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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re

FOX ORTEGA ENTERPRISES, INC.,
dba PREMIER CRU,

Debtor.

MICHAEL G. KASOLAS, Trustee

Plaintiff,

vs.

SAUL GEVERTZ,

Defendant.

Case No. 16-40050-WJL

Chapter 7

Adversary Proceeding No.

**COMPLAINT TO AVOID AND
RECOVER PREFERENTIAL AND
FRAUDULENT TRANSFERS**

Plaintiff Michael G. Kasolas ("Trustee" or "Plaintiff"), alleges:

JURISDICTION AND VENUE

1. Fox Ortega Enterprises, Inc., dba Premier Cru ("the Debtor"), filed its voluntary petition for relief under chapter 7 of the Bankruptcy Code (Title 11 of the United States Code) commencing the above-captioned case, on January 8, 2016 ("Petition Date").

2. Plaintiff is the duly appointed trustee of the Debtor's estate.

3. This Court has jurisdiction over the claims stated herein under 28 U.S.C. § 1334(b) and 28 U.S.C. § 157.

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

5. The claims stated herein are core proceedings under 28 U.S.C. § 157(b)(2)(A),(E), (F), (H), and (O).

6. The Trustee consents to the entry of a final order by the above-entitled Bankruptcy Court.

GENERAL ALLEGATIONS

7. 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 (the "Petition Date").

8. The Trustee is the duly appointed trustee of the Debtor's chapter 7 case (the "Case").

9. SAUL GEVERTZ ("Defendant") is an individual who was a shareholder of the Debtor at all times from 2010.

10. Defendant would from time to time make loans to the debtor; on April 24, 2014, the Debtor executed an unsecured promissory note in favor of Defendant in the sum of \$1,100,000.00.

11. At all times from February 2010, Defendant owned 40 percent of the outstanding voting securities of 1011 University LLC ("LLC"), a limited liability company whose other 60 percent membership interest was owned by the Debtor.

12. The LLC owned real property located at 1001-1011 University Avenue, Berkeley, California, which it leased to the Debtor for the operation of its business.

13. On or about August 11, 2016, the Debtor's founder and president, John Fox, entered into a Plea Agreement in his criminal case [*United States v. John Fox*, Case No. CR 16-281 JD, N.D. Cal] in which he admitted that the Debtor had been running a fraudulent enterprise

1 since at least 2010 that involved both the sale of “phantom wines” and his use of current customer
2 payments or wine to satisfy prior defrauded customer orders.

3 14. John Fox further admitted in his Plea Agreement, among other things, that he used
4 the Debtor’s funds to pay his and others’ personal credit card debts.

5 15. From January 9, 2009, through January 8, 2016 (the “Reach-back Period”), the
6 Debtor transferred to Defendant at least \$3,663,812.92 from its operating accounts, purportedly
7 on account of antecedent debts (the “Bank Payments”).

8 16. In addition to the foregoing Bank Payments, during the Reach-back Period, the
9 Debtor paid \$1,465,480.17 to American Express on account of the Defendant’s personal credit
10 card liabilities (the “Credit Card Payments”),

11 17. The Bank Payments and the Credit Card Payments are collectively referred to
12 herein as the “Reach-back Period Transfers.”

13 18. From January 9, 2015, through the Petition Date, on the dates, in the amounts, and
14 to the transferees as indicated on the spreadsheet attached hereto as **Exhibit A** and made a part
15 hereof, the Debtor made the following transfers to or for the benefit of Defendant from its
16 operating accounts at Community Bank of the Bay:

| Payee | Aggregate Amount Transferred within 1 year | Amount Transferred within 90 days of Petition Date |
|---|--|--|
| Community Bank of the Bay (Saul’s Line) | \$222,861.54 | \$56,666.66 |
| Gevertz AMEX Card | \$601,476.16 | \$0 |
| Gevertz Chase Visa Card | \$29,330.14 | \$0 |
| Ann Taylor, Trustee | \$66,666.64 | \$8,333.33 |
| Schindler Gevertz | \$50,000.00 | \$0 |
| Other Payees | \$24,000.00 | \$0 |
| Total | \$994,334.48 | \$64,999.99 |
| Net within 1 Year and 90 Days Before Petition Date | \$929,334.49 | |

19. The amount of transfers made within one year and 90 days before the Petition Date as summarized in the table above in the amount of \$929,334.49 are referred to herein as the "One Year Transfers."

20. The One Year Transfers were made from the Debtor's operating accounts at Community Bank of the Bay and were property of the Debtor.

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

FIRST CLAIM FOR RELIEF
(Avoidance and Recovery of Insider Preferential Transfers under 11 U.S.C. §547(b))

22. Plaintiff realleges the preceding paragraphs as though fully set forth herein.

23. At all times during the One Year Period, the Defendant was an insider of the Debtor as that term is defined under 11 U.S.C. §101(31)(B) in that he was an insider of an affiliate of the Debtor.

24. Plaintiff is informed and believes and thereon alleges that the Defendant guaranteed the LLC's obligation to Ann Taylor, trustee of the Taylor Family Trust.

25. The One Year Transfers were made to or for the benefit of Defendant, who was a creditor of the Debtor.

26. The One Year Transfers were made on account of antecedent debts.

27. The One Year Transfers were made while the Debtor was insolvent.

28. The One Year Transfers were made from property of the Debtor.

29. The One Year Transfers were made between 90 days and one year before the Petition Date.

30. The One Year Transfers enabled Defendant to receive more than he would have received if: (a) the case was a case under chapter 7 of Title 11; (b) the Debtor had not made the Transfer; and (c) Defendant received payment of such debt to the extent provided by the provisions of Title 11.

31. As to each One Year Transfer, the Defendant was the initial transferee or the entity for whose benefit the Transfer was made.

1 32. The Trustee's investigation is ongoing and to the extent the Trustee discovers
2 additional transfers that were made to or for the benefit of Defendant within the One Year Period,
3 Date, the Trustee will amend this complaint to include such transfers as part of this claim.

4
5 WHEREFORE, the Trustee prays for relief as set forth below.

6 **SECOND CLAIM FOR RELIEF**
7 **(Avoidance and Recovery of Preferential Transfers under 11 U.S.C. §547(b))**

8 33. Plaintiff realleges the preceding paragraphs as though fully set forth herein.

9 34. As indicated in the table above and in the spreadsheet attached hereto as Exhibit A,
10 from October 10, 2015, through the Petition Date, the Debtor transferred the total sum of
11 \$64,999.99 to or for the benefit of the Defendant (the "Preference Period Transfers")

12 35. The Preference Period Transfers were made to or for the benefit of a creditor,
13 namely the Defendant.

14 36. The Preference Period Transfers were made on account of antecedent debts.

15 37. The Preference Period Transfers were made while the Debtor was insolvent.

16 38. The Preference Period Transfers were made from property of the Debtor.

17 39. The Preference Period Transfers were made between 90 days and one year before
18 the Petition Date.

19 40. The Preference Period Transfers were made while the Debtor was insolvent.

20 41. The Preference Period Transfers enabled Defendant to receive more than he would
21 have received if: (a) the case was a case under chapter 7 of Title 11; (b) the Debtor had not made
22 the Transfer; and (c) Defendant received payment of such debt to the extent provided by the
23 provisions of Title 11.

24 42. As to each Preference Period Transfer, the Defendant was the initial transferee or
25 the entity for whose benefit the Transfer was made.

43. The Trustee's investigation is ongoing and to the extent the Trustee discovers additional Preference Period Transfers made to or for the benefit of Defendant, the Trustee will amend this complaint to include such transfers as part of this claim.

WHEREFORE, Plaintiff prays for relief as set forth below.

THIRD CLAIM FOR RELIEF
(Claim to Avoid and Recover Constructive Fraudulent Transfers)
(California Civil Code § 3439.4(a)(2) et seq.; 11 U.S.C. §§ 544(b) and 550)

1. Plaintiff realleges the preceding paragraphs as though fully set forth herein.

2. The Trustee may invoke 11 U.S.C. §544(b) to avoid the Reach-back Period Transfers under California Civil Code §§3439 et seq. because at least one creditor holding an unsecured claim that is allowable in the Case under 11 U.S.C. §502 was a creditor of the Debtor on or after the dates of the Transfers.

3. To the extent that the Reach-back Period Transfers were not made on account of antecedent debts of the Debtor, the Debtor did not receive a reasonably equivalent value in exchange for them.

4. At the time each Reach-back Period Transfer was made (i) the Debtor was insolvent, (ii) its remaining assets were unreasonably small in relation to its business, or (iii) it believed or reasonably should have believed that it would incur debts beyond its ability to pay as they became due.

5. Defendant was the initial transferee or the party for whose benefit the Reach-back Period Transfers were made.

WHEREFORE, Plaintiff prays for relief as set forth below.

FOURTH CLAIM FOR RELIEF
(Claim to Avoid and Recover Intentional Fraudulent Transfers Under California Civil Code § 3439.04(a)(1) et seq.; 11 U.S.C. §§ 544(b) and 550)

6. Plaintiff realleges the preceding paragraphs as though fully set forth herein.

1 7. The Debtor made the Reach-back Period Transfers with intent to hinder, delay or
2 defraud the Debtor's creditors.

3 WHEREFORE, Plaintiff prays for relief as follows.

4 **FIFTH CLAIM FOR RELIEF**
5 **(Claim to Avoid and Recover Intentional Fraudulent Transfers**
6 **Under 11 U.S.C. §§ 548(a)(1)(A) and 550(a))**

7 44. Plaintiff realleges the preceding paragraphs as though fully set forth herein.

8 45. To the extent the Reach-back Period Transfers were made within 2 years of the
9 Petition Date (the "Two Year Period Transfers"), they are avoidable under 11 U.S.C. §548(a).

10 46. When the Two Year Period Transfers were made, (i) the Debtor was insolvent, (ii)
11 the remaining assets of the Debtor were unreasonably small in relation to its business, or (iii) the
12 Debtor believed or reasonably should have believed that it would incur debts beyond its ability to
13 pay as they became due.

14 47. The Debtor did not receive a reasonably equivalent value in exchange for the Two
15 Year Period Transfers.

16 48. The Trustee's investigation is ongoing and to the extent the Trustee discovers
17 additional transfers that were made by the Debtor, directly or indirectly through John Fox, to or
18 for the benefit of Defendant within two years prior to the Petition Date, the Trustee will amend
19 this complaint to include such transfers as part of this claim,

20 WHEREFORE, Plaintiff prays for relief as set forth below.

21 **SIXTH CLAIM FOR RELIEF**
22 **(Claim to Avoid and Recover Intentional Fraudulent Transfers**
23 **Under 11 U.S.C. §§ 548 (a)(1)(A) and 550 (a))**

24 49. Plaintiff realleges the preceding paragraphs as though fully set forth herein.

25 50. The Debtor made the Two Year Period Transfers with actual intent to hinder, delay
26 or defraud the Debtor's existing or future creditors.

27 51. The Trustee's investigation is ongoing and to the extent the Trustee discovers
28 additional actual intent fraudulent transfers were made to or for the benefit of Defendant within

1 two years prior to the Petition Date, the Trustee will amend this complaint to include such
2 transfers as part of this claim.

3 WHEREFORE, Plaintiff prays for relief as set forth below.

4 **PRAYER FOR RELIEF**

5 Plaintiff prays for judgment as follows:

6 **On the First claim for Relief:**

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8 1. Avoiding the One Year Transfers under 11 U.S.C. §547(b) and granting recovery
9 under 11 U.S.C. §550(a).

10 **On the Second Claim for Relief:**

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12 2. Avoiding the Preference Period Transfers under 11 U.S.C. §547(b) and granting
13 recovery under 11 U.S.C. §550(a)(1).

14 **On the Third and Fourth Claims for Relief:**

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16 3. Avoiding the Reach-back Period Transfers under 11 U.S.C. §544(b) and Cal. Civil
17 Code §3439.01, et seq. and granting recovery under 11 U.S.C. §550(a) and awarding pre-judgment
18 interest at the California legal rate from the date of each transfer.

19 **On the Fifth and Sixth Claims for Relief:**

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21 4. Avoiding the Two-Year Period Transfers under 11 U.S.C. §548 and granting
22 recovery under 11 U.S.C. §550(a).

23 **On Each Claim for Relief:**

24 5. For costs of suit and such other relief as the Court deems proper.

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1 Dated: January 8, 2018

WENDEL, ROSEN, BLACK & DEAN LLP

2
3 By: /s/ Mark S. Bostick

4 Mark S. Bostick
5 Attorneys for Plaintiff
6 Michael G. Kasolas, Trustee
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EXHIBIT A

