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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OREGON POTATO COMPANY,

Plaintiff,

v.

SEVEN STARS FRUIT COMPANY,
LLC,

Defendant.

CASE NO. C12-0931JLR

ORDER GRANTING MOTION
FOR TEMPORARY
RESTRAINING ORDER

I. INTRODUCTION

This matter is before the court on Plaintiff Oregon Potato Company’s (“OPC”) motion for a temporary restraining order (“TRO”) and preliminary injunction. (Mot. (Dkt. # 5).) The court held a hearing by telephone on June 18, 2012, and all parties were represented by counsel and present for the hearing. The court has considered the motion and all documents filed in support and opposition thereto, including: (1) OPC’s motion for a TRO and preliminary injunction (Dkt. # 5); (2) the declaration of Diana Evens (Dkt.

1 # 5-1), and all exhibits and attachments thereto; (3) the declaration of Frank Tiegs (Dkt. #
2 5-2), and all exhibits and attachments thereto; (4) the declaration of Crane Bergdahl (Dkt.
3 # 5-3), and all exhibits and attachments thereto; (5) OPC's complaint (Dkt. # 1); (6) the
4 responsive memorandum of Defendants Seven Stars Fruit Company, LLC and Monte
5 Maberry (Dkt. # 6); and (7) OPC's reply memorandum (Dkt. # 8). Having also
6 considered the oral arguments of counsel and the relevant law, and being fully advised,
7 the court GRANTS OPC's motion for a TRO.

8 II. BACKGROUND

9 Between November 2011 and May 2012, OPC sold and delivered blueberries and
10 raspberries to Seven Stars, shipping the berries according to Seven Star's instructions
11 either to Seven Stars' cold storage in Lynden, Washington (where Seven Stars is
12 headquartered) or to specific customers designated by Seven Stars. (Compl. (Dkt. # 1) ¶
13 2.4; Evens Decl. (Dkt. # 5-1) ¶ 3.) During this period of time, OPC shipped
14 \$2,418,322.30 worth of berries to Seven Stars. (Evens Decl. ¶ 3; *see* Tiegs Decl. (Dkt. #
15 5-2) ¶ 2.) Seven Stars agreed to pay OPC for the berries. (Compl. ¶ 2.4.)

16 OPC sent invoices to Seven Stars for each shipment of berries. (*Id.* ¶ 2.6.) The
17 invoices specify that payment is to be made within 30 days of the "B/L Date," or the bill
18 of lading date. (*See* Evens Decl. ¶ 4 & Ex. A.) In each instance, OPC's invoice to Seven
19 Stars bears the same date as the bill of lading. (*See id.* Ex. A.)

20 When OPC did not receive payment, Ms. Diana Evens, the accounts receivables
21 manager of OPC, Mr. Frank Tiegs, the President of OPC, and others began contacting
22 Mr. Monte Maberry, the owner and manager of Seven Stars. (*Id.* ¶ 5; Tiegs Decl. ¶¶ 3-5.)

1 Mr. Maberry assured OPC staff that payment from Seven Stars would be forthcoming.
2 (Evens Decl. ¶ 5; Tiegs Decl. ¶ 5.)

3 OPC received partial payment from Seven Stars with respect to only one of its
4 invoices during this time period. (Evens Decl. ¶ 3; Tiegs Decl. ¶ 6.) On March 9, 2012,
5 OPC received a check from Seven Stars in the amount of \$695,257.00, but it was
6 returned by OPC's bank when Seven Stars stopped payment on the check before the
7 funds were transferred. (See Tiegs Decl. ¶ 5.) Then, on March 15, 2012, OPC received a
8 \$300,000.00 payment by wire transfer, and on March 20, 2012, OPC received another
9 \$100,000.00 payment by wire transfer from Seven Stars. (*Id.* ¶ 6.) Seven Stars made
10 these two partial payments with respect to OPC's Invoice No. 1139042, which is for a
11 total of \$509,373.00 and is dated December 12, 2011. (*Id.*) In addition, at oral
12 argument, counsel for both parties represented that Seven Stars made an additional
13 payment to OPC on June 15, 2012 of \$40,000.00. Seven Stars has made no other
14 payments with respect to OPC's invoices. (*Id.*) Thus, to date, Seven Stars has failed to
15 remit payment to OPC for outstanding invoices totaling \$1,978,322,30. (See Evens Decl.
16 ¶ 3 & Ex. A (attaching unpaid invoices).)

