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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

TQM FOOD SERVICES, INC., a
California corporation,

Plaintiff,

vs.

FREEDOM MARKET, INC., a
California corporation dba Somos
Tacos & Atomic Wings; SALEM
SOMO, an individual; and
FEDDWON SOMO, an individual,

Defendants.

CASE NO. 3:15-cv-1600-H
(DHB)

**(1) ORDER GRANTING
PLAINTIFF’S MOTION FOR
TEMPORARY
RESTRAINING ORDER;**

**(2) ORDER TO SHOW
CAUSE WHY
PRELIMINARY
INJUNCTION SHOULD NOT
ISSUE;**

**(3) SCHEDULING
PRELIMINARY
INJUNCTION HEARING**

[Doc. No. 2]

On July 20, 2015, Plaintiff TQM Food Services, Inc. (“Plaintiff”) filed a complaint against Defendants Freedom Market, Inc., Salem Somo, and Feddwon Somo (collectively, “Defendants”), alleging violations of the Perishable Agricultural Commodities Act (“PACA”), 7 U.S.C. § 499e(c)(5). (Doc. No. 1.) Also on July 20, 2015, Plaintiff filed a motion for a temporary restraining order. (Doc. No. 2.) The Court ordered Plaintiff to serve Defendants with a copy of the complaint, a copy of the

1 motion for a temporary restraining order, and a copy of this order no later than July 21,
2 2015 at 12:00 p.m. (Doc. No. 4.) Defendants did not file an opposition. The Court
3 held a hearing on Plaintiff’s motion on July 24, 2015 at 10:30 a.m. in Courtroom 15A.
4 Attorney Mitch Wallis appeared for Plaintiff. Defendants did not appear. For the
5 reasons that follow, the Court grants Plaintiff’s motion for a temporary restraining
6 order. The Court also orders Defendants to show cause by July 31, 2015 why a
7 preliminary injunction should not issue and schedules a preliminary injunction hearing
8 for August 11, 2015 at 10:30 a.m. in Courtroom 15A.

9 **Background**

10 According to the complaint, Plaintiff is a company that buys and sells wholesale
11 quantities of perishable agricultural commodities. (Doc. No. 1 at ¶ 1.) Plaintiff states
12 that was licensed as a dealer under PACA at all relevant times. (Id.) Plaintiff alleges
13 that Defendants Salem and Feddwon Somo are shareholders and officers of Freedom
14 Market, Inc. (“Somos”), a business that buys wholesale quantities of produce in
15 interstate commerce and is subject to PACA. (Id. at ¶ 2.) Plaintiff alleges that
16 Defendants had control over PACA trust assets belonging to Plaintiff. (Id.)

17 Plaintiff states that it delivered \$5,005.04 worth of perishable agricultural
18 commodities to Defendants between December 3, 2014 and December 8, 2014. (Id. at
19 ¶¶ 1, 4.) Plaintiff alleges that it sent invoices containing the language required by 7
20 U.S.C. § 499e(c)(4) to Defendants. (Doc. No. 2-1 at 4-5.) According to Plaintiff,
21 Defendants do not dispute the debt but have failed to repay Plaintiff. (Doc. No. 1 at ¶¶
22 8, 9.) Plaintiff also alleges that Defendants told Plaintiff that they lacked sufficient
23 funds to pay the debt. (Id. at ¶ 9.)

24 Plaintiff asks the Court to issue a temporary restraining order against Defendants
25 pursuant to Rule 65 of the Federal Rules of Civil Procedure. (Doc. No. 2 at 1.)
26 Specifically, Plaintiff asks the Court to restrain the transfer of and direct to Plaintiff any
27 and all of Defendants’ assets, not to exceed \$5,005.04 plus interest, costs, and attorney
28 fees. 7 U.S.C. § 499e(c). (Id.; Doc. No. 2-1 at 1.)

