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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

**SUPPLEMENTAL APPLICATION TO
EMPLOY COUNSEL FOR TRUSTEE ON
CONTINGENCY BASIS**

**TO: THE HONORABLE WILLIAM J. LAFFERTY, UNITED STATES BANKRUPTCY
JUDGE AT OAKLAND, CALIFORNIA AND THE U.S. TRUSTEE:**

Michael G. Kasolas ("Applicant"), trustee of the estate of Fox Ortega Enterprises, Inc., doing business as Premier Cru ("Debtor"), hereby applies for an order modifying his counsel's employment agreement to include contingency fee provisions and subject to and on the terms and for the reasons set forth below.

1. Debtor filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code on January 8, 2016, and Applicant was thereafter appointed as chapter 7 trustee.

2. Applicant filed his original application to employ Wendel, Rosen, Black & Dean LLP ("Wendel Rosen") as his counsel in this case on January 20, 2016, (the "Employment

Application”) [Doc. # 13]; an order granting the application and authorizing Wendel Rosen’s employment was entered on February 8, 2016 [Doc. # 62] (the “Employment Order”).

3. The Employment Application provided that all of Wendel Rosen’s services would be compensated on an hourly basis, including services relating to its investigation and prosecution of avoidance claims on behalf of the estate.

4. Wendel Rosen filed its First Interim Application for Compensation on November 16, 2016, for services rendered through October 31, 2016 [Doc #465]. Those services mostly related to title disputes and the disposition of the estate’s wine inventory. An order granting the fee application was entered on December 16, 2016 [Doc #500].

5. Applicant now wishes to pursue the estate’s avoidance claims and European wine account claims and, at the Court’s suggestion, Applicant seeks to modify Wendel Rosen’s Employment Application effective from November 1, 2016, to provide that it be compensated on a contingency fee basis for its services to investigate, prosecute and collect the estate’s avoidance claims under 11 U.S.C. §§544, 547, 548, 549, 550 or 553 on the terms set forth in Paragraph 7 below. All other services performed by Wendel Rosen in the case, such as claims objections, compromise enforcement, creditor communications, and other administrative related-matters, will continue to be compensated according to the terms of its Employment Application.

6. The contingency fee arrangement does not apply to “net-winner” claims arising from the Debtor’s Ponzi scheme. Applicant intends to retain counsel to pursue those claims on a contingency basis upon further application to the Court.

7. The proposed terms of the contingency fee arrangement to apply to Wendel Rosen’s prosecution and collection of avoidance and European wine claims are as follows:

(a) 30% of the gross recovery (as such term is defined below) if the recovery is obtained before the filing of any lawsuit or the first day of any mediation or settlement conference;

(b) 33⅓% of the gross recovery if the recovery is obtained after the filing of a lawsuit, or after the first day of any mediation or settlement conference;

(c) 40% of the gross recovery if the recovery is obtained after 10 days before the trial date first set in the matter;

(d) 45% of the gross recovery if the recovery is obtained after Applicant files an appellate brief in any appeal from a Court judgment;

(e) The term “gross recovery” means the total present or fair market value of everything of value recovered for Applicant, including, without limitation, the value of non-cash items, from any and all defendants, adverse parties, third persons, insurance carriers, or other sources; to the extent that a claim by the transferee is reduced, its value shall be determined at the end of the case by multiplying the amount of any reduction by the percentage of any dividend paid on claims of the same class. The term “obtained” means when funds are received or in the case of a settlement when the payment obligation is in writing and is binding on the transferee subject only to court approval and the funds are subsequently received according to the agreed terms;

(f) If there is no recovery on a matter, counsel will not receive attorneys’ fees with respect to that matter;

(g) Costs advanced by counsel in connection with its pursuit of avoidance claims, including third party collection costs (including the cost of collection agents in Europe) and attorneys’ fees incurred to enforce out-of-state judgments shall be reimbursed to counsel from recoveries or other unencumbered assets of the estate, subject to Bankruptcy Court approval;

(h) Counsel will not settle Applicant’s claims without prior approval of Applicant and the Bankruptcy Court; and

(i) Any disputes under the terms of this contingency fee arrangement shall be adjudicated by this Bankruptcy Court.

8. All other terms of the Employment Application shall remain in effect, excepting those matters referenced in Paragraph 6, which shall be pursued if at all, on terms as approved by separate application.

9. Applicant believes that a contingency fee arrangement is in the best interests of the estate and creditors as it will insure that the lion’s share of funds recovered from avoidance claims will be available to pay unsecured creditors of the estate.

10. Applicant believes that the firm of Wendel Rosen possesses the requisite integrity, skill, intelligence and familiarity with proceedings under the Bankruptcy Code so as to enable

1 them to perform these professional services beneficial to Applicant and to creditors of the estate.

2 11. Applicant maintains that Wendel Rosen is a disinterested party and it has no
3 conflicts or material connections to the Debtor, any other party in interest, including potential
4 avoidance claim defendants or European wine merchants, their respective attorneys or
5 accountants, the U.S. Trustee, or any person employed in the office of the U.S. Trustee, except as
6 previously disclosed and it represents no interest adverse to the estate in the contingency matters
7 upon which Wendel Rosen is to be retained.

8 WHEREFORE, Applicant requests that an order be entered under 11 U.S.C. §328 (a)
9 modifying the Wendel Rosen Employment Order to incorporate the contingency fee provisions set
10 forth herein effective from November 1, 2016.

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12 DATED: February 3, 2017

/s/ Michael G. Kasolas
Michael G. Kasolas, Trustee