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

FRESH & BEST PRODUCE, INC.,

Plaintiff,

v.

OAKTOWN VENTURES, LLC, et al.,

Defendants.

Case No. 16-cv-06991-BLF

**ORDER CONSTRUING PLAINTIFF'S
COUNSEL'S DECLARATION AS A
MOTION FOR RECONSIDERATION;
GRANTING MOTION FOR
RECONSIDERATION; AND
GRANTING PLAINTIFF'S MOTION
FOR DEFAULT JUDGMENT AGAINST
DEFENDANT RICHARD HACKETT**

On July 3, 2017, Plaintiff Fresh & Best Produce, Inc. filed a document titled "Declaration of Susan E. Bishop in Support of Second Request for Default Judgment as to Richard Hackett." Bishop Decl., ECF 32. The document is a declaration of Plaintiff's counsel which acknowledges the Court's denial of Plaintiff's prior motion for default judgment against Defendant Richard Hackett (ECF 14) on the basis that Plaintiff had failed to establish this Court's personal jurisdiction over Hackett; asserts the existence of a new fact establishing the existence of personal jurisdiction over Hackett; and requests that the Court grant Plaintiff's prior motion for default judgment against Hackett. *Id.* The declaration relies on a proof of service filed by Plaintiff on June 16, 2017, showing personal service of process on Hackett within the state of California on June 7, 2017. POS, ECF 31.

The Court construes counsel's declaration as a motion for reconsideration of the Court's prior denial of default judgment against Hackett based on a new fact. For the reasons discussed

1 below, the Court GRANTS Plaintiff's motion for reconsideration and GRANTS Plaintiff's
2 (previously denied) motion for default judgment against Hackett.

3 **I. BACKGROUND**

4 On December 6, 2016, Plaintiff Fresh & Best Produce, Inc. filed this complaint against
5 Defendants Oaktown Ventures, LLC and its managing member, Richard Hackett. Compl., ECF 1.
6 Plaintiff alleges that Oaktown, which then was doing business as Jack's Oyster Bar and Fish
7 House, ordered and accepted produce from Plaintiff but failed to pay invoices due and owing in
8 excess of \$27,000. *Id.* ¶¶ 2, 7-10. Plaintiff asserts claims against Oaktown for multiple violations
9 of the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §§ 499a-499t, and for breach
10 of contract. *Id.* ¶¶ 12-39. Plaintiff also asserts a single claim against Hackett for breach of
11 fiduciary duty under PACA. *Id.* ¶¶ 40-49. Plaintiff alleges that as a result of Hackett's breach of
12 fiduciary duty, Plaintiff "has incurred damages in the amount of \$27,053.06, plus interest from the
13 date each invoice became past de [sic], costs and attorneys' fees." *Id.* ¶ 47.

14 Neither Oaktown nor Hackett responded to the complaint. Plaintiff obtained a clerk's
15 entry of default against Oaktown and Hackett and then filed a motion for default judgment against
16 both defendants. Clerk's Entry of Default, ECF 12; Motion for Default Judgment, ECF 14. At
17 that time, the case was assigned to Magistrate Judge Nathanael M. Cousins. Judge Cousins issued
18 a Report and Recommendation ("R&R") recommending that Plaintiff's motion for default
19 judgment be granted against Oaktown but denied against Hackett, and requesting that the case be
20 reassigned to a district judge. R&R, ECF 22. The case thereafter was reassigned to the
21 undersigned judge. Order Reassigning Case, ECF 23. This Court adopted the R&R, granted
22 default judgment against Oaktown, and denied default judgment against Hackett. Order Adopting
23 R&R, ECF 29. The basis for the denial as to Hackett was Plaintiff's failure to establish this
24 Court's personal jurisdiction over Hackett. *Id.* The denial as to Hackett was without prejudice.
25 *Id.*

26 Plaintiff has filed a declaration of counsel requesting that the Court grant default judgment
27 against Hackett based upon Plaintiff's subsequent personal service of process on Hackett within
28 the state of California on June 7, 2017. Bishop Decl. ¶ 7, ECF 32; POS, ECF 31. As noted above,

1 the Court construes the declaration of counsel as a motion for reconsideration of the prior denial of
2 default judgment against Hackett.

3 **II. DISCUSSION**

4 **A. Reconsideration**

5 In order to obtain reconsideration of an interlocutory order, the moving party “must
6 specifically show reasonable diligence in bringing the motion” and also must show one of the
7 following: (1) “a material difference in fact or law exists from that which was presented to the
8 Court before entry of the interlocutory order for which reconsideration is sought”; (2) “[t]he
9 emergence of new material facts or a change of law occurring after the time of such order”; or
10 (3) “[a] manifest failure by the Court to consider material facts or dispositive legal arguments
11 which were presented to the Court before such interlocutory order.” Civ. L.R. 7-9(a), (b).

