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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FRESH & BEST PRODUCE, INC.,

Plaintiff,

v.

SPINELLO'S EAST COAST EATERY, an
unknown entity; MICHAEL SPINELLO, an
individual; DOES 1 to 10,

Defendants.

Case No. [5:16-cv-06984-HRL](#)

**ORDER FOR REASSIGNMENT TO A
DISTRICT JUDGE**

**REPORT AND RECOMMENDATION
RE MOTION FOR DEFAULT
JUDGMENT**

Re: Dkt. No. 15

Plaintiff Fresh & Best Produce, Inc. (Fresh & Best) sues to recover unpaid sums it says it is owed for fruits and vegetables it delivered to defendants Spinello's East Coast Eatery (Eatery) and Michael Spinello (Spinello). Defendants were served with process (Dkt. 9, 10), but failed to answer or otherwise respond to the complaint. At plaintiff's request, the Clerk of the Court entered defendants' default on January 23, 2017. (Dkt. 14).

Plaintiffs now move for default judgment, seeking the unpaid principal balance of \$8,057.48, plus prejudgment interest, as well as \$1,862.00 in attorney's fees and \$620.00 in costs. This court has received no response to the motion.¹ Pursuant to this court's interim order (Dkt.

¹ It appears that plaintiff did not serve defendants with notice of the instant motion for entry of judgment. However, a party in default is not entitled to notice under Fed. R. Civ. P. 55(b)(2) unless it has appeared, formally or informally, and demonstrated a clear intent to defend the suit.

1 19), plaintiff submitted further documents in support of the motion at the motion hearing.
2 Although plaintiff has consented to proceed before a magistrate judge, 28 U.S.C. § 636(c); Fed. R.
3 Civ. P. 73, defendants have never appeared and are in default. Accordingly, this court directs the
4 Clerk of the Court to reassign this action to a district judge, with the following report and
5 recommendation that plaintiff's motion for default judgment be granted.

6 **BACKGROUND**

7 Fresh & Best brings this action for alleged violation of the Perishable Agricultural
8 Commodities Act (PACA), 7 U.S.C. § 499a, et seq. The complaint alleges the following:

9 Plaintiff is a California corporation, with its principal place of business in San Jose,
10 California, engaged in the business of buying and selling wholesale quantities of perishable
11 agricultural commodities (hereafter, "produce") in interstate commerce. (Dkt. 1, Complaint ¶ 1).
12 Fresh & Best further states that, at all times relevant to this action, it was a dealer subject to the
13 provisions of PACA, 7 U.S.C. §§ 499a-499t. (Id.). The defendant Eatery is alleged to be a sole
14 proprietorship, with its principal place of business in Los Gatos, California. (Id. ¶ 2). Further,
15 plaintiff alleges that the Eatery was a dealer operating subject to the provisions of PACA. (Id. ¶
16 6). Defendant Spinello is said to be the Eatery's owner; and, in that capacity, he allegedly
17 controlled or was in a position to control its assets. (Id. ¶ 3).

18 According to the complaint, plaintiff began selling and delivering produce (various fruits
19 and vegetables) to the Eatery in or about 2015, and the Eatery reportedly purchased over \$100,000
20 in produce from plaintiff. (Id. ¶ 7). Although the Eatery accepted the produce, it allegedly failed
21 to pay for all of it. (Id. ¶ 9). Fresh & Best claims that as of November 30, 2016, defendants still
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23 Fed. R. Civ. P. 55(b)(2) ("If the party against whom a default judgment is sought has appeared
24 personally or by a representative, that party or its representative must be served with written notice
25 of the application at least 7 days before the hearing."); In re Roxford Foods, Inc., 12 F.3d 875, 879
26 (9th Cir. 1993) ("While it is true that the failure to provide 55(b)(2) notice, if the notice is
27 required, is a serious procedural irregularity that usually justifies setting aside a default judgment
28 or reversing for the failure to do so, notice is only required where the party has made an
appearance.") (quotations and citations omitted); Wilson v. Moore & Assocs., Inc., 564 F.2d 366,
368 (9th Cir. 1977) ("No party in default is entitled to 55(b)(2) notice unless he has 'appeared' in
the action."). As will be discussed, although defendants properly were served with notice of this
lawsuit, they have never appeared, formally or otherwise, in this action.

