

1 SALLY J. ELKINGTON SBN 142619  
2 JAMES A. SHEPHERD SBN 264400  
3 ELKINGTON SHEPHERD LLP  
4 409 13th Street, Tenth Floor  
5 Oakland, CA 94612  
6 Telephone: 510/465-0404  
7 Facsimile: 510/465-0202  
8 email: [jim@elkshep.com](mailto:jim@elkshep.com)

9 Attorneys for Creditor/Wine Owner  
10 MALIK M. HASAN, M.D.

11 **UNITED STATES BANKRUPTCY COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**  
13 **OAKLAND DIVISION**

14 In re

15 FOX ORTEGA ENTERPRISES, INC.,  
16 dba PREMIER CRU,

17 Debtor.

18 Case No. 16-40050 WJL

19 Chapter 7

20 Adv. Pro. 16-04033 WJL

21 **LIMITED OBJECTION OF DR. MALIK**  
22 **M. HASAN TO OBJECT TO MOTION**  
23 **FOR ORDER AUTHORIZING SALE OF**  
24 **WINE AND FOR RELATED RELIEF**  
25 **[DOCKET NO. 359]; CERTIFICATE**  
26 **OF SERVICE**

27 **Hearing:**

28 Date: August 30, 2016

Time: 10:00 a.m.

Place: 1300 Clay Street

Room 220

Oakland, CA 94612

Judge: Hon. William J. Lafferty

29 MALIK M. HASAN, M.D., a creditor and party in interest in the above-captioned  
30 Chapter 7 case and an owner of certain wine sought to be sold under in the auction sale  
31 proposed under the above-referenced Motion, for his objection thereto, states as follows:<sup>1</sup>

32 Dr. Hasan has reviewed extensive inventory records of the debtor and concluded that, of  
33 the many hundreds of bottles he purchased but never received from the debtor, only a relative  
34 handful (i) remain in inventory; (ii) have not been “Allocated” to him; and (iii) are intended for  
35

36  
37  
38 <sup>1</sup> A factual and procedural background pertaining to Dr. Hasan in this case is found in his  
39 Objection to Class Settlement Agreement [Docket No. 351] and is incorporated herein. Dr. Hasan  
40 reserves all rights to supplement this limited objection.

1 inclusion in the proposed auction sale. Debtor’s allocation of these wines appears to have been  
2 arbitrary. A chart identifying these wines is attached hereto as **EXHIBIT A** (“Additional Opt  
3 Out Bottles”). Dr. Hasan’s records prove he purchased these wines (see Proof of Claim No.  
4 2211) and claims the same as his own and not property of the estate, which by law cannot be  
5 sold at auction. Instead, any order approving the Motion should require those bottles to be  
6 removed from the sale, whereupon Dr. Hasan can take steps to store or ship them.

7 **I. Dr. Hasan Challenges the Arbitrary “Allocation” of the Additional Opt-Out**  
8 **Bottles.**

9 Under the terms of debtor’s Stipulation of Settlement with the class herein, certain wines  
10 in debtor’s warehouse were “Allocated,” meaning as of the Petition Date, “there was a code  
11 entry in the Debtor’s computer inventory system associating a wine by variety and  
12 vintage...with a particular purchaser or purchasers.” Docket No. 315 at 10. No further  
13 explanation on Allocation is provided. During the brief time since he learned of the case filing,  
14 Dr. Hasan has been unable to determine how or why the Additional Opt Out Bottles -- some of  
15 which he purchased in 2010 -- were Allocated to someone other than himself. Perhaps if he had  
16 been properly notified at the outset he could have participated in the critical early activities that  
17 led to mediation and the class settlement and obtained insights into debtor’s Allocation  
18 methodology, whether first to purchase, first to request delivery or some other criteria.

19 Lacking this information, Dr. Hasan objects to the Allocation of the subject wines as  
20 arbitrary. With completed sale orders in hand, he claims sole ownership of the Additional Opt-  
21 Out Bottles.

