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Attorneys for Michael G. Kasolas, Trustee

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re
FOX ORTEGA ENTERPRISES, INC.,
dba PREMIER CRU,

Debtor.

Case No. 16-40050-WJL

Chapter 7

**DECLARATION OF MARK S. BOSTICK IN
SUPPORT OF APPLICATION FOR ORDER
SHORTENING TIME FOR NOTICE OF
HEARING ON MOTION FOR ORDER
APPROVING SURCHARGE AGREEMENT**

I, Mark S. Bostick, declare:

1. I am duly admitted to practice before the above-entitled court and am a partner with the firm of Wendel, Rosen, Black & Dean, counsel for Michael G. Kasolas, trustee ("Trustee") of the above-captioned estate, and I have personal knowledge of the matters set forth herein. If called as a witness I would and could competently testify as follows.

2. This declaration is filed in support of the *Trustee's Application for Order Shortening Time for Notice of Hearing on Motion for Order Approving Surcharge Agreement* in compliance with Bankruptcy Local Rule 9006-1(c).

1 3. Attached hereto as **Exhibit A** is a copy of the Trustee's *Motion for Order*
2 *Approving Surcharge Agreement* (the "Motion") together with my declaration in support thereof.

3 3. The order reducing of time for notice is requested in order that the Motion may be
4 heard and determined at the same time as the professionals' fees applications set for hearing on
5 December 14, 2016, so that distributions may be made before the end of the year.

6 4. Counsel for the secured creditors Community Bank of the Bay (David Rapson) and
7 Adv. Rest. Fin LLC (Angela Velen), and counsel for the United States Trustee (Maggie McGee),
8 have confirmed to me or my office that they consent to reducing time for notice and having the
9 Motion heard December 14, 2016.

10 5. No previous time modifications have been sought in connection with this Motion;
11 reducing time for the Motion will not otherwise affect scheduling in the case.

12 I declare under penalty of perjury under the laws of the United States of America that the
13 foregoing is true and correct and that this declaration was executed in Oakland, California on
14 December 7, 2016.

15 /s/ Mark S. Bostick

16 Mark S. Bostick

17 Attorneys for Michael G. Kasolas, Trustee
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EXHIBIT A

Mark S. Bostick (Bar No. 111241)
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In re

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dba PREMIER CRU,

Debtor.

Case No. 16-40050-WJL

Chapter 7

**MOTION FOR ORDER APPROVING
SURCHARGE AGREEMENT**

Date:

Time:

Place: 1300 Clay Street
Courtroom 220
Oakland, CA 94612

Judge: The Hon. William J. Lafferty

TO THE HONORABLE WILLIAM J. LAFFERTY, UNITED STATES BANKRUPTCY
JUDGE:

Michael G. Kasolas, the duly appointed chapter 7 trustee of the above-captioned estate
("Trustee"), hereby moves for an order approving an Agreement re Surcharge of Collateral
("Agreement") with Community Bank of the Bay ("CBB") and Advance Restaurant Finance, LLC
("ARF"), a copy of which is attached to the Declaration of Mark S. Bostick filed in support

1 hereof. This motion is brought under 11 U.S.C. §§ 506(c), 363(c)(2)(A), 510(a) and 105(a) based
2 on the following facts.

3 1. Pursuant to a court approved Stipulation of Settlement between the Trustee and the
4 class representative of parties claiming ownership rights in the debtor's wine inventory, all wine
5 inventory was sold at auction on August 30, 2016, for \$3,676,000, subject to adjustments. Under
6 the formulae set forth in the Stipulation for Settlement, the proceeds are to be divided between the
7 class and the estate. The Trustee's proposed division of funds between the estate and the class
8 (and sub-classes) –subject to approval by the class counsel - is set forth in the attached **Exhibit A**.

9 2. The Trustee believes that CBB and ARF (the "Secured Creditors") hold duly
10 perfected and unavoidable personal property liens on the debtor's inventory securing their
11 respective claims of about \$1,150,000.00 and \$150,000.00. In connection with the Trustee's
12 motions to approve the Stipulation of Settlement and the sale of wine inventory, the Secured
13 Creditors agreed to not assert any lien on the share of sale proceeds going to the class; but as to the
14 estate's share of proceeds, their liens were expressly reserved.

15 3. As provided under the Agreement, the Secured Creditors agree that up to One
16 Million Dollars of their collateral may be used to pay the Trustee's administrative and professional
17 fees, which they agree were necessary to the preservation and disposition of the collateral.

