

1 Mark S. Bostick (Bar No. 111241)
Tracy Green (Bar No. 114876)
2 **WENDEL, ROSEN, BLACK & DEAN LLP**
1111 Broadway, 24th Floor
3 Oakland, California 94607-4036
Telephone: (510) 834-6600
4 Fax: (510) 834-1928
Email: mbostick@wendel.com
5 Email: tgreen@wendel.com

6 Attorneys for Michael G. Kasolas, Trustee

7
8
9
10 UNITED STATES BANKRUPTCY COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION
13

14 *In re*

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

17 *Debtor.*
18
19

Case No. 16-40050-WJL

Chapter 7

**TRUSTEE'S APPLICATION FOR ORDER
AUTHORIZING PAYMENT OF
ADMINISTRATIVE FEES AND EXPENSES
INCURRED TO ADMINISTER CLASS
SETTLEMENT AND AUTHORIZING
PAYMENT OF PREVIOUSLY ALLOWED
PROFESSIONAL FEES**

20 Date: July 12, 2017
21 Time: 2:00 p.m.
22 Place: 1300 Clay Street
Courtroom: 220
Oakland, CA 94612
23

24 Michael G. Kasolas, the duly appointed trustee in the above-captioned case ("Trustee"),
25 hereby moves for an order allowing administrative fees and expenses incurred by the Trustee,
26 Brian Nishi and BMC Group Inc. to administer the Stipulation of Settlement approved herein on
27 July 29, 2016 [Doc No. 365] and authorizing him to pay such fees and expenses as well as fees
28 previously allowed but reserved under prior orders approving interim applications for

1 compensation brought by the estate's professionals.

2 This application is brought under Bankruptcy Code Sections 330(a)(1) and 503(b) and in
3 furtherance of this Court's orders approving the Stipulation of Settlement entered on July 29, 2016
4 (Docket No. 365), authorizing the sale of wine free and clear of liens entered on September 2,
5 2016 (Docket No. 397) and approving first interim applications for compensation of the estate's
6 professionals entered on December 16, and 19, 2016 (Docket Nos. 499-502). and the subsequent
7 facts and occurrences as discussed herein. This Application is based on the Declarations of
8 Michael G. Kasolas, Brian Nishi and Varouj Bakhshian filed in support hereof.

9 -

10 **I. REQUEST FOR ALLOWANCE OF FEES AND EXPENSES FOR SERVICES**
11 **RENDERED TO ADMINISTER THE STIPULATION OF SETTLEMENT.**

12 **A. *Background.***

13 1. The debtor's case was commenced on January 8, 2016, by the filing of its
14 voluntary petition for relief under chapter 7.

15 2. Among the estate's assets were over 78,000 bottles of wine held in the debtor's
16 Berkeley facility warehouse against which over 4,000 customers of the debtor claimed ownership
17 interests. A resolution of those ownership claims was required before any wine could be sold.

18 3. On May 23, 2016, the Trustee entered into a "Stipulation of Settlement" in a class
19 action complaint [Adv. Pro. No. 16-04033] brought by Michael D. Podolsky, as class
20 representative of customers claiming ownership interests in the wine, to resolve all competing
21 ownership claims to the wine.

22 4. The Stipulation of Settlement provided a mechanism to permit the sale of all wine
23 held in the debtor's warehouse provided that the proceeds were distributed according to the
24 formulae set forth in the Stipulation.

25 **B. *The Orders Approving the Stipulation of Settlement and Sale of Wine.***

26 5. The Stipulation of Settlement was approved by this Court under orders entered in
27 the class action (AP Docket No. 58) and in the case (Case Docket No. 365) on July 29, 2016.

28 6. In accordance with the Stipulation of Settlement, the Court authorized the Trustee

1 to sell all the subject wine to Spectrum Wine Auctions (“Spectrum”) for \$3,676,000.00, subject to
2 adjustments, under an order entered on September 2, 2016 (Docket No. 397) (the “Sale Order”)

3 7. The Sale Order at Paragraph 17 further provided that the Trustee was authorized to
4 make the disbursements required to implement the Stipulation of Settlement.

5 8. The sale of wine to Spectrum was completed on or about January 23, 2017, for a
6 net sale price of \$3,449,396.00.¹

7 **C. *Implementing the Stipulation of Settlement.***

8 9. Pursuant to authorizations granted under the Stipulation of Settlement and the Sale
9 Order, the Trustee, with the assistance of BMC Group and Brian Nishi, administered the
10 Stipulation of Settlement.

