in which a produce dealer holds
13 produce-related assets as a fiduciary until full payment is made to the produce seller or producer.”
14 Bowlin & Son, Inc. v. San Joaquin Food Serv. (In re San Joaquin Food Serv., Inc.), 958 F.2d 938,
15 939 (9th Cir. 1992). “The trust automatically arises in favor of a produce seller upon delivery of
16 produce and is for the benefit of all unpaid suppliers or sellers involved in the transaction until full
17 payment of the sums owing has been received.” C & E Enters., Inc. v. Milton Poulos, Inc. (In re
18 Milton Poulos, Inc.), 947 F.2d 1351, 1352 (9th Cir. 1991).

19 Plaintiff seeks a TRO to preserve PACA trust assets. The standard for issuing a TRO is the
20 same as that for the issuance of preliminary injunction. See New Motor Vehicle Bd. of Cal. v. Orrin
21 W. Fox Co., 434 U.S. 1345, 1347 n.2, 98 S. Ct. 359, 54 L. Ed. 2d 439 (1977). A preliminary
22 injunction is “an extraordinary remedy that may only be awarded upon a clear showing that the
23 plaintiff is entitled to such relief.” Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 129 S. Ct.
24 365, 376, 172 L. Ed. 2d 249 (2008). “In the Ninth Circuit, a district court may issue a preliminary
25 injunction when the moving party demonstrates either (1) a combination of probable success on the
26 merits and the possibility of irreparable injury or (2) the existence of serious questions going to the
27 merits and the balance of hardships tips sharply in its favor.” Lockheed Missile & Space Co v
28 Hughes Aircraft Co., 887 F. Supp. 1320, 1322 (N.D. Cal. June 7, 1995) (citing Arcamuzi v.

1 Continental Air Lines, Inc., 819 F.2d 935, 937 (9th Cir. 1987)); Alliance for the Wild Rockies v.
2 Cottrell, 622 F.3d 1045, 1049 (9th Cir. 2010). “These formulations are not different tests but
3 represent two points on a sliding scale in which the degree of irreparable harm increases as the
4 probability of success on the merits decreases.” Big Country Foods, Inc. v Board of Educ. of the
5 Anchorage School Dist., 868 F.2d 1085, 1088 (9th Cir. 1989).

6 **B. Application**

7 Here, Plaintiff has met its burden to demonstrate probable success on the merits coupled with
8 the possibility of irreparable injury.

9 As to the first part of the test, Plaintiff is entitled to the benefits associated with a PACA trust
10 as a registered producer of agricultural commodities, and has preserved its ability to enforce the
11 benefits of PACA through language on the invoices used in its dealings with Garden. See 7 U.S.C. §
12 499a(b)(6); see also 7 U.S.C. § 499e(c)(3) (“The unpaid supplier, seller, or agent shall lose the
13 benefits of such trust unless such person has given written notice of intent to preserve the benefits of
14 the trust to the commission merchant, dealer, or broker and had filed such notice with the Secretary
15 [of Agriculture] within thirty calendar days (I) after expiration of the time prescribed by which
16 payment must be made, as set forth in regulations issued by the Secretary, [or] (ii) after expiration of
17 such other time by which payment must be made....”); see also JC Produce, Inc. v. Paragon
18 Steakhouse Restaurants, Inc., 70 F. Supp. 2d 1119, 1122, at n.5 (concluding that the notice on
19 plaintiff’s invoices, which advised that produce was sold pursuant to statutory trust authorized by
20 PACA and were unchallenged by defendant, appeared consistent with PACA’s statutory notice
21 requirements). Although it has since been revealed that Garden is not a PACA licensee contrary to
22 Gonzalez’s initial representation, the invoices and declarations presented establish that Garden
23 nonetheless qualifies as an unlicensed “dealer” as that term is defined by PACA based on the
24 amount of produce purchased by Garden. See 7 U.S.C. § 499a(b)(6). Plaintiff has also presented
25 sufficient evidence that Garden has not complied with its duties under PACA to maintain trust
26 assets, and that Plaintiff has not been fully paid for produce it sold to Garden. Thus, Plaintiff has
27 demonstrated likely success on the merits in its application.

