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Michael G. Kasolas, Trustee

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

In re
FOX ORTEGA ENTERPRISES, INC., dba
PREMIER CRU,
Debtors.

Case No. 16-40050-WJL
Chapter 7

MICHAEL G. KASOLAS, Trustee,
Plaintiff,
vs.
SOUTHWICK COURT FINE WINES (2012)
LTD, a Private Limited Company;
SOUTHWICK COURT FINE WINES LTD, a
Private Limited Company,
Defendants.

Adversary Proceeding No.

**COMPLAINT OF TRUSTEE MICHAEL
G. KASOLAS (1) TO AVOID AND
RECOVER FRAUDULENT TRANSFERS
(Cal. Civ. Code § 3439.04), (2) TO AVOID
AND RECOVER FRAUDULENT
TRANSFERS (Cal. Civ. Code § 3439.05),
(3) FOR MONEY HAD AND RECEIVED,
AND (4) FOR CONVERSION**

1 Plaintiff Michael G. Kasolas (“Trustee”), trustee of the chapter 7 bankruptcy estate of Fox
2 Ortega Enterprises, Inc., dba Premier Cru (“Debtor”), alleges as follows:

3 **JURISDICTION AND VENUE**

4 1. The Debtor filed a voluntary petition for relief under chapter 7 of the Bankruptcy
5 Code (Title 11 of the United States Code) on January 8, 2016 (“Petition Date”).

6 2. The Trustee is the duly qualified and acting trustee of the Debtor’s chapter 7 case.

7 3. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334(b)
8 and 28 U.S.C. § 157.

9 4. Venue is proper pursuant to 28 U.S.C. § 1409(a).

10 5. Claims for Relief One and Two are core proceedings pursuant to 28 U.S.C. §
11 157(b)(2)(A), (H) and (O), which seek relief under 11 U.S.C. §§ 544(b) and 550 and Rule 7001(1)
12 of the Federal Rules of Bankruptcy Procedure. Claims for Relief Three and Four are claims that
13 are related to a case under Title 11 of the United States Code.

14 6. Plaintiff consents to the entry of a final order or judgment by the Court on each of
15 the claims pled herein.

16 **GENERAL ALLEGATIONS**

17 7. The Trustee is informed and believes and thereon alleges that defendant **Southwick**
18 **Court Fine Wines (2012) Ltd** (“SCFW 2012”) is a Private Limited Company organized and
19 existing under the laws of the United Kingdom of Great Britain and Northern Ireland (“United
20 Kingdom”), with its principal place of business in London, England, United Kingdom, with a
21 designated Company Number of 08234049. The Trustee is informed and believes and thereon
22 alleges that SCFW 2012 has a registered office address of Harben House Harben Parade, Finchley
23 Road, London, United Kingdom, NW3 6LH and does business at Unit 15B, Baltimore House,
24 Battersea Reach, London, United Kingdom, SW18 1TS.

25 8. The Trustee is informed and believes and thereon alleges that defendant **Southwick**
26 **Court Fine Wines Ltd** is a Private Limited Company organized and existing under the laws of
27 the United Kingdom, with its principal place of business in London, England, United Kingdom,
28 with a designated Company Number of 04904558. The Trustee is informed and believes and

1 thereon alleges that Southwick Court Fine Wines Ltd has a registered office address of 46 Vivian
2 Avenue, London, United Kingdom, NW4 3XP and does business at Unit 15B, Baltimore House,
3 Battersea Reach, London, United Kingdom, SW18 1TS. The Trustee is informed and believes and
4 thereon alleges that Southwick Court Fine Wines Ltd may be in liquidation or have been
5 liquidated.

6 9. The Trustee is informed and believes and thereon alleges that George Dafydd Rhys
7 (“Rhys”) is a British citizen of the United Kingdom and a director of SCFW 2012 and Southwick
8 Court Fine Wines Ltd with significant ownership and control of those business entities.

9 10. In addition to the named defendants SCFW 2012 and Southwick Court Fine Wines
10 Ltd, the Trustee is informed and believes and thereon alleges that there were and are other
11 business entities affiliated with Rhys and his “Southwick Court Fine Wines” operation, including,
12 but not limited to “**Southwick Court (London) Fine Wines Ltd**” (Company Number 06165855).
13 The Trustee is informed and believes and thereon alleges that Southwick Court (London) Fine
14 Wines Ltd has been dissolved.

