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MALIK M. HASAN, M.D.

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

In re

FOX ORTEGA ENTERPRISES, INC.,
dba PREMIER CRU,

Debtor.

MICHAEL D. PODOLSKY, on behalf of
himself and all others similarly situated,

Plaintiff,

vs.

MICHAEL G. KASOLAS, Trustee,

Defendant.

Case No. 16-40050 WJL

Chapter 7

Adv. Pro. 16-04033 WJL

**OBJECTION OF MALIK M.
HASAN, M.D., TO CLASS
SETTLEMENT AGREEMENT;
CERTIFICATE OF SERVICE**

Hearing:

Date: July 27, 2016

Time: 10:00 a.m.

Place: 1300 Clay Street

Room 220

Oakland, CA 94612

Judge: Hon. William J. Lafferty

NOW COMES MALIK M. HASAN, M.D., a creditor and party in interest in the above-captioned Chapter 7 case, and an owner of wine claimed to be property of debtor's estate including wine that is subject to the proposed class settlement agreement in this adversary proceeding, for his objection to said settlement,¹ states as follows:

///

¹ The Notice related to this matter states that parties who opt out of the class, as Dr. Hasan has, cannot be heard to object to the proposed settlement. See Notice, par. 12, Dkt. No. 15-2, p.5. However, Dr. Hasan is a claimant in this case (POC No. 2211) and submits that he owns certain of the property that could be auctioned off under the proposed settlement, and therefore should be heard as an objecting party. Regarding the timing of this filing, Dr. Hasan submits that no party in interest will be prejudiced or unduly harmed by hearing this objection or granting the relief requested herein.

1 I. INTRODUCTION

2 Dr. Hasan purchased wines through the debtor and its principal John Fox over a period
3 of many years. At the time of debtor's Chapter 7 filing, of which Dr. Hasan was not provided
4 notice due to an error in his address, debtor was holding a substantial amount of Dr. Hasan's
5 wine in its warehouse. Other of his wines may have already been purchased through Premier
6 Cru but not yet delivered to California. Under the proposed class settlement, much of this wine
7 would be auctioned without Dr. Hasan's consent. He should be allowed to review the trustee's
8 postpetition physical inventory records as well as debtor's existing sales and inventory records
9 to determine which wines are in fact Dr. Hasan's property, and not property of this estate. He
10 should also be given immediate access to documents and other information on wines delivered
11 to the warehouse postpetition and to be delivered, because his wines may be among those
12 shipments.

13 As a creditor in these cases, albeit one who has opted out of the proposed class in an
14 effort to protect his rights in wines being held by the trustee or to be received by him -- as well
15 as to protect all rights under his homeowner's insurance policy, which covers all his assets
16 wherever located, at a minimum, Dr. Hasan is entitled to receive the records and other
17 information sought herein. Until that time, the court should not approve the proposed class
18 settlement or allow any auction or other sale of wine to go forward.

19 II. FACTS AND PROCEDURAL BACKGROUND

20 A. Dr. Hasan's Notices Were Sent to the Wrong Address.

21 1. This case was filed on January 8, 2016. Dr. Hasan was included on the mailing
22 matrix with an address of 1201 Williams St., Denver, CO 80218. He was not initially, and has
23 not subsequently, been included on Schedule F. Dr. Hasan's correct address is: 1201 **North**
24 **Williams Street, 9th Floor**, Denver, CO 80218. See Declaration of Malik Hasan, M.D.,
25 attached hereto as **EXHIBIT A**, ¶¶3. There is also a South Williams Street in Denver. Id.

26 2. Because of this error, Dr. Hasan, who had purchased wines through John Fox and
27 Premier Cru for many years, did not receive notice of the case filing at its outset. Decl., ¶¶2-3.
28 Nor did he receive debtors' Notice of Possible Dividends [Docket No. 7]; Notice of Chapter 7