1 **Discussion**

2 **I. Legal Standards**

3 PACA provides for the creation of a statutory trust “in which a produce dealer
4 holds produce-related assets as a fiduciary until full payment is made to the produce
5 seller.” Bowlin & Son, Inc. v. San Joaquin Food Serv. (In re San Joaquin Food Serv.,
6 Inc.), 958 F.2d 938, 939 (9th Cir. 1992). “The trust automatically arises in favor of a
7 produce seller upon delivery of produce and is for the benefit of all unpaid suppliers or
8 sellers involved in the transaction until full payment of the sums owing has been
9 received. C&E Enters., Inc. v. Milton Poulos, Inc. (In re Milton Poulos, Inc.), 947 F.2d
10 1351, 1352 (9th Cir. 1991).

11 Plaintiff requests a temporary restraining order to preserve PACA trust assets.
12 (Doc. No. 2.) The standard for a temporary restraining order is “substantially identical”
13 to the standard for granting a preliminary injunction. Stuhlbarg Int’l Sales Co. v. John
14 D. Brush & Co., 240 F.3d 832, 839 n.7 (9th Cir. 2001). A preliminary injunction is “an
15 extraordinary remedy that may only be awarded upon a clear showing that the plaintiff
16 is entitled to such relief.” Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22
17 (2008); accord Earth Island Inst. v. Carlton, 626 F.3d 462, 469 (9th Cir. 2010). A party
18 seeking preliminary relief “must establish that he is likely to succeed on the merits, that
19 he is likely to suffer irreparable harm in the absence of preliminary relief, that the
20 balance of equities tips in his favor, and that an injunction is in the public interest.”
21 Winter, 555 U.S. at 20. In the Ninth Circuit, the court may apply a sliding scale test,
22 under which “the elements of the preliminary injunction test are balanced, so that a
23 stronger showing of one element may offset a weaker showing of another.” Alliance
24 for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011); see also id. at
25 1132 (“The serious questions approach survives the Winter decision when applied as
26 part of the four-element Winter test.”).

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1 **II. Analysis**

2 **A. Likelihood of Success on the Merits**

3 Plaintiff has shown that it is likely to succeed on the merits of its PACA claim.
4 Winter, 555 U.S. at 20. PACA applies to “perishable agricultural commodit[ies],”
5 defined as “[f]resh fruits and fresh vegetables of every kind and character.” 7 U.S.C.
6 § 499a(b)(4). Plaintiff states that it is a licensed dealer under PACA and sells wholesale
7 quantities of perishable agricultural commodities. (Doc. No. 1 at ¶ 1.) Moreover, the
8 PACA trust provisions create a remedy for a produce dealer if a purchaser fails to pay
9 for certain perishable goods. 7 U.S.C. § 499e(c). Plaintiff states that it sent perishable
10 agricultural commodities worth \$5,005.04 to Defendants between December 3 and
11 December 8, 2014, and alleges that Defendants have failed to pay. (Id. at ¶¶ 1, 4, 8, 9;
12 Doc. No. 2-1 at 2.) Finally, the trust provisions of PACA provide that an unpaid,
13 licensed supplier can preserve the benefits of the trust if it uses its ordinary invoice
14 statements to give notice of its intent to preserve the trust.¹ 7 U.S.C. § 499e(c)(4).
15 Plaintiff states that it preserved an interest in the PACA trust by sending invoices to
16 Defendants with the requisite language. (Doc. No. 1 at ¶ 7; Doc. No. 2-1 at 4-5.) For
17 these reasons, Plaintiff has shown a likelihood of success on the merits. Winter, 555
18 U.S. at 20.