1 owed a principal balance of \$8,057.48, despite numerous requests for payment. (Id. ¶ 10).

2 This lawsuit followed shortly after. The complaint asserts six claims for relief. Five of
3 those claims are for alleged PACA violations. Claims 1 through 4 are asserted against the Eatery
4 for declaratory relief (i.e., that the Eatery is a PACA trust beneficiary with a valid claim for
5 payment) (7 U.S.C. § 499e(c)(3)); enforcement of payments from PACA trust assets (7 U.S.C. §
6 499e(c)(5)); failure to maintain PACA trust assets (7 U.S.C. § 499b(4)); and failure to pay
7 promptly (7 U.S.C. § 499b(4)). The fifth claim for relief asserts that the Eatery breached its
8 contracts with Fresh & Best by failing to pay for all of the delivered produce. And, the sixth claim
9 for relief alleges that defendant Spinello breached his fiduciary duty to PACA trust beneficiaries.

10 LEGAL STANDARD

11 After entry of default, courts may, in their discretion, enter default judgment. Fed. R. Civ.
12 P. 55; Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980). In deciding whether to enter
13 default judgment, a court may consider the following factors: (1) the possibility of prejudice to
14 the plaintiff; (2) the merits of the plaintiff's substantive claim; (3) the sufficiency of the complaint;
15 (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material
16 facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying
17 the Federal Rules of Civil Procedure favoring decisions on the merits. Eitel v. McCool, 782 F.2d
18 1470, 1471-72 (9th Cir. 1986). In considering these factors, all factual allegations in the plaintiff's
19 complaint are taken as true, except those relating to damages. TeleVideo Sys., Inc. v. Heidental,
20 826 F.2d 915, 917-18 (9th Cir. 1987). When the damages claimed are not readily ascertainable
21 from the pleadings and the record, the court may conduct a hearing to conduct an accounting,
22 determine the amount of damages, establish the truth of any allegation by evidence, or investigate
23 any other matter. Fed. R. Civ. P. 55(b)(2).

24 DISCUSSION

25 A. Jurisdiction and Service of Process

26 The exercise of subject matter jurisdiction over this matter is proper because the PACA
27 claims raise a federal question, 28 U.S.C. § 1331. The court properly may exercise supplemental
28 jurisdiction over the state law contract claim because it arises out of the same factual allegations as

1 the PACA claims. 28 U.S.C. § 1367(a). Additionally, the court has personal jurisdiction over
2 both defendants. Plaintiff alleges that the Eatery is a sole proprietorship, owned by Spinello, with
3 its principal place of business is in Los Gatos, California. Defendants’ commercial activities in
4 California support the exercise of general personal jurisdiction. See generally Mavrix Photo, Inc.
5 v. Brand Technologies, Inc., 647 F.3d 1218, 1223-24 (9th Cir. 2011) (“For general jurisdiction to
6 exist, a defendant must engage in continuous and systematic general business contacts that
7 approximate physical presence in the forum state.”) (citations omitted).

8 Plaintiff properly effected service by personally serving the Summons and Complaint on
9 Spinello and the Eatery (Dkts. 9, 10). See Fed.R.Civ.P. 4(e)(2) (service may be effected “by
10 delivering a copy of the summons and of the complaint to the individual personally” or by
11 “leaving a copy of each at the individual’s dwelling or usual place of abode with someone of
12 suitable age and discretion who resides there”; or by “delivering a copy of each to an agent
13 authorized by appointment or by law to receive service of process”); Fed. R. Civ. Proc. 4(h)(1)(B)
14 (a corporation may be served “by delivering a copy of the summons and of the complaint to an
15 officer, a managing or general agent, or any other agent authorized by appointment or by law to
16 receive service of process and---if the agent is one authorized by statute and the statute so
17 requires---by also mailing a copy of each to the defendant”).

