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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  
PERMIER CRU,  
Debtors.

MICHAEL G. KASOLAS, Trustee,  
Plaintiff,  
vs.  
LE CELLIER DES PRODUCTEURS SARL,  
a French Business Entity, Form Unknown,  
Defendant.

Case No. 16-40050-WJL

Chapter 7

**COMPLAINT TO AVOID AND  
RECOVER FRAUDULENT TRANSFERS  
AND FOR DAMAGES**

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. This is an adversary proceeding, pursuant to the Federal Rules of Bankruptcy  
5 Procedure (“Fed. R. Bankr. P.”), which relates to the Chapter 7 proceeding captioned *In re Fox*  
6 *Ortega Enterprises, Inc., dba Premier Cru*, Case No. 16-40050-WJL (Bankr. N.D. Cal., Oakland  
7 Div.) (the “Bankruptcy Case”). The above-captioned Court has jurisdiction over this matter  
8 pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(a).

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

10 3. The forum-related activities on the part of the Defendant, as defined below, gave  
11 rise to the action before the Court. The Defendant purposefully availed itself of the privilege of  
12 conducting activities in and/or consummated the transactions described below within California,  
13 thereby invoking the benefits and protection of California law. Furthermore, the Trustee’s claims  
14 arise out of or relate to the Defendant’s forum-related activities. As set forth further below, the  
15 Debtor transacted substantial business with Defendant which involved the Debtor’s purchase of  
16 fine wines from or through Defendant for import to the United States and sale through the  
17 Debtor’s business in California. Defendant engaged in direct communications, including via  
18 electric email, with the Debtor regarding their business relationship, including regarding orders  
19 placed, payments made and the status of Debtor’s account with Defendant.

20 4. Claims for Relief One, Two and Five are core proceedings pursuant to 28 U.S.C. §  
21 157(b)(2)(A), (H) and (O), which seek relief under 11 U.S.C. §§ 544(b) and 550 and Fed. R.  
22 Bankr. P. Rule 7001(1). Claims for Relief Three and Four are claims that are related to a case  
23 under Title 11 of the United States Code.

24 5. Plaintiff consents to the entry of a final order or judgment by the Bankruptcy Court  
25 on each of the claims pled herein.

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## GENERAL ALLEGATIONS

6. The Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code (Title 11 of the United States Code) on January 8, 2016 (“Petition Date”), commencing the Bankruptcy Case.

7. The Trustee is the duly qualified and acting trustee of the Debtor’s Bankruptcy Case.

8. The Trustee is informed and believes and thereon alleges that defendant **Le Cellier des Producters SARL (“Defendant”)** is a business entity, form unknown, organized and existing under the laws of the Country of France, doing business in the City of Saint Emilion, France. The Trustee is informed and believes and thereon alleges that Defendant maintains a place of business at 21 Rue Guadet, 33330 Saint Emilion, France.

9. On or about August 11, 2016, the Debtor’s founder and president, John Fox, entered into a guilty plea in his criminal case [*United States v. John Fox*, Case No. CR 16-281 JD, N.D. Cal.] and in his Plea Agreement admitted that the Debtor had been running a fraudulent enterprise since at least 2010 that involved both the sale of “phantom wines” and his use of current customer payments to satisfy prior customer orders. John Fox further admitted in his Plea Agreement that he embezzled funds from the Debtor, including to purchase personal items for himself and his family and make other fraudulent transfers.

10. From 2013 through 2014, the Debtor made certain payments (the “Payments”) to Defendant. Those Payments totaled not less than **€230,000.00** European Union euros, as set forth below:

Date	Payment
8/29/2013	€ 45,000.00
9/11/2013	€ 45,000.00
10/3/2013	€ 40,000.00
2/4/2014	€ 100,000.00
	€ <b>230,000.00</b>

11. The Debtor received delivery—or arranged for delivery to its customers for Debtor’s benefit—of certain wines purchased from or acquired through Defendant (the “Delivered Wines”) and that sold for or had a value of approximately **€5,472.00**, including any associated fees

1 and charges, on account of the Payments.

2 12. The Debtor did not receive delivery of any wines or other goods or services in  
3 exchange for the Payments made to Defendant, other than the Delivered Wines. With a credit for  
4 the Delivered Wines, the balance of the Payments for which the Debtor did not receive delivery of  
5 any wines or other goods or services totals not less than **€224,528.00**, as set forth below:

6 Payments Made by Debtor **€230,000.00**

7 Wine Delivered to Debtor or Debtor's Customers **€5,472.00**  
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9 **Payments for Which Debtor Received No Value: €224,528.00**

10 13. Accordingly, the Debtor did not receive wines or other consideration for a  
11 significant portion of the Payments made. The transfers made of the Debtor's funds to Defendant  
12 by way of the Payments for which the Debtor did not receive any wine or other consideration are  
13 referred to hereinafter as the "Transfers."

14 14. The funds used to make the Transfers came from the Debtor's operating accounts  
15 and were property of the Debtor.

16 15. At all times from and after January 8, 2009, the Debtor was insolvent.

17 16. The Trustee may invoke 11 U.S.C. § 544(b) to avoid the Transfers under California  
18 Civil Code § 3439 *et seq.* because at least one creditor holding an unsecured claim that is  
19 allowable in the Case under 11 U.S.C. § 502 was a creditor of the Debtor when the Transfers were  
20 made.

21 17. Defendant was the initial transferee of the Transfers for purposes of 11 U.S.C. §  
22 550(a)(1) because Defendant had dominion and control of the transferred funds.

23 **FIRST CLAIM FOR RELIEF**

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

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

26 18. The Trustee re-alleges and incorporates by this reference Paragraphs 1 through 17  
27 above, as though fully set forth herein.

28 19. The Debtor made the Transfers:

- 1 (a) With actual intent to hinder, delay or defraud the Debtor's creditors; and/or  
2 (b) Without receiving a reasonably equivalent value in exchange for the  
3 Transfers, and the Debtor either:  
4 (i) Was engaged or was about to engage in a business or a transaction  
5 for which the remaining assets of the Debtor were unreasonably small in relation to the business or  
6 transaction; or  
7 (ii) Intended to incur, or believed or reasonably should have believed  
8 that the Debtor would incur, debts beyond the Debtor's ability to pay as they became due.

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

10 **SECOND CLAIM FOR RELIEF**

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

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

13 20. The Trustee re-alleges and incorporates by this reference Paragraphs 1 through 17  
14 above, as though fully set forth herein.

15 21. The Debtor made the Transfers without receiving a reasonably equivalent value in  
16 exchange for the Transfers.

17 22. The Debtor was insolvent at that time or the Debtor became insolvent as a result of  
18 the Transfers.

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

20 **THIRD CLAIM FOR RELIEF**

21 **(Money Had and Received)**

22 23. The Trustee re-alleges and incorporates by this reference Paragraphs 1 through 17  
23 above, as though fully set forth herein.

24 24. Defendant received money, by virtue of the Transfers, that was intended to be used  
25 for the benefit of the Debtor, including, but not limited to, for the payment of wine orders or  
26 futures placed with Defendant and for the shipment or future release of such wines.

27 25. The money was not used for the benefit of the Debtor.

28 26. Defendant has not given the money to the Debtor or the Trustee.

1           27.     The Trustee hereby demands delivery of the wines for which the Debtor paid or  
2 else repayment of the money paid to Defendant for which the Debtor did not receive  
3 consideration.

4           28.     As a direct and proximate result of the above acts or omissions on the part of  
5 Defendant, the Debtor has suffered damages of not less than €224,528.00.

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

7                           **FOURTH CLAIM FOR RELIEF**

8                                   **(Conversion)**

9           29.     The Trustee re-alleges and incorporates by this reference Paragraphs 1 through 17  
10 above, as though fully set forth herein.

11           30.     To the extent that the Debtor paid for wines that Defendant failed to deliver to the  
12 Debtor or to the Debtor's customers for the Debtor's benefit, such wines were the personal  
13 property of the Debtor and, upon the filing of the Debtor's petition in bankruptcy, became the  
14 property of the bankruptcy estate. Said wines are referred to hereinafter as the "Undelivered Paid  
15 Wines."

16           31.     The Trustee is informed and believes and thereon alleges that some of the  
17 Undelivered Paid Wines was held by Defendant and/or other third parties, and Defendant  
18 purported to resell or otherwise dispose of the Undelivered Paid Wines, purportedly to "credit" the  
19 proceeds against amounts allegedly due and owing to Defendant and/or other third parties. Any  
20 purported resale or other disposition of such Undelivered Paid Wines was wrongful and not  
21 authorized by the Debtor or the Trustee.

22           32.     Defendant wrongfully converted the Undelivered Paid Wines to its own use and  
23 benefit, in violation of the Debtor's and/or the Trustee's ownership and/or right of possession.

24           33.     As a direct and proximate result of the above acts or omissions on the part of  
25 Defendant, the Debtor has suffered damages of not less than €224,528.00.

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

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**FIFTH CLAIM FOR RELIEF**

**(Avoid and Recover Fraudulent Transfers Under 11 U.S.C. §§ 548(a) and 550)**

34. The Trustee re-alleges and incorporates by this reference Paragraphs 1 through 17 above, as though fully set forth herein.

35. The Debtor made the Transfers with actual intent to hinder, delay, or defraud any entity to which the Debtor was or became, on or after the date that such Transfers were made, indebted; or

36. The Debtor received less than a reasonably equivalent value in exchange for the Transfers and (i) was insolvent on the date that such Transfers were made, or became insolvent as a result of such Transfers, and/or (ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the Debtor was an unreasonably small capital; and/or (iii) intended to incur, or believed that the Debtor would incur, debts that would be beyond the Debtor's ability to pay as such debts matured.

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

**PRAYER FOR RELIEF**

The Trustee requests judgment against Defendant 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 determining that Defendant was the initial transferees under 11 U.S.C. § 550(a)(1) and granting recovery against Defendant in the amount of not less than €224,528.00, plus any additional amounts as may be established according to proof;

**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 determining that Defendant was the initial transferees under 11 U.S.C. § 550(a)(1) and granting recovery against Defendant in the amount of not less than €224,528.00, plus any additional amounts as may be established according to proof;

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

5. For damages, according to proof;

**On the Fourth Claim for Relief (Conversion):**

6. For damages, according to proof;

**On the Fifth Claim for Relief [11 U.S.C. §§ 548(a) and 550]:**

7. For a judgment avoiding the Transfers, and each of them;

8. For a judgment determining that Defendant was the initial transferees under 11 U.S.C. § 550(a)(1) and granting recovery against Defendant in the amount of not less than €224,528.00, plus any additional amounts as may be established according to proof;

**On Each Claim:**

9. For allowable costs of suit incurred herein;

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

11. For such further relief as may be just and proper.

Dated: January 8, 2018

WENDEL, ROSEN, BLACK & DEAN LLP

By: /s/ Leonard E. Marquez

Leonard E. Marquez

Attorneys for Plaintiff

Michael G. Kasolas, Trustee