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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

**SECOND INTERIM APPLICATION FOR
COMPENSATION AND REIMBURSEMENT
OF EXPENSES OF COUNSEL FOR
TRUSTEE**

Date: December 20, 2017
Time: 2:00 p.m.
Place: Courtroom 220
1300 Clay Street
Oakland, CA
Judge: The Hon. William J. Lafferty III

**TO: THE HONORABLE WILLIAM J. LAFFERTY III, UNITED STATES
BANKRUPTCY JUDGE AT OAKLAND, CALIFORNIA:**

Wendel, Rosen, Black & Dean LLP, a limited liability partnership, (“Applicant”) hereby
applies for approval of its Second Interim Application for Compensation and Reimbursement of
Expenses (“Second Interim Application”), which seeks approval of \$112,602.00 in fees and
\$5,330.20 in costs advanced for services rendered on an hourly basis and approval of \$490,336.27

1 for services rendered on a contingency basis for the period of November 1, 2016, through
2 November 15, 2017 (the “Second Application Period”).

3 Applicant was initially employed on an hourly basis as counsel for the trustee effective
4 from January 8, 2016, under an order entered on February 4, 2016 [Doc #62] (the “Employment
5 Order”). On December 16, 2016, an order was entered approving Applicant’s *First Interim*
6 *Application for Compensation and Reimbursement of Expenses of Counsel for Trustee* [Doc.
7 #465] (the “First Interim Application”) and awarding fees in the amount of \$944,563.00 and costs
8 in the amount of \$4,259.76 for services rendered and costs advanced from January 8, 2016,
9 through October 31, 2016 (the “First Application Period”) [Doc #500].

10 On February 7, 2017, the Court entered an order modifying the Employment Order to
11 provide that Applicant’s services to pursue avoidance claims and European wine claims would be
12 compensated on a contingency fee basis effective from November 1, 2016 [Doc #514] (the
13 “Contingency Fee Order”).¹

14 This Second Interim Application seeks interim allowance of fees for both hourly and
15 contingency related services and costs incurred during the Second Application Period.

16 **I. CASE HISTORY AND STATUS**

17 **A. Disposition of the Wine.**

18 During the First Application Period, the trustee resolved over 4000 claims to over 78,000
19 bottles of wine held at the debtor’s warehouse, under a class action Stipulation of Settlement
20 approved by the Court on July 29, 2016. Pursuant to the Stipulation of Settlement, the trustee sold
21 the wine for the net price of \$3,449,396.00 (the “Sale Proceeds”) to Spectrum Wine Auctions
22 under an order entered on September 2, 2016 [Doc #397]. The Sale Proceeds were disbursed to
23
24

25 ¹ The effective date of the contingency agreement was set out in the prayer to the Supplemental
26 Application To Employ Counsel for Trustee on Contingency Basis filed on February 3, 2017
27 [Doc# 512]. “Net winner” avoidance claims were specifically excluded from the scope of
28 Applicant’s employment. The trustee retained special counsel Diamond McCarthy LLP to pursue
those claims on a contingency fee basis pursuant to an order entered on October 6, 2017 [Doc
#582].

1 the estate and class members in accordance with the Stipulation of Settlement during the Second
2 Application Period, as were all the events and services described below.

3 **B. Surrender of the Lease and Sale of the Premises.**

4 The trustee vacated the debtor's premises located at 1011 University Avenue, Berkeley,
5 California (the "Premises") on November 5, 2016. Pursuant to an Order Confirming Rejection of
6 Lease and Abandonment of Personal Property and Payment of Post-Petition Rent entered on
7 November 2, 2016 [Doc # 442], all residual personalty left on the Premises was abandoned to the
8 landlord, 1011 University LLC (in lieu of clean-up costs). On December 3, 2016, the landlord
9 sold the personalty at public auction for net sale proceeds of \$37,434.44. Under the trustee's
10 compromise with Saul Gevertz approved by the Court on April 12, 2016 [Doc #251] (the "Gevertz
11 Compromise"), 60 percent of all net sale proceeds recovered by 1011 University LLC are to be
12 paid to the estate.²

13 On April 12, 2017, the Premises were sold to the City of Berkeley for \$6,650,000.00. The
14 sale price was sufficient to pay all liens in full, including the deeds of trust held by Community
15 Bank of the Bay. As a result, Community Bank of the Bay's secured claim for about
16 \$1,300,000.00 against all assets of the debtor was paid in full from the sale proceeds of the
17 Premises.

18 **C. Resolution of the ARF Secured Claim.**

19 On May 9, 2017, the Court entered an order approving a compromise under which
20 Advanced Restaurant Financing LLC ("ARF") agreed to accept \$70,000.00 in full satisfaction of
21 its secured claim for about \$150,000.00 [Doc #550]. The trustee thereafter paid the compromise
22 amount to ARF so that all secured claims against the estate were then paid in full.

23 **D. Administration of the Stipulation of Settlement.**

24 On March 9, 2017, the trustee served all class members with notice of his proposed
25 distribution of Sale Proceeds pursuant to the Stipulation of Settlement (the "Notice"). No one
26 objected; consequently, on April 28, 2017, the trustee disbursed dividends to all class members as

27 ² The estate's share of the sale proceeds of the personal property has yet to be disbursed to the
28 trustee.

provided in the Notice. A second distribution recirculating uncashed checks was disbursed to class members on or about October 11, 2017.

E. Pursuit of Avoidance Claims.

During the Second Application Period, the trustee pursued avoidance claims and through November 15, 2017, had entered into settlements totaling \$1,608,821.86, as more particularly described in Section III-A below.³ Subsequent to November 15, 2017, the trustee entered into additional settlements totaling more than \$600,000.00. Proceeds from these later settlements are expected to be in hand prior to December 31, 2017.

F. Status of the Estate

The trustee currently holds about \$2,287,374.00 in unencumbered funds. He is expected to hold at least \$3,000,000.00 by the hearing date on this application or by the end of the year with the balance coming from recoveries on settlements entered to date.

Approximately 2,300 claims have been filed in the case in the aggregate asserted amount of \$58,887,815.70. Of those, approximately \$454,467.00 in amount appears to be entitled to priority status under 11 USC §507(a)(4)(8). The trustee intends to file an interim report in the first quarter of 2018 seeking authority to pay all priority claims in full.

Outstanding administrative expenses, excluding trustee fees, total about \$1,020,138.70.⁴

The trustee estimates that between Two and Six Million Dollars in unresolved avoidance claims remain outstanding and that by mid-2019, absent protracted litigation, the case should be ready to close.

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³ During the First Application Period, Applicant had spent 26.8 hours (Fees: \$13,266.00) working on avoidance claim related matters and a total of 3.2 (Fees: \$1,485.00) on Ponzi-related matters (mostly in the context of the class mediation).

⁴ These include the fees requested in this application; those requested on behalf of Brian Nishi for \$141,411.52, BMC Group, Inc. for \$53,032.35 and Kokjer, Pierotti, Maiocco & Duck for \$217,471.36.

SERVICES RENDERED

II. HOURLY FEES

A. General/Administrative

This category includes miscellaneous services relating to preservation of assets and administration of the case. They include Applicant's investigation and filing of a claim for \$167,987.13 against the bankruptcy estate of International Payment Group pending in South Carolina [Case No. 08-03453] and discussions with counsel for a potential purchaser of the debtor's customer list, among other matters.

Applicant spent 3.30 hours in performing these tasks, incurring fees in the amount of \$1,652.00, as more particularly described in the attached **Exhibit A**.

B. Records Procurement

These services relate to Applicant's procurement of the debtor's records, including its tax returns from the debtor's former accountant by way of a Rule 2004 examination order. The time billed in this category does not include time incurred to obtain records needed to pursue avoidance claims; that time is billed as Contingency Fees under Section III below.

Applicant spent 4.6 hours in performing these tasks, incurring fees in the amount of \$2,389.50, as more particularly described in the attached **Exhibit B**.

C. Communications with Creditors and Class Members.

This category includes Applicant's time spent communicating with creditors about their claims, the case status, and data regarding their claims for their insurance and credit card recovery purposes. It includes Applicant's communications with class members concerning their claim status, treatment of their claims, and distribution status.

These services assisted the trustee in complying with his duties under 11 USC §704(a)(7) to furnish information to creditors and under 11 USC §704(a)(2) to account for property received.

Applicant spent 11.40 hours in performing these tasks, incurring fees in the amount of \$5,888.00, as more particularly described in the attached **Exhibit C**.

D. Administration of the Class Action Settlement.

This category includes Applicant's time to assist the trustee in administering the Stipulation of Settlement and includes services to fix the amount of administrative deductions (as a necessary prerequisite to fixing the amounts to be paid to sub-classes), to integrate the Bott settlement into the distribution provisions⁵; to determine the amount to be distributed to each sub-class and class member; to confirm redemption claims; to draft the Notice of Proposed Distribution and other communications to class members (including providing individualized calculation of the dividend payment to each member); to negotiate with class counsel for a provision amending the Stipulation of Settlement to provide for the automatic reduction of class members' claims based on the dividends received⁶; to draft the trustee's application and obtain an order authorizing the trustee to pay administrative deductions, to develop logistics with BMC Group to ensure class member privacy, to respond to class member inquiries, among other matters.

Administering the Stipulation of Settlement was complex and required a team effort among the trustee, Brian Nishi, BMC Group, class counsel and Applicant to achieve accuracy and universal acceptance among class members.

Applicant spent 82.60 hours in performing these tasks, incurring fees in the amount of \$42,669.50, as more particularly described in the attached **Exhibit D**.

E. Disposition of Premises Lease and Related Personality.

This category includes legal services required to resolve the estate's lease obligations by obtaining an order authorizing the trustee to surrender possession of the Premises and to abandon the personality left there after the wine sale. The personality was sold at auction by the landlord for \$37,434.44, 60; under the Gevertz Compromise, the trustee was entitled to 60 percent of the net proceeds thereof. Applicant responded to US Trustee inquiries and public complaints that the landlord's sale of empty wine boxes might promote future fraud.

⁵ The Bott settlement affected over 11,000 bottles with different overlay within the class settlement categories: Bott, the only class member to opt out of the settlement, agreed to purchase some bottles and abandon others. The details of his settlement are set forth in the Application to Approve Compromise with Ross Bott filed on September 29, 2016 [Doc #413].

⁶ As approved by order entered on April 20, 2017 in AP #160433 [Doc #73].

1 These services also include Applicant's communications with the County of Alameda Tax
2 Collector persuading it to withdraw its Notice of Sale of the Premises under its tax liens pending
3 the owner's continuing efforts to sell the Premises. As a result, the Premises were ultimately sold
4 on a non-distressed basis and all liens were paid in full and the trustee recovered \$79,344.84 as his
5 share of net proceeds (60 percent) under the Gevertz Compromise.

6 These services benefited the estate by minimizing the estate's liability under the lease and
7 by maximizing the value of the Premises.

8 Applicant spent 12.40 hours in performing these tasks, incurring fees in the amount of
9 \$6,383.00, as more particularly described in the attached **Exhibit E**.

10 **F. Administrative Motions**

11 This category includes Applicant's time to prepare and prosecute the administrative claim
12 applications of BMC Group, the estate's Noticing Agent, West Auctioneers, and Brian Nishi filed
13 on June 21, 2017 [Doc #563] and allowed by order entered on July 14, 2017[Doc. #568].

14 Applicant spent 10.50 hours in performing these tasks, incurring fees in the amount of
15 \$5,260.00, as more particularly described in the attached **Exhibit F**.

16 **G. Fox Bankruptcy**

17 This category includes Applicant's time to examine John Fox at Santa Rita Detention
18 Facility, to communicate with him by U.S. Mail and email, to coordinate investigations with his
19 bankruptcy case trustee and her counsel, to negotiate with his counsel for extensions to file an
20 objection to his discharge (which he ultimately consented to waiving), to communicate with the
21 Office of the United States Attorney regarding its prosecution of Ms. Yum (who had extorted Mr.
22 Fox) and its processing of restitution orders against Ms. Yum and Mr. Fox.

23 Applicant spent 15.40 hours in performing these tasks, incurring fees in the amount of
24 \$7,700.50, as more particularly described in the attached **Exhibit G**.

25 **H. Disposition of Secured Claims.**

26 This category includes Applicant's time to negotiate, document and obtain court approval
27 for the trustee's surcharge agreement with the secured creditors (approved by the Court on
28 December 16, 2016 [Doc #498]) and the trustee's settlement agreement with ARF. It also

1 includes some time incurred to enforce the estate's rights in connection with application of the
2 proceeds from the sale of the Premises.

3 These services benefitted the estate by enabling administrative claims to be paid and by
4 reducing ARF's secured claim from about \$150,000.00 to \$70,000.00.

5 Applicant spent 35.20 hours in performing these tasks, incurring fees in the amount of
6 \$17,894.00, as more particularly described in the attached **Exhibit H**.

7 **I. [Reserved] [17.9 Hours].**

8 **J. Wine Sale Closing Issues.**

9 This category includes Applicant's time to negotiate for and obtain the final reconciliation
10 of the wine sale to Spectrum. The sale was subject to adjustments for bad bottles and to bottles
11 withdrawn as a result of the Bott compromise, among other complicating factors.

12 Applicant spent 6.00 hours in performing these tasks, incurring fees in the amount of
13 \$2,995.00, as more particularly described in the attached **Exhibit J**.

14 **K. Determining Claims**

15 These services include Applicant's time to review priority proofs of claim and to
16 informally resolve 150 claims (most with priority amounts asserted) filed by creditor Alvin Smith.
17 These services benefitted the estate by enabling the trustee to prepare an interim distribution to
18 priority claimants and by eliminating 149 of Mr. Smith's claims without litigation.

19 Applicant spent 9.80 hours in performing these tasks, incurring fees in the amount of
20 \$4,726.50, as more particularly described in the attached **Exhibit K**.

21 **L. Class Action Second Distribution.**

22 These services include Applicant's time to review, approve and draft communications
23 relating to the second distribution to class members under the Stipulation of Settlement.

24 Applicant spent 3.30 hours in performing these tasks, incurring fees in the amount of
25 \$1,716.00, as more particularly described in the attached **Exhibit L**.

26 **M. Preparing First Interim Application**

27 In preparing its First Interim Application, Applicant incurred time in both the First and
28 Second Application Periods. In the First Interim Application, Applicant billed 47.1 hours in the

1 amount of \$23,019.50 (for 2.4 percent of total requested fees) for this category. In the Second
2 Application Period, Applicant billed 44.6 hours for which it seeks discounted fees in the total sum
3 of \$10,000.00. Combined, the \$33,019.50 incurred between both fee applications for this category
4 constitute 3.43 percent of total fees sought (i.e. \$962,383.00) in the First Interim Application.⁷

5 Applicant does not seek compensation for any time “defending” the fee application; it
6 seeks only time to prepare the application, address U.S. Trustee inquiries and appear at the
7 hearing.

8 Applicant spent 44.6 hours in performing these tasks for which it seeks fees in the amount
9 of \$10,000.00, as more particularly described in the attached **Exhibit M**.

10 **N. Preparing Second Interim Application.**

11 During this Second Application Period, Applicant spent 6.40 hours to prepare this Second
12 Interim Application, incurring fees in the amount of \$3,328.00, as more particularly described in
13 the attached **Exhibit N**. This amount represents 2.95% of the hourly fees sought under this
14 application.

15 **III. CONTINGENCY FEES: AVOIDANCE CLAIMS**

16 The primary task of Applicant during this Second Application Period was to investigate,
17 research and pursue avoidance claims. Under the Contingency Fee Order, Applicant’s
18 compensation for such services is based on results, not time. During this Second Application
19 Period, the trustee entered into settlements totaling \$1,617,804.24. Of those, one remains subject
20 to court approval (the Tananbaum settlement for \$150,000.00) and two payments have not yet
21 been received: (B of A for \$63,547.00 and State Farm for \$41,960.00.)⁸ Excluding “net-winner”
22 claims, Applicant believes that between \$2,500,000.00 and \$4,000,000.00 in potential avoidance
23 claim recoveries remain outstanding.

24
25 _____
26 ⁷ The total of \$33,019.50 in fees sought for this category represents 3.49 percent of total fees
allowed (i.e. \$944,563.00) under the First Interim Application.

27 ⁸ They are due by December 8, 2017. In addition, on November 29, 2019, the Trustee entered into
28 a settlement with Citibank for \$599,999.99 with payment due prior to the end of the year.

Attached as Exhibit A to the Declaration of Mark S. Bostick filed in support hereof is a list of all claims recovered by the trustee to date, showing the amount of the full claim and the amount recovered (with names withheld). The table below summarizes the amounts recovered and time expended on fraudulent transfers and preference recoveries.

Type of Claim	Amount Recovered	Time Incurred	Hourly Rate Value
Fraudulent Transfers	\$1,075,939.36	181.5	\$149,489.50
Preferences	\$541,864.88	367.2	\$190,925.50
General Contingency		297.2	\$76,594.50
Total	\$1,617,804.24	845.9	\$417,009.50

Applying the contingency percentages to recoveries obtained to date (including the three contingent matters discussed above), Applicant is entitled to compensation in the sum of \$490,336.27.⁹

IV. SUMMARY OF FEES AND COSTS

Applicant's total time representing the Trustee for services rendered in this Second Interim Application total 244.40 hours, representing \$112,602.00 in hourly fees. The hours are detailed on Applicant's computerized timesheets, copies of which are attached as **Exhibits A through N**. Applicant also incurred costs of \$5,330.20 as indicated in the attached **Exhibit O**.

The Exhibits detail specific services and identify the individual attorneys and paralegals that performed those services. At the end of each Exhibit appears a summary of time expended, blended hourly rates, and fees incurred by each attorney and paralegal.

SUMMARY OF FEES

Exhibit	CATEGORY	HOURS	TOTAL
A	General/Administrative	3.30	\$1,652.00
B	Records Procurement	5.10	2,389.50
C	Communications with Creditors and Class Members.	11.80	5,888.00

⁹ $(30\% \times \$1,467,804.24) + (33.33\% \times 150,000) = \$440,341.27 + \$49,995.00 = \$490,336.27$

Exhibit	CATEGORY	HOURS	TOTAL
D	Administration of the Class Action Settlement.	82.60	42,669.50
E	Lease Issues (Surrender of Premises and Abandonment of Personalty).	12.40	6,383.00
F	Administrative Motions	11.20	5,260.00
G	Fox Bankruptcy	15.40	7,700.50
H	Resolving Secured Claims	35.20	17,894.00
I	[Reserved]		
J	Wine Closing Issues	6.00	2,995.00
K	Creditor Claims	9.80	4,726.50
L	Wine Closing Issues	3.30	1,716.00
M	Preparing First Interim Application	44.60	10,000.00
N	Second Fee Application	6.40	3,328.00
	Totals	247.10	\$112,602.00

SUMMARY OF COSTS

<u>Category</u>	<u>Amount</u>
Outside Records Copying Services	\$1,036.25
Copy Charges	126.00
Court Call	41.20
DataSearch	550.50
Court Filing Fees	876.00
Lexis-Nexis Data Search	405.00
Process Service	551.76
U.S. Postage	456.99
Transcripts	385.19
UPS Delivery	541.81
Subpoena Charges from Marin and Heritage Banks	359.50
Total	\$5,330.20

Note on Costs. In accordance with the Bankruptcy Court Guidelines for Compensation and Expense Reimbursement of Professionals, Applicant's incoming facsimile charges are charged at 10¢ per page. Applicant has removed all surcharges from telephone calls and computerized research, if any, and has charged the estate only for its actual costs.

Letter Transmitting Fee Application to Trustee. In accordance with the Guidelines for Compensation and Expense Reimbursement of Professionals and Trustees, Applicant has transmitted a copy of this Application to Trustee, together with a copy of the transmittal letter attached hereto as **Exhibit P**.

I. CONCLUSION

In view of the time expended, the responsibilities assumed, and Applicant's reputation and skill in the bankruptcy field, Applicant respectfully submits that the reasonable value of the services rendered during the Second Application Period is \$112,602.00 in hourly fees. Applicant also expended the sum of \$5,330.20, for costs during the Second Application Period, and seeks approval of reimbursement of that amount, for a total amount of \$117,932.20 for hourly fees and incurred costs. Applicant's contingency fees requested total \$490,336.27.

Applicant respectfully submits that the services rendered to Trustee were necessary or beneficial to the estate and that the fees requested constitute reasonable fees expended on behalf of the estate.

WHEREFORE, Applicant prays that this court enter its order:

1. Allowing and authorizing payment of the sum of \$112,602.00 for hourly attorneys' fees and \$5,330.20 for costs incurred and expended on behalf of Trustee during the Second Application Period;

2. Allowing and authorizing payment of \$490,336.27 as contingency fees incurred based on avoidance claim recoveries of \$1,617,804.24;

3. Authorizing the Trustee to pay from Debtor's estate to Applicant, the total sum of \$608,268.47, representing hourly and contingency fees and costs approved by the court; and

4. For such other and further relief as this court deems just and proper.

DATED: November 29, 2017

WENDEL, ROSEN, BLACK & DEAN LLP

By: /s/ Mark Bostick

Mark Bostick

Attorneys for Michael G. Kasolas

Chapter 7 Trustee

CERTIFICATION

The undersigned professional certifies that (a) I have read the Application; (b) to the best of my knowledge, information, and belief, formed after reasonable inquiry, the compensation and expense reimbursement sought is in conformity with the Guidelines for Compensation and Expense Reimbursement of Professionals for the United States Bankruptcy Court for the Northern District of California, except that Section II, Category D exceeds \$20,000; (c) the compensation and expense reimbursement requested are billed at rates, in accordance with practices, no less favorable than those customarily employed by Applicant and generally accepted by Applicant's clients; and (d) Applicant has not entered into any agreement or understanding with any other entity for the sharing of compensation received or to be received for services rendered in or in connection with this case, nor has the Applicant received from or shared with any other entity any compensation for services rendered in or in connection with this case.

I declare under penalty of perjury that all representations and time records attached to this Application are true and correct to the best of my knowledge, information, and belief.

DATED: November 29, 2017

WENDEL, ROSEN, BLACK & DEAN LLP

By: /s/ Mark Bostick

Mark Bostick

Attorneys for Michael G. Kasolas

Chapter 7 Trustee