18 4. The Agreement further provides that the Trustee will transfer \$250,000.00 to CBB
19 to hold as collateral pending the sale of real property located at 1011 University Ave., Berkeley,
20 California (the Real Property"), on which Real Property CBB holds three deeds of trust. An offer
21 to purchase the Real Property for \$6,400,000.00 has been accepted by the owner of Real Property
22 (the "Contract of Sale"), which price would be sufficient to pay CBB's secured claim in full. The
23 closing date for the Contract of Sale was recently extended from December 20, 2016 to December
24 30, 2016. If CBB is paid in full from the sale of the Real Property, CBB will return the \$250,000
25 to the estate.

26 5. The Trustee has made no other agreement with Secured Creditors other than as
27 provided in the Agreement except that the parties have an understanding that CBB will look first
28

1 to the sale proceeds of the Real Property before enforcing its liens on the estate's personal
2 property.

3 **DISCUSSION**

4 The Agreement demonstrates the Secured Creditors' recognition of the value of the estate's
5 professional's services rendered to preserve, obtain and dispose of their collateral and to the estate
6 for creating value and enabling CBB's liens to be satisfied from the sale of non-estate assets in a
7 timely and beneficial manner. There is a hearing set for December 14, 2016 on professional fees.
8 No professionals have received payment since this case commenced.

9 The Court is authorized to approve the Agreement under the Bankruptcy Code provisions
10 cited above.

11 For these and other reasons as may be presented at the hearing the Trustee submits that
12 approval of the Agreement is appropriate and in the best interests of creditors and the estate.

13
14 DATED: December 7, 2016

WENDEL, ROSEN, BLACK & DEAN LLP

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16 By: /s/ Mark S. Bostick

17 Mark S. Bostick

18 Attorneys for Michael G. Kasolas, Trustee
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SUBCLASS DISTRIBUTION ANALYSIS

		Unfettered	Unallocated	New Bottles	Purchased	Oversubscribed	Segregated	Segregated Oversubscribed	Total:
Purchase	Main List	\$139,187	\$316,538	\$172,656	\$2,107,207	\$593,191	\$143,246	\$77,976	\$3,550,000
	Unfettered List	\$126,000							\$126,000
	From Bott				\$70,322				\$70,322
	Total Purchase:	\$265,187	\$316,538	\$172,656	\$2,177,529	\$593,191	\$143,246	\$77,976	\$3,746,322

Deductions	Redeemed						\$29,595		\$29,595
	Hasan				\$2,103	\$3,693		\$2,352	\$8,149
	Bott to Buy				\$148,321		\$19,906		\$168,228
	SWA Rejects	\$88,350			\$27,633	\$3,145	\$333		\$119,461
Total Deductions:		\$88,350	\$0	\$0	\$178,057	\$6,838	\$49,834	\$2,352	\$325,431

Net

Total	\$176,837	\$316,538	\$172,656	\$1,999,472	\$586,352	\$93,412	\$75,624	\$3,420,891
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To Estate:	\$176,837	\$316,538	\$172,656	\$999,736	\$293,176	\$18,682	\$30,249	\$2,007,875
To Class:				\$999,736	\$293,176	\$74,729	\$45,374	\$1,413,016

EXHIBIT "A"

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APPROVING SURCHARGE AGREEMENT**

I, Mark S. Bostick, declare:

I am duly admitted to practice before the above-entitled court and am a partner with the firm of Wendel, Rosen, Black & Dean, counsel for Michael G. Kasolas, trustee ("Trustee") of the above-captioned estate, and I have personal knowledge of the matters set forth herein. If called as a witness I would and could competently testify as follows.

1. I submit this declaration in support of the Trustee's Motion for Order Approving Surcharge Agreement (the "Motion").
2. Attached hereto as **Exhibit A** is a true and correct copy of the executed Agreement re Surcharge of Collateral together with an addendum to the agreement to be executed today.

4. The Disposition Table attached as Exhibit A to the Motion was prepared by Brian Nishi and appears to be accurate and complete; it is currently under review for approval by class counsel and the Trustee; once it is finally approved, the funds will be allocated accordingly.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed in Oakland, California on December 7, 2016.