18 **B. The Eitel Factors**

19 All of the Eitel factors favor entry of default judgment here. Plaintiff essentially seeks to
20 enforce a PACA trust. “PACA protects sellers of perishable agricultural goods by requiring a
21 merchant, dealer, or retailer of perishable produce to hold in trust proceeds from the sale of the
22 perishable produce, and food derived from that produce, for the benefit of all unpaid suppliers.”
23 Fresh Packing Corp. v. Guicho, No. 15-cv-01551-LHK, 2016 WL 1365947, at *7 (N.D. Cal., Apr.
24 6, 2016) (citing 7 U.S.C. § 499e(c)(2); Royal Foods Co. v. RJR Holdings, Inc., 252 F.3d 1102,
25 1104-05 (9th Cir. 2001)). “PACA provides for the establishment of a statutory trust ‘in which a
26 produce dealer holds produce-related assets as a fiduciary until full payment is made to the
27 produce seller or producer.’” Church Bros. LLC v. Garden of Eden Produce, LLC, No. 5:11-cv-
28 04114 EJD, 2012 WL 1155656 at *3 (N.D. Cal., Apr. 5, 2012) (quoting In re San Joaquin Food

1 Serv., Inc., 958 F.2d 938, 939 (9th Cir.1992)). “The trust automatically arises in favor of a
2 produce seller upon delivery of produce and is for the benefit of all unpaid suppliers or sellers
3 involved in the transaction until full payment of the sums owing has been received.” Id. (quoting
4 In re Milton Poulos, Inc., 947 F.2d 1351, 1352 (9th Cir.1991)). A PACA claim requires a plaintiff
5 to show that:

6 (1) the commodities sold were perishable agricultural commodities; (2) the
7 purchaser was a commission merchant, dealer, or broker; (3) the transaction
8 occurred in contemplation of interstate or foreign commerce; (4) the seller
9 has not received full payment on the transaction; and (5) the seller preserved
its trust rights by including statutory language referencing the trust on their
invoices.

10 Beachside Produce, LLC v. Flemming Enterprises, LLC, No. C06-04957 JW, 2007 WL 1655554
11 at *2 (N.D. Cal., June 6, 2007) (citing 7 U.S.C. § 499e(c)(3), (4) and 7 C.F.R. § 46.46(c), (f)).

12 Fresh & Best has sufficiently alleged that defendants violated PACA. According to the
13 complaint’s factual allegations, which are deemed true, plaintiff sold perishable agricultural
14 commodities (various fruits and vegetables) to defendants in interstate commerce. (Complaint ¶¶
15 7-8). See 7 U.S.C. § 499a(4)(A) (defining the term “perishable agricultural commodity” as “Fresh
16 fruits and fresh vegetables of every kind and character”). The Eatery is alleged to be a PACA
17 dealer that purchased produce from plaintiff. (Id. ¶¶ 6-7). Additionally, plaintiff alleges that, as
18 the Eatery’s owner, Spinello controlled or was in a position to control the Eatery’s assets. (Id. ¶
19 3). And, “individuals associated with corporate defendants may be liable under a PACA trust
20 theory.” Fresh Packing Corp., 2016 WL 1365947 at *7 (quoting Sunkist Growers, Inc. v. Fisher,
21 104 F.3d 280, 282 (9th Cir. 1997)). Fresh & Best alleges that it did not receive full payment for
22 all of the produce it delivered to defendants. (Id. ¶¶ 9-10). Finally, PACA “[l]icensees may
23 preserve their trust benefits by giving written notice or by using invoices including certain PACA
24 language.” In re Enoch Packing Co., Inc., No. CIV-F-06-0388 AWI, 2007 WL 1589537 at *4
25 (E.D. Cal., June 1, 2007).² Fresh & Best says that, on invoices it sent to the Eatery, it gave written

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28 ² As discussed above, plaintiff says that at all times relevant to this action, it was a dealer subject
to the provisions of PACA, 7 U.S.C. §§ 499a-499t, and all PACA dealers are required to be PACA
licensees. In re Enoch Packing Co., Inc., 2007 WL 1589537 at *4.