Case, Meeting of Creditors, and Deadlines [Docket No. 11]; Order Scheduling Hearing on Motions to Employ [Docket No. 17]; Order Authorizing Employment of West Auctions, Inc to Prepare Inventory, Secure Premises and Prepare Appraisal [Docket No. 27]; Order Authorizing Trustee to Pay Urgent and Necessary Administrative Claims to Protect Assets of the Estate and to Use Cash Collateral [Docket No. 28]; Order Scheduling Hearing on Application to Employ [Docket No. 45]; Amended Trustee's Ex Parte Application for Order Establishing Certain Noticing Procedures [Docket Nos. 72, 100, 136]; **Motion for Sale of Property /Motion for Order Authorizing Sale of Wine Pursuant to Bankruptcy Code Section 363 and to Determine Title to Segregated Wine or Notice thereof [Docket Nos. 235, 236] - not named at all**; or numerous other pleadings or orders served on the mailing matrix herein [e.g., Order Authorizing the Trustee to Employ Brian Nishi as an IT Consultant, Docket No. 73]. Id., ¶4.

3. Dr. Hasan eventually became aware of the bankruptcy filing and engaged Colorado counsel, who prepared Proof of Claim No. 2211 on his behalf and filed the same on June 3, 2016. Decl., ¶5. Claim No. 2211 is a general unsecured claim for \$689,176.92, and is supported by sales orders and other documentation.

B. Colorado Counsel Was Denied Access to Relevant Records.

4. Dr. Hasan Colorado counsel, Glenn W. Merrick of G.W. Merrick & Associates, LLC, of Centennial, Colorado, communicated with professionals in these matters beginning in or about early June, 2016. Id., ¶6. Among other information sought, Counsel requested access to the trustee's postpetition physical inventory records, as well as to debtor's prepetition records related to its inventory, sales and deliveries, but these requests were largely refused. Id.

C. Dr. Hasan Opted Out of the Settlement Class and His Counsel Was Denied Access to Documents Related to Wines Not Identified in the Settlement Papers.

5. Colorado counsel later communicated with Meyers Law Group, counsel for the proposed settlement class, including with respect to Dr. Hasan being shown as having only 97 bottles of wine at the Premier Cru warehouse, whereas in fact he had at least 303 bottles located

1 there as of the petition date, and probably many more than that. Decl., ¶7.² The vast majority of
2 the roughly 600 bottles that, in the fall of 2014, were stated to be in California and ready to ship
3 to Dr. Hasan were in fact never delivered to him. Id. Counsel's requests for further
4 documentation were not met. Id.

5 6. Dr. Hasan opted out of the proposed settlement class in an effort to protect his
6 rights in wines being held by the trustee or to be received by him, as well as to protect all his
7 rights under his homeowner's insurance policy, which covers all his assets wherever located.
8 Decl., ¶8.

9 7. Based on many years of dealing with John Fox and his associates, Dr. Hasan
10 always paid in full for his wines at the time of ordering, with the understanding that he became
11 the owner of the wine as soon he paid for it, whether or not it had already been shipped to
12 Premier Cru in California. Decl., ¶9. In a sense, Premier Cru acted more as Dr. Hasan's purchasing
13 agent than as seller of the wines. Id. Shipping of the wines to California was included in the
14 purchase price but Dr. Hasan always paid to have his wine shipped to Colorado or elsewhere
15 upon his direction. Id. Other of his purchased wine was stored in Premier Cru's warehouse for a
16 time, with the company awaiting his shipping instructions. Id.

17 8. Further in Dr. Hasan's experience with John Fox and Premier Cru, wine orders
18 often took months or years to be shipped to California. Decl., ¶10. He understood that in late
19 2015 Premier Cru was to be receiving shipments of wine, including wine that Dr. Hasan owned.
20 He understands that his Colorado counsel requested access to records and information about
21 postpetition and future shipments from the trustee and class counsel, but was not provided it. Id.

22 9. Certain wines are listed as "oversubscribed" in this case, including in the
23 proposed settlement agreement, meaning that Premier Cru is alleged to have sold the same
24 wines to more than one person in some instances. Dr. Hasan claims entitlement to view records
25 of whoever else may have been sold wines that were also sold to him, to determine who was
26

27 ² As shown in records attached to POC No. 2211, Dr. Hasan paid more than \$1500 per bottle for
28 many the wines at issue.

1 first to purchase, among other relevant information. Decl., ¶11. His Colorado counsel requested
2 access to said records and information from the trustee and class counsel, but was not provided
3 it. Id.

4 10. Without access to inventory, shipping, sales and other records from Premier Cru,
5 or its Chapter 7 bankruptcy trustee and/or counsel for the proposed settlement class, Dr. Hasan
6 cannot adequately protect his rights under his homeowner's insurance policy.

7 III. POINTS AND AUTHORITIES IN OPPOSITION

8 **A. Dr. Hasan's Wine is Not Property of the Estate Subject to Auction in this Case.**

9 Dr. Hasan has been refused access to records of the trustee and debtor to determine
10 exactly which wines are in storage at Premier Cru's facility, which were delivered to debtor
11 postpetition and which may be already paid for and set for future delivery. Without this
12 documentation, Dr. Hasan cannot discover which of his own wines - which by definition are
13 not property of the debtor or its estate - are included in the proposed class settlement agreement.
14 At a minimum, Dr. Hasan should be granted access to the relevant documents immediately or
15 within a reasonable time in advance of any auction sale.

16 Debtor is only empowered to sell property of the estate. 11 USC § 363(b). Section 541
17 "defines what interests of the debtor are included in the bankruptcy estate [but] does not address
18 the threshold questions of the existence and scope of the debtor's interest in a given asset."
19 Fadel v. DCB United LLC (In re Fadel), 492 B.R. 1, 10 (B.A.P. 9th Cir. 2013) (internal
20 citations and quotation marks omitted). Instead, the bankruptcy court must consult
21 nonbankruptcy law "to determine whether, and to what extent, the debtor has any legal or
22 equitable interests in property as of the commencement of the case." Id. (citing Butner v. United
23 States, 440 U.S. 48, 55 (1979)).

24 Dr. Hasan submits that he, and only he, owns or has interests in the wines that he has
25 already paid for, and that title in the wines passed to him at the latest upon delivery in
26 California. Debtor's own website states that sales are deemed to occur in California and that
27
28

1 title passes in California.³ Moreover, to the extent the Premier Cru may be held to have acted
2 more as a purchasing agent than a seller in its dealings with Dr. Hasan, title to wine may have
3 passed on completion of each of the sale orders, long before delivery.

4 Under the UCC, parties to sales transaction can agree to pass title to goods on whatever
5 terms they wish. See Cal. Comm. Code § 2401. California law holds that, “**Unless otherwise**
6 **explicitly agreed** title passes to the buyer [of goods] at the time and place at which the seller
7 completes his performance with reference to the physical delivery of the goods . . . and in
8 particular . . . (a) If the contract requires or authorizes the seller to send the goods to the buyer
9 but does not require him to deliver them at destination, title passes to the buyer at the time and
10 place of shipment; but (b) If the contract requires delivery at destination, title passes on tender
11 there.” Id. (emphasis added).⁴

12 In this case, Dr. Hasan’s sales orders (see POC No. 2211, attachments) specify a delivery
13 address but no charge for delivery. Sales of wine were paid in full at the outset and delivery was
14 to be arranged later, at the buyer’s (now owner’s) expense. Dr. Hasan submits that, based on
15 course of dealing over many years and records thereof, title to the wines located in Premier
16 Cru’s warehouse and to wines delivered or to be delivered to Premier Cru postpetition, may

18 ³ See the Terms and Condition pages of debtor’s now-defunct website, attached to a declaration
19 of Brian Nishi submitted herein, state that, “Any wine sold to you by Premier Cru is sold in California,
20 and title passes to you, the buyer, in California. All orders are shipped by a licensed California wine
21 retailer. The buyer is solely responsible for the shipment of wine.” See Terms and Conditions, attached
22 hereto as **EXHIBIT B**, p.2. On its Shipping Information page Premier Cru stated, “Completed orders are
23 either held for future delivery or shipped by your preferred shipping method. We will not be responsible
24 for any wines damaged by weather once they have left our warehouse.” Id. Nevertheless, Dr. Hasan
reserves all rights to claim that title passes before wines were received in California, based on past
dealings and agreement of the parties, and that the cited Terms of Conditions language is more of a
statement of what law applies to sales as opposed to a statement determining where and when title in
wine passes to the buyer.

25 ⁴ The parties sales documents and course of dealing would show that delivery of wine to a
26 specific location and time was not contracted for at the outset. Instead, delivery was contracted for and
27 paid for by Dr. Hasan after the consummation of the sale transaction. Therefore, the reference in § 2401
28 to passage of title once seller completes its performance with respect to “physical delivery of the goods”
may not apply to Dr. Hasan’s sales.

1 have already passed to him, especially if Premier Cru is determined to be more of a purchasing
2 agent than seller of wines. To the extent title has passed, this estate cannot legally sell those
3 wines as is contemplated under the proposed class settlement agreement.

4 **B. Dr. Hasan Should Be Given Immediate Access to Relevant Documents.**

5 Even if the proposed settlement agreement is allowed to go forward over Dr. Hasan's
6 objections, he should at least be afforded access to the documents and other information
7 referenced herein as to debtor's pre- and post-petition inventory including the trustee's
8 postpetition physical inventory,⁵ and sales records as to past and to-be-delivered wines, right
9 away or within a reasonable time before any auction is to be held.

10 Dr. Hasan should also be allowed immediate access to specific records related to wines
11 designated as "Oversubscribed" in the proposed settlement agreement, including records
12 showing precisely who is purported to have been sold particular Oversubscribed wines, and
13 when. Once title to wine had passed to Dr. Hasan (or any other customer), Premier Cru would
14 have lost all right and power to pass title to another customer. See Cal. Comm. Code § 2403
15 ("A purchaser of goods acquires all title which his transferor had or had power to transfer.").
16 Dr. Hasan may in fact own numerous bottles identified as Oversubscribed in the settlement
17 documents.

18 **C. If Wine is Auctioned Under the Settlement Agreement Before Dr. Hasan Can**
19 **Access Relevant Records, His Ability to Asset a Homeowner's Insurance Claim Could Be**
20 **Lost.**

21 As stated, Dr. Hasan's homeowner's insurance policy covers all his property, wherever
22 located. In order to assess and assert a claim of loss under his policy, he requires access to the
23 documents referenced herein. Once the inventoried wines are auctioned under the proposed
24 settlement agreement – and once other wines that may have been or will be delivered
25

26 ⁵ "I am informed and believe that the [] Trustee retained . . . West Auctions to prepare a physical
27 inventory of all of the bottles in the Premier Cru warehouse." Declaration of Brian Nishi in Support of
28 Motion for Order Authorizing Sale of Wine Pursuant to Bankruptcy Code Section 363 and to Determine
Title to Segregated Wine [Docket No. 235-8, ¶35].

1 postpetition are auctioned as well – Dr. Hasan will have lost his ability to prove which wines
2 were owned by him at any given time, impairing or even destroying his ability to assert a claim
3 under the policy. Any inconvenience to the Trustee, his professionals or any other party in
4 interest herein would be outweighed by the need for Dr. Hasan to access records, which he
5 would pledge to accomplish as efficiently, expeditiously and unobtrusively as possible.

6 IV. PRAYER FOR RELIEF

7 WHEREFORE, Dr. Hasan requests that the court decline to approve the proposed class
8 settlement agreement or, alternatively, if the proposed agreement is to be approved, that the
9 Chapter 7 Trustee and counsel for the proposed class be required to grant access to the
10 documents and other information demanded herein, immediately or within a reasonable time in
11 advance of any auction, and that the court grant such other and additional relief as is just under
12 the circumstances.

13
14 Dated: July 20, 2016

Respectfully submitted,

ELKINGTON SHEPHERD LLP

By: /s/ James A. Shepherd

Counsel for Creditor
MALIK M. HASAN, M.D.

1 **CERTIFICATE OF SERVICE**

2 I, James A. Shepherd, state that I am over the age of eighteen years and not a party to the
3 within action; that my business address is Elkington Shepherd LLP, 409 - 13th Street, 10th
4 Floor, Oakland, CA 94612; and that on the date below, I caused to be served a copy of the
5 within court-filed

6 **OBJECTION OF MALIK M. HASAN, M.D., TO CLASS**
7 **SETTLEMENT AGREEMENT; CERTIFICATE OF SERVICE**
8 **(including Exhibits A & B Thereto);**

9 electronically through the court's ECF system on parties entitled to electronic notice in this
10 case, including the Chapter 7 Trustee, his attorneys and proposed class counsel, in accordance
11 with applicable law.

12 I declare under penalty of perjury under the laws of the United States that the foregoing
13 is true and correct. Executed at Oakland, California on July 20, 2016.

14 /s/ James A. Shepherd