12 Here, Plaintiff has satisfied the second prong by showing the emergence of a new material
13 fact occurring after the Court’s denial of Plaintiff’s motion for default judgment against Hackett,
14 namely, personal service of process on Hackett within the state of California. Bishop Decl. ¶ 7,
15 ECF 32; POS, ECF 31. Personal service of process on an individual who is voluntarily in the
16 forum state is sufficient to confer personal jurisdiction over that individual even if his presence in
17 the state is unrelated to the litigation. *Burnham v. Superior Court*, 495 U.S. 604, 628 (1990).
18 Plaintiff therefore has established personal jurisdiction over Hackett. Because lack of personal
19 jurisdiction was the basis upon which the Court denied Plaintiff’s motion for default judgment
20 against Hackett, the Court will reconsider its denial of that motion.

21 **B. Default Judgment**

22 Having determined that reconsideration is appropriate with respect to its denial of
23 Plaintiff’s motion for default judgment against Hackett, the Court now revisits that motion.

24 **1. Jurisdiction and Service**

25 Pursuant to Federal Rule of Civil Procedure 55, a court may grant default judgment against
26 a defendant who has failed to plead or otherwise defend an action. Fed. R. Civ. P. 55(b)(2).
27 “When entry of judgment is sought against a party who has failed to plead or otherwise defend, a
28 district court has an affirmative duty to look into its jurisdiction over both the subject matter and

1 the parties.” *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999). The district court also must “assess the
2 adequacy of the service of process on the party against whom default is requested.” *DFSB*
3 *Kollecative Co., Ltd. v. Bourne*, 897 F. Supp. 2d 871, 877 (N.D. Cal. 2012) (internal quotation
4 marks and citation omitted).

5 For the reasons discussed above, the Court is satisfied regarding the adequacy of service of
6 process and the existence of personal jurisdiction over Hackett. Subject matter jurisdiction is
7 based on federal question, as the bulk of Plaintiff’s claims (including the only claim asserted
8 against Hackett) are brought under PACA. Accordingly, the threshold requirements for default
9 judgment have been met.

10 **2. Eitel Factors**

11 Plaintiff nonetheless is not automatically entitled to a default judgment, and “[t]he district
12 court’s decision whether to enter a default judgment is a discretionary one.” *Aldabe v. Aldabe*,
13 616 F.2d 1089, 1092 (9th Cir. 1980). In exercising that discretion, this Court must consider the
14 following seven factors articulated by the Ninth Circuit in *Eitel v. McCool* (“*Eitel* factors”): “(1)
15 the possibility of prejudice to the plaintiff, (2) the merits of plaintiff’s substantive claim, (3) the
16 sufficiency of the complaint, (4) the sum of money at stake in the action; (5) the possibility of a
17 dispute concerning material facts; (6) whether the default was due to excusable neglect, and (7) the
18 strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.”
19 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). In evaluating the *Eitel* factors, well-pled
20 allegations in the complaint are taken as true, except those regarding damages. *Televideo Sys.,*
21 *Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987). The Court may, in its discretion,
22 consider evidence submitted with a motion for default judgment to determine damages. *Id.*

23 **a. Prejudice (Factor 1)**

24 With respect to the first factor, prejudice to the plaintiff, Plaintiff would have no recourse
25 absent entry of default judgment because Hackett has elected not to respond to the complaint. *See*
26 *Wilamette Green Innovation Ctr., LLC v. Quartis Capital Partners*, No. 13-cv-00848-JCS, 2014
27 WL 5281039, at *6 (N.D. Cal. Jan. 21, 2014) (“Denying a plaintiff a means of recourse is by itself
28 sufficient to meet the burden posed by this factor.”). This factor weighs in favor of default

1 judgment.

