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7 [Proposed] Attorneys for Michael G. Kasolas,  
Trustee

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

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

16  
17 Debtor.

Case No. 16-40050-WJL

Chapter 7

**REPLY TO OBJECTION TO  
APPLICATION FOR ORDER  
AUTHORIZING EMPLOYMENT OF  
BRIAN NISHI**

18 Date: TBD  
19 Time: TBD  
20 Place: Courtroom 220  
1300 Clay Street  
Oakland, CA  
21 Judge: The Hon. William J. Lafferty, III

22  
23 TO: THE HONORABLE WILLIAM J. LAFFERTY, UNITED STATES BANKRUPTCY  
24 JUDGE AT OAKLAND CALIFORNIA, DEBTOR'S COUNSEL, THE U.S. TRUSTEE  
AND INTERESTED PARTIES:

25 Michael G. Kasolas ("Trustee") replies to the U.S. Trustee's objection to the employment  
26 of Brian Nishi as an IT consultant to access the electronic data of Fox Ortega Enterprises, Inc., dba  
27 Premier Cru ("Debtor").  
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## BACKGROUND

1. The Debtor filed its petition for relief under Chapter 7 on January 8, 2016 (the “Filing Date”). Michael G. Kasolas is the duly appointed and acting trustee of the debtor’s estate (the “Trustee”).

2. The Debtor maintained sophisticated electronic data programs and websites to record its financial, sales and inventory data, and to maintain operations.

3. The Trustee has secured all data on the Debtor’s servers and wishes to retain Mr. Nishi to assist him in accessing all electronic data and business records and reports.

4. Brian Nishi has worked for the Debtor for over 20 years, and was its in-house “IT Technician” since 2008. In such capacity, he developed, modified and operated the Debtor’s electronic record-keeping systems, and has a thorough understanding of its unique contents, functions, capabilities and reliability. As a long-standing employee, he understands how the Debtor’s business worked and how that can be demonstrated and accessed through its electronic data systems and record-keeping practices. Mr. Nishi is the primary person that the Trustee is aware of with such knowledge and expertise specific to the Debtor’s systems.

5. Mr. Nishi is able to generate reports at the Trustee’s direction to show, for example, the status of each recorded bottle of wine on hand, its identity and location, its cost, sale orders relating to it, among other reports. His assistance in locating assets, explaining the Debtor’s business practices, identifying transactions, substantiating sale orders in favor of interested parties will serve as an invaluable and substantial benefit to creditors and the estate.

6. Mr. Nishi had no ownership interest in the Debtor, and was not a controlling officer of the Debtor; he worked as an employee in charge of technology.

7. Mr. Nishi holds a claim against the estate for unpaid wages based on nonpayment of his last pay check for about \$2,500. It also appears that he unwillingly advanced credit to the Debtor when it used his credit card to purchase wine without Mr. Nishi’s authority. Within 90-days before the filing of the Debtor’s bankruptcy petition, he was repaid \$25,000 for such credit extension by receiving wine from the Debtor that was not otherwise subject to any purchase orders that the Debtor had valued at \$25,000. Mr. Nishi may have received additional preferences as a

1 result of the Debtor's use of Mr. Nishi's credit card. The Trustee is not able to fully analyze all  
2 preferential transfers and consider all defenses at this time. He is actively trying to preserve the  
3 assets of this estate and negotiate the best method to liquidate the assets.

4 8. The Trustee sought this Court's approval of the retention of Mr. Nishi because all  
5 estate expenses must be approved by the Court. See, *In re Cloobek*, 788 F.3d 1243 (9th Cir.  
6 *June 12, 2015*).

7 9. The Trustee never sought employment of Mr. Nishi as a professional, but as a  
8 former employee of the Debtor with percipient knowledge unique to this case. Mr. Nishi has been  
9 advised of the potential avoidability of the transfer he received. The Trustee reserves all rights to  
10 pursue that preference and Mr. Nishi reserves all rights to raise any defense that he believes is  
11 applicable.