19 **B. Likelihood of Irreparable Harm**

20 Plaintiff has also shown that it is likely to suffer irreparable harm in the absence
21 of a temporary restraining order. Winter, 555 U.S. at 20. “A showing of threatened
22 trust dissipation amounts to a showing of a possibility of irreparable injury.” Rey Rey
23 Produce SFO, Inc. v. Mis Amigos Meat Market, Inc., 2008 WL 1885738 (N.D. Cal.
24 Apr. 24, 2008). “[O]nce the PACA trust is dissipated, it is almost impossible for a

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26 ¹The invoice must contain the following statement: “The perishable agricultural
27 commodities listed on this invoice are sold subject to the statutory trust authorized by section
28 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of
these commodities 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.” 7 U.S.C. § 499e(c)(4).

1 beneficiary to obtain recovery.” Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.,
2 222 F.3d 132, 139 (3d Cir. 2000) (citation omitted). Plaintiff alleges that Defendants
3 have failed to pay their debt and have told Plaintiff that they lack sufficient funds to
4 pay. (Doc. No. 1 at ¶ 9; Doc. No. 2-1 at 4.) Therefore, Plaintiff has shown a likelihood
5 of irreparable harm. Winter, 555 U.S. at 20.

6 **C. Balance of the Equities and the Public Interest**

7 The record does not indicate that Defendants will suffer harm if the temporary
8 restraining order issues. Winter, 555 U.S. at 20. Instead, they would only be required
9 to fulfill their repayment obligations. Tanimura, 222 F.3d at 140. Further, issuing a
10 temporary restraining order would be in the public interest. Winter, 555 U.S. at 20.
11 Congress created PACA to alleviate the burden created when purchasers of perishable
12 agricultural commodities fail to make payments, and stated that the statute would
13 “protect the public interest.” 7 U.S.C. § 499e(c)(1). Therefore, Plaintiff has shown that
14 the balance of equities tips in its favor and that an injunction is in the public interest.
15 Winter, 555 U.S. at 20.

16 **Conclusion and Order**

17 For the reasons stated above, the Court grants Plaintiff’s motion for a temporary
18 restraining order. Additionally:

- 19 1. Defendants are ordered to show cause in writing why they should not be
20 preliminarily enjoined from distributing PACA trust funds as set out in
21 Plaintiff’s application for a temporary restraining order. Defendants must
22 file a written response, if any, to this Order to Show Cause on or before
23 July 31, 2015. Plaintiff may file a reply to Defendants’ response on or
24 before August 7, 2015. The Court schedules a preliminary injunction
25 hearing for August 11, 2015 at 10:30 a.m. in Courtroom 15A.
- 26 2. Pending the hearing on the Order to Show Cause, Defendants and their
27 respective agents, attorneys, officers, assigns, and any other of their
28 banking institutions must not pay, withdraw, transfer, assign, or sell any

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and all existing PACA trust assets or otherwise dispose of corporate or personal assets to any creditors, persons, or entities until further order of the Court.

3. Pending further order of the Court, no banking institution holding funds for any Defendant shall pay, transfer, or permit assignment or withdrawal of any existing PACA trust assets held on behalf of Defendants. Further, pending further order of this Court, no banking institution holding funds for any Defendant shall pay, transfer, or permit assignment or withdrawal of the corporate or personal assets of any Defendants without this Court's express written consent.
4. This Order is binding upon the parties to this action, their officers, agents, servants, employees, banks, attorneys, and all other persons or entities who receive actual notice of this Order by personal service or otherwise. In this regard, Defendants shall serve a copy of this Order on all financial institutions with which any of the Defendants does any business, may do business with, or who may be holding any PACA trust assets for or on behalf of any of the Defendants.
5. Due to the nature of the issues in this action, the Court dispenses with the bond requirement contained in Federal Rule of Civil Procedure 65(c).
6. This temporary restraining order is effective on the date and time of filing and remains in effect until the date and time of the hearing on preliminary injunction specified above.


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7. If Defendants pay Plaintiff the sum of \$5,005.04, Plaintiff must immediately file a document informing the Court of this fact so the temporary restraining order can be dissolved and the hearing vacated.

IT IS SO ORDERED.

DATED: July 24, 2015


MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT