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11 UNITED STATES BANKRUPTCY COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 OAKLAND DIVISION
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15 In re

16 FOX ORTEGA ENTERPRISES, INC., dba
PREMIER CRU,

17 Debtors.

18 MICHAEL G. KASOLAS, Trustee,

19 Plaintiff,

20 vs.

21 JOHN N. VOGLEY ASP and DELITE BIRO
22 VOGLEY PROFIT SHARING PLAN;
23 PAMELA BORCHERT, JOAN E. PROPP,
24 SHARON HELMAN, Trustee of the Helman
Family Trust; NANCY LEE RAPP; Trustee of
the Nancy Lee Rapp Living Trust; and
TRANS-BAY INVESTMENT SERVICE,

25 Defendants.
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Case No. 16-40050-WJL

Chapter 7

Adversary Proceeding No.

**COMPLAINT TO AVOID AND
RECOVER FRAUDULENT TRANSFERS**

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 above-captioned Court has jurisdiction over this matter pursuant to 28 U.S.C. §
5 1334(b) and 28 U.S.C. § 157(a).

6 2. Venue is proper in this Court pursuant to 28 U.S.C. § 1409(a).

7 3. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (H), which seeks
8 relief under 11 U.S.C. §§ 544(b) and 550 and Rule 7001(1) of the Federal Rules of Bankruptcy
9 Procedure.

10 4. Plaintiff consents to the entry of a final order by the Bankruptcy Court.

11 **GENERAL ALLEGATIONS**

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

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

16 7. Defendants John N. Vogley ASP and Delite Bir Vogley Profit Sharing Plan,
17 Bamela Borchert, Joan E. Propp, Sharon Helman, trustee of the S & E Helman Family Trust and
18 Nancy Lee Rapp, Trustee of the Nancy Lee Rapp Living Trust, and Trans-Bay Investment Service
19 (collectively, "Defendants") jointly hold a promissory note dated April 5, 2010, executed by 1011
20 University LLC (the "LLC"), a California limited liability company, in the principal amount of
21 \$500,000.00 (the "Note").

22 8. Plaintiff is informed and believes and thereon alleges that defendant Trans Bay
23 Investment Service is the servicing agent for the Defendants.

24 9. On or about August 11, 2016, the Debtor's founder and president, John Fox,
25 entered into a guilty plea in his criminal case [*United States v. John Fox*, Case No. CR 16-281 JD,
26 N.D. Cal] and in his Plea Agreement admitted that the Debtor had been running a fraudulent
27 enterprise since at least 2010 that involved both the sale of "phantom wines" and his use of current
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1 customer payments to satisfy prior customer orders.

2 10. John Fox further admitted in his Plea Agreement that he embezzled funds from the
3 Debtor to purchase personal items for himself and his family. He also embezzled funds from the
4 Debtor to pay for personal obligations of himself and other insiders of the Debtor, including the
5 LLC.

6 11. From June 3, 2010 through January 2, 2013, on the dates and in the amounts as
7 indicated on the attached **Exhibit A**, which exhibit is made a part hereof, the Debtor paid the
8 Defendants the aggregate sum of \$96,766.57 ("the Transfers") on account of the Note.

9 12. The Debtor was not obligated under the Note and did not guarantee it.

10 13. The Note was not secured by property that the Debtor owned.

11 14. The funds used to make the Transfers came from the Debtor's operating accounts at
12 Community Bank of the Bay and Heritage Bank of Commerce as indicated in Exhibit A and were
13 property of the Debtor.

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

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

18 17. Plaintiff is informed that all of the Defendants, except Trans-Bay Investment
19 Service, were the initial transferees of the Transfers for purposes of 11 U.S.C. §550(a)(1) because
20 they had dominion and control of the transferred funds. Plaintiff is informed and believes that
21 Defendant Trans-Bay Investment Service as an immediate transferee of the Transfers.

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

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

26 19. At the time of each Transfer, (i) the Debtor was engaged or was about to engage in
27 a business or a transaction for which the remaining assets of the Debtor were unreasonably small
28 in relation to the business or transaction or (ii) the Debtor intended to incur or believed or

1 reasonably should have believed that it would incur debts beyond its ability to pay as they became
2 due.

3 20. The Debtor did not receive a reasonably equivalent value in exchange for the
4 Transfers.

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

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

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

10 22. The Debtor made the Transfers with actual intent to hinder, delay or defraud the
11 Debtor's creditors.

12 WHEREFORE, Plaintiff prays for relief as follows.

13 **THIRD CLAIM FOR RELIEF**
14 **(Claim to Avoid and Recover Intentional Fraudulent Transfers Under**
15 **California Civil Code § 3439.05(a) et seq.; 11 U.S.C. §§ 544(b) and 550)**

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

17 24. The Debtor made the Transfers without receiving a reasonably equivalent value in
18 exchange for the transfer or obligation and the Debtor was insolvent at that time or became
19 insolvent as a result of the Transfer.

20 WHEREFORE, Plaintiff prays for relief as follows.

21 **PRAYER FOR RELIEF**

22 Plaintiff prays for judgment:

- 23 1. Avoiding the Transfers as intentional or constructive fraudulent transfers;
24 2. Granting recovery against the Defendants and each of them in the sum of
25 \$96,766.57;
26 3. Awarding pre-judgment interest at the legal rate under California law from the date
27 of each transfer; and
28 4. For cost of suit and such further relief as the Court may deem proper.

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1 Dated: January 8, 2018

WENDEL, ROSEN, BLACK & DEAN LLP

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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

					Payee										
			Transaction	Transaction #	Last										
SEQ#	BANK	ACCT#	Date	Check #/Wire #	Name/Business Name	Disbursement	Lee	Borchert	S&E	Vogley	Propp	delta			
2587	HBC	1035	6/3/2010	8393	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
2847	CBB	1248	7/19/2010	1131	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
2935	CBB	1248	8/2/2010	1211	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
3112	CBB	1248	9/2/2010	1327	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
3273	CBB	1248	10/5/2010	1404	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
3425	CBB	1248	11/2/2010	1482	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
3603	CBB	1248	12/3/2010	1629	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
3838	CBB	1248	1/7/2011	1811	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
3997	CBB	1248	2/2/2011	1900	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
4178	CBB	1248	3/7/2011	2069	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
4343	CBB	1248	4/5/2011	2161	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
4546	CBB	1248	5/4/2011	2273	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
4685	CBB	1248	6/2/2011	2360	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
4923	CBB	2956	7/7/2011	2466	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
5115	CBB	2956	8/1/2011	2729	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
5364	CBB	2956	9/2/2011	2847	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
5642	CBB	2956	10/12/2011	52987	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
5818	CBB	2956	11/3/2011	53084	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
6074	CBB	2956	12/7/2011	53221	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
6311	CBB	2956	1/4/2012	53327	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
6623	CBB	2956	2/9/2012	53482	Trans-Bay Investment Service	\$ 3,433.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ (100.00)			
7001	CBB	2956	3/19/2012	53689	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
7176	CBB	2956	4/4/2012	53765	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
7555	CBB	2956	5/24/2012	53963	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
7643	CBB	2956	6/5/2012	53964	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
7882	CBB	2956	7/11/2012	54133	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
8049	CBB	2956	8/2/2012	54167	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
8277	CBB	2956	9/5/2012	54314	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
9147	CBB	2956	1/2/2013	54762	Trans-Bay Investment Service	\$ 3,333.33	\$ 833.34	\$ 333.33	\$ 1,333.33	\$ 500.00	\$ 333.33	\$ -			
						\$ 96,766.57	\$ 24,166.86	\$ 9,666.57	\$ 38,666.57	\$ 14,500.00	\$ 9,666.57	\$ (100.00)			