2 **b. Merits of Claims/Sufficiency of Complaint (Factors 2 & 3)**

3 The second and third factors, addressing the merits of the plaintiff’s claims and the
4 sufficiency of the complaint, are satisfied if the plaintiff asserts claims upon which he may
5 recover. *IO Group, Inc. v. Jordon*, 708 F. Supp. 2d 989, 997 (N.D. Cal. 2010). Plaintiff’s only
6 claim against Hackett is a claim for breach of fiduciary duty under PACA. “PACA protects sellers
7 of perishable agricultural goods by requiring a merchant, dealer, or retailer of perishable produce
8 to hold in trust proceeds from the sale of the perishable produce, and food derived from that
9 produce, for the benefit of all unpaid suppliers.” *Golden W. Veg, Inc. v. Bartley*, No. 16-CV-
10 03718-LHK, 2017 WL 2335602, at *5 (N.D. Cal. May 30, 2017). Individuals “who are in a
11 position to control PACA trust assets, and who breach their fiduciary duty to preserve those assets,
12 may be held personally liable under the Act.” *Tom Ver LLC v. Organic All., Inc*, No. 13-CV-
13 03506-LHK, 2015 WL 2412381, at *2 (N.D. Cal. May 20, 2015). This Court previously
14 determined that Plaintiff’s PACA claims against Oaktown are sufficient. R&R at 6-8, ECF 22;
15 Order Adopting R&R, ECF 29. The Court now concludes that Plaintiff’s allegations regarding
16 Hackett’s control of Oaktown, and failure to preserve trust assets, is sufficient to state a PACA
17 claim against him individually. *See* Compl. ¶¶ 41-48, ECF 1. Consequently, these factors weigh
18 in favor of default judgment.

19 **c. Sum of Money at Stake (Factor 4)**

20 With respect to the fourth factor, the sum of money at stake, Plaintiff seeks \$27,055.06 in
21 unpaid invoices, plus prejudgment interest, attorneys’ fees, and costs. PACA claims include
22 contractual rights to interest and attorneys’ fees. *Middle Mountain Land and Produce Inc. v.*
23 *Sound Commodities*, 307 F.3d 1220, 1224-25 (9th Cir. 2002). This Court previously determined
24 that as of May 19, 2017, the record evidence supported an award of damages in the amount of
25 \$27,055.06, prejudgment interest in the amount of \$2,298.40, attorneys’ fees in the amount of
26 \$1,199.00, and costs in the amount of \$620.00. R&R at 10-12, ECF 22; Order Adopting R&R,
27 ECF 29. Plaintiff has not requested an increase in these amounts. Accordingly, the total sum of
28 money at stake is \$31,172.46. This sum is relatively modest, and other district courts within the

1 Ninth Circuit have granted default judgment in PACA cases involving similar amounts. *See, e.g.,*
2 *Greenfield Fresh, Inc. v. Berti Produce-Oakland, Inc.*, No. 14-CV-01096-JSC, 2014 WL 5700695,
3 at *2 (N.D. Cal. Nov. 3, 2014) (granting default in PACA case where sum of money at stake was
4 \$28,718.32); *Family Tree Produce, Inc. v. Bautista*, No. SA CV 13-00364-DOC, 2013 WL
5 6733576, at *4 (C.D. Cal. Dec. 13, 2013) (granting default in PACA case where sum of money at
6 stake was \$58,848.12). Therefore, this factor weighs in favor of default judgment.

7 **d. Potential Disputes of Fact/Material Neglect (Factors 5 and 6)**

8 The fifth and sixth factors focus on whether there are any potential disputes of fact and
9 whether the defendant’s failure to appear might be the result of excusable neglect. Service of
10 process was effected on Hackett twice, the second time by personal service. Therefore, it is
11 unlikely that Hackett’s failure to appear was the result of excusable neglect or that Hackett –
12 having failed to appear – will present any disputes of material fact. These factors weigh in favor
13 of default judgment.

14 **e. Public Policy (Factor 7)**

15 The seventh and final factor, the strong public policy favoring decisions on the merits,
16 does not preclude default judgment when the other *Eitel* factors favor it. *PepsiCo, Inc. v.*
17 *California Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002). Here, Defendants’ failure to
18 answer the complaint “makes a decision on the merits impractical, if not impossible.” *Id.*

19 **C. Damages**

20 “A plaintiff seeking default judgment must also prove all damages sought in the
21 complaint.” *Golden W. Veg*, 2017 WL 2335602, at *8 (internal quotation marks and citation
22 omitted). “Federal Rule of Civil Procedure 55 does not require the Court to conduct a hearing on
23 damages, as long as it ensures that there is an evidentiary basis for the damages awarded in the
24 default judgment.” *Id.* As discussed above, this Court previously considered and found sufficient
25 Plaintiff’s evidence regarding the amount of money owing on unpaid invoices and Plaintiff’s
26 entitlement to prejudgment interest, attorneys’ fees, and costs. R&R at 10-12, ECF 22; Order
27 Adopting R&R, ECF 29.

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III. ORDER

- (1) Plaintiff's motion for default judgment is GRANTED as to Defendant Hackett 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; and
- (2) The Default Judgment previously issued against Defendant Oaktown only shall be amended to reflect default judgment against both Defendant Oaktown and Defendant Hackett.

Dated: July 14, 2017


BETH LABSON FREEMAN
United States District Judge