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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON

8 TELAYA, LLC, an Idaho limited
9 liability company, and EARL E.
SULLIVAN, an individual,

10 Plaintiffs,

11 v.

12 CRUZ ESTATES, LLC d/b/a/
13 CANON DEL SOL WINERY, a
14 Washington limited liability
15 company, and VICTOR J. CRUZ,
and KIMBERLY CRUZ, husband
and wife, and the marital community
thereof,

16 Defendants.

No. CV-13-5075-RHW

**ORDER GRANTING
PLAINTIFFS' MOTION FOR
ENTRY OF JUDGMENT BY
DEFAULT**

17 Before the Court is Plaintiffs' Motion for Entry of Judgment by Default,
18 ECF No. 13. The motion was heard without oral argument. Plaintiffs are
19 represented by Karin Jones and Maren Norton. Defendants have not appeared
20 personally or by a representative.

21 Plaintiffs ask the Court to enter judgment by default against Defendants in
22 the amount of \$132,654.96.¹ In their complaint, Plaintiffs allege six causes of
23 action: (1) breach of contract; (2) breach of implied covenant of good faith and
24 fair dealing; (3) breach of express warranties; (4) breach of implied warranty of
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26 _____
27 ¹This amount is comprised of \$92,751.96 in actual damages; \$25,000 in
28 statutory damages under Wash. Rev. Code § 19.86.090; \$14,267.00 in reasonable
attorneys' fees; and \$636.00 in taxable costs.

**ORDER GRANTING PLAINTIFF'S MOTION FOR ENTRY OF
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1 merchantability; (5) breach of implied warranty of fitness for a particular purpose;
2 and (6) violation of the Washington Consumer Protection Act.

3 Under Fed. R. Civ. P. 55(b)(2), a party can move for entry of judgment by
4 default. “The district court’s decision whether to enter a default judgment is a
5 discretionary one.” *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980).
6 “[J]udgment by default is a drastic step appropriate only in extreme circumstances;
7 a case should, whenever possible, be decided on the merits.” *Falk v. Allen*, 739
8 F.2d 461, 463 (9th Cir. 1984). In determining whether default judgment is
9 appropriate, the court considers the following factors:

10 (1) [T]he possibility of prejudice to plaintiff, (2) the merits of
11 plaintiff’s substantive claim, (3) the sufficiency of the complaint, (4)
12 the sum of money at stake in the action, (5) the possibility of a
13 dispute concerning the material facts, (6) whether the default was due
14 to excusable neglect, and (7) the strong policy underlying the Federal
15 Rules of Civil Procedure favoring decisions on the merits.
16 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

17 After entry of default, all well-pleaded factual allegations in the complaint
18 are taken as true, except as to the amount of damages. *Fair Housing of Marin v.*
19 *Combs*, 285 F.3d 899, 906 (9th Cir. 2002).

20 Here, the majority of the factors suggest that the award of default judgment
21 would be appropriate. Plaintiffs would be prejudiced if they are not permitted to
22 obtain judgment by default. Defendants have not responded or participated in the
23 proceedings. Defendants failed to respond to a demand letter sent by Plaintiffs
24 prior to filing the lawsuit. Plaintiffs do not have any other avenue with which to
25 obtain relief. There is no indication in the record that the default was due to
26 excusable neglect. Given that Defendants have failed to communicate with
27 Plaintiffs even before the lawsuit was filed, it is likely Defendants are choosing to
28 not respond in hopes that the lawsuit will go away. Also, it appears that samples of
the wine were tested by an independent laboratory, so the possibility of a dispute
concerning material facts are minimized.

On the other hand, two of the factors support the denial of the motion. First,

1 Plaintiff is seeking a significant amount of damages; and second, the strong policy
2 in favor of decisions on the merits will always support a finding that judgment by
3 default is not appropriate.

4 Finally, as set forth below, Plaintiffs have alleged facts, which taken as true,
5 establish the elements of the majority of their claims, with an exception of their
6 Consumer Protection Act claim.

7 **(1) Breach of Contract**

8 A failure to perform a contractual duty constitutes a breach, and an injured
9 party is generally entitled to those damages necessary to put that party in the same
10 economic position it would have occupied had the breach not occurred. *TMT Bear*
11 *Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, 140 Wash.App. 191,
12 209 (2007). In their complaint, Plaintiffs allege facts that demonstrate that
13 Defendants failed to perform a contractual duty. Defendants promised to provide
14 quality vintage wine and failed to do so.

15 **(2) Breach of Covenant of Good Faith and Fair Dealing**

16 An implied covenant of good faith and fair dealing is present in contracts
17 that give one party discretionary authority to determine a contract term. *Myers v.*
18 *State*, 152 Wash.App. 823, 828 (2009). This duty “obligates the parties to
19 cooperate with each other so that each may obtain the full benefit of performance.”
20 *Id.*

21 “The duty of good faith and fair dealing requires only that the parties
22 perform in good faith the obligations imposed by their agreement.” *United*
23 *Financial Cas. Co. v. Coleman*, 173 Wash.App. 463, 476 (2012). “The duty of
24 good faith and fair dealing does not inject substantive terms into the parties’
25 contract or create a free-floating duty of good faith unattached to the underlying
26 legal document.” *Id.* The duty exists only in relation to performance of a specific
27 contract term. *Carlile v. Harbor Homes, Inc.*, 147 Wash.App. 193, 216 (2008).

28 The 2011 contract indicates that Defendant agreed to make approximately

1 100 cases of Cabernet Sauvignon and 150 cases of a red blend. ECF No. 1-1, Ex.

2 A. The 2012 contract states:

3 Cruz Estates will perform appropriate maintenance including
4 topping, racking, and testing of the product from the time the fruit
5 enters Cruz Estates possession until bottling is finished. All materials
6 will be maintained in a clean and appropriately temperature
7 controlled environment.

8 ECF No. 1-1, Ex. B.

9 In their Complaint, Plaintiffs allege that Defendants certified their full
10 release to Plaintiffs of the 2011 and 2012 Vintage Wines, and represented that the
11 wine had been maintained according to the 2012 and 2011 contracts. Plaintiffs
12 allege the wine received by Defendants was of extremely poor quality, with levels
13 of bacteria that “are consistent with a failure to properly maintain the wine in an
14 appropriate manner, including winery sanitation, topping of wine on a regular
15 basis and generally maintaining the wine according to industry standards.” ECF
16 No. 1 at ¶ 3.8.

17 Plaintiffs have alleged facts that support that Defendants did not act in good
18 faith in performing a specific contract term, namely, that they would perform
19 appropriate maintenance of the product and maintain the product in a clean and
20 appropriately temperature-controlled environment.

21 **(3) Breach of Express Warranties**

22 Under Washington law,

23 Any affirmation of fact or promise made by the seller to the
24 buyer which relates to the good and becomes part of the basis of the
25 bargain creates an express warranty that the goods shall conform to
26 the affirmation or promise.

27 Wash. Rev. Code § 62A.2-313.

28 The more specific a statement the more likely it is an affirmation. *Federal
Signal Corp. v. Safety Factors, Inc.*, 125 Wash.2d 413, 424 (1994). Affirmations
of fact or promises will generally relate to the quality of a good. *Id.* The Court
should consider whether any hedging occurred, the experimental nature of the
good, a buyer’s actual or imputed knowledge of the true condition of the good, and

1 the nature of the defect. *Id.*

2 In their Complaint, Plaintiffs allege that Defendants represented to Plaintiffs
3 that the 2011 and 2012 Vintage Wines would be premium products suitable for
4 resale on the premium market; and on a specific occasion, stated that the Viognier
5 wine would be a “nice wine,” thereby guaranteeing that the wine would be of the
6 premium quality for which Plaintiffs had bargained.