17 OPC's accounts receivable with Seven Stars date back seven months. (*Id.* ¶ 9.)
18 OPC has contacted some of Seven Star's customers who have advised that they have paid
19 for the delivery of berries shipped to them from OPC on Seven Stars' account. (*Id.*)
20 OPC, nevertheless, has not received payment on those shipments from Seven Stars. (*Id.*)

21 OPC brought the present action against Seven Stars under the Perishable
22 Agricultural Products Act ("PACA"), 7 U.S.C. § 499e(c)(5). (See generally Compl.)

1 After the complaint in this action was filed, Defendants appeared by counsel. (Not. of
2 App. (Dkt. # 3).) The parties entered into negotiations to resolve the matter without
3 further litigation and without necessitating the filing of a motion for a TRO and
4 preliminary injunction by OPC, and Seven Stars executed a settlement agreement.
5 (Bergdahl Decl. (Dkt. # 5-3) ¶¶ 4-11.) Seven Stars, however, failed to timely follow
6 through with a payment of \$400,000 as agreed. (*Id.* ¶¶ 12-13.)

7 The court is aware of at least one other PACA complaint that has been filed
8 against Seven Stars within approximately the past month. (*See Fruitrade Int'l, Inc. v.*
9 *Seven Stars Fruit Co., et al.*, No. C12-0815JLR (W.D. Wash.)) On May 21, 2012, the
10 court issued a TRO against Seven Stars in that matter as well. (*Id.* at Dkt. # 18.)

11 III. ANALYSIS

12 The court is authorized to issue this TRO by Federal Rule of Civil Procedure
13 65(b). *See* Fed. R. Civ. P. 65(b). To be entitled to a TRO, OPC must show: (1) a
14 likelihood of success on the merits; (2) that irreparable harm is likely, not just possible, if
15 the TRO is not granted; (3) that the balance of equities tips in its favor; and (4) that an
16 injunction is in the public interest. *See Alliance For The Wild Rockies v. Cottrell*, 632
17 F.3d 1127, 1134-35 (9th Cir. 2011). Alternatively, if requirements (2) and (4) are
18 satisfied, and the balance of equities “tips sharply in the plaintiff’s favor,” the plaintiff
19 need only raise “serious questions going to the merits” to be entitled to injunctive relief.
20 *Id.* at 1134–35 (holding that this formulation of the Ninth Circuit’s sliding scale test
21 survives *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008)).
22

1 OPC brought this suit under PACA, 7 U.S.C. §§ 499a–499t, which establishes a
2 nonsegregated trust in which a produce dealer holds produce-related assets in trust as a
3 fiduciary until full payment is made to the produce seller. *Middle Mountain Land &*
4 *Produce Inc. v. Sound Commodities Inc.*, 307 F.3d 1220, 1223-24 (9th Cir. 2002). The
5 trust automatically arises in favor of a produce seller upon delivery of produce and is for
6 the benefit of all unpaid suppliers or sellers involved in the transaction until full payment
7 of the sums owing has been received. *Id.* at 1224. PACA was intended “to increase the
8 legal protection for unpaid sellers and suppliers of perishable agricultural commodities
9 until full payment of sums due have been received by them.” *Id.*

10 OPC’s moving papers show that it fits within the category of produce suppliers
11 that PACA was intended to protect, and an injunction would be within the public interest.
12 Moreover, the balance of equities favors OPC because it has received very little payment
13 (\$440,000.00) in proportion to the overall value of the perishable agricultural goods it has
14 supplied (\$2,418,322.30) while Seven Stars has presumably been able to sell the produce
15 and receive its return.

16 The court next turns to whether OPC is (1) likely to prevail on the merits and (2) is
17 likely to suffer irreparable harm if the TRO is not issued. The record reveals that Seven
18 Stars likely is dissipating the sales proceeds it received from OPC’s produce. At least
19 one of Seven Stars’ checks to OPC has bounced, Seven Stars has refused to pay or
20 commit to pay despite months of demands, and Seven Stars breached a settlement
21 agreement that it entered into with OPC for the express purpose of avoiding the filing of
22 the present motion by failing to timely make a \$400,000.00 payment to OPC. In

1 addition, this is at least the second PACA action filed against Seven Stars within
2 approximately one month. Based on this evidence, it appears that Seven Stars is
3 suffering financial difficulty and using the proceeds from selling OPC's produce for
4 purposes other than repaying OPC. Given this, it is likely that OPC will suffer
5 irreparable harm if the TRO is not issued and the funds are not sequestered in a trust
6 account. *See Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.*, 222 F.3d 132, 139
7 (3rd Cir. 2000) (holding in a PACA case that once the sales proceeds are "dissipated, it is
8 almost impossible for a beneficiary to obtain recovery"). In addition, based on the
9 foregoing facts, the court finds that OPC is likely to prevail on the merits of its PACA
10 claim.

11 Thus, OPC has met all the requirements for injunctive relief set forth in *Cottrell*
12 and Federal Rule of Civil Procedure 65(b), as discussed above. Because this is a motion
13 for a TRO, this decision was rendered with less than a full record and full argument, and
14 so the findings in this decision are subject to modification. The court simply is holding
15 here that OPC has met the threshold requirements for issuance of a TRO. The Court
16 expresses no opinion on whether a preliminary injunction is appropriate.

17 Seven Stars has filed an opposition to OPC's motion for a TRO in which Seven
18 Stars expresses concern that any TRO the court grants should not "go[] beyond the scope
19 of the trust authorized by statute." (Resp. (Dkt. # 6) at 2.) The court is concerned about
20 the scope of the TRO proposed by OPC. OPC seeks to prevent Seven Stars from making
21 any payments to anyone until it pays OPC. In other words, OPC proposes placing a
22 statutory trust on all the proceeds of Seven Stars. Although the breadth of such a trust is

1 extensive, that is precisely the intent behind PACA, as indicated by the following
2 statutory language:

3 Perishable agricultural commodities received by a commission merchant,
4 dealer, or broker in all transactions, and all inventories of food or other
5 products derived from perishable agricultural commodities, and any
6 receivables or proceeds from the sale of such commodities or products,
7 shall be held by such commission merchant, dealer, or broker in trust for
the benefit of all unpaid suppliers or sellers of such commodities or agents
involved in the transaction, until full payment of the sums owing in
connection with such transactions has been received by such unpaid
suppliers, sellers, or agents.

8 7 U.S.C. § 499e. The TRO, however, should not extend to assets outside the trust. *See*
9 *Osborne v. Fong*, No. C 11–0302 SBA, 2011 WL 577415, at *1 (N.D. Cal. Feb. 9, 2011)
10 (“Upon an appropriate showing, the Court may enter a preliminary injunction and freeze
11 the PACA trust assets held in trust by the defendant and prevent payment of these assets
12 to anyone other than the plaintiff.”) (citing *Inn Foods, Inc. v. Fong, LLC*, No. C 07–649
13 SI, 2007 WL 2769849, at *1 (N.D. Cal. Sept. 21, 2007)). Accordingly, the court will
14 craft the TRO in such a manner as to allow OPC to otherwise use funds, but only those
15 that it can demonstrate to the court are not within the PACA trust.

16 In addition, Mr. Maberry contends that although it is true that PACA liability can
17 extend beyond the direct buyer to a shareholder or member of the buyer, an individual is
18 only secondarily liable if the principle purchaser is unable to pay. (*See Resp.* at 2-3.)
19 Moreover, Mr. Maberry asserts that he is only personally liable if he has failed to
20 preserve the trust. (*Id.* at 3.)

21 The court agrees that “individual shareholders, officers, or directors of a
22 corporation who are in a position to control PACA trust assets, and who breach their