15 11. The Trustee is informed and believes and thereon alleges that defendant SCFW
16 2012 is the successor-in-interest to Southwick Court Fine Wines Ltd and any other business
17 entities operated or controlled by Rhys in connection with his “Southwick Court Fine Wines”
18 operation and the transactions with the Debtor that are the subject of this Complaint.

19 12. Defendants SCFW 2012 and Southwick Court Fine Wines Ltd are referred to
20 collectively hereinafter as the “**Southwick Defendants.**”

21 13. The Debtor was founded in 1980 and opened its first store on Piedmont Avenue in
22 Oakland, California, where it was in the business of selling fine wines. In the 1990s, with the
23 explosion of the internet, the Debtor rose to national prominence on the wine scene. With its
24 increasing popularity, the Debtor began importing more wines from sources overseas and
25 eventually outgrew its space on Piedmont Avenue. In 1998, the Debtor relocated to a much larger
26 store in Emeryville, California and remained at that location for over 10 years. In late 2010, the
27 Debtor moved to a state of the art building on University Avenue in Berkeley, California. The
28 Debtor shipped wine throughout the United States and sourced wine from international as well as

1 domestic United States suppliers.

2 14. John Fox ("Fox") was the Debtor's president from 1980 through the Petition Date.

3 15. From at least 2010 through the Petition Date, Fox ran the debtor as a fraudulent
4 scheme by selling millions of dollars of phantom "pre-arrival" wine that he never purchased and
5 diverting money coming in from current customers to obtain wine for prior customers who had
6 never received their wine. On or about August 11, 2016, Fox entered into a guilty plea in his
7 criminal case (*United States v. John Fox*, United States District Court, Northern District of
8 California, Oakland Division, Case No. CR 16-281 JD). Based on the Plea Agreement, Fox was
9 sentenced to incarceration in federal prison.

10 16. Among the international suppliers to the Debtor was a specialty supplier of fine
11 wines, including French wines, known as "Southwick Court Fine Wines" operating out of the
12 United Kingdom. Rhys was and continues to be the principal of that operation and has done
13 business over the years under several different business entities and associated trade names,
14 including, but not limited to, the Southwick Defendants.

15 17. The Debtor and its principal Fox had a long-standing relationship with Rhys and
16 his various business entities as far back as at least the 1990s. Over that time period, the Debtor
17 transacted millions of dollars' worth of business with those business entities, much of which
18 involved the Debtor's purchase of fine wines from those entities for import to the United States
19 and sale through the Debtor's business in California.

20 18. Rhys visited California on multiple occasions, visiting Fox and his California
21 operation in furtherance of their ongoing business relationship. Rhys engaged in direct
22 communications, including via electric email, with Fox regarding their business relationship,
23 including regarding orders placed, payments made and the status of various accounts with Rhys'
24 business entities, including, but not limited to, the Southwick Defendants.

25 19. Since approximately 2013, the Debtor's purchases from Rhys' "Southwick Court
26 Fine Wines" operation were done through the Southwick Defendants and from late 2013,
27 primarily through the SCFW 2012 entity, which was formed in late 2012.

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20. Between 2013 and 2015, the Debtor placed numerous orders with the Southwick Defendants (the “Orders”) for delivery of fine wines for resale in the United States or for direct delivery to customers of the Debtor, many of whom were located in California. The Orders and the associated charges to the Debtor were billed in various invoices (the “Invoices”) which were stated in various currencies, including the United Kingdom pound (£GBP) and European Union euro (€EUR). Those Orders exceeded £1.6 million pounds over the course of at least 2013 through 2015.

21. Numerous payments in connection with a portion of the Orders were made by the Debtor to the Southwick Defendants between 2013 and 2015 (the “Payments”). The Trustee is informed and believes and thereon alleges that from and after late 2013, the Payments were made to the SCFW 2012 entity and/or maintained in its accounts. The Payments were made in various currencies, including United States dollars (\$USD), United Kingdom pounds (£GBP) and European Union euros (€EUR).