1 notice of its intent to preserve trust benefits by including the requisite statutory language to that
2 effect: “The perishable agricultural commodities listed on this invoice are sold subject to the
3 statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7
4 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all
5 inventories of food or other products derived from those commodities, and any receivables or
6 proceeds from the sale of these commodities until full payment is received.” (Complaint ¶ 13;
7 Dkt. 15-2, Cho Decl. ¶ 4, Ex. B).

8 Plaintiff also sufficiently states a claim for breach of contract. Under California law, a
9 claim for breach of contract consists of the following elements: (1) the existence of a contract;
10 (2) plaintiff’s performance (or excuse for nonperformance); (3) defendant’s breach; and
11 (4) damages. First Commercial Mortgage Co. v. Reece, 89 Cal.App.4th 731, 745, 108 Cal.Rptr.2d
12 23 (2001). Fresh & Best alleges that it entered into contracts with the Eatery for the purchase of
13 produce; plaintiff delivered the produce; the Eatery accepted the produce, but breached the
14 contracts by failing to pay for each shipment of produce; and plaintiff has incurred damages in the
15 amount of \$8,057.48, plus interest, as a result of defendant’s nonpayment. (Complaint ¶¶ 35-37).

16 The amount of money at stake is reasonable and is targeted to defendants’ actions, i.e., the
17 failure to pay plaintiff for all of the produce they ordered and received. Because all liability-
18 related allegations are deemed true, there is no possibility of a dispute as to material facts.
19 Moreover, defendants received proper notice of this lawsuit, but have failed to appear or present a
20 defense in this matter. There is no indication that their default was due to excusable neglect.
21 While the court prefers to decide matters on the merits, defendants’ failure to participate in this
22 litigation makes that impossible. A default judgment against them is plaintiff’s only recourse.

23 **C. Damages**

24 **1. Principal Unpaid Balance**

25 Any dealer who violates PACA’s provisions “shall be liable to the person or persons
26 injured thereby for the full amount of damages . . . sustained in consequence of such violation.” 7
27 U.S.C. § 499e(a). Additionally, as discussed above, individuals may be held liable under a PACA
28 trust theory. Fresh Packing Corp., 2016 WL 1365947 at *7; Sunkist Growers, Inc., 104 F.3d at

1 282. Fresh & Best claims that defendants owe the principal sum of \$8,057.48. (Complaint ¶ 10).
2 In support of the present motion, plaintiff has submitted the declaration of one of its owners,
3 Chong Suk Cho, along with a statement summarizing outstanding invoices and payments, showing
4 the total amount due per invoice sent and the remaining unpaid balance from April 30, 2015
5 through September 2, 2016. (Cho Decl. ¶ 3, Ex. A). Cho avers that the statement shows the
6 invoices that remained unpaid as of October 31, 2016. (Id.). And, as discussed above, plaintiff
7 says that the principal balance remained unpaid as of November 30, 2016. Having reviewed the
8 documents, this court finds that the principal amount of \$8,057.48 is capable of being ascertained
9 from definite figures. Plaintiff therefore is entitled to an award of the unpaid principal balance of
10 \$8,057.48.

