

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

**NOTICE AND OPPORTUNITY FOR
HEARING ON MOTION FOR ORDER
APPROVING COMPROMISE WITH
ADVANCED RESTAURANT FINANCE, LLC**

TO: THE TWENTY LARGEST CREDITORS, PARTIES REQUESTING SPECIAL NOTICE, THE U.S. TRUSTEE, THE DEBTOR AND OTHER INTERESTED PARTIES:

PLEASE TAKE NOTICE THAT Michael G. Kasolas (“Kasolas” or “Trustee”), the chapter 7 trustee for the bankruptcy estate of above-captioned debtor (“Debtor”), has filed a motion under Bankruptcy Rule 9019 (the “Motion”) for an order approving his compromise with Advanced Restaurant Finance, LLC (“ARF”). The Motion is based on the facts and merits summarized below.

The Compromise Terms

A copy of the parties’ Settlement Agreement is attached as **Exhibit A** (the “Agreement”) and is made a part hereof. It provides that subject to certain conditions, Kasolas will pay ARF \$70,000 in full satisfaction of its secured claim.

Factual Background and Merits of Compromise

The Debtor filed its voluntary petition for relief under chapter 7 of the Bankruptcy Code on January 8, 2016. Kasolas is the duly appointed trustee in the case. ARF holds a second position security interest in all assets of the Debtor, securing a debt of \$146,423.04. ARF acquired the debt and security position from Mission Valley Bank, which had loaned the Debtor \$150,000.00. ARF’s lien is behind that of Community Bank of the Bay (“CBB”), whose first position lien secures a debt of about \$1,310,000.00. CBB’s debt is secured by additional collateral in the form of junior deeds of trust on real property owned by 1011 University LLC (the “Realty”), which Realty is in contract to be sold for an amount believed to be sufficient to pay off CBB’s secured claim(s). The Trustee currently holds about \$760,000.00 in sale proceeds from the wine located at the Debtor’s warehouse which is net of obligations to pay class members under the Stipulation of Settlement approved on July 29, 2017 [Doc # 365]. Other assets that may be subject to the liens are yet to be collected.

A condition of the Agreement is that CBB be paid at least 90 percent of its claim from the sale of the Realty or agree to release its claim for less than \$200,000. The Realty is in contract to be sold and the condition that CBB be paid at least 90 percent of its secured claim is expected to be met.

In settling with ARF, the Trustee is releasing it from the following potential claims: (1) the claim that its security interest never attached to the sale proceeds because the Debtor did not own the

inventory; (2) a preference claim to avoid about \$24,000 in payments made to ARF during the 90-day period prior to the filing of the Debtor's bankruptcy petition filing (made while the Debtor was operating a Ponzi scheme); (3) a claim to determine the validity and extent of ARF's security interests based on inadequate documentation or lack of value of the collateral covered by the lien.

The Trustee submits that the proposed compromise is fair and equitable and in the best interests of creditors under the factors set forth in *In re A&C Properties*, 784 F.2d 1377 (9th Cir. 1986), *cert denied*, 479 U.S. 854 (1986), because it: (1) avoids the potentially costly litigation to determine the Debtor's ownership interests in the sold wine (to determine if the lien attached), the result of which is uncertain and would be amenable to appeal; (2) assuming that ARF's lien rights are enforceable, as the Trustee does, it results in a benefit to the estate of \$76,473.00 plus accrued interest, based on the difference between the amount of ARF's secured claim and the settlement payment; (3) the risk that CBB is paid less than 90 percent on its claim from the Realty is eliminated by the condition that requires it to be so paid before the settlement payment becomes enforceable.

Procedure to Object and Request a Hearing

PLEASE TAKE FURTHER NOTICE that this matter is governed by Bankruptcy Local Rule 9014-1(b)(3), which states:

Any objection to the requested relief, or a request for hearing on the matter, must be filed and served upon the initiating (undersigned) party within twenty-one (21) days of mailing the notice (i.e. by May 2, 2017.

Any objection or a request for a hearing must be accompanied by any declarations or memoranda of law any requesting party wishes to present in support of its position;

If there is no timely objection to the requested relief or a request for hearing, the court may enter an order granting the relief by default;

The initiating party will give at least seven (7) days written notice of the hearing to the objecting or requesting party, and to any trustee or committee appointed in the case.

Any objection or request for hearing must be served on the undersigned and filed with the Clerk of the United States Bankruptcy Court, Northern District of California, Oakland Division, 1300 Clay Street, Room 300, Oakland, CA 94612, or in the case via Pacer.

PLEASE TAKE FURTHER NOTICE that the Motion and supporting declaration of Mark S. Bostick are on file and may be obtained from the Bankruptcy Court Clerk, through Pacer at <https://ecf.canb.uscourts.gov/>, or upon request from the undersigned.

Dated: April 11, 2016
[Date of Mailing]

/s/ Mark S. Bostick
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Attorneys for Michael G. Kasolas, Trustee

EXHIBIT A

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into as of March 31, 2017, between Michael G. Kasolas, Trustee ("Trustee" or "Kasolas") of the chapter 7 bankruptcy estate of Fox Ortega Enterprises, Inc., doing business as Premier Cru, the Debtor ("Debtor" or "Fox Ortega") and Advanced Restaurant Finance, LLC ("ARF").

FACTUAL RECITALS

This Agreement is made with reference to the following recitals of facts, all of which the Parties affirm and acknowledge are true and correct.

1. On January 8, 2016 ("Filing Date"), the Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code, thereby commencing Case No. 16-44050 (the "Case"), and Kasolas was appointed and continues to serve as trustee of the Fox Ortega bankruptcy estate ("Estate") in the Case.

2. ARF holds a secured claim against all personal property of Debtor based on the following documents:

(a) The Merchant Agreement between Mission Valley Bank and Fox Ortega Enterprises Inc., as merchant, dated September 24, 2014, as amended on June 18, 2015, reflecting a loan amount of \$150,000.00.

(b) A UCC-1 Financing Statement covering "all personal property" filed by Corporation Service Company, as representative, with the California Secretary of State on September 22, 2014.

(c) A Transfer Agreement dated January 15, 2016, between Mission Valley Bank and ARF.

(d) An amended proof of claim filed on July 6, 2016, by ARF in the sum of \$146,423.04 confirming the balance due on the debt.

3. ARF's security interest in the Debtor's personal property is subordinate to that of Community Bank of the Bay ("CBB"), which perfected its security interest(s) on or about May 8, 2009, and filed timely extension(s) thereof. The secured debt of CBB is about \$1,400,000.00.

4. The Trustee currently holds net proceeds from the sale of wine located at the Debtor's warehouse of about \$800,000.00. This amount is subject to administrative expenses as well as CBB's lien. All rights and remedies of customers in the wine that was sold by the Trustee was assigned to the Trustee under a class action settlement. Questions of who held title to the wine or who has superior rights to the wine have not been determined.

5. CBB holds additional collateral in the form of junior deeds of trust on the Debtors' former leasehold premises located at 1011 University Avenue, Berkeley, California (the

“Real Property”) It hopes to be paid off or in large part from the proceeds of any sale of that property.

6. In addition, it is as yet undetermined whether ARF's lien attached to any of the wine bottles held in the Debtor's warehouse because the vast majority of those had been paid for and have been allocated to customers of Fox Ortega.

7. In the 90 days before the Filing Date, the Debtor made three payments to Mission Valley Bank on account of its debt in the total sum of \$24,428.86. In 2016, the Debtor's chief executive officer, John Fox, entered a plea agreement admitting that the Debtor was in effect engaged in a Ponzi scheme at all times from 2012. The Trustee contends that the payments to Mission Valley Bank were therefore not made in the ordinary course of business and are avoidable as preferential transfers.

The parties wish to resolve their disputes and eliminate delay and uncertainty and avoid expense of any potential litigation and agree as follows:

AGREEMENT

1. **Settlement Payment Amount.** The Trustee shall pay ARF \$70,000 in full satisfaction of its secured debt within 14 days upon the occurrence of the following conditions:

A. The Real Property is sold for a sum sufficient to pay CBB at least 90 percent of its secured debt or CBB agrees to release its secured claim for not more than \$200,000.00.

B. This Agreement is approved by the United States Bankruptcy Court presiding over the Case.

2. **Anticipated Timing of Settlement Payment.** The parties anticipate that if the conditions above are met that the Trustee will make the settlement payment to ARF by no later than May 15, 2017. The date for performance may be extended up to 60 days to allow the conditions to occur.

3. **Entitlement to Unsecured Claim.** ARF's right to assert that balance of its claims as an unsecured claim is preserved. It will have 30 days from the date it receives payment to amend its proof of claim in the case. If it fails to do so, it shall be left with no claim in the case. waivers and releases

4. **Release.** Upon its receipt of payment, ARF shall release its secured claim(s) against the Debtor's estate.

5. **Integrated Agreement.** This Agreement, including any exhibits hereto, constitutes the entire agreement between the parties with respect to the transaction contemplated hereby and supersedes all prior agreements and understandings between the parties hereto relating to the subject matter hereof.

6. **Modification.** This Agreement may be amended or modified only by a written instrument executed by all of the parties hereto.


7. **Successors.** This Agreement shall be binding upon and shall inure to the benefit of the successor-in-interest and assigns of each party to this Agreement.

8. **Counterparts.** This Agreement may be executed in counterparts, each of which is deemed an original and all of which together constitute one document. It may further be signed in duplicate by facsimile signature or by electronic signature and such signatures shall be regarded and have the same force and effect as an original signature.


