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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

FRESH & BEST PRODUCE, INC.,

Plaintiff,

v.

OAKTOWN VENTURES, LLC dba
JACK'S OYSTER BAR AND FISH
HOUSE, and RICHARD HACKETT aka
RICK HACKETT,

Defendants.

Case No. 16-cv-06991-BLF

**ORDER ADOPTING MAGISTRATE
JUDGE'S REPORT AND
RECOMMENDATION TO GRANT
MOTION FOR DEFAULT JUDGMENT
AGAINST DEFENDANT OAKTOWN
VENTURES, LLC ONLY, AND TO
DENY DEFAULT JUDGMENT
AGAINST DEFENDANT HACKETT**

[Re: ECF 14, 22]

Before the Court is Magistrate Judge Nathanael M. Cousins' Report and Recommendation ("R&R"), which addresses Plaintiff Fresh & Best Produce, Inc.'s motion for default judgment against Defendants Oaktown Ventures, LLC ("Oaktown") and Richard Hackett ("Hackett"). *See* R&R, ECF 22; Motion for Default Judgment, ECF 14. Plaintiff claims that Oaktown, which was doing business as Jack's Oyster Bar and Fish House, ordered and accepted produce from Plaintiff but failed to pay invoices due and owing in excess of \$27,000. Compl. ¶¶ 2, 7-10, ECF 1. Plaintiff moves for default judgment against Oaktown and its managing member, Hackett, on its claims that Oaktown is liable for breach of contract and violations of the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §§ 499a-499t, and that Hackett is liable under PACA for breach of fiduciary duties to trust beneficiaries. Compl., ECF 1; Motion for Default Judgment, ECF 14. The R&R recommends that the motion be granted as to Oaktown but denied as to Hackett on the basis that Plaintiff has not established this Court's personal jurisdiction over Hackett.

1 Plaintiff , which was served with the R&R on May 19, 2017 via the Court’s Electronic
2 Case Filing System, was required to file any objection to the R&R by June 2, 2017. *See* Fed. R.
3 Civ. P. 72(b)(2) (deadline for objection is fourteen days after being served with report and
4 recommendation). Plaintiff filed an untimely objection on June 5, 2017, asserting two errors in
5 the R&R. Pl.’s Obj., ECF 25. First, Plaintiff points out an apparent clerical error in a portion of
6 the R&R concluding that “Oaktown” – rather than Plaintiff – is entitled to default judgment in the
7 amount of \$31,172.46. Plaintiff requests that this Court rule that *Plaintiff* is entitled to default
8 judgment in the amount of \$31,172.46. Second, Plaintiff disputes the R&R’s conclusion that
9 Plaintiff has failed to establish personal jurisdiction over Hackett. Because it perceives no
10 prejudice to any party in doing so, the Court exercises its discretion to consider Plaintiff’s
11 untimely objection on the merits. The Court therefore reviews *de novo* both arguments raised by
12 Plaintiff. *See* Fed. R. Civ. P. 72(b)(3) (“The district judge must determine *de novo* any part of the
13 magistrate judge’s disposition that has been properly objected to.”).

14 Plaintiff served Defendants Oaktown and Hackett with copies of the R&R by mail on June
15 7, 2017. However, the Court need not wait for expiration of the fourteen-day period for objection
16 following service on Defendants, because Defendants are not entitled to present argument unless
17 and until they obtain relief from the Clerk’s entry of default. *See* Schwarzer, Tashima &
18 Wagstaffe, *Federal Civil Procedure Before Trial* ¶ 6:6 (2017 ed.) (“Entry of default cuts off the
19 defendant’s right to appear in the action. The court clerk cannot accept any papers from the
20 defendant other than a motion for relief from the default.”); ¶ 6:42 (“Entry of a defendant’s default
21 cuts off his or her right to appear in the action or to present evidence.”).