11 **2. Prejudgment Interest**

12 Plaintiff may also collect prejudgment interest “if supported by a contractual right;
13 otherwise, the court retains discretion to award reasonable prejudgment interest if such an award
14 promotes the interests of PACA claimants.” Church Bros., LLC, 2012 WL 1155656 at *3 (citing
15 Middle Mountain Land & Produce, Inc. v. Sound Commodities, Inc., 307 F.3d 1220, 1225-26 (9th
16 Cir. 2002)). Fresh & Best seeks interest based on contracts created by invoices sent to defendants.
17 (Complaint ¶¶ 34-37). Here, a sample invoice submitted by plaintiff states, in pertinent part:
18 “Per agreed credit terms a service charge of 1 1/2% per month at the annual percentage rate of
19 18% will be charged on all accounts not paid within thirty (30) days.” (Cho Decl. ¶ 4, Ex. B). At
20 that rate, Fresh & Best says that interest on the outstanding balance accrues at \$4.03 per day
21 (\$8,057.48 x 0.015/30) and that it is entitled to \$580.32 in interest for the 144 days from
22 September 2, 2016 (the apparent date of defendant’s last payment) to January 24, 2017 (the day
23 after defendants’ default was entered). (Id.). Having reviewed plaintiff’s papers, this court
24 concludes that plaintiff is entitled to prejudgment interest of \$580.32 through January 24, 2017,
25 plus an additional \$362.70 (\$4.03 x 90 days) for interest accrued since then, for a total of \$943.02
26 in prejudgment interest.

27 **3. Attorney’s Fees and Costs**

28 Plaintiff is also entitled to recover its attorney’s fees and costs based on the same contract

1 created by the invoices. Church Bros., LLC, 2012 WL 1155656 at *3. Here, the submitted
 2 sample invoice states: “Buyer agrees to pay reasonable attorney fees and court costs if collection
 3 is necessary.” (Cho Decl. ¶ 5, Ex. B). This court finds that language sufficient to support a claim
 4 for fees and costs as to the Eatery.³ Id.; Sequoia Sales, Inc. v. P.Y. Produce, LLC, NO. CV 10-
 5 5757 CW (NJV), 2011 WL 3607242 at *8 (N.D. Cal., July 29, 2011).

6 As to the amount of fees requested: Whether calculating attorney’s fees under California
 7 or federal law, courts follow the lodestar approach. “The most useful starting point for
 8 determining the amount of a reasonable fee is the number of hours reasonably expended on the
 9 litigation multiplied by a reasonable hourly rate.” Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.
 10 Ct. 1933, 76 L.Ed.2d 40 (1983), abrogated on other grounds by Tex. State Teachers Ass’n. v.
 11 Garland Indep. Sch. Dist., 489 U.S. 782, 109 S. Ct. 1486, 103 L.Ed.2d 866 (1989). “In
 12 determining a reasonable hourly rate, the district court should be guided by the rate prevailing in
 13 the community for similar work performed by attorneys of comparable skill, experience, and
 14 reputation.” Chalmers v. City of Los Angeles, 796 F.2d 1205, 1210-11 (9th Cir. 1986), reh’g
 15 denied, amended on other grounds, 808 F.2d 1373 (9th Cir. 1987) (citing Blum v. Stenson, 465
 16 U.S. 886, 895 n.11, 104 S. Ct. 1541, 79 L.Ed.2d 891 (1984)). “Generally, the relevant community
 17 is the forum in which the district court sits.” Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir. 1997)
 18 (citing Davis v. Mason County, 927 F.2d 1473, 1488 (9th Cir. 1991)). The fee applicant has the
 19 burden of producing evidence, other than declarations of interested counsel, that the requested
 20 rates are in line with those prevailing in the community for similar services by lawyers of
 21 reasonably comparable skill, experience and reputation. Blum, 465 U.S. at 896 n.11.
 22 Additionally, the court can rely on its own knowledge and experience in evaluating a request for
 23 fees. Ingram v. Oroudjian, 647 F.3d 925, 928 (9th Cir. 2011) (agreeing that “judges are justified
 24 in relying on their own knowledge of customary rates and their experience concerning reasonable