11 10. On March 9, 2017, the Trustee served all class members with his Notice of Posting
12 of Proposed Distributions (the “Notice”) showing each class member the amount they were
13 proposed to receive and the basis therefor.

14 11. No timely objections or requests to arbitrate were filed or served in response to the
15 Notice and pursuant to Paragraph 19 of the Stipulation of Settlement, all objections to the Notice
16 were deemed waived and forever barred.

17 12. On April 28, 2017, distributions pursuant to the Notice in the aggregate sum of
18 \$1,309,367.00 were mailed to all class members.

19 **D. *The Fees and Expenses Incurred to Administer the Stipulation of Settlement.***

20 13. Implementing the Stipulation of Settlement was a joint effort among the Trustee,
21 Brian Nishi, BMC Group, Class Counsel and the Trustee’s Counsel.

22 14. Only those fees of Nishi, BMC Group and the Trustee, however, were entitled to be
23 deducted from sale proceeds as Administrative Deductions under Paragraph 16 of the Stipulation
24 of Settlement.

25 15. Their services included: determining the category, sale price, purchase price and

26 _____
27 ¹ These net proceeds included amounts contributed to the price by Ross Bott under his
28 compromise with the Trustee approved on October 25, 2016 [Docket No. 438]. Bott was the only
one among 4,450 prospective class members who elected to opt out of the class.

ownership claims against each bottle; determining the qualified bottles and claims of each class member; determining the Administrative Deductions, providing notifications as required under the Stipulation; responding to class member inquiries; and making the necessary calculations and distributions according to the formulae under the Stipulation of Settlement.

16. The time expended, fees incurred and expenses advanced by the Trustee, Nishi and BMC Group to administer the Stipulation of Settlement, as more particularly set forth in the Declarations of Brian Nishi, Varouj Bakhshian and Michael G. Kasolas filed in support hereof, for which the Trustee seeks allowance and authority to pay, are summarized as follows:

Claimant	Time	Fees	Expenses	Total Requested
Kasolas:	128.00	\$55,000.00	\$ 0.00	\$55,000.00 ²
Brian Nishi	149.60	\$18,700.00	\$ 0.00	\$18,700.00
BMC	128.00	\$9,794.00	\$12,270.13	\$22,064.13

II. REQUEST FOR AUTHORITY TO PAY PROFESSIONAL EXPENSES HERETOFORE ALLOWED BUT RESERVED.

A. *Background: The Holdback Orders.*

17. The first interim fee applications brought on behalf of the estate's professionals and others were heard on December 14, 2016. Because the sale was not complete, the Stipulation of Settlement had not been implemented, and the status of liens on the estate's share of wine proceeds was undetermined as of the time of hearing, the Court granted the applications and allowed fees but ordered that 30 percent of the allowed fees would be held back or reserved pending further developments in the case and further order(s) of the Court.³ The fees reserved under those orders were as follows:

² The Trustee's fees and expenses were capped at \$55,000.00 under Paragraph 16 of the Stipulation of Settlement for purposes of establishing the amount of Administrative Deductions. The Trustee reserves his right to seek fees in excess of that amount for his services rendered to administer the Stipulation of Settlement in a future application.

³ The liens against the sale proceeds totaled about \$1,450,000.00, however, the lienholders had agreed that their collateral could be surcharged up to \$1,000,000.00 to pay the estate's allowed professional fees. An Order approving the surcharge agreement was entered on December 16, 2016 [Docket No. 498].

Claimant	Holdback Amount	Date of Order and Doc #
Wendel Rosen et al	\$283,368.90	12-16-16 [#500]
Kokjer Pierotti et al	\$43,615.65	12-19-16 [#501]
Arent Fox LLP	\$3,943.20	12-19-16 [#502]
BMC Group	\$6,323.70	12-16-16 [#499]

B. *Subsequent Events: The Completed Sale, the Implemented Stipulation of Settlement and the Release of all Liens Against Estate Property.*

18. As discussed above, subsequent to the December 14, 2016, the Spectrum sale was completed and the Stipulation of Settlement was fully implemented and administered.

