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

13 In re
14 FOX ORTEGA ENTERPRISES, INC.,
dba PREMIER CRU,
15 Debtor.
16

Case No. 16-40050-WJL

Chapter 7

**DECLARATION OF MARK S. BOSTICK
IN SUPPORT OF MOTION FOR ORDER
APPROVING COMPROMISE WITH
JAMES TANANBAUM**

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19 1. I am duly admitted to practice before the above-entitled court and am a partner with
20 the law firm of Wendel, Rosen, Black and Dean, LLP, attorneys for the trustee Michael G.
21 Kasolas ("Trustee") in the above-captioned case. If called upon to testify regarding the facts set
22 forth herein, I could competently testify to those facts based upon my own personal knowledge,
23 except for those matters as so indicated based upon my belief, which I believe to be true. I submit
24 this declaration in support of the Trustee's *Motion for Order Approving Compromise with James*
25 *Tananbaum* (the "Motion") filed herewith.

26 1. Attached as Exhibit 1 to the Motion is a copy of the Trustee's *Notice and*
27 *Opportunity for Hearing on Trustee's Motion for Order Approving Compromise with James*
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1 *Tananbaum* (the "Notice"), which was served on those creditors and interested parties entitled to
2 notice.

3 2. All of the facts stated in the Notice are true.

4 3. This dispute concerned a matter that had been in litigation for over six months.
5 The parties engaged in discovery and informal settlement discussions to arrive at the settlement
6 amount. As stated in the Notice, an important factor for the trustee in reaching this settlement was
7 to insure that litigation of the issues in this case would not adversely affect other potential claims
8 of the estate.

9 4. Attached hereto as **Exhibit A** is a true and correct copy of the parties' executed
10 Settlement Agreement and Release.

11 5. For the reasons stated in the Notice, the Trustee and I believe that the proposed
12 compromise is fair and equitable and in the best interest of creditors and the estate.

13 I declare under penalty of perjury under the laws of the United States that the foregoing is
14 true and correct, and that this declaration was executed on November 27, 2017 at Oakland,
15 California.

16 /s/ Mark S. Bostick
17 Mark S. Bostick
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EXHIBIT A

SETTLEMENT AND RELEASE AGREEMENT

*Fox Ortega Enterprises, Inc., dba Premier Cru, Debtor,
Case No. 16-40050-WJL
[Preference Claim]*

This SETTLEMENT AND RELEASE AGREEMENT ("Agreement") is entered into between trustee Michael G. Kasolas and James Tananbaum ("Transferee") (collectively the "Parties").

RECITALS

A. On January 8, 2016, Fox Ortega Enterprises, Inc., dba Premier Cru, ("Debtor"), filed a voluntary petition for relief under Chapter 7 of Title 11 of the U.S. Code thereby commencing Case No. 16-40050-WJL (the "Case"). Kasolas is the duly appointed and acting trustee of the Debtor's estate ("Kasolas" or "Trustee").

B. Kasolas has claimed that within 90 days of the filing of the Debtor's petition, the Debtor sent refunds to Transferee based on cancelled orders in the aggregate sum of \$259,083.40 (the "Transfers").

C. Kasolas contends that the Transfers are avoidable as preferential transfers under 11 U.S.C. §547(b) and are recoverable under 11 U.S.C. §550(a)(1) and has filed a complaint to recover the Transfers labeled as Adversary Proceeding No. 17-04031. Transferee has answered the complaint and disputes the Trustee's contentions and contends that the Transfers are not avoidable or recoverable.

D. The parties wish to resolve their disputes without further cost, risk or delay and agree to settle on the terms set forth below.

E. The parties acknowledge that references to Kasolas herein are meant to denote Kasolas on behalf of the Debtor's estate in the Case.