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 26 ³ Because the contract claim is asserted solely against the Eatery, the fees and costs are not
 27 assessed as against defendant Spinello. See Chong’s Produce, Inc. v. Pushpak Restaurants, Inc.,
 28 No. 15-cv-04923-BLF, 2017 WL 976040 (N.D. Cal., Mar. 14, 2017) (declining to award fees
 against the individual defendant where the sole claim against him sounded in tort and in view of
 the scope of the invoice provision re fees) (citing Casella v. SouthWest Dealer Servs., Inc., 157
 Cal. App.4th 1127, 1132 (2007)).

1 and proper fees.”).

2 Here, plaintiff seeks fees for work performed by its counsel Susan Bishop, who charged
3 her time in this litigation at \$380/hour in 2016 and \$390/hour in 2017. Her supplemental
4 declaration states that she has been practicing law for over 20 years (with a particular focus on
5 business litigation) and currently is a partner at the Berliner Cohen law firm. (Dkt. 20, Suppl.
6 Bishop Decl. ¶¶ 2-3, 6). Bishop correctly notes that her \$380/hour rate has been approved in this
7 district. See, e.g. Chong’s Produce, Inc. v. Pushpak Restaurants, Inc., No. 15-cv-04923-BLF,
8 2017 WL 976040 (N.D. Cal., Mar. 14, 2017); Chong’s Produce, Inc. v. Pushpak Restaurants, Inc.,
9 No. 15-cv-04923, 2017 WL 990585 (N.D. Cal., Feb. 27, 2017). Additionally, this court (and
10 others) have approved rates up to \$400/hour for work performed by attorneys of comparable skill
11 and experience in other PACA cases. See, e.g., Healthy Harvest Berries, Inc. v. Health Am. Fresh
12 Foods, Inc., No. 15-cv-03663-HRL, 2016 WL 8673580 (N.D. Cal., Apr. 22, 2016); see also Tom
13 Ver LLC v. Organic Alliance, Inc., No. 13-cv-03507-LHK, 2015 WL 6957483 at *13 (N.D. Cal.
14 Nov. 11, 2015). Accordingly, this court finds that Bishop’s \$380 and \$390 hourly rates are
15 reasonable.

16 Additionally, having reviewed Bishop’s timesheets, this court finds that the time spent was
17 reasonably incurred and that plaintiff’s request for costs is also amply supported by the record.
18 (Dkt. 15-1). Accordingly, plaintiff is entitled to \$1,862.00 in attorney’s fees and \$620.00 in costs
19 as to the defendant Eatery.

20 **ORDER**

21 Because not all parties have consented to the undersigned’s jurisdiction, IT IS ORDERED
22 THAT this case be reassigned to a District Judge. Further, it is RECOMMENDED that plaintiff’s
23 motion for default judgment be granted and that plaintiff be awarded:

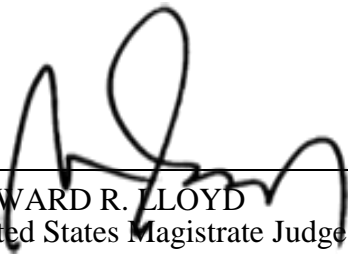
- 24 • \$ 8,057.48 in unpaid principal balance, plus \$ 943.02 in prejudgment interest, for a
25 **total of \$9,000.50** as to the defendants; and
- 26 • an additional \$1,862.00 in attorney’s fees and \$620.00 in costs, for a **total of**
27 **\$2,482.00** as to the defendant Eatery.

28 Any party may serve and file objections to this Report and Recommendation within

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fourteen days after being served. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; Civ. L.R. 72-3.

Dated: April 24, 2017



HOWARD R. LLOYD
United States Magistrate Judge

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5:16-cv-06984-HRL Notice has been electronically mailed to:

Susan E. Bishop susan.bishop@berliner.com, sabina.hall@berliner.com