28 Plaintiff has also shown that it will suffer irreparable injury in the absence of a TRO. “A

1 showing of threatened trust dissipation amounts to a showing of a possibility of irreparable injury.”
2 Rey Rey Produce SFO, Inc. v. Mis Amigos Meat Market, Inc., No C 08-1518 VRW, 2008 U.S. Dist.
3 LEXIS 40607, at *5 (N.D. Cal. Apr. 24, 2008). “[O]nce the PACA trust is dissipated, it is almost
4 impossible for a beneficiary to obtain recovery.” Tanimura & Antle, Inc. v Packed Fresh Produce,
5 Inc., 222 F.3d 132, 139 (3rd Cir. 2000) (citing Frio Ice, SA v Sunfruit, Inc., 918 F.2d 154, 159 (11th
6 Cir. 1990)). In this case, Gonzalez indicated to Plaintiff’s representative that Garden is encountering
7 financial difficulties which have rendered it incapable of paying Plaintiff for the produce it
8 purchased. Moreover, the court is concerned about Gonzalez’s prior misrepresentations as to the
9 status of Garden’s PACA registration and forthcoming payments. Comprehensively, this is
10 sufficient to show irreparable injury under PACA. See Rey Rey Produce SFO, Inc., 2008 U.S. Dist.
11 LEXIS 40607, at *5-6 (finding evidence of prior bounced checks and unfulfilled promises to pay
12 established irreparable injury element for a TRO under PACA).

13 In light of the discussion above, the court finds Plaintiff is entitled to a TRO. Accordingly,
14 the court issues the following order which contains some, but not all, of the injunctive provisions
15 proposed by Plaintiff.

16 III. ORDER

17 Based on the foregoing, Plaintiff’s ex parte application for a TRO is GRANTED such that:

18 1. Pending the hearing on the Order to Show Cause scheduled herein, Garden, Gonzalez
19 and their agents, bankers, subsidiaries, successors, assignees, principals, attorneys, and persons
20 acting in concert with them shall be and hereby are prevented from transferring, withdrawing or in
21 any other manner removing Perishable Agricultural Commodities Act [7 U.S.C. § 499e(c)] trust
22 assets, including but not limited to farm products (in raw or processed form), the proceeds from the
23 sale of farm products (in raw or processed form), and funds on deposit in banking accounts held by
24 or on behalf of the defendants named in this action, from said defendants’ banking accounts.

25 2. This Order shall be binding upon the parties to this action and all other persons or
26 entities who receive actual notice of this Order by personal service or otherwise.

27 3. Due to the nature of the issues presented by this action, the court dispenses with the
28 bond requirement contained in Federal Rule of Civil Procedure 65(c);

1 4. This TRO is effective on upon the date and time of filing and shall remain in effect
2 until the date of hearing on preliminary injunction specified below.

3 5. Plaintiff shall forthwith serve Defendants, or their resident agent, or their counsel,
4 with a copy of this Order. Such service shall be completed no later than **August 29, 2011**.

5 Defendants are further ORDERED to show cause why they should not be preliminarily
6 enjoined from distributing PACA trust funds as set out in Plaintiff's application for a preliminary
7 injunction. Defendants shall file a written response, if any, to this Order to Show Cause and
8 Plaintiff's application on or before **September 2, 2011**. Plaintiff may file a reply to Defendant's
9 response on or before **September 6, 2011**.

10 Plaintiff's motion for preliminary injunction will be heard on **September 8, 2011, at 10:00**
11 **a.m.** in Courtroom 1, 5th Floor, at the United States District Court located at 280 S. 1st Street in San
12 Jose.

13 **IT IS SO ORDERED.**

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15 Dated: August 25, 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:

Daniel Edward Griffiee dan@johnsonmoncrief.com
Paul Hart paulhart@johnsonmoncrief.com
Dennis James Lewis dennis@johnsonmoncrief.com

Dated: August 25, 2011

Richard W. Wieking, Clerk

**By: /s/ EJD Chambers
Elizabeth Garcia
Courtroom Deputy**