7 Here, Defendants’ representations that the 2011 and 2012 Vintage Wines
8 would be a premium product is an express warranty that the wines would, in fact,
9 be of premium quality suitable for resale on the premium market. Thus, Plaintiffs
10 have established that Defendants breached an express warranty.

11 **(4) Breach of Implied Warranty of Merchantability**

12 A warranty that the goods are merchantable is implied in a contract for their
13 sale if the seller is a merchant with respect to goods of that kind. Wash. Rev. Code
14 § 62A.2-314.

15 Under the UCC, a merchant is

16 a person who deals in goods of the kind or otherwise by his or
17 her occupation holds himself or herself out as having knowledge or
18 skill peculiar to the practices or goods involved in the transaction or
19 to whom such knowledge or skill may be attributed by his or her
20 employment of an agent or broker or other intermediary who by his or
21 her occupation holds himself or herself out as having such knowledge
22 or skill.

23 Wash. Rev. Code § 62A.2-104(1).

24 For purpose of section 62A.2-314, a merchant must be one who deals
25 regularly in goods of the kind involved in the transaction or otherwise have a
26 professional status such that he or she could be expected to have specialized
27 knowledge or skills peculiar to those goods. *Miller v. Badgley*, 51 Wash.App. 285,
28 291 (1988). Thus, liability for breach of implied warranty of merchantability
excludes those merchants who have only a general knowledge of industry
practices. *Id.*

In order for goods to be merchantable, they must at least:

1 (a) pass without objection in the trade under the contract description; and
2 (b) in the case of fungible goods, are of fair average quality within the
description; and
3 (c) are fit for the ordinary purposes for which such goods are used; and
4 (d) run, within the variations permitted by the agreement, of even
kind, quality and quantity within each unit and among all units
involved; and
5 (e) are adequately contained, packaged, and labeled as the agreement
may require; and
6 (f) conform to the promises or affirmations of fact made on the
container or label if any.
Wash. Rev. Code § 62A.2-314(2).

7
8 Courts generally use a reasonable standard to determine whether goods are
9 merchantable. *Federal Signal Corp.*, 125 Wash.2d at 426. A product which
10 conforms to the quality of other brands in the market will normally be
11 merchantable. *Id.* Factors the Court considers when evaluating merchantability
12 include: (1) the usage in the trade, (2) the price actually paid as compared to the
13 standard price, (3) the characteristics of similar goods manufactured by others, and
14 (4) government standards and regulations. *Id.*

15 In their Complaint, Plaintiffs allege they were unable to resell the 2011 and
16 2012 Vintage Wines as premium products. They indicate that many of the Wines
17 were completely unsalvageable and could not be consumed or sold to third parties
18 because of the high levels of bacteria and because the Volatile Acidity exceeded
19 the maximum federal limits.

20 Plaintiffs have alleged facts that support a finding that Defendants were
21 merchants under the UCC, and that the wine produced by Defendants was not
22 merchantable.

23 **(5) Breach of Implied Warranty of Fitness For a Particular Purpose**

24 The implied warranty of fitness for a particular use arises when a buyer
25 makes known a particular intended use for the goods, and relies upon the seller's
26 expertise about fitness in purchasing the goods for that purpose. Wash. Rev. Code
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1 § 62A.2-315.²

2 In their Complaint, Plaintiffs allege that they relied on Defendants’
3 expertise, as winemakers and wine merchants, to produce the premium 2011 and
4 2012 Vintage Wines for Plaintiffs, and that Defendants were aware of Plaintiffs’
5 intention to sell the wine as a premium product. Also, Plaintiffs paid Defendants a
6 consulting fee of \$65 per case of wine. Plaintiffs have established that Defendants
7 breached an implied warranty of fitness for a particular purpose.