12 10. Mr. Nishi will not be assisting the estate with any matter related to any claim that  
13 the Trustee may have against him.

14 11. The Trustee proposes to retain Mr. Nishi at the rate of \$100 per hour effective from  
15 January 19, 2016, when he first provided assistance to the Trustee.

16 12. Mr. Nishi was out of the country on vacation from late 2015 through January 18,  
17 2016, and upon his return on January 19<sup>th</sup> began assisting the Trustee. Therefore, the Trustee seeks  
18 authority to retain him from January 19, 2016.

19 13. The source of funds to pay Mr. Nishi will come from assets of the estate to be  
20 distributed upon further court order.

21 14. Mr. Nishi's services will be necessary throughout this case, but most critically in  
22 the initial phases of this case while the Trustee investigates the issues of this case, in addition to  
23 future litigation. Mr. Nishi's services are critical to the success of this case. To date he has  
24 explained the available searches that the Trustee can run, has run various reports, and is willing  
25 and able to run additional searches as reports as needed. He has no central role in administering  
26 this case. He only takes actions at the request of the Trustee. He has no formal education or  
27 license related to this position.  
28

## MOTION

### A. Mr. Nishi Is Not A Professional

## DEFINITION OF PROFESSIONALS

The list of “professional persons” provided by section 327(a) – attorneys, accountants, appraisers, liquidators, auctioneers – is not exhaustive. The trustee must seek court approval only if the person sought to be employed is a “professional person” within the scope of section 327(a). The trustee may find it necessary to employ brokers, underwriters, farm managers, private investigators, or others to assist in the administration of estate assets. If an issue arises regarding the need to obtain court approval of the employment, the trustee should consider the following:

- 1) Does the person play a central role in the administration of the estate?
- 2) Does the person possess discretion or autonomy over some part of the estate?
- 3) Does the person have special knowledge or skill usually achieved by study and educational attainments?
- 4) Does the person operate under a license or governmental regulation?

Although his assistance is very helpful to the Trustee and this estate, he is not administering anything in the estate, he does not have discretion or autonomy and is only running reports as requested, he learned about the debtors systems while on the job and has no formal degree or license related to his services, and the value of his services that he brings to the estate is his ability to inform the Trustee on issues unique to the case. The Trustee could retain other IT services or persons who have graduate degrees and specialize in recovering electronic systems, but none of these persons would have a background on how this Debtor operated and those are the services that Mr. Nishi is able to provide for this estate—the services of a former employee.

The U.S. Trustee objects to Mr. Nishi’s employment on the grounds that he is a professional and is not disinterested. However, the U.S. Trustee shows no evidence that Mr. Nishi is a professional. The U.S. Trustee’s position that everyone is a professional is untenable when applied to all estates. Does this mean that no Chapter 11 Debtor can continue to employ an employee who received a preference? Does every Trustee have to complete a full preference analysis before employing any former employee of a debtor to perform any task no matter how clerical the position?

1 The Trustee believes that he and creditors of the estate are very lucky to have Mr. Nishi  
2 assisting him in this case, and that creditors will realize greater recoveries as a result of Mr.  
3 Nishi's participation as an IT consultant and in authenticating business records, and will enable the  
4 Trustee to provide fairness and transparency to the title determination process, which in turn will  
5 help to promote the integrity of the bankruptcy system.

6 WHEREFORE, Trustee requests that this Court overrule the U.S. Trustee's objection and  
7 enter an order authorizing Trustee to retain Mr. Nishi at the rate of \$100.00 per hour effective  
8 January 19, 2016, and determining that he is not a professional, and therefore, it is irrelevant as to  
9 whether or not he is disinterested.

10  
11 DATED: February 5, 2016

WENDEL, ROSEN, BLACK & DEAN LLP

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13 By: /s/ Tracy Green  
14 Tracy Green  
15 Attorneys for Michael G. Kasolas  
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