22 **II. Title to These Wines Passed Upon Purchase or, At the Latest, Delivery in**  
23 **California.**

24 Debtor is only empowered to sell property of the estate. 11 USC § 363(b). Section 541  
25 “defines what interests of the debtor are included in the bankruptcy estate [but] does not address  
26 the threshold questions of the existence and scope of the debtor’s interest in a given asset.”  
27 Fadel v. DCB United LLC (In re Fadel), 492 B.R. 1, 10 (B.A.P. 9th Cir. 2013) (internal  
28 citations and quotation marks omitted). The bankruptcy court must consult nonbankruptcy law

1 “to determine whether, and to what extent, the debtor has any legal or equitable interests in  
2 property as of the commencement of the case.” Id. (citing Butner v. United States, 440 U.S. 48,  
3 55 (1979)).

4 Dr. Hasan submits that he, and only he, owns or has interests in the Additional Opt-Out  
5 Bottles and that title in the wines passed to him at the latest upon delivery in California.  
6 Debtor’s own website stated that sales are deemed to occur in California and that title passes in  
7 California.<sup>2</sup> Moreover, to the extent the Premier Cru may be held to have acted more as a  
8 purchasing agent than a seller in its dealings with Dr. Hasan, title may have passed on  
9 completion of a sale order.

10 Under the UCC, parties to sales transaction can agree to pass title to goods on whatever  
11 terms they wish. See Cal. Comm. Code § 2401. California law holds that, “**Unless otherwise**  
12 **explicitly agreed** title passes to the buyer [of goods] at the time and place at which the seller  
13 completes his performance with reference to the physical delivery of the goods . . . and in  
14 particular . . . (a) If the contract requires or authorizes the seller to send the goods to the buyer  
15 but does not require him to deliver them at destination, title passes to the buyer at the time and  
16 place of shipment; but (b) If the contract requires delivery at destination, title passes on tender  
17 there.” Id. (emphasis added).<sup>3</sup>

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

<sup>3</sup> The parties sales documents and course of dealing would show that delivery of wine to a  
specific location and time was not contracted for at the outset. Instead, delivery was contracted for and  
paid for by Dr. Hasan after the consummation of the sale transaction. Therefore, the reference in § 2401  
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 Dr. Hasan's sales orders (see POC No. 2211, attachments) for the Additional Opt-Out  
2 Bottles specify a delivery address but no charge for delivery. Sales of wine were paid in full at  
3 the outset and delivery was to be arranged later, at the buyer's (now owner's) expense. Dr.  
4 Hasan submits that, based on course of dealing over many years and records thereof, title to the  
5 wines located in the warehouse and to wines delivered or to be delivered postpetition, may have  
6 already passed to him, especially if Premier Cru is determined to have been more of a  
7 purchasing agent than seller of wines. To the extent title passed to Dr. Hasan, this estate cannot  
8 legally sell the Additional Opt-Out Bottles.

9 WHEREFORE, Dr. Hasan requests that, in any order granting the Motion, the court  
10 should require that the Additional Opt-Out Bottles be held out of the proposed auction sale, and  
11 that the court grant such other and additional relief as is just under the circumstances.

12  
13 Dated: August 18, 2016

Respectfully submitted,

ELKINGTON SHEPHERD LLP

By: /s/ James A. Shepherd

Attorneys for Creditor/Wine Owner  
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 **LIMITED OBJECTION OF DR. MALIK M. HASAN TO OBJECT TO  
7 MOTION FOR ORDER AUTHORIZING SALE OF WINE AND FOR  
8 RELATED RELIEF [DOCKET NO. 359]; CERTIFICATE OF SERVICE  
9 (including Exhibits A & B Thereto);**

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

13 I declare under penalty of perjury under the laws of the United States that the foregoing  
14 is true and correct. Executed at Oakland, California on August 18, 2016.

15 /s/ James A. Shepherd