22. In United Kingdom pounds, the Payments made by the Debtor between 2013 and 2015 totaled approximately £1,116,207.31 pounds.

23. It was Rhys’ and the Southwick Defendants’ general custom and practice to require prepayment for wines purchased by the Debtor prior to shipment of the wines. Prior to the release of ordered wines for shipment to the Debtor or its customers in the United States, some wines were warehoused and held by third parties, including Seabrook Export Services located in the United Kingdom.

24. Between 2013 and 2015, the Debtor received delivery—or arranged for delivery to its customers for Debtor’s benefit—of certain wines that the Debtor purchased from the Southwick Defendants (the “Delivered Wines”). The Debtor was charged and paid to the Southwick Defendants, and/or each of them, an amount of not less than £477,815.00 pounds for the Delivered Wines.

25. Certain fees and other charges were invoiced by the Southwick Defendants in connection with the Delivered Wines, which fees and other charges totaled approximately £4,691.07 pounds.

26. The last shipment to the Debtor from the Southwick Defendants, and/or each of them, occurred in or about September 2014.

27. The Debtor did not receive delivery of any wines or other goods or services in exchange for the balance of the Payments made to the Southwick Defendants, and/or each of them, in the amount of not less than £633,701.24 pounds, as set forth below:

Payments Made by Debtor	£1,116,207.31
Wine Delivered to Debtor or Debtor's Customers	£477,815.00
Fees and Charges Invoiced and Paid	£4,691.07

Payments for Which Debtor Received No Value: £633,701.24

28. Accordingly, the Debtor did not receive wines or other consideration for a significant portion of the Payments made. The transfers made of the Debtor's funds to the Southwick Defendants, and/or each of them, for which the Debtor did not receive any wine or other consideration are referred to hereinafter as the "Transfers."

29. At the currency exchange rate as of January 4, 2018, the £633,701.24 pounds worth of Transfers totals approximately \$858,557.45 dollars (\$USD).

FIRST CLAIM FOR RELIEF

[Avoid and Recover Fraudulent Transfers Under Cal.

Civ. Code § 3439.04 *et seq.*; 11 U.S.C. §§ 544(b) and 550]

30. The Trustee re-alleges and incorporates by this reference Paragraphs 1 through 29 above, as though fully set forth herein.

31. The Southwick Defendant to whom each of the Transfers was made was the initial transferee.

32. The Debtor made the Transfers:

(a) With actual intent to hinder, delay or defraud the Debtor's creditors; and/or

(b) Without receiving a reasonably equivalent value in exchange for the

Transfers, and the Debtor either:

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1 (i) Was engaged or was about to engage in a business or a transaction
2 for which the remaining assets of the Debtor were unreasonably small in relation to the business or
3 transaction; or

4 (ii) Intended to incur, or believed or reasonably should have believed
5 that the Debtor would incur, debts beyond the Debtor's ability to pay as they became due.

6 33. The Trustee may invoke 11 U.S.C. § 544(b) to avoid the Transfers under California
7 Civil Code § 3439 *et seq.* because when the subject Transfers were made at least one creditor
8 holding an unsecured claim that is allowable in the Case under 11 U.S.C. § 502 held a claim
9 against the Debtor.

10 WHEREFORE, the Trustee prays for relief as set forth below.

11 **SECOND CLAIM FOR RELIEF**

12 **[Avoid and Recover Fraudulent Transfers Under Cal.**

13 **Civ. Code § 3439.05 *et seq.*; 11 U.S.C. §§ 544(b) and 550]**

14 34. The Trustee re-alleges and incorporates by this reference Paragraphs 1 through 28
15 above, as though fully set forth herein.

16 35. The Southwick Defendant to whom each of the Transfers was made was the initial
17 transferee.

18 36. The Debtor made the Transfers without receiving a reasonably equivalent value in
19 exchange for the Transfers.

20 37. The Debtor was insolvent at that time or the Debtor became insolvent as a result of
21 the Transfers.

22 38. The Trustee may invoke 11 U.S.C. § 544(b) to avoid the Transfers under California
23 Civil Code § 3439 *et seq.* because when the subject Transfers were made at least one creditor
24 holding an unsecured claim that is allowable in the Case under 11 U.S.C. § 502 held a claim
25 against the Debtor.