22 The Court concludes that the R&R is well-founded in fact and law with the exception of
23 the clerical error noted by Plaintiff. With respect to Oaktown, the Court agrees with Judge
24 Cousins’ determinations regarding the existence of subject matter jurisdiction and personal
25 jurisdiction; analysis of the factors governing default judgment set forth in *Eitel v. McCool*, 782
26 F.2d 1470 (9th Cir. 1986); and finding that Plaintiff is entitled to default judgment in the total
27 amount of \$31,172.46.

28 With respect to Hackett, the Court agrees with Judge Cousins’ determination that Plaintiff

1 has not established the existence of personal jurisdiction. Plaintiff challenges that determination,
2 arguing that “[d]omicile has been established.” Pl.’s Obj. at 1, ECF 25. The Court has reviewed
3 Plaintiff’s evidence of domicile *de novo* as required by Federal Rule of Civil Procedure 72(b)(3).
4 Plaintiff relies on the declarations of one of its owners, Chong Suk Cho, and its attorney, Susan
5 Bishop. Cho’s declaration contains no information relevant to Hackett’s domicile: Cho refers
6 generally to prior conversations with Hackett, states that Hackett has avoided Cho’s telephone
7 calls for several months, and asserts that Hackett signed a check on an Oaktown account which
8 was returned for insufficient funds. Second Decl. of Chong Suk Cho, ECF 18. Counsel’s
9 declaration does contain statements relevant to Hackett’s domicile, for example, that Hackett
10 “lives and works in or around Oakland, California.” Bishop Decl. ¶ 11. Evidence that Hackett
11 lives in or around Oakland would be evidence of domicile. However, counsel’s declaration does
12 not contain facts establishing her personal knowledge regarding Hackett’s residence. Counsel
13 bases her statements on public filings which she asserts provide Oakland addresses for Hackett.
14 *Id.* ¶¶ 14-16 and Exhs. D-E. While the filings in question do list two different Oakland addresses
15 for Hackett, those addresses are the addresses of two companies for which Hackett is listed as the
16 Chief Executive Officer, Oaktown and Bocanova, LLC. *Id.* The filings do not suggest that either
17 of the two Oakland addresses is Hackett’s residence, nor do they provide any other information
18 regarding Hackett’s domicile. Counsel’s statement that a website listed Hackett as the “Chef
19 Owner” of Jack’s Oyster Bar in Oakland, California likewise does not establish that Hackett is
20 domiciled in California.

21 Plaintiff requests that in the event the Court concludes that Hackett’s domicile has not been
22 established, the Court grant Plaintiff additional time to effect service of process on Hackett
23 personally while he is in California as a means of establishing this Court’s personal jurisdiction
24 over him. *See Burnham v. Superior Court*, 495 U.S. 604, 628 (1990) (California courts may
25 exercise personal jurisdiction over a defendant based service of process on the defendant while the
26 defendant is present in the state). That request is granted.

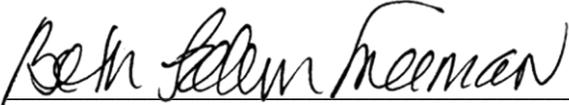
27 Accordingly, the Court ADOPTS the R&R, with the exception of the clerical error
28 discussed above, and ORDERS as follows:

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- (1) Plaintiff's motion for default judgment is GRANTED as to Defendant Oaktown.
- (2) Plaintiff is entitled to default judgment against Defendant Oaktown in the total amount of \$31,172.46, comprising \$27,055.06 in unpaid principal balance, \$2,298.40 in prejudgment interest, \$1,199.00 in attorneys' fees, and \$620.00 in costs.
- (3) Plaintiff's motion for default judgment is DENIED WITHOUT PREJUDICE as to Defendant Hackett.
- (4) Plaintiff's request for an extension of time to effect service of process on Defendant Hackett personally while he is present in the state of California is granted. Plaintiff shall file a certificate of service or a status update regarding service on or before September 15, 2017.

IT IS SO ORDERED.

Dated: June 12, 2017


BETH LABSON FREEMAN
United States District Judge