| SEQ# | ACCT# | Date | Check # / Wire # | Name / Business Name | Disbursement | Saul's Line | Ann Taylor Note (1.0M) | AMEX Loan | Chase Visa | Other | Comment |
|-------|-------|------------|---------------------|----------------------------|---------------|---------------|---------------------------|---------------|--------------|--------------|---------------------------|
| 15004 | 4184 | 1/30/2015 | 70789 | American Express | \$ 150,000.00 | | | \$ 150,000.00 | | | repay saul |
| 14981 | 4184 | 1/30/2015 | 70790 | American Express | \$ 576.16 | | | \$ 576.16 | | | |
| 15026 | 2956 | 2/4/2015 | 57127 | Taylor | \$ 8,333.33 | | \$ 8,333.33 | | | | |
| 15189 | 4184 | 2/25/2015 | 70874 | Gevertz | \$ 3,750.00 | | | | | \$ 3,750.00 | 50% vig for Amex 150k x 3 |
| 15194 | 4184 | 2/25/2015 | 70856 | Gevertz | \$ 40,000.00 | \$ 40,000.00 | | | | | repayment of 70k loan |
| 15291 | 4184 | 3/9/2015 | 70895 | AMEX, Saul Gevertz AC 4005 | \$ 150,000.00 | | | \$ 150,000.00 | | | |
| 15467 | 4184 | 3/31/2015 | 70935 | Gevertz | \$ 3,750.00 | | | | | \$ 3,750.00 | vig on amex use |
| 15474 | 4184 | 3/31/2015 | 70934 | AMEX, Saul Gevertz AC 4005 | \$ 150,000.00 | | | \$ 150,000.00 | | | |
| 15490 | 2956 | 4/3/2015 | 57209 | Taylor | \$ 8,333.33 | | \$ 8,333.33 | | | | |
| 15491 | 2956 | 4/3/2015 | 57210 | Taylor | \$ 8,333.33 | | \$ 8,333.33 | | | | |
| 15671 | 2956 | 4/27/2015 | 57254 | Gevertz | \$ 1,500.00 | | | | | \$ 1,500.00 | |
| 15720 | 2956 | 5/1/2015 | 57286 | Gevertz | \$ 3,000.00 | | | | | \$ 3,000.00 | vig for Amex |
| 15769 | 2956 | 5/6/2015 | | CBB LOC Loan 190007315 | \$ 20,000.00 | \$ 20,000.00 | | | | | Saul's Line |
| 15901 | 4184 | 5/20/2015 | 71005 | Chase Card Services | \$ 29,330.14 | | | | \$ 29,330.14 | | Chase Card Services |
| 15916 | 4184 | 5/22/2015 | 71040 | AMEX, Saul Gevertz AC 4005 | \$ 900.00 | | | \$ 900.00 | | | |
| 15944 | 4184 | 5/22/2015 | 71018 | Gevertz | \$ 20,000.00 | \$ 20,000.00 | | | | | |
| 15949 | 4184 | 5/22/2015 | 71017 | AMEX, Saul Gevertz AC 4005 | \$ 150,000.00 | | | \$ 150,000.00 | | | |
| 16151 | 4184 | 6/15/2015 | 71127 | Gevertz | \$ 1,500.00 | | | | | \$ 1,500.00 | |
| 16162 | 4184 | 6/15/2015 | 71071 | Gevertz | \$ 4,000.00 | | | | | \$ 4,000.00 | vig |
| 16166 | 4184 | 6/15/2015 | 71072 | Gevertz | \$ 5,000.00 | | | | | \$ 5,000.00 | vig |
| 16303 | 3624 | 7/2/2015 | 190007795 | Gevertz | \$ 50,000.00 | \$ 50,000.00 | | | | | To: Shindler Gevertz |
| 16369 | 2956 | 7/10/2015 | | Gevertz | \$ 10,000.00 | \$ 10,000.00 | | | | | |
| 16426 | 4184 | 7/15/2015 | | Gevertz | \$ 10,000.00 | \$ 10,000.00 | | | | | Saul's Line |
| 16605 | 3624 | 8/10/2015 | | Gevertz | \$ 32,000.00 | \$ 32,000.00 | | | | | |
| 16671 | 2956 | 8/18/2015 | 57454 | Taylor | \$ 8,333.33 | | \$ 8,333.33 | | | | |
| 16672 | 2956 | 8/18/2015 | 57455 | Taylor | \$ 8,333.33 | | \$ 8,333.33 | | | | |
| 16842 | 2956 | 9/9/2015 | 57564 | Gevertz | \$ 861.54 | \$ 861.54 | | | | | repayment of loan of 35k |
| 16929 | 2956 | 9/18/2015 | 57595 | Taylor | \$ 8,333.33 | | \$ 8,333.33 | | | | |
| 17070 | 2956 | 10/2/2015 | 57702 | Gevertz | \$ 1,500.00 | | | | | \$ 1,500.00 | |
| 17221 | 2956 | 10/21/2015 | 57760 | Taylor | \$ 8,333.33 | | \$ 8,333.33 | | | | |
| 17303 | 2956 | 10/28/2015 | 57731 | Gevertz | \$ 10,000.00 | \$ 10,000.00 | | | | | |
| 17410 | 2956 | 11/9/2015 | 57732 | Gevertz | \$ 10,000.00 | \$ 10,000.00 | | | | | |
| 17597 | 2956 | 11/27/2015 | 57945 | Taylor | \$ 8,333.33 | | \$ 8,333.33 | | | | |
| 17809 | 3624 | 12/17/2015 | 1034 | Gevertz | \$ 5,000.00 | \$ 5,000.00 | | | | | |
| 17810 | 3624 | 12/17/2015 | 1035 | Gevertz | \$ 5,000.00 | \$ 5,000.00 | | | | | |
| 17921 | 3624 | 1/4/2016 | 1033 | Gevertz | \$ 10,000.00 | \$ 10,000.00 | | | | | |
| | | | | | \$ 944,334.48 | \$ 222,861.54 | \$ 66,666.64 | \$ 601,476.16 | \$ 29,330.14 | \$ 24,000.00 | |