1 fiduciary duty to preserve those assets, may be held personally liable under [PACA].”
2 *Sunkist Growers v. Fisher*, 104 F.3d 280, 283 (9th Cir. 1997). Thus, in order to prevail
3 against Mr. Maberry personally, OPC must demonstrate that (1) Seven Stars’ assets are
4 insufficient to satisfy the liability, (2) Mr. Maberry controlled PACA trust assets, and (3)
5 Mr. Maberry breached his fiduciary duty to preserve those assets. *See Wahluke Produce,*
6 *Inc. v. Guerra Marketing Inter’l, Inc.*, No. 1:11-cv-1981 LJO-BAM, 2012 WL 1601687,
7 at *3 (E.D. Cal. May 7, 2012). Based on the facts described above, the court is persuaded
8 that OPC is likely to succeed in demonstrating that Seven Stars’ assets are insufficient to
9 satisfy its liability to OPC, that Mr. Maberry controlled PACA trust assets, and that Mr.
10 Maberry breached his fiduciary duty to preserve those assets. Accordingly, the court
11 finds that OPC is likely to succeed on the merits of its claim against Mr. Maberry
12 personally, and the court will issue the TRO against both Seven Stars and Mr. Maberry
13 personally.

14 Finally, OPC seeks to waive the bond, but Federal Rule of Civil Procedure 65(c)
15 contains no exception for the bond requirement. Thus, the Court will require a bond.

16 IV. CONCLUSION

17 Having found that the factors for a TRO set forth in *Alliance for the Wild Rockies*
18 *v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011), have been met, and in accordance with the
19 forgoing memorandum decision, the court hereby GRANTS OPC’s motion for a TRO
20 (Dkt. # 8).

21 NOW THEREFORE IT IS HEREBY ORDERED, that Mr. Maberry and Seven
22 Stars, and their customers, agents, officers, subsidiaries, assigns, and banking institutions,

1 shall not alienate, dissipate, pay over, or assign any assets of Mr. Maberry or Seven Stars
2 or their subsidiaries or related companies except for payment to OPC until further order
3 of this court or until Mr. Maberry and/or Seven Stars pay OPC the sum of \$1,978,322.30
4 by cashiers check or certified check, at which time this Order will be dissolved. Under 7
5 U.S.C. § 499e(c)(2) of PACA, the assets subject to this Order include all of the assets of
6 Seven Stars and Mr. Maberry, including but not limited to any and all bank accounts at
7 any and all financial institutions, unless Mr. Maberry and/or Seven Stars can prove to this
8 court that a particular asset is not (1) derived from perishable agricultural commodities,
9 (2) other products derived from perishable agricultural commodities, or (3) receivables or
10 proceeds from the sale of such commodities or products.

11 IT IS FURTHER ORDERED that in the event Seven Stars Fruit and/or Mr.
12 Maberry fail to pay OPC the sum of \$1,978,322.30 by cashiers or certified check within
13 two (2) business days of service of this Order, then Mr. Maberry and Seven Stars shall
14 file with this court, with a copy to Plaintiff's counsel, an accounting that identifies all of
15 their assets, liabilities, and each account receivable of Seven Stars signed under penalty
16 of perjury; and that Mr. Maberry and Seven Stars shall also supply to Plaintiff's counsel,
17 within five (5) days of the date of this Order, any and all documents in connection with
18 the assets and liabilities of Seven Stars and its related and subsidiary companies,
19 including, but not limited to, the most recent balance sheets, profit/loss statements,
20 accounts receivable reports, accounts payable reports, accounts paid records, and income
21 tax returns.

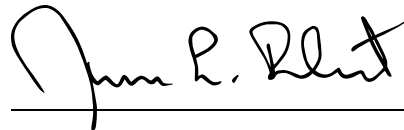
1 IT IS FURTHER ORDERED that this TRO shall remain in effect for 14 days as
2 permitted by Rule 65(b)(2), and shall therefore expire on July 2, 2012.

3 IT IS FURTHER ORDERED that a hearing shall be held on OPC's motion for a
4 preliminary injunction on July 2, 2012, at 10:30 a.m. in the Federal Courthouse in Seattle,
5 Washington.

6 IT IS FURTHER ORDERED that Seven Stars and Mr. Maberry shall file a
7 response to Plaintiff's motion for a preliminary injunction on or before June 25, 2012,
8 and that Plaintiff shall file a reply brief on or before June 29, 2012.

9 IT IS FURTHER ORDERED that OPC immediately submit a bond pursuant to
10 Federal Rule of Civil Procedure 65(c) in the sum of \$5,000.00. OPC may post its bond in
11 cash into the registry of the court.

12 Dated this 18th day of June, 2012.

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15 JAMES L. ROBART
16 United States District Judge
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