Attorneys for Michael G. Kasolas, Trustee

AGREEMENT RE SURCHARGE OF COLLATERAL

Community Bank of the Bay ("CBB") and Michael G. Kasolas ("Kasolas"), trustee of the chapter 7 estate of Fox Ortega Enterprises Inc., Case No. 16-40050-WJL, agree as follows:

RECITALS

1. Fox Ortega Enterprises Inc., dba Premier Cru ("Debtor"), filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code in Case No. 16-40050-WJL on January 8, 2016, thereby creating the Debtor's Chapter 7 bankruptcy estate (the "Estate").
2. Kasolas is duly appointed and acting trustee of the Estate.
3. Among the assets of the Estate was the Debtor's claims to and rights in about 79,000 bottles of wine (the "Wine Inventory") located at its warehouse facility located at 1011 University Avenue, Berkeley, California (the "Facility").
4. Over 6,000 customers of the Debtor also held rights and interests in the Wine inventory that they claimed was superior to those of the Estate.
5. The Debtor is indebted to CBB under three promissory notes, the estimated total current outstanding balance of which is about \$1,150,000.00 (the "Total Debt"). Each of the notes are secured by the Debtor's inventory and equipment under security agreements duly perfected as indicated in the footnote below.¹
6. About \$1,000,000 of the Total Debt is also secured by deeds of trust on the Facility, while the balance of about \$150,000 is to be paid from the proceeds of the sale of the Facility also pursuant to a court-approved settlement agreement between Saul Gevertz, the managing member of 1011 University LLC and Kasolas dated February 23, 2016.

¹ The documentation creating and perfecting the security interests includes the following: (1) a promissory note in the original principal amount of \$1,250,000.00 dated May 4, 2009, a Security Agreement of even date and a UCC-1 Financing Statement filed with the California Secretary of State on May 8, 2009 as amended on July 4, 2011 [Filing No. 11-72757075] and as continued by a continuation statement filed November 12, 2013 [Filing No. 13-73861932]; (2) a promissory note in the original principal amount of \$1,230,000.00 dated August 4, 2010, a Security Agreement of even date and the filed Financing Statements referenced above; (3) a promissory note dated December 22, 2010 in the principal amount of \$200,000, a Security Agreement of even date and the Financing Statements referenced above.

7. There is currently pending an executed contract for the sale of the Facility for \$6,400,000.00 set to close on December 20, 2016. The Facility sale proceeds are expected to be sufficient to pay the Total Debt in full.

8. The Debtor's Wine Inventory was subject to a junior position security interest in favor of Adv. Rest. Fin. LLC ("ARF") securing a debt in the approximate amount of \$150,000.00.

9. Under a court-approved settlement agreement between Kasolas and the class representative of all customers claiming a superior right or claim to the Wine Inventory, the Wine Inventory was sold and the proceeds thereof are to be distributed between the Estate and the class members as provided in the agreement. It is estimated that approximately \$1,800,000 will be distributed to the Estate (the "Estate's Settlement Proceeds") with the balance to be distributed to the classes and other expenses as provided under the agreement. As part of the class settlement agreement, all rights of the class members in the proceeds disbursed to the Estate are assigned to the Trustee. Pursuant to the order authorizing sale, the Wine Inventory liens of CBB and ARF attach to the Estate Settlement Proceeds to the same extent as they attached prior to the sale.

10. The trustee's professionals have filed their interim applications for compensation in the bankruptcy case and the total amount of those, excluding any fees as may have been earned by the trustee, exceeds \$1,000,000.00.²

11. The parties hereto agree that the trustee's professionals should be paid for their services from the Estate's Settlement Proceeds and agree as follows.

AGREEMENT

A. Kasolas shall obtain an order authorizing him to pay the sum of \$250,000.00 from the Estate's class settlement proceeds to CBB to hold as additional collateral to secure the Estate's obligation to pay the Total Debt (the "Fund");

² The professional applications for compensation include those of Wendel, Rosen, Black & Dean LLP in the sum of \$962,383.00 in fees and \$4,259.76 in costs; Kokjer., Pierotti, Maiocco & Duck LLP in the sum of \$145,385.50 in fees and \$82.84 in costs; Arent Fox in the sum of \$16,102.50 in fees and \$1,227.95 in costs and BMC Group, Inc in the sum of \$21,079.00 in fees and \$32,926.44 in costs. In addition, Brian Nishi, who is not a professional, is seeking allowance of an administrative claim for \$117,609.90, \$31,484.60 of which will be chargeable against the Estate Settlement Proceeds with the balance to be paid as preservation expenses as provided under the class settlement agreement).