26 WHEREFORE, the Trustee prays for relief as set forth below.
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THIRD CLAIM FOR RELIEF

(Money Had and Received)

39. The Trustee re-alleges and incorporates by this reference Paragraphs 1 through 28 above, as though fully set forth herein.

40. The Southwick Defendants, and/or each of them, received money, by virtue of the Transfers, that was intended to be used for the benefit of the Debtor, including, but not limited to, for the payment of wine orders placed with the Southwick Defendants, and/or each of them, and for the shipment or release of wines purchased by the Debtor.

41. The money was not used for the benefit of the Debtor.

42. The Southwick Defendants, and/or each of them, have not given the money to the Debtor or the Trustee, despite the demand of the Trustee for the delivery of the wines for which the Debtor paid or else repayment of the money paid to Southwick for which the Debtor did not receive consideration.

43. As a direct and proximate result of the above acts or omissions on the part of the Southwick Defendants, and/or each of them, the Debtor has suffered damages of not less than £633,701.24 pounds, or approximately \$858, 557.45 United States dollars, based on the currency exchange rate as of January 4, 2018.

WHEREFORE, the Trustee prays for relief as set forth below.

FOURTH CLAIM FOR RELIEF

(Conversion)

44. The Trustee re-alleges and incorporates by this reference Paragraphs 1 through 28 above, as though fully set forth herein.

45. To the extent that the Debtor paid for wines that the Southwick Defendants, and/or each of them, failed to deliver to the Debtor or to the Debtor's customers for the Debtor's benefit, such wines were the personal property of the Debtor and, upon the filing of the Debtor's petition in bankruptcy, became the property of the bankruptcy estate. Said wines are referred to hereinafter as the "Undelivered Paid Wines."

46. The Trustee is informed and believes and thereon alleges that some of the

Undelivered Paid Wines was held by Seabrook Export Services and that the Southwick Defendants, and/or each of them, purported to cancel certain of the Orders and resold or otherwise disposed of the Undelivered Paid Wines, purportedly to “credit” the proceeds against amounts allegedly due and owing to the Southwick Defendants, and/or each of them. Any purported resale or other disposition of such Undelivered Paid Wines was wrongful and not authorized by the Debtor or the Trustee.

47. The Southwick Defendants, and/or each of them, wrongfully converted the Undelivered Paid Wines to their own use and benefit, in violation of the Debtor’s and/or the Trustee’s ownership and/or right of possession.

48. As a direct and proximate result of the above acts or omissions on the part of the Southwick Defendants, and/or each of them, the Debtor has suffered damages of not less than £633,701.24 pounds, or approximately \$858,557.45 United States dollars, based on the currency exchange rate as of January 4, 2018.

WHEREFORE, the Trustee prays for relief as set forth below.

PRAYER FOR RELIEF

The Trustee requests judgment against the Southwick Defendants, and/or each of them, for the following relief:

On the First Claim for Relief (Cal. Civ. Code § 3439.04; 11 U.S.C. §§ 544(b) and 550):

1. For a judgment avoiding the Transfers, and each of them;
2. For a judgment granting recovery under 11 U.S.C. §550(a)(1) for the amount of the Transfers or for such other amount according to proof; and

On the Second Claim for Relief (Cal. Civ. Code § 3439.05; 11 U.S.C. §§ 544(b) and 550):

3. For a judgment avoiding the Transfers, and each of them;
4. For a judgment granting recovery under 11 U.S.C. §550(a)(1) for the amount of the Transfers or for such other amount according to proof; and

On the Third Claim for Relief (Money Had and Received):

5. For damages, according to proof;

On the Fourth Claim for Relief (Conversion):

1 6. For damages, according to proof;

2 **On Each Claim:**

3 7. For allowable costs of suit incurred herein;

4 8. For an award of all recoverable prejudgment interest at the legal rate allowed by
5 law; and

6 9. For such further relief as may be just and proper.

7 Dated: January 4, 2018

WENDEL, ROSEN, BLACK & DEAN LLP

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By: /s/ Leonard E. Marquez

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Leonard E. Marquez

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Attorneys for Plaintiff

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Michael G. Kasolas, Trustee

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