AGREEMENT

1. **Payment.** In consideration of and subject to the covenants and conditions herein, Transferee agrees to pay Kasolas the total sum of \$150,000.00 on or before November 28, 2017 (the "Payment"). Kasolas shall hold the Payment in trust for the benefit of the Transferee, and the Payment shall not constitute property of the estate under 11 U.S.C. § 541, until entry of a final order approving this Settlement Agreement. In the event that the Bankruptcy Court denies any motion by Kasolas to approve this compromise, Kasolas shall return the \$150,000.00 within two business days thereof.

2. **Release.** Effective upon his receipt of the settlement payment, and except as provided herein, Kasolas hereby releases Transferee from any and all known or unknown claims.

EXHIBIT "A"

3. **Expenses of Litigation.** The Parties agree that each Party shall bear its own respective costs and fees, including attorneys' fees, incurred in connection with the Case.

4. **Waiver of Cal Civil Code Section 1542.** Kasolas expressly waives any and all rights and claims under Section 1542 of the California Civil Code, which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM, MUST HAVE MATERIALLY AFFECTED THE SETTLEMENT WITH THE DEBTOR.

5. **Agreement Subject to Bankruptcy Court Approval.** The Bankruptcy Court entered an order on April 20, 2017, granting the Trustee authority to settle claims under \$250,000.00 without the need for further notice or court order if the settlement payment was at least 70 percent of the claim [Doc #533]. Because the settlement under this agreement is less than 70 percent of the claim (as adjusted by deducting sale tax refunds), court approval of this agreement is required. The Trustee will use his best efforts to receive the approval of the Bankruptcy Court by no later than August 31, 2018.

6. **No Reliance on Subsequent Events.** The parties agree that neither party shall rely on any events subsequent to the date of this agreement to attempt to avoid compliance with the settlement, including but not limited to the Trustee receiving approval from the Bankruptcy Court by no later than August 31, 2018.

7. **No Admission of Liability.** This Agreement was negotiated, in part, to avoid the time, effort and cost of litigation. This Agreement was never intended and shall never constitute nor be construed as an admission of any liability or wrongdoing by Transferee.

8. **Waiver of Proof of Claim.** Transferee waives his right to file a proof of claim for the amount paid in settlement under this Agreement.

9. **Consultation with Counsel.** The parties have had full opportunity to consult with their respective legal counsel before entering into this Agreement and have read, understood, and voluntarily agreed to execute this Agreement with full knowledge that upon execution it shall become a binding and enforceable contract.

10. **Entire Agreement.** This Agreement contains the entire agreement between the parties with respect to the matters referred to in this Agreement and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, and there are no representations or other agreements between the parties in connection with the subject matter hereof except as specifically set forth herein. No delay or omission on the part of either party in exercising any right hereunder will operate as a waiver of such right or any other right. A waiver on one occasion will not be construed as a bar to or a waiver of any right on any further occasion.

11. **Modification.** This Agreement may be modified only by a writing signed by both parties.

12. No Other Representations or Warranties. The parties acknowledge that no representations or warranties of any kind have been made by anyone to induce the signing of this Agreement other than as set forth in this Agreement.

13. Bankruptcy Court Jurisdiction and Governing Law. The parties agree that the Bankruptcy Court presiding over the Case shall have exclusive jurisdiction to resolve any dispute that may arise under the Agreement and that the Agreement shall be governed by California law.

14. Confidentiality. Because notice of this agreement is required to obtain court approval, this agreement will not be confidential once notice of the compromise is served on creditors.

15. Counterparts. This Agreement may be executed in one or more counterparts; a copy of an executed original shall be deemed an original for all purposes; a signed copy transmitted by email shall be deemed an executed original.

16. Effective Date. This Agreement shall be effective and binding as of the date it is executed by the parties

15. Severability. In the event any provision of this Agreement is held to be void, voidable or unenforceable, the remaining provisions of this Agreement will remain in full force and effect.

THE FOREGOING IS AGREED:

Dated: November 11, 2017



JAMES TANANBAUM

Dated: _____

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

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THE FOREGOING IS AGREED:

Dated: _____

JAMES TANANBAUM

Dated: 11/9/17



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