B. Kasolas may surcharge CBB's liens on the Estate's Settlement Proceeds to pay professional administrative expenses up to \$1,000,000.00 as expenses that were reasonable and necessary to preserve and dispose of the Wine Inventory to the benefit of lienholders.

C. To the extent the Total Debt is paid off from the Facility sale proceeds, CBB shall return the Fund to Kasolas; to the extent the Facility sale proceeds are insufficient to pay the Total Debt, CBB may draw on the Fund to the extent necessary to pay any deficiency in full and shall remit any balance to Kasolas together with an accounting for the Facility sale proceeds. To the extent the Facility sale proceeds and the Fund are insufficient to pay the Total Debt in full, all of the CBB's rights and interests under its security interests are preserved in the remaining Estate Settlement Proceeds.

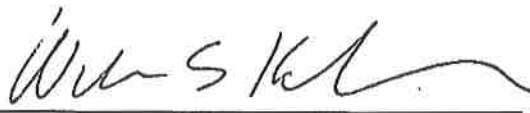
D. The parties shall continue to cooperate to facilitate the sale of the Facility.

E. This agreement is subject to Bankruptcy Court approval.

F. Adv. Rest. Fin LLC consents to the surcharge as stated herein.

IT IS SO AGREED:

Dated: 11-23-16



President, Community Bank of the Bay

Dated: 11/28/16



Michael G. Kasolas, Trustee

Dated:

Angela A. Velen, Counsel for Adv. Rest.
Fin. LLC.

B. Kasolas may surcharge CBB's liens on the Estate's Settlement Proceeds to pay professional administrative expenses up to \$1,000,000.00 as expenses that were reasonable and necessary to preserve and dispose of the Wine Inventory to the benefit of lienholders.

C. To the extent the Total Debt is paid off from the Facility sale proceeds, CBB shall return the Fund to Kasolas; to the extent the Facility sale proceeds are insufficient to pay the Total Debt, CBB may draw on the Fund to the extent necessary to pay any deficiency in full and shall remit any balance to Kasolas together with an accounting for the Facility sale proceeds. To the extent the Facility sale proceeds and the Fund are insufficient to pay the Total Debt in full, all of the CBB's rights and interests under its security interests are preserved in the remaining Estate Settlement Proceeds.

D. The parties shall continue to cooperate to facilitate the sale of the Facility.

E. This agreement is subject to Bankruptcy Court approval.

F. Adv. Rest. Fin LLC consents to the surcharge as stated herein.

IT IS SO AGREED:

Dated:

President, Community Bank of the Bay

Dated:

Michael G. Kasolas, Trustee

Dated: 12-1-16



Angela A. Velen, Counsel for Adv. Rest.
Fin. LLC.

**ADDENDUM TO
SURCHARGE AGREEMENT**

THIS ADDENDUM TO AGREEMENT RE SURCHARGE OF COLLATERAL ("Addendum"), dated for reference purposes as of December 7, 2016, is an addition to and a modification of that Agreement re Surcharge of Collateral (the "Surcharge Agreement") first executed on November 23, 2016, between MICHAEL G. KASOLAS ("Trustee") and COMMUNITY BANK OF THE BAY ("Secured Creditor"), with respect to the Estate's Settlement Proceeds. The Surcharge Agreement, as modified by this Addendum, may be referred to collectively as the "Agreement." In the event of any conflict between the Surcharge Agreement and this Addendum, the terms and provisions of this Addendum will govern. Capitalized terms used in this Addendum and not otherwise defined have the meanings set forth in the Surcharge Agreement. The paragraph numbers and captions in this Addendum correspond to the paragraph numbers and captions of the Surcharge Agreement being modified.

Paragraph 11: Paragraph 11 is deleted and replaced with the following:

The parties hereto agree that the bulk of the trustee's professional services, fees and expenses were reasonable and necessary costs of preserving or disposing of the wine inventory to the benefit of Secured Creditor and agree that they may be paid from the Estate's Settlement Proceeds as provided below.

Paragraph H (New): Paragraph is added after Paragraph G and provides as follows:

It is the parties' intent that this Agreement shall not affect the amount of the secured parties' claims.

Except as set forth in this Addendum, all of the other terms of the Surcharge Agreement remain in full force in effect.

SECURED CREDITOR:

TRUSTEE:

COMMUNITY BANK OF THE BAY

By: _____

By: _____

Name: _____

Michael G. Kasolas, Trustee

Its: _____

Date: December 7, 2016

Date: December 7, 2016