9. **Bankruptcy Court Jurisdiction.** The parties agree that the Bankruptcy Court presiding over the Case shall retain jurisdiction to hear and determine any dispute concerning the interpretation or enforcement of this Agreement.

Dated: 3/31/17

ADVANCED RESTAURANT FINANCE, LLC

By: 
Vincent Monard
CFO

Dated: 4/11/17


MICHAEL G. KASOLAS
Chapter 7 Trustee of the Bankruptcy
Estate of Fox Ortega Enterprises, Inc.
dba Premier Cru

CERTIFICATE OF SERVICE

I, Jeanne Rose, declare:

I am a citizen of the United States and am employed in Alameda County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1111 Broadway, 24th Floor, Oakland, California 94607-4036.

On the date set forth below, I served a copy of the following document(s):

**NOTICE OF OPPORTUNITY FOR HEARING ON MOTION FOR ORDER APPROVING
COMPROMISE WITH ADVANCED RESTAURANT FINANCE, LLC**

- [X] **by ECF** to the parties listed on the attached service list in accordance with the *Order Granting Motion to Reduce Notice Required for Future Notices Under Bankruptcy Rule 2002(a)* [Docket No. 437] who are ECF recipients.

AND

- [X] **(by mail)** to the parties listed on the attached service list in accordance with the *Order Granting Motion to Reduce Notice Required for Future Notices Under Bankruptcy Rule 2002(a)* [Docket No. 437] who are not ECF recipients by placing a true and correct copy thereof enclosed in a sealed envelope with first-class postage prepaid in a designated area for outgoing mail, addressed as set forth below. At Wendel, Rosen, Black & Dean, LLP, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the City of Oakland, California to the following recipients

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct, and that this declaration was executed on April 11, 2017, at Oakland, California.

/s/ Jeanne Rose
JEANNE ROSE

See attached service list.

**FOX ORTEGA ENTERPRISES, INC., DBA PREMIER CRU, DEBTOR
CASE NO. 16-40050**

**LIMITED NOTICE MAILING LIST
(Per Order Dated October 26, 2016)**

Twenty Largest Unsecured Creditors Who Have Timely Claims:

American Express Travel Rltd. Srvcs. Co. Inc. c/o Becket and Lee LLP P.O. Box 3001 Malvern, PA 19355-0701
MSI Electronic Payments, LLC c/o T. Micah Dortch Cooper & Scully, P.C. 900 Jackson St., Suite 100 Dallas, Texas 75202
Universal Card, Inc. dba Merchant Services Thomas J. Stolp, Esq. Rogers, MacLeith & Stolp, LLP 10061 Talbert Avenue, Suite 390 Fountain Valley, CA 92708
Mun Hei Li aka Li Mun Hei c/o Raphael Cung, Esq. Callahan & Blaine, APLC 3 Hutton Centre Drive, 9th Floor Santa Ana, CA 92707
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Michael D. Thomson 3111 Welborn St. #1604 Dallas, TX 75219
Richard Schmidt 2500 Hospital Drive Mountain View, CA 94040

<p>Nikolai Khabibulin c/o Michael VanNiel Banker and Hostetler 127 Public Square, #2000 Cleveland, OH 44114</p>
<p>Michael Troise 401 E 89th Street New York, NY 10128</p>
<p>Bo Feng Room 605, Admiralty Centre Tower 2, 18 Harcourt Road HONG KONG</p>
<p>Brad Karp 653 Paseo de la Cuma Santa Fe, NM 87501</p>
<p>Robert Nilsson c/o Michael VanNiel 127 Public Square #2000 Cleveland, OH 44114-1214</p>
<p>39 Partners, LLC c/o Lane Powell, PC, Attn: Heidi Anderson 1420 Fifth Avenue, Suite 4200 P.O. Box 91302 Seattle, WA 98111-9402</p>
<p>Ross Bott 152 Poplar St Half Moon Bay, CA 94019</p>
<p>T. Szen Low c/o Akin Gump, et al Attn: David P Simonds 2029 Century Park East #2400 Los Angeles, CA 90067</p>
<p>Michael Collins c/o Gregory K. Jones Dykema Gossett LLP 333 S. Grand Ave. #2100 Los Angeles, CA 90071</p>
<p>Chun Yu Jonathan Polland Gordon & Polland LLP 235 Montgomery Street, Suite 701 San Francisco, CA 94104</p>

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The United States Trustee:

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(ECF Recipient)

Governmental Agencies Who Have Filed Claims

Franchise Tax Board
Bankruptcy Section MS A340
P.O. 2952
Sacramento, CA 95812-2952

Department of the Treasury
Internal Revenue Service
P.O. Box 7346
Philadelphia, PA 19101-7346

State Board of Equalization
Special Operations Branch MIC:55
PO Box 942879
Sacramento CA 94279-0055

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Request for Special Notice

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Entries in bold NOT on ECF – Service by First Class Mail.

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