8 **(6) Violation of the Consumer Protection Act**

9 To establish a claim under the Washington Consumer Protection Act, the
10 plaintiff must prove five elements: (1) an unfair or deceptive act or practice that
11 (2) occurs in trade or commerce, (3) impacts the public interest, (4) and causes
12 injury to the plaintiff in her business or property; and (5) the injury is causally
13 linked to the unfair or deceptive act. *Michael v. Mosquera-Lacy*, 165 Wash.2d
14 595, 698-699 (2009). A violation of the UCC is not a *per se* showing of public
15 interest sufficient to bring a private action under the Consumer Protection Act.
16 *Haner v. Quincy Farm Chemicals, Inc.*, 97 Wash.2d 753, 763 (1982).

17 In determining whether the claim impacts the public interest, the Court
18 considers four factors that are not necessarily dispositive, nor must they all be
19 present: (1) whether the alleged acts were committed in the course of defendant’s
20 business; (2) whether the defendant advertised to the public in general; (3)
21 whether the defendant actively solicited this particular plaintiff, indicating
22 potential solicitation of others, and (4) whether the plaintiff and defendant have
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24 ²Where the seller at the time of contracting has reason to know any
25 particular purpose for which the goods are required and that the buyer is relying
26 on the seller’s skill or judgment to select or furnish suitable goods, there is unless
27 excluded or modified under the next section an implied warranty that the goods
28 shall be fit for such purpose. Wash. Rev. Code § 62A.2-315.

1 unequal bargaining positions. *Hangman Ridge Training Stables, Inc. v. Safeco*
2 *Title Ins. Co.*, 105 Wash.2d 778, 790-91 (1986). “A breach of a private contract
3 affecting no one but the parties to the contract, whether that breach be negligent or
4 intentional, is not an act or practice affecting the public interest.” *Lightfoot v.*
5 *MacDonald*, 86 Wash.2d 331, 334 (1976). “[I]t is the likelihood that additional
6 plaintiffs have been or will be injured in exactly the same fashion that changes a
7 factual pattern from a private dispute to one that affects the public interest.”
8 *Hangman*, 105 Wash.2d at 790.

9 Here, Plaintiffs have not alleged facts that establish a violation of the
10 Consumer Protection Act, nor does the record permit the Court to find that
11 Defendants violated the Consumer Protection Act. Specifically, the record fails to
12 demonstrate that Plaintiffs’ CPA claim impacts the public interest.

13 (7) Conclusion

14 Here, in balancing the factors set forth above, the Court exercises its
15 discretion and finds that it is appropriate to award judgment in default against
16 Defendants for Plaintiffs’ claims for breach of contract; breach of the implied
17 covenant of good faith and fair dealing; breach of express warranties; breach of
18 implied warranty of merchantability; and breach of the implied warranty of fitness
19 for a particular purpose.

20 Plaintiffs seek damages for \$92,751.96 in actual damages and \$636.00 in
21 taxable costs. These amounts are supported by the record. On the other hand,
22 Plaintiffs are not entitled to their requested statutory damages under the
23 Washington Consumer Protection Act. Similarly, Plaintiffs are not entitled to their
24 attorneys’ fees under the CPA. Because Plaintiffs have not identified any contract
25 provision that authorizes attorneys’ fees, the Court declines to award attorneys’
26 fees.

27 Accordingly, **IT IS HEREBY ORDERED:**

28 1. Plaintiffs’ Motion for Entry of Judgment by Default, ECF No. 13, is

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1 **GRANTED**, in part.

2 2. The District Court Executive is directed to enter judgment in the amount
3 of **\$93,387.96** (\$92,751.96 in actual damages, \$636.00 in taxable costs) in favor of
4 Plaintiffs and against Defendants.

5 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
6 enter this Order, furnish copies to counsel and Defendants, and **close** the file.

7 **DATED** this 15th day of November, 2013.

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s/Robert H. Whaley

ROBERT H. WHALEY
United States District Judge

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