19. On April 12, 2017, the secured claim of Community Bank of the Bay in the amount of about \$1,300,000.00 was paid in full from the sale proceeds of 1011 University Avenue, Berkeley, California, on which the bank held cross-collateralized deeds of trust.⁴

20. On or about May 16, 2017, Advance Restaurant Finance (“ARF”) accepted payment of \$70,000.00 in full satisfaction of its secured claim for about \$150,000.00 pursuant to a compromise approved by the Court on May 9, 2017 (Docket No. 550).

21. As a consequence of these events, there are currently no liens or encumbrances asserted against the assets of the estate.

C. *Funds on Hand and Other Assets of the Estate*

22. The Trustee currently holds \$1,638,952.95. He has previously disbursed \$2,437,964.52 pursuant to Court orders.

23. Of the funds currently held, about \$462,000.00 derive from avoidance claim settlements.

24. With the exception of certain wine held overseas, all tangible assets of the estate

⁴ The real property formerly leased by the debtor was owned and sold by 1011 University LLC, a former affiliate of the debtor, to the City of Berkeley for \$6,650,000.

1 have been liquidated.

2 25. Other assets include the debtor's customer list and avoidance claims. While it is
3 still premature to estimate the net value of the estate's unliquidated avoidance claims, that value
4 could range from Three to Eight Million Dollars.

5 26. The Trustee has not yet reviewed proofs of claim filed against the estate:
6 According to the claims register, 2,238 claims have been filed. Among those, \$1,039,423.80 is
7 asserted as priority claims and \$53,829,278.00 is asserted as general unsecured claims.
8

9
10 **III. THE RELIEF REQUESTED IS AUTHORIZED UNDER THE BANKRUPTCY**
11 **CODE AND IS APPROPRIATE UNDER THE CIRCUMSTANCES.**

12 27. The Stipulation of Settlement clearly contemplated that the fees incurred to
13 administer it would be compensable from the estate, despite benefits running to third parties. The
14 administrative fees approved by Class Counsel and allowed as Administrative Deductions,
15 including the fees and expenses sought herein, were deducted from sale proceeds and paid to the
16 estate as provided in Paragraph 16 of the Stipulation of Settlement.

17 28. The services to form, administer and implement the Stipulation of Settlement
18 provided undoubted benefit to the estate and its creditors. Had it not been entered into, the estate's
19 ability to realize a net recovery from any disposition of the wine was highly speculative. It could
20 have taken years to determine the parties' competing rights to possession and by then the wine
21 would had to have been moved and stored at significant expense, with no assurance of the
22 outcome.
23

24 29. As a result of the Stipulation of Settlement, as reflected in the Notice, the estate
25 recovered \$2,140,029.00 in proceeds from the sale of wine. Of the \$3,449,396.00 in total sale
26 proceeds, the estate received \$1,879,166.00 according to the formulae plus \$260,863 in
27 Administrative Deductions, while the class received a total of \$1,309,367.00.
28

30. The Stipulation of Settlement could not have been implemented without the informed expertise of Brian Nishi and BMC Group operating under the direction of the Trustee.

31. Respecting the holdback amounts reserved under the Orders granting the estate's professionals' first interim applications for compensation, the grounds and basis for allowance of those fees have already been established and approved. The cause for the holdbacks has been removed: the sale has been completed; all competing claims to the wine have been resolved under the fully implemented Stipulation of Settlement and Bott settlement; and all liens against the estate's property have been removed. The \$1,638,952.95 now held by the trustee is wholly unencumbered.

IV. CONCLUSION AND RELIEF REQUESTED

Based on the foregoing, the Trustee requests that an order be entered:

1. Approving and allowing the fees and expenses of the Trustee, Brian Nishi and BMC Group as set forth above to administer the Stipulation of Settlement;

2. Authorizing the Trustee to pay such allowed fees and expenses in the amounts as indicated in Paragraph 16 above and to pay the previously allowed but reserved fees of Wendel Rosen Black & Dean LLP, Kokjer Pierotti, Maiocco & Duck LLP, Arent Fox LLP and BMC Group, Inc. in the amounts as set forth in Paragraph 17 above;

3. Granting such other relief as the Court deems proper.

DATED: June 21, 2017

WENDEL, ROSEN, BLACK & DEAN LLP

By: /s/ Mark S. Bostick

Mark S. Bostick

Attorneys for Michael G. Kasolas, Trustee