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8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION
10

11 In re
12 FOX ORTEGA ENTERPRISES, INC., dba
13 PERMIER CRU,
14 Debtors.

Case No. 16-40050-WJL

Chapter 7

**COMPLAINT TO AVOID AND
RECOVER FRAUDULENT TRANSFERS**

15 MICHAEL G. KASOLAS, Trustee,
16 Plaintiff,
17 vs.
18 YERBA BUENA BUILDERS, INC., a
19 California corporation,
20 Defendant.

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. 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 Fed. R.
12 Bankr. P. Rule 7001(1).

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

15 **GENERAL ALLEGATIONS**

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

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

21 7. The Trustee is informed and believes and thereon alleges that defendant **Yerba**
22 **Buena Builders, Inc. (“Defendant”)** is a California corporation, doing business as “Yerba Buena
23 Builders,” organized and existing under the laws of the State of California, doing business in the
24 City and County of San Francisco, California. The Trustee is informed and believes and thereon
25 alleges that Defendant maintains a place of business at 725 California Avenue, Treasure Island,
26 San Francisco, California 94130.

27 8. On or about August 11, 2016, the Debtor’s founder and president, John Fox,
28 entered into a guilty plea in his criminal case [*United States v. John Fox*, Case No. CR 16-281 JD,

1 N.D. Cal.] and in his Plea Agreement admitted that the Debtor had been running a fraudulent
2 enterprise since at least 2010 that involved both the sale of “phantom wines” and his use of current
3 customer payments to satisfy prior customer orders. John Fox further admitted in his Plea
4 Agreement that he embezzled funds from the Debtor, including to purchase personal items for
5 himself and his family and make other fraudulent transfers.

6 9. On or about July 8, 2011, the Debtor made an payment (the “Payment”) to
7 Defendant in an amount not less than **\$37,513.42**.

8 10. The Payment was made by the Debtor to pay for the costs of certain lessee
9 improvements, including roofing and other construction work, done by Defendant on the premises
10 of tenant Bauman College located at 1007 University Avenue in Berkeley, California. That work
11 was for the benefit of the Bauman College tenant and the related costs were to be paid by Bauman
12 College’s landlord as tenant improvement allowances and were the obligations of that landlord,
13 1011 University LLC, not the Debtor. Mr. Fox fraudulently diverted funds of the Debtor to pay
14 those tenant improvement allowances.

15 11. Although John Fox was the managing member of 1011 University Avenue LLC
16 (the “LLC”) and the Debtor had a 60% membership interest in the LLC, any obligation of the LLC
17 to pay for tenant improvements to the Bauman College premises was an obligation of the LLC, not
18 the Debtor. The Debtor’s payment of tenant improvement related obligations of the separate LLC
19 entity did not discharge any legal obligation of the Debtor to Defendant such that the Debtor
20 received any value. Rather such payment was a fraud on the Debtor’s creditors and represented
21 the misappropriation of its assets under the direction of Mr. Fox.

22 12. The transfers made of the Debtor’s funds to Defendant, including the Payment, for
23 which the Debtor did not receive any goods or services or other consideration are referred to
24 hereinafter as the “Transfers.”

25 13. The funds used to make the Transfers came from the Debtor’s operating accounts
26 and were property of the Debtor.

27 14. At all times from and after January 8, 2009, the Debtor was insolvent.

28 15. The Trustee may invoke 11 U.S.C. § 544(b) to avoid the Transfers under California

1 Civil Code § 3439 *et seq.* because at least one creditor holding an unsecured claim that is
2 allowable in the Case under 11 U.S.C. § 502 was a creditor of the Debtor when the Transfers were
3 made.

4 16. Defendant was the initial transferee of the Transfers for purposes of 11 U.S.C. §
5 550(a)(1) because Defendant had dominion and control of the transferred funds.

6 **FIRST CLAIM FOR RELIEF**

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

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

9 17. The Trustee re-alleges and incorporates by this reference Paragraphs 1 through 16
10 above, as though fully set forth herein.

11 18. The Debtor made the Transfers:

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

13 (b) Without receiving a reasonably equivalent value in exchange for the
14 Transfers, and the Debtor either:

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

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

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

21 **SECOND CLAIM FOR RELIEF**

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

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

24 19. The Trustee re-alleges and incorporates by this reference Paragraphs 1 through 16
25 above, as though fully set forth herein.

26 20. The Debtor made the Transfers without receiving a reasonably equivalent value in
27 exchange for the Transfers.

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

1 the Transfers.

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

3 **PRAYER FOR RELIEF**

4 The Trustee requests judgment against Defendant for the following relief:

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

- 6 1. For a judgment avoiding the Transfers, and each of them;
- 7 2. For a judgment determining that Defendant was the initial transferees under 11
- 8 U.S.C. § 550(a)(1) and granting recovery against Defendant in the amount of not less than
- 9 \$37,513.42, plus any additional amounts as may be established according to proof;

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

11 **550]:**

- 12 3. For a judgment avoiding the Transfers, and each of them;
- 13 4. For a judgment determining that Defendant was the initial transferees under 11
- 14 U.S.C. § 550(a)(1) and granting recovery against Defendant in the amount of not less than
- 15 \$37,513.42, plus any additional amounts as may be established according to proof;

16 **On Each Claim:**

- 17 5. For allowable costs of suit incurred herein;
- 18 6. For an award of all recoverable prejudgment interest at the legal rate allowed by
- 19 law; and
- 20 7. For such further relief as may be just and proper.

21 Dated: January 8, 2018

WENDEL, ROSEN, BLACK & DEAN LLP

23 By: /s/ Leonard E. Marquez

24 Leonard E. Marquez
25 Attorneys for Plaintiff
26 Michael